

Challenges to Freedom of Religion or Belief in Nepal

A Briefing Paper

July 2018

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EXECUTIVE SUMMARY AND RECOMMENDATIONS TO THE AUTHORITIES OF NEPAL

The right to freedom of religion or belief is guaranteed in a number of core international human rights instruments. It includes a broad range of rights, such as the freedom to have or to adopt a religion or belief of one's choice, and the freedom to manifest one's religion or belief in worship, observance, practice and teaching, either individually or in community with others, in public or private. Moreover, the right to freedom of religion or belief encompasses the right to freedom of thought and personal convictions in all matters, and protects all kinds of beliefs, whether theistic, non-theistic or atheistic beliefs, and the freedom not to disclose one's religion or belief.

The Constitution of Nepal, 2015, recognizes the "secular" nature of the State. It guarantees the right of individuals to freely "profess, practise and preserve" their religion, and prohibits discrimination on a number of grounds, including on the basis of one's religion. However, as the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples noted in his 2009 report, following his December 2008 visit to Nepal, the special status attributed to Hinduism in the country and "a number of discriminatory regulations still persist".

PEW global research reports on freedom of religion published in 2017 and 2018 illustrate some of these discriminatory practices, and indicate that levels of social hostilities towards religious minorities in Nepal rose from moderate levels in 2014 to high levels in 2015 and 2016. For example, Hindu politicians made speeches attacking the "epidemic" of conversions and Christians who sought to "convert" Hindus, and local communities in the Kathmandu Valley opposed burials by perceived "outsiders", "making it difficult for Protestant churches to access land they had bought years earlier." According to these reports, unlawful restrictions by the Government on the freedom of religion were also on the rise.

Some of these unlawful restrictions include laws relating to "proselytism" and "blasphemy". The Constitution of Nepal, as well as the new Penal Code, 2017 – which comes into force in August 2018 – retain a range of provisions prohibiting and criminalizing "proselytism", in a manner that is incompatible with international standards. Similarly, the new Penal Code contains a number of vague and overly broad "anti-blasphemy" provisions that criminalize "hurting religious sentiment and feelings". These laws are similar to "blasphemy laws" that exist elsewhere in the region, including in India, Pakistan and Myanmar, where their enforcement has resulted in widespread abuse, particularly because these so-called religious offences have been instrumental in the persecution of people belonging to minority religions.

The authorities in Nepal have also failed to fulfill their duty to ensure the right of Tibetan refugees to freely manifest their religion in community with their fellow believers. Furthermore, they have failed to take necessary measures to fulfill the right to freedom of religion or belief, without discrimination, of Muslim, Christian and other religious communities living in and around Kathmandu, Nepal's capital, who, in accordance with their religious beliefs, bury their deceased loved ones in burial grounds or cemeteries.

The International Commission of Jurists (ICJ) has identified a number of challenges related to the protection and promotion of the right to freedom of religion or belief in Nepal. This briefing paper discusses four of these challenges: (1) the prohibition and criminalization of "proselytism"; (2) criminal offences related to "blasphemy" and "hurting religious sentiment"; (3) discrimination against religious minorities arising from denial of use of burial grounds and cemeteries in and around Kathmandu; and (4) Tibetan Refugees' exercise of their right to freedom of religion or belief.

In light of concerns detailed in the present briefing, and arising in connection with the above-mentioned challenges, the ICJ makes the following recommendations to the authorities of Nepal:

- Coordinate with Christian, Muslim, Baha'i and other affected religious communities, including by establishing a commission or working group with a view to locating appropriate sites for use as cemeteries in harmony with environment and development planning as soon as possible;
- Facilitate the free exercise of Tibetan refugees' right to manifest their religion in community with their fellow believers;
- Repeal or substantially amend Sections 155 and 156 of the Penal Code, 2017, so that they be consistent with international standards, including on freedom of expression; freedom of thought, conscience or religion; and equality before the law and equal protection of the law without discrimination, as guaranteed under the International Covenant on Civil and Political Rights (ICCPR);
- Expressly include the requirement of proof of deliberate and malicious intent in all offences related to religion that are retained in the short or long term, particularly Sections 155 and 156 of the Penal Code;
- Revise Section 158 of the Penal Code, 2017, criminalizing converting anyone from one religion to another, to ensure that only "forceful conversion" be proscribed and, at the same time, provide that "forceful conversion" entail elements of coercion and/or undue influence;
- Amend Article 26(1) of the Constitution to harmonize the scope of the right to religious freedom provided therein with the right to freedom of religion or belief guaranteed in Article 18 of the ICCPR, including by express recognition of the right to manifest one's religious beliefs in teaching; and
- Amend Article 26(3) of the Constitution to prohibit only forceful conversion, and remove any clause prohibiting conversion per se.

BACKGROUND

Nepal is a country with a population that practises diverse religions and faiths. According to statistics published by the Nepali authorities, the vast majority of people in Nepal are Hindu, comprising approximately 81.3 per cent of the population; the second most popular religion in the country is Buddhism, accounting for 9.04 per cent of the population; Islam is the third, with 4.38 per cent; Kiratism the fourth, at 3.04 per cent of the population;¹ and Christianity the fifth one, accounting for 1.41 per cent of the population.² Other five religions officially recorded by the authorities in Nepal cover less than 1 per cent of the population.³

Nepal became a secular State pursuant to the promulgation of the Interim Constitution of Nepal, 2007,⁴ which marked the end of a ten-year-long armed conflict. Prior to that, Nepal had been an official Hindu State since 1962 as declared by the then Constitution,⁵ and an unofficial Hindu State before that time.⁶

Even though Nepal has officially been a secular State since the promulgation of the Interim Constitution in 2007, as the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples noted in his July 2009 report following his December 2008 visit to the country, the special status attributed to Hinduism in the country has persisted. For instance, most official festivities in Nepal align with the Hindu calendar, and "a number of discriminatory regulations still persist such as the prohibition of cow-slaughtering, which leads to the prosecution of many indigenous individuals who have traditionally relied on cows for their subsistence or religious practices."⁷

The Special Rapporteur also observed that the official declaration of Hinduism as the State religion in 1962 had over the years perpetuated homogenization of religious identity of the country.⁸ The Special Rapporteur noted that this deprived indigenous people of cultural recognition,⁹ and "the opportunity to fully exercise their cultural rights, resulting in the gradual loss of their distinct languages and cultural and spiritual traditions",¹⁰ and had a discriminatory effect on indigenous people leading to suppression or complete undermining of their religion or belief.¹¹

The current Constitution of Nepal, which came into force in 2015, retains the secular character of the State introduced by the then Interim Constitution in 2007. However, the present Constitution defines "secular" to mean the "protection of religion and culture being practised since ancient times and religious and cultural freedom," which the Supreme Court has in the past interpreted as affording a special status to Hinduism.¹²

¹ Religion of the Kirati tribes of Nepal.

² Government of Nepal, Central Bureau of Statistics (CBS), *Statistical Pocketbook Nepal, 2016*, June 2017, Kathmandu, p. 33, available at: <http://cbs.gov.np/publications/Statistical%20Pocket%20Book%202016> [accessed on 10 April 2018].

³ *Ibid.*, p. 35. The census is silent on the number of people espousing atheistic beliefs, agnosticism or humanism.

⁴ Interim Constitution of Nepal, 2007 (2063 B.S.) Article 4 (1).

⁵ See, Constitution of the Kingdom of Nepal, 1990 (2047 B.S.), Article 4 (1); The Constitution of Nepal, 1962 (2019 B.S.), Article 3 (1).

⁶ See, Constitution of the Kingdom of Nepal, 1958 (2015 B.S.), Article 1 (3). See also, Government of Nepal's Constitutional Act, 1947 (2004 B.S.), Preamble.

⁷ James Anaya, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Report on the Situation of Indigenous Peoples in Nepal, UN Doc. A/HRC/12/34/Add.3, (2009), para. 43.

⁸ *Ibid.*, para. 7.

⁹ *Ibid.*, para. 16.

¹⁰ *Ibid.*, para. 42.

¹¹ *Ibid.*, para. 43.

¹² *Charles Mendes et. al. v. His Majesty's Government*, Nepal Law Journal 2046, Vol. 6, Decision No. 3855. See also, US Bureau of Democracy, Human Rights and Labor International Religious Freedom Report for 2017, available at: <https://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2017&dclid=281030#wrapper>

Although Nepal's commitment to equality, non-discrimination and social justice is embodied in various provisions of the Constitution,¹³ social realities reveal a different picture altogether. For example, the Human Development Index (HDI) value for the Muslim community in Nepal is 0.422, which is significantly lower than that of Brahmin/Chettris, who are predominantly Hindu, and who have a HDI value of 0.538.¹⁴ This disparity has been largely attributed to low educational attainment of Muslims in the country.¹⁵ Although HDI values of the Muslim community in Nepal have risen slightly, from 0.401 in 2009 to 0.422 in 2014, the progress is negligible at best.¹⁶ While there may be a number of reasons that could explain these differences in HDI values, including ethnicity and location, religion appears to be a significant factor.

PEW global research reports on freedom of religion from 2017 and 2018 indicate that levels of social hostilities towards religious minorities in Nepal rose from moderate levels in 2014 to high levels in 2015 and 2016.¹⁷ For example, Hindu politicians made speeches attacking the "epidemic" of conversions and Christians who sought to "convert" Hindus, and local communities in the Kathmandu Valley opposed burials by perceived "outsiders", "making it difficult for Protestant churches to access land they had bought years earlier."¹⁸ Likewise, unlawful restrictions by the Government on freedom of religion were also on the rise,¹⁹ including restrictions on non-governmental organizations (NGOs) preaching or promoting religious conversion, and the introduction of new laws criminalizing "proselytism" and "blasphemy".

In recent years, there has also been an increase in communal tensions in the country. For example, certain Hindu groups have started declaring 'Religion Conversion Restricted Zones' in at least three different locations, including in the cities of Butawal, 184 kilometers to the West of Kathmandu, and Bhaktapur, 15 kilometers to the East of Nepal's capital. Those carrying out such acts appear to be emboldened by new legal provisions in the Constitution that prohibit "conversion", giving them a cloak of legitimacy.

In April 2018, Srinibas Acharya, a well-known Hindu religious leader, was shot in Biratnagar, a city in the plains bordering India. Shortly after the incident, he was arrested after preliminary investigations showed that he had deliberately got himself shot, allegedly to fuel a religious riot in the city. Srinibas Acharya has long been advocating that Nepal be made a Hindu State once again.

Against this background, in December 2017 the Special Rapporteur on Freedom of Religion and Belief sent a country visit request to the Government of Nepal.²⁰ Thus far, the

¹³ See, Constitution of Nepal, (2015 A.D.) Articles 18(2)(3), 38(3), 50(2), 51(c)(5).

¹⁴ National Planning Commission (NPC) & United Nations Development Programme (UNDP), Nepal Human Development Report 2014: Beyond geography, unlocking human potential, 2014, p. 17, available at: http://www.np.undp.org/content/nepal/en/home/library/human_development/human_development-report-2016.html [accessed 10 April 2018].

¹⁵ Ibid, p. 18.

¹⁶ United Nations Development Programme (UNDP), Nepal Human Development Report 2009: State transformation and human development", 2009, p. 43, available at: http://hdr.undp.org/sites/default/files/nepal_nhdr_2009.pdf [accessed 21 April 2018].

¹⁷ Pew Research Center, "Global Restrictions on Religion Rise Modestly in 2015, Reversing Downward Trend", 11 April 2017, p. 18, available at: <http://assets.pewresearch.org/wp-content/uploads/sites/11/2017/04/24102207/Pew-Research-Center-Religious-Restrictions-2017-FULL-REPORT.pdf> [accessed 13 April 2018] and Pew Research Center, "Global uptick in Government Restrictions on Religion in 2016", 21 June 2018, available at: <http://assets.pewresearch.org/wp-content/uploads/sites/11/2018/06/27121723/Restrictions-IX-FULL-REPORT-WITH-APPENDIXES.pdf> [accessed 1 July 2018]

¹⁸ Pew Research Center, "Global uptick in Government Restrictions on Religion in 2016", 21 June 2018, available at: <http://assets.pewresearch.org/wp-content/uploads/sites/11/2018/06/27121723/Restrictions-IX-FULL-REPORT-WITH-APPENDIXES.pdf> [accessed 1 July 2018]

¹⁹ Supra fn 17, p. 26.

²⁰ Ahmed Shaheed, Special Rapporteur on Freedom of Religion and Belief, Report of the Special Rapporteur on freedom of religion or belief (Focus: State-Religion Relationships and their Impact on Freedom of Religion or Belief (Advance edited version), UN Doc. A/HRC/37/49, (2018), para. 3.

Government of Nepal has only acknowledged receipt of such request, but has not agreed to the visit yet.²¹

While the ICJ is cognizant that there are multiple challenges related to the protection and promotion of the right to freedom of religion or belief in Nepal, this briefing paper discusses only four of these challenges: (1) the prohibition and criminalization of "proselytism"; (2) offences related to "blasphemy" and "hurting religious sentiment"; (3) discrimination against religious minorities arising from denial of use of burial grounds and cemeteries in and around Kathmandu; and (4) Tibetan Refugees' exercise of their right to freedom of religion or belief.

²¹ See, United Nations Office of the High Commissioner for Human Rights (OHCHR), Country Visits of the Special Procedures of the Human Rights Council, available at: http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/Search.aspx?Lang=en [accessed 15 April 2018].

INTERNATIONAL LEGAL FRAMEWORK

Nepal became party to the International Covenant on Civil and Political Rights (ICCPR) on 14 May 1991.

Duty to respect, protect and fulfill

By becoming parties to international human rights treaties, States undertake to respect, protect and fulfill the rights guaranteed therein. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill human rights means that States must take positive action to facilitate their exercise and enjoyment.

Freedom of religion or belief

Article 18 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to freedom of thought, conscience and religion (hereinafter: freedom of religion or belief).²²

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The right to freedom of religion or belief is also guaranteed in other international human rights instruments, both treaties²³ and declaratory standards,²⁴ including the UN General

²² UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 18 (1).

²³ See, e.g., UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 18; United Nations Educational, Scientific and Cultural Organization (UNESCO), Convention for the Safeguarding of the Intangible Cultural Heritage, 2003, Paris, UN Doc. MISC/2003/CLT/CH/14, Article 2 (C). See also Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3; and UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, A/RES/34/180.

Assembly's Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981, and has been elaborated on in great depth, among others, by the UN Human Rights Committee, and the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People and the Special Rapporteur on Contemporary Forms Of Racism, Racial Discrimination, Xenophobia And Related Intolerance in their reports.²⁵

The right to freedom of religion or belief includes a broad range of rights, including the freedom to have or to adopt a religion or belief of one's choice, and the freedom to manifest one's religion or belief in worship, observance, practice and teaching, either individually or in community with others, in public or private.²⁶

Moreover, the right to freedom of religion or belief encompasses the right to freedom of thought and personal convictions in all matters, and protects all kinds of beliefs, whether theistic, non-theistic or atheistic beliefs, and the freedom not to disclose one's religion or belief.²⁷

Freedom of Expression

Article 19(1) of the ICCPR guarantees the right of everyone to hold opinions without interference, and Article 19(2) guarantees the right of everyone to freedom of expression, including to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.

The UN Human Rights Committee, expounding on Article 19 of the ICCPR, has specifically stated: "Prohibitions of displays of lack of respect for a religion or other belief system, including "blasphemy laws", are incompatible with the Covenant, except in the specific circumstances envisaged in Article 20, paragraph 2, of the Covenant".²⁸ The Human Rights Committee has further clarified that it is impermissible for any such laws to discriminate in

²⁴ See, e.g., UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, UN GA resolution 217 A (III), Article 18; UN General Assembly, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 25 November 1981, UN Doc. A/Res/36/55; UN General Assembly, Combating Intolerance, Negative Stereotyping, Stigmatization, Discrimination, Incitement to Violence and Violence Against Persons, Based on Religion or Belief, adopted by the General Assembly Resolution 72/176 of 29 January 2018, UN Doc. A/RES/72/176; UN General Assembly, Freedom of Religion or Belief, adopted by the General Assembly Resolution 72/177 of 19 December 2017, UN Doc. A/RES/72/177; UN General Assembly, Freedom of Religion or Belief, adopted by the General Assembly Resolution 71/196 of 24 December 2016, UN Doc. A/RES/71/196; UN General Assembly, Combating Intolerance, Negative Stereotyping, Stigmatization, Discrimination, Incitement to Violence and Violence Against Persons, Based on Religion or Belief, adopted by the General Assembly Resolution 71/195 of 23 January 2017, UN Doc. A/RES/71/195; UN General Assembly, Effective Promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the General Assembly Resolution 70/166 of 22 February 2016, UN Doc. A/RES/70/166; UN General Assembly, Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted by the General Assembly Resolution 66/168 of 11 April 2012, UN Doc. A/RES/66/168.

²⁵ The analysis in this briefing is largely based on the authoritative interpretations of the right to freedom of religion or belief provided by the Special Rapporteurs.

²⁶ E.g., ICCPR, Article 18 (1).

²⁷ UN Human Rights Committee (HRC), General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Article 18), 27 September 1993, UN Doc. CCPR/C/21/Rev.1/Add.4, paras 1 – 2.

²⁸ UN Human Rights Committee, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland-the Crown Dependencies of Jersey, Guernsey and the Isle of Man, 25 April 2000, UN Doc. CCPR/CO/79/Add.119, HRC, GC 34, para. 48. Article 20(2) of the ICCPR relates to the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. This prohibition does not necessarily mean censorship or stifling of freedom of expression but possibility of civil remedies. See Commission of Human Rights, Travaux Préparatoires of Article 20 of the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/SR.377,10, cited at, Michael G. Kearney, *The Prohibition of Propaganda for War in International Law*, 2007, New York, Oxford University Press, p. 111.

favour of or against a particular religion or belief system, or their adherents over another or religious believers over non-believers. It is also impermissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.

Additionally, the Human Rights Committee has observed that, "all forms of opinions are protected including opinions of a...religious nature", and that, "harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of Article 19(1)."²⁹

The Human Rights Committee has also considered that criminalizing the holding of an opinion, no matter what the opinion, is incompatible with Article 19.³⁰

Freedom of expression, on the other hand, is not an absolute right, and it may be subject to State regulation for the furtherance of those purposes set forth in Article 19(3) of the ICCPR, for example. These include the respect of the rights or reputations of others and the protection of national security, public order, or of public health or morals. However, protection of a particular religion or religious belief per se, or someone's religious sentiments for that matter, do not constitute legitimate grounds recognized under international human rights law and standards for the lawful imposition of certain restrictions on the exercise of the right to freedom of expression.

Conversely, there may be instances in which someone's freedom of expression may be lawfully restricted, including for the protection of certain religious communities, particularly minorities, from discrimination. However such restrictions should be prescribed by law, for the purposes recognized by the ICCPR, and be strictly necessary for the protection of interests set forth in Article 19(3) ICCPR.³¹

In *Ross v. Canada*,³² the UN Human Rights Committee examined the circumstances in which freedom of expression may be lawfully restricted to protect the interest of a religious community. The case related to the transfer of Malcolm Ross, a resource teacher for remedial reading, to a non-classroom teaching position because of his public statements and writings widely perceived as "anti-Jewish". The Human Rights Committee concluded that the restrictions imposed on the author by the State party "were for the purpose of protecting the "rights or reputations" of persons of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance."³³ The Committee agreed that the State party had established a causal link between the author's anti-Semitic views and the 'poisoned school environment' experienced by Jewish children in schools, and thus, ultimately, found that the removal of

²⁹ UN Human Rights Committee (HRC), General Comment 34: Freedoms of Opinion and Expression (Article 19), UN Doc. CCPR/C/GC/34, (2011), para. 9, available at: <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> [accessed 24 April 2018].

³⁰ Ibid., para 48.

³¹ *Malcolm Ross v. Canada*, Human Rights Committee Communication No. 736/1997, UN Doc. CCPR/C/70/D/736/1997 Views of 26 October 2000, see paras 11.1 – 11.6.

³² Ibid., the author (Mr. Malcolm Ross) submitted a communication to the Human Rights Committee claiming that Canada as a State Party to the ICCPR had violated his rights set forth in Articles 18 and 19 of the Covenant. The author worked as a modified resource teacher for remedial teaching from 1976 onwards until 1991. Throughout this period the author published several books, pamphlets and appeared in television interviews. The content of his books, pamphlets and interviews were anti-Semitic. After complaints from a few parents the author's in class teachings were monitored from 1979 onwards and he was also warned that continued public discussion of anti-Semitic views could lead to his dismissal. However, he once again appeared in a television interview which led to a complaint being filed by a Jewish parent with the Human Rights Commission of New Brunswick stating that the lack of action against the author by the commission and the school board implied that they condoned the author's anti-Semitic views and violated Jewish and other minority students' rights against non discrimination. This led to the author being placed under a legal moratorium on publication or expression of anti-Semitic views for 18 months, violation of which could lead to his dismissal. The author claimed that the State Party violated his right to freedom of opinion and expression and his right to freedom of religion (see paras 2.1, 2.2, 2.3, 4.3).

³³ *Ross v. Canada*, supra note 31, para. 11.5.

the author from a teaching position was a restriction necessary to protect the rights and freedoms of Jewish children to a learning environment free of bias and prejudice.³⁴ Additionally, the Committee observed that the restrictions placed on the author did not go any further than strictly required to fulfill the protective purpose.³⁵

"Proselytism"

In General Comment 22, the Human Rights Committee has stated: "the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs...the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications."³⁶

Similarly, the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of the General Assembly states that the right to freedom of thought, conscience, religion or belief includes the freedom, "to write, issue and disseminate relevant publications in these areas", and "to teach a religion or belief in places suitable for these purposes."

The Special Rapporteur on freedom of religion or belief has noted that proselytism is itself inherent in religion, which explains its legal status in international instruments and in the 1981 Declaration.

Similarly, under international standards, missionary activity is accepted as a legitimate expression of religion or belief and, therefore, enjoys the protection afforded by Article 18 of the ICCPR and other relevant international instruments. The UN Special Rapporteur on freedom of religion or belief has underscored that missionary activity cannot be considered a violation of the right to freedom of religion or belief of others "if all involved parties are adults able to reason on their own and if there is no relation of dependency or hierarchy between the missionaries and the objects of the missionary activities."³⁷

Not only would constraints on peaceful acts of proselytism almost always be inconsistent with Article 18 of the ICCPR, but also, even when the circumstances may justify the authorities' taking of constraining measures on the exercise of the right, such measures would have to be justified on the facts of each case. At the minimum, this means they must pursue a legitimate aim, be strictly necessary and proportionate, and be applied in a non-discriminatory manner.

Force, coercion, undue influence or pressure and other forms of abuse

The scope of the freedom afforded to persons to practise a religion or belief, including through the production and distribution of information about their religion or belief is wide. However, as long as they are warranted and in accordance with Article 18, paragraph 3, of the Covenant, certain limitations on the right to freedom of religion or belief may be imposed lawfully. In this context, however, it should be noted that Article 18(3) of the ICCPR allows for restrictions only in very exceptional cases, and that, even in such cases, most measures of limitations would not require the resort to the criminal law, and that measures short of the criminal law may be effective and suffice.

Any measure taken by the authorities should clearly distinguish between, on the one hand, religious teachings, as a rightful manifestation of the right to freedom of religion or belief, as well as the legitimate exercise of the right to freedom of opinion and expression and, on the other hand, acts which, through the use of coercion, force, undue influence or pressure

³⁴ Ibid.

³⁵ Ibid.

³⁶ Human Rights Committee, GC 22, para. 4.

³⁷ Asma Jahangir, Special Rapporteur of the Commission on Human Rights on Freedom of Religion or Belief, Elimination of All Forms of Religious Intolerance, UN Doc. A/60/399, (2005), para. 67.

or other forms of abuse seek to pressurize and coerce another person into adopting a particular religious belief. The former are legitimate manifestations of one's rights (i.e., one's rights to freedom of religion or belief, and to freedom of opinion and expression) and cannot be lawfully restricted, while the latter amount to acts that nullify or impair another person's right to freedom of religion or belief, in particular, one's right not to be subject to coercion impairing one's right to have or to adopt a religion or belief of one's choice, under Article 18(2) of the ICCPR. As such, those abusive acts would fall outside the scope of Article 18 altogether.

Presumption of innocence

The presumption of innocence is one of the most fundamental legal principles of a criminal justice system that upholds human rights and the rule of law. The presumption of innocence underpins criminal procedure, the conduct of criminal trials, as well as substantive criminal law. Until proven guilty beyond any reasonable doubt on the basis of convincing evidence presented by the authorities in a criminal trial that affords the accused fundamental fair trial guarantees, the accused is entitled to be considered innocent. While chiefly a critical important notion with respect to criminal procedure, where it is mainly applicable, the presumption of innocence is also relevant to substantive criminal law, where it entails that serious offences, namely, those that upon conviction may lead to deprivation of liberty, must comprise a culpability requirement. This, in turn, means that for the accused to be found guilty it must be proven that, at the time of the commission or omission of the material element of any offence, they possessed a defined degree of mental culpability,³⁸ deserving censure, for having caused harm.

Principle of Legality

The principle of legality is a recognized general principle of law, a foundational requirement contained in almost every international human rights instrument,³⁹ as well as a basic tenet of criminal law.⁴⁰ It requires that crimes – and corresponding sanctions – be defined in law in an intelligible manner, and in a way that clearly outlines what conduct is criminalized. Vague and overbroad laws, purporting to prevent intangible social harms, such as generic “[im]morality” laws, which can be used to punish a wide range of behaviors enforced in an

³⁸ In the criminal law context, culpability may be defined as the blameworthiness of the accused. Generally speaking, people charged with a crime should only be found guilty of that crime when they are actually found to have been culpable for the conduct in question, and they cannot rely on defences, such as incapacity and duress, or other exemptions from criminal liability, including being below the age criminal responsibility. This is why, ordinarily, a higher level of culpability needs to be shown in criminal law than say in civil law (e.g. in tort), at least for serious offences. In fact, generally, the higher level of censure that attaches to a certain crime, the greater level of culpability needs to be proven. In ascertaining their culpability, generally, the accused are blamed for their actual conduct, as well as its consequences.

³⁹ See, ICCPR, e.g. Article 15(1) in respect of the principle of *nullum crimen sine lege*.

⁴⁰ See S Lamb, 'Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law' in A Cassese & P Gaeta, *et al.* (eds.). The principle of legality covers several rules, which are interconnected and sometimes overlapping. First, the prohibition on the retroactive application of the criminal law: no act may be punished as a crime that was not a criminal offence under a law applicable to the accused at the time of the act, and the rule that upon conviction the accused may not be punished with a higher penalty than that which was provided in law when the action took place. Second, the rule that the criminal law must be sufficiently clear to provide notice that the act was prohibited at the time it was committed (principle of *lex certa*). Third, the rule that a crime may not be created through analogous application of criminal law (prohibition against analogy or *lex stricta*). Fourth, in line with these rules, it is often also accepted that only criminal law statutes can define a criminal offence and prescribe a penalty (principle of *lex scripta*). See, Piet Hein van Kempen, 'Introduction – Criminal Law and Human Rights', in: P.H.P.H.M.C. van Kempen (ed.), *Criminal Law and Human Rights*, The International Library of Essays on Criminal Law, England/USA: Ashgate, 2014, p. XI-XXXIII. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2953285. See also, some of the general principles of criminal law enshrined in the Rome Statute of the International Criminal Court, e.g., Article 22 *Nullum crimen sine lege*, Article 23 *Nulla poena sine lege*, Article 24 on non-retroactivity *ratione personae*, and Article 25 on individual criminal responsibility.

abusive manner, likely fail to satisfy the principle of legality.⁴¹As such, the requirement of legality, and more precisely, legal certainty, or *lex certa*, is another basic principle of general criminal liability, and it is a foundational principle of substantive criminal law. In fact, legal certainty is a general, basic principle of law: namely, the law needs to be predictable, fairly certain and capable of being respected. Legal certainty is particularly important in the criminal law context, given the gravity of the consequences that breaches of the criminal law entail. The principle of legality requires that criminal offences must be clearly, precisely and comprehensibly drafted so as to be ordinarily understood.

⁴¹ See, e.g., Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.

NATIONAL LEGAL FRAMEWORK

The Constitution of Nepal, 2015, along with the Penal Code, 2017, set out Nepal's legal framework related to the right to freedom of religion or belief.

Nepal consolidated legislation related to criminal offences through the Country Penal (Code) Act, 2017 (hereinafter: Penal Code), which replaced the Country Code (*Muluki Ain*), 1963. The recently adopted Penal Code enters into force on 17 August 2018.⁴² An entire chapter of the Penal Code is dedicated to so-called religious offences.

The following section analyzes the provisions of the Constitution and the Penal Code related to freedom of religion or belief and so-called religious offences in light of Nepal's international human rights obligations to guarantee the right to freedom of religion or belief as enshrined in international human rights law and standards.

The right to freedom of religion or belief in the Constitution

The Constitution of Nepal guarantees the right of individuals to freely "profess, practise and preserve" their religion.⁴³ However, while the Constitution recognizes the right to freedom of religion or belief of those who subscribe to a religious faith, it fails to guarantee the right to freedom of thought and conscience, which, in turn, includes the freedom to have theistic, non-theistic or atheistic beliefs, and the freedom not to profess any religion or belief.⁴⁴

Additionally, the narrow definition of the right to freedom of religion provided in Article 26 of the Constitution fails to guarantee the right to manifest one's religious beliefs through teachings, which, in turn, is an integral part of the freedom to manifest one's religious belief.⁴⁵ The UN Human Rights Committee, in its interpretation and elaboration of Article 18 of the ICCPR, has underscored that

*the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.*⁴⁶

As such, the formulation of the right to freedom of religion or belief in the Nepali Constitution is inconsistent with the right to freedom of religion or belief guaranteed in Article 18 of the ICCPR. In light of this, Nepal has fallen short of the obligation under the Covenant to guarantee that necessary changes be made in its domestic legal framework to ensure that its laws be in conformity with the rights guaranteed under the ICCPR.⁴⁷

A number of other provisions in the Constitution also relate to the right to freedom of religion or belief. For example, Article 18 of the Constitution provides for equality before the law, and states there shall be no discrimination in the application of general laws, including on the grounds of "origin, **religion**, race, caste, tribe, sex..." (**emphasis added**)

Furthermore, Article 29 of the Constitution prohibits exploitation, including on the basis of "religion, custom, tradition, culture, practices or any other bases." Article 38 provides that

⁴² Country Penal (Code) Act, 2017 (2074 B.S.), section 1(1).

⁴³ Constitution of Nepal, Article 26(1).

⁴⁴ ICCPR, Article 18(1); Human Rights Committee, GC 22, supra note 27, paras 1-2.

⁴⁵ Human Rights Committee, GC 22, supra note 27, para. 4; Un General Assembly, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UN Doc. A/Res/36/55, (1981), Article 6(e).

⁴⁶ Ibid.

⁴⁷ ICCPR, Article (2); UN Human Rights Committee (HRC), General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, (2004) para. 13.

there shall not be any physical, mental, sexual or psychological or any other kind of violence against women, or any kind of oppression based on "religious, social and cultural tradition, and other practices."

"Proselytism"

Nepal has had criminal provisions prohibiting the act of converting a person from one religion to another since 1958.⁴⁸ Sections 1 and 1A of Chapter 19 of the Country Code (*Muluki Ain*), 1963, in force until the entry into force of the recently adopted Penal Code on 17 August 2018, criminalized propagating "any religion in such manner as to undermine the religion of others" or causing others to convert their religion. The offence carried a punishment of three to six years' imprisonment upon conviction.

The criminalization of proselytism has been used in the past with blatant disregard of the right to freedom of religion or belief. For instance, in 1983, a Christian pastor, Charles Mendes was charged with proselytism and "creating a disturbance to Hinduism" by distributing pamphlets about Christianity.⁴⁹ Charles Mendes had been living in Nepal for almost a decade, selling Bibles, preaching in Churches and preaching the Christian faith to college students. The District Court of Lalitpur, a city located in the south-central part of the Kathmandu valley, acquitted Charles Mendes, a decision that was later upheld by the Appellate Court. However, the prosecution appealed the decision to the Supreme Court, which, in 1989, overturned the acquittal of Charles Mendes, convicted him of proselytism under Article 1 of the Country Code (*Muluki Ain*), 1963, and sentenced him to six years' imprisonment. The Court also ordered that two Nepali citizens who had "converted" from Hinduism to Christianity, allegedly as a result of Charles Mendes' preaching, be "reverted" to Hinduism.⁵⁰

The Supreme Court judgment in *Charles Mendes* gives some insight into the absence of the right to teach a religious faith from the definition of the right to freedom of religion in the Constitution of Nepal, 1962, and in subsequent versions of the Constitution, including the current Constitution of Nepal, 2015, as well as to the special status accorded to "religion and culture being practised since ancient times" in the country. Problematically, the Supreme Court reasoned in its decision in the Mendes case that preaching Christianity adversely affects Hinduism, which enjoyed a protected status in Nepal because it had been practised "from ancient times", unlike other religions like Islam or Christianity.

In the same judgment, the Supreme Court further stated that Article 14 of the then Constitution (i.e., Constitution of Nepal, 1962),⁵¹ along with Article 1 of Chapter 19 of the Country Code (*Muluki Ain*), 1963, prohibited propagating another religion to "undermine" the Hindu religion, and forbade converting a Hindu believer to another faith – even if done peacefully and without any coercion – and maintained that if anyone converted from Hinduism to another religion, such act "shall be void and such person shall remain as Hindu".

The Court reasoned that the prohibition of proselytism did not curtail the right to profess, practise and preserve religion. The prohibition applied to only two acts: the act of "converting" Hindus to other religions – as that undermined a religion "handed down from

⁴⁸ See, Constitution of the Kingdom of Nepal, 1958 (2015 B.S.), Article 5 proviso; The Constitution of Nepal, 1962 (2019 B.S.), Article 14 proviso; Constitution of the Kingdom of Nepal, 1990 (2047 B.S.), Article 19(2); Interim Constitution of Nepal, 2007 (2063 B.S.) Article 23 proviso; Constitution of Nepal, Article 26(3).

⁴⁹ See, *Mendes et. al. v. His Majesty's Government*, supra note 12.

⁵⁰ *Ibid.*, para. 29.

⁵¹ Article 14 of the Constitution of Nepal, 1962 guaranteed the right to religion. Article 14 of the Constitution of Nepal, 1962 said that every person shall have the right to profess, practise and preserve his/her own religion as handed down to him/her from ancient times paying due regard to social and cultural traditions. There is also a proviso, which reads "Provided that no person shall be entitled to convert another person from one religion to another and no person shall act or behave in a manner which may infringe upon the religion of others."

the ancient times” – and the act of converting from Hinduism to any other religion, which was void and without any effect.

The Supreme Court took a very narrow approach to the right to freedom of religion or belief, resulting in the exclusion of religious teaching from the scope of the legitimate exercise of the right itself, notwithstanding the fact that, under international standards, teaching is an integral part of the right to freedom of religion or belief. The Court’s interpretation that Hinduism is a protected religion because it has been practised since “ancient times” – as opposed to other religions, including Islam and Christianity – was also discriminatory and against the principle of equal protection of the law.

Even though the current Constitution of Nepal, 2015, is “secular”, it still protects “religion and culture being practised since ancient times”, and retains the prohibition of proselytism, which makes the Supreme Court judgment in the *Charles Mendes* case relevant even today.

The Constitution of Nepal, 2015, and the new Penal Code, 2017, entering into force in August 2018, retain a range of provisions prohibiting “proselytism”. Article 26(3) of the Constitution of Nepal, 2015, prohibits a person from converting “another person from one religion to another”.⁵² Section 158 (1) of Nepal’s Penal Code, 2017, criminalizes converting any one from one religion to another, as well as the abetment of such “conversion”, whereas Section 158 (2) criminalizes converting “any one into another religion, whether by inducement or not, in a manner to so undermine or propagate such religion...”

The retention of the prohibition of “proselytism” in the new Constitution of Nepal, 2015, as well as the criminalization of the same in the new Penal Code, 2017 are among the major concerns regarding the right to freedom of religion or belief in the country.

Constitution of Nepal, Article 26, right to freedom of religion

(1) Every person who has faith in religion shall have the freedom to profess, practise and protect his or her religion according to his or her conviction.

[....]

(3) **No person shall, in the exercise of the right conferred by this Article, do, or cause to be done, any act which may be contrary to public health, decency and morality or breach public peace, or convert another person from one religion to another or any act or conduct that may jeopardize other's religion** and such act shall be punishable by law. [**emphasis added**]

During Nepal’s 2015 Universal Periodic Review, Spain and the United States of America recommended that Nepal amend its legal provisions prohibiting conversion to another religion as they undermined freedom of religion.⁵³ However, this recommendation is among the few that Nepal actually rejected. Instead, Nepal defended its legal framework relating to the freedom of religion or belief, arguing:

Nepal considers that the constitution ... fully ensures religious freedoms to all people, and prohibits discrimination of any form on ground of religious faith and philosophy. Every person is free to choose, adopt, profess or practise religious

⁵² Constitution of Nepal, Article 26(3).

⁵³ See, Human Rights Council, Report of the Working Group on the Universal Periodic Review: Nepal, UN Doc. A/HRC/31/9, (2015) paras 124.7, 124.16. United States of America and Spain suggested these recommendations respectively.

*belief. However, proselytism by force or undue influence or inducement is prohibited. This does not undermine freedom of religion.*⁵⁴

"Proselytism" and the right to freedom of religion or belief

Nepal's laws related to "proselytism" are directly contrary to relevant international human rights law and standards, including, in particular, Article 18(1) of the ICCPR, which, as set out above, guarantees the right to freedom of religion or belief, including one's freedom – either individually or in community with others and in public or private – to manifest one's religion or belief in teaching. This situation is compounded further by the fact that the right to impart religious teaching is glaringly absent from the formulation of the right to freedom of religion or belief guaranteed by the Constitution of Nepal, 2015.

The government of Nepal has claimed that the prohibition on converting another person to a religion in the Constitution and the criminalization of the same in the recently adopted Penal Code concern "forcible" proselytism only, that is, acts that seek to convert people to a particular religion or belief through force, coercion or other forms of abuse.⁵⁵ However, as mentioned above, any express or implied mention of force, coercion, abuse or other forms of undue influence are glaringly absent from the text of Article 26 of the Nepali Constitution, 2015, and from Section 158 of the Penal Code, 2017.

These omissions leave these provisions open to abuse, as was illustrated in a recent case from Dolakha district in the North-East of Nepal. Even though the accused were prosecuted on charges under the Country Code, (*Muluki Ain*), 1963, which are soon to be replaced by their equivalents under the recently adopted Penal Code when the latter enters into force in August 2018, this case is nonetheless relevant as an illustration of how similar provisions prohibiting proselytism in the new Penal Code, 2017, may soon be enforced.

On 9 June 2016, the Dolakha District Police arrested eight Christians, following an anonymous tip alleging that they had been proselytizing among young children at the Mount Valley Higher Secondary School of Charikot, Dolakha. The accused were affiliated with an NGO named Teach Nepal, registered with the objective of imparting moral education to children. They were eventually tried on charges of "converting another person" before the Dolakha District Court, and ultimately acquitted.⁵⁶ The Court observed that the offence of "converting another person" was only applicable to "coercive proselytizing", and that it was not in the interest of justice to affirm that distributing books to students and parents would disrupt the peace among and between diverse religious groups or disrupt any other individual's religious activities.

While the case resulted in acquittal thanks to the court's enlightened narrow interpretation of the offence of proselytism, many people within the Christian community in Nepal are fearful that the penal provisions related to conversion could be used against them as the new Penal Code, 2017, provisions once again fail to specify exactly what conduct is prohibited, leaving the door open to abusive and selective prosecutions and interpretations, based on discriminatory policies of government officials and the personal predilections of judges. Furthermore, the mere existence of penal provisions criminalizing proselytism can embolden acts of religious intolerance, and has a chilling effect on the right to freedom of religion or belief more generally.

It is also important to note that so-called religious offences featured in Nepal's Penal Code, 2017, including provisions justified on the grounds that they address "blasphemy" and "proselytism", allow any person purporting to have relevant knowledge of the supposed criminal actions, or being in the process of occurring or where there exists a possibility of

⁵⁴ *Ibid.*, para. 132.

⁵⁵ See, *Ibid.*

⁵⁶ Dolakha District Court, *Government of Nepal v. Dangol et. al.*, Decision No. 59 of 2073 (2016).

their occurrence in near future, to file a criminal complaint against those purportedly responsible for the said acts.⁵⁷

While ordinarily these provisions require that a person who brings a legal action before a court must establish sufficient harm or connection to the action being challenged before it, instead, with respect to “blasphemy” and “proselytism”, the legal procedure allows any person unrelated to the cause of action to start legal proceedings through anonymous tips. Coupled with the vague language of these provisions, they have the potential to allow the law to be used by organized religious groups against minority religions.

On decency/etiquette, Chapter 19 of the Country Code, (*Muluki Ain*), 1963

Number 1. No one shall propagate any religion in such manner as to undermine the religion of other nor shall cause other to convert his or her religion. If a person attempts to do such act, the person shall be liable to imprisonment for a term of three years, and if a person has already caused the conversion of other's religion, the person shall be liable to imprisonment for a term of six years, and 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.

Number 1A. If any person does any act to undermine any religious place or religious function, the person may be liable to the punishment of imprisonment for a term not exceeding three years or a fine of up to three Thousand Rupees or both.

Prohibition of proselytizing, Section 158 of the Penal Code, 2017

(1) No person shall convert any one from one religion to another or make attempt to or abet such conversion.

(2) No person shall do any act or conduct which undermines the religion, opinion or feeling/faith of any caste, tribe/ethnic group, community or convert any one into another religion, whether by inducement or not, in a manner to so undermine or propagate such religion or opinion with the intention of making such conversion.

(3) Whoever commits, or cause to be committed, an offence under sub-Section (1) or (2) shall be liable to a sentence of imprisonment for a term not exceeding five years and a fine not exceeding fifty thousand rupees.

(4) Where a foreigner has committed, or caused to be committed, an offence under sub-section (1) or (2), he or she shall be deported from Nepal within seven days after the date of completion of the service of imprisonment under this Section.

Offences Related to Religion and “Blasphemy”

Section 1A of Chapter 19 of the Country Code, (*Muluki Ain*), 1963, of Nepal, in force until August 2018 when the new Penal Code takes effect, criminalizes acts that “undermine any religious place or religious function”, and upon conviction, carries a sentence of up to three years’ imprisonment.

However, the new Penal Code, 2017 goes much further and contains a number of vague and overbroad offences that relate to “the protection of religion and religious sentiment”. For example, Section 155 and 156 of the Country Penal (Code) Act, 2017, criminalize a

⁵⁷ Country Criminal Procedure Act, 2017 (2074 B.S.), section 4 & schedule 1.

wide range of conduct that “damages” or “defiles” places of worship and “outrages” religious feelings of any person.

Section 155 of the Penal Code states

*No person shall damage or injure or, in any way, defile, destroy or pollute any place of religious worship, pray or function or place, object held sacred or burial place or place of sepulture or do similar other act with intent to outrage/hate or insult the religion or religious feelings of any caste, tribe/ethnic group, community or class or with the knowledge that such outrage or insult is likely to occur.*⁵⁸

Section 156 of the Penal Code prohibits “outraging” religious feelings of any person and states

No person shall outrage the religious feelings of any caste, tribe/ethnic group, community or class by words, either spoken or written, by gesture/ figures/ visible representation or signs or otherwise.

Upon conviction, sentences for commission of acts prohibited by Sections 155 and 156 may result in three years’ and two years’ imprisonment, respectively.

These laws are similar to “blasphemy laws” that exist elsewhere in the region including in India, Pakistan and Myanmar, where their enforcement has resulted in widespread abuse, particularly because these so-called religious offences have been instrumental in the persecution of people belonging to minority religions.⁵⁹

The provisions related to “blasphemy” in the new Penal Code are incompatible with Nepal’s international human rights obligations, including under the ICCPR, to respect the rights to freedom of thought, conscience and religion; freedom of expression; and the principle of non-discrimination and the rights to equality before the law and equal protection of the law without discrimination for all. In addition, the vague and over-broad formulations of these laws violate the principle of legality and leave them open to subjective interpretation and misuse.

The international human rights regime, and Article 18 of the ICCPR, in particular, guarantees the right of every individual to freedom of religion or belief. Such right does not entail – nor extend to – the protection of any particular religion. It is simply one’s right to have, adopt and practise one’s religion of choice that is guaranteed and protected under the international human rights framework – as opposed to the protection, maintenance or guarantee of any particular religion per se.⁶⁰ In light of this, criticism, scorn, mockery – or even insults – of any particular religious sentiment or of a religion itself do not necessarily limit or threaten the right of others to exercise their freedom to have, adopt or manifest their religion, any more than criticism, mockery, etc. of any particular political belief or opinion.⁶¹ Under international standards, the right to freedom of religion or belief does not,

⁵⁸ Country Penal (Code) Act, 2017 (2074 B.S), section 155(1), based on an unofficial translation by UNDP of the Nepali original.

⁵⁹ ICJ, “On Trial: The Implementation of Pakistan’s Blasphemy Laws”, November 2015, pp. 5-7, available at: <https://www.icj.org/wp-content/uploads/2015/12/Pakistan-On-Trial-Blasphemy-Laws-Publications-Thematic-Reports-2015-ENG.pdf> [accessed 3 June 2018]; See also, ICJ, ‘Myanmar: Blasphemy Detainees Must Be Freed’, 29 January 2016, at <https://www.icj.org/myanmar-blasphemy-detainees-must-be-freed/> [accessed 3 June 2018]; See also, Vani Sathisan, Sanhita Ambast and Reema Omer, “Blasphemy Prosecutions Invoke Dignity of Religion to Deny Human Rights and Undermine the rule of Law”, 21 July 2015, ICJ, available at: <https://www.icj.org/blasphemy-prosecutions-invoke-dignity-of-religion-to-deny-human-rights-and-undermine-the-rule-of-law/> [accessed 3 May 2018].

⁶⁰ Jeroen Temperman, “Blasphemy, Defamation of Religions & Human Rights Law”, 17 April 2012, Netherlands Quarterly of Human Rights 2008, pp. 517-545, at pp. 7-8, available at: SSRN: <https://ssrn.com/abstract=2041292> [accessed 10 May 2018].

⁶¹ Ibid., pp. 10-11.

either expressly or by implication, place a duty on all people to have respect for everyone's religion or belief at all times,⁶² nor does it include the right to have one's faith elevated to a status over and above any others and/or where it is free from criticism or even insult.⁶³

There is a clear difference between insult and offence to a particular religion or religious belief on the one hand, and advocacy of hatred that constitutes incitement to discrimination, hostility or violence on religious grounds. While international human rights law prohibits the latter, the former is a human rights protected activity, including under Article 19 of the ICCPR,⁶⁴ albeit one whose exercise may be subject to certain restrictions in certain, very limited circumstances, and only such that are provided by law and are necessary. As mentioned above, the Human Rights Committee has also stated that criminalizing the holding of an opinion, no matter what opinion, is incompatible with Article 19.⁶⁵

Criminal provisions on "blasphemy" also raise another overarching concern: pursuant to such provisions, entirely harmless conduct is prohibited and criminalized simply on the ground that it is purportedly deemed offensive to the sentiments of other people; however, the gravity of the perceived offense an allegedly blasphemous statement may purportedly cause to others is obviously a matter of subjective analysis, rather than a question of an objective evaluation of harm caused, and of the culpability, if any, of the person responsible. Harm and culpability, in turn, are the elements required to warrant the imposition of criminal sanctions.⁶⁶ As a result, "blasphemy laws" are per se eminently arbitrary, and run the risk of being arbitrarily enforced.

Since the Penal Code has not yet come into force, it remains to be seen how the "blasphemy laws" in Nepal will be implemented. However, experiences from Nepal and elsewhere in the region show a troubling picture. For example, in September 2012, activists from the World Hindu Federation threatened an artist in Kathmandu for "outrageous portrayals" of Hindu gods at an exhibition of his works at a local art gallery.⁶⁷ A case was reportedly filed against the artist for "undermining any religious place or religious function", and the police responded by locking the gallery. The charges were dropped after the gallery removed the exhibition. In the region, even when "blasphemy laws" do not specify a particular religion and, purportedly, they seek to protect the religious sentiment of believers of all religions - as is the stated case in Nepal - they are often used disproportionately or even exclusively against believers of minority religions.⁶⁸ Particularly in countries where the majority of the population identifies strongly with a specific religion, "blasphemy laws" can be used as tools to limit human rights, especially, the right to freedom of expression.⁶⁹

PRINCIPLE OF LEGALITY

In addition, the provisions related to offences against religion in Nepal, particularly Section 155, 156 and 158 of the Penal Code, are framed in overly broad and vague terms, and thus breach the principle of legality (see above).

⁶² Ibid., p. 10.

⁶³ Asma Jahangir, Special Rapporteur on freedom of religion or belief, and Doudou Diène, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Report on Incitement to Racial and Religious Hatred and the Promotion of Tolerance, UN Doc. A/HRC/2/3, (2006), para. 36.

⁶⁴ Jahangir and Diène, at supra note 63, p. 16.

⁶⁵ Human Rights Committee, GC 34, supra note 29, para 48.

⁶⁶ Martha Nussbaum, "Secret Sewers of Vice: Disgust, Bodies and the Law", in Susan Bandes (ed.), *The Passions of Law*, New York University Press, 1999, pp. 19-62, cited at Peter Cumper, & Tom Lewis, "Last Rites and Human Rights: Funeral Pyres and Religious Freedom in the United Kingdom", 2010, *Ecclesiastical Law Journal*, 12(2), 131-151, Cambridge University Press.

⁶⁷ "Artist in death threat trouble for 'blasphemy'", *The Kathmandu Post*, 11 September 2012, available at: <http://kathmandupost.ekantipur.com/printedition/news/2012-09-11/artist-in-death-threat-trouble-for-blasphemy.html>

⁶⁸ Jeroen Temperman, Supra note 60, p. 15.

⁶⁹ Ibid., p. 9.

Section 155 of the Penal Code, for example, criminalizes damaging or injuring or, in any way, defiling, destroying or polluting any place of religious worship, with the intent of insulting the religion or religious feelings of “any caste, tribe/ethnic group, community or class”. Similarly, Section 156 criminalizes “outraging” religious feelings of any caste, tribe, group or community by written or spoken words, or gestures, or figures, or any other form of visible representation or signs or otherwise.

As is evident from a plain reading of these provisions, fundamental, definitional elements – which, in turn, are critical to defining Section 155 and Section 156 offences, and thus to determining what should and should not be criminalized – are glaringly vague and overbroad, and thus open to subjective interpretations; indeed the way in which these “offences” are formulated gives virtually no instruction to ordinary people or law enforcement officials and to the judiciary regarding what behavior is prohibited.

Not only must criminal offences be prescribed by law, but they must also conform to the principle of legality. This means that the laws proscribing acts or omissions as criminal must be formulated clearly and precisely to ensure individuals can regulate their conduct accordingly. Crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense. This means that there must be a clear definition of the criminalized conduct that establishes its elements and the factors that also distinguish it from conduct that is permissible.⁷⁰

Vague laws undermine the rule of law because they leave the door open to selective prosecution and interpretation, based on discriminatory policies of government officials and the personal predilections of judges.

The UN Human Rights Committee has emphasized that laws must not confer unfettered discretion to those responsible for their enforcement, and must provide sufficient guidance to enable law enforcers and the general public to determine what kinds of expression are restricted.⁷¹

INTENT AND THE PRESUMPTION OF INNOCENCE

The vague language of Section 156 of the recently adopted Penal Code makes no reference to a potential offender’s psychological state or intention, and thus opens the door for abusive prosecutions and the persecution of minorities, in particular, on religious or sectarian grounds.

Under international human rights law, in accordance with the right of every person charged with a criminal offence to be presumed innocent unless and until proven guilty beyond any reasonable doubt in a trial that affords fair trial guarantees, the prosecution is required to prove every element of the offence, including, ordinarily,⁷² the requisite criminal intent (*mens rea*) in order to convict a defendant (see above).

⁷⁰ *Castillo Petruzzi et al v Peru*, Judgment of the Inter-American Court of Human Rights (1999), para 121, cited at ICJ, “On Trial: The Implementation of Pakistan’s Blasphemy Laws”, November 2015, p. 19, available at: <https://www.icj.org/wp-content/uploads/2015/12/Pakistan-On-Trial-Blasphemy-Laws-Publications-Thematic-Reports-2015-ENG.pdf> [accessed 3 June 2018]

⁷¹ Human Rights Committee, GC 34, *supra* note 29, para. 25.

⁷² In substantive criminal law terms, most criminal offences comprise – or, arguably, should comprise (other than for instance for appropriately conceived strict liability offences, such as in cases concerned with corporate criminal liability)– the following two elements: -a material element, i.e., an act/omission (*actus reus*): for the accused to be found guilty they must have committed an act – or have omitted to do so notwithstanding a legal obligation to act – that has brought about, or unacceptably risked bringing about, a prohibited kind of **harm**; and a mental element (*mens rea*): for the accused to be found guilty it must be proven that, at the time of the commission or omission of the material element, they possessed a defined degree of mental **culpability**, deserving censure, for having caused that harm.

The conviction of an individual in the absence of proof beyond a reasonable doubt of all elements of a crime, including the requisite intent, would violate the presumption of innocence and, consequently, the right to a fair trial.

Burial and Management of Cemeteries

Every religious group has its own funerary rites, distinct from one another. Funerary rites not only serve the practical purpose of disposing of the dead, but also fulfill multiple other purposes that are intrinsically related to the manifestation of one's freedom of religion or belief.⁷³ Furthermore, funerary rites have been deemed to have considerable impact on the identity of a religious group.⁷⁴

Christians, Muslims and Baha'is in Nepal reportedly face serious impediments to performing last rites for the deceased, especially in Kathmandu, the capital and most populous city in the country.⁷⁵ Christians had been burying their dead in the *Shleshmantak / Mrigasthali* Forest⁷⁶ until the Pashupati Area Development Trust, a public trust established by the Nepali Government pursuant to Pashupati Area Development Trust Act, 1987 (2044), decided to prohibit such burials on 29 December 2010. Following the decision of the Trust, a group of people filed a writ petition with the Supreme Court of Nepal requesting the Court to issue an interim order to allow Christians to bury their dead in the *Sleshmantak* forest along with other sub-sects of Hindus, and to issue a declaration with a view to arranging places for cemeteries for Christians all over the country.⁷⁷

However, the Supreme Court's judgment in this case appears to indicate that, in fact, the Court viewed the use of the *Shleshmantak* forest by Christians for performing their deceased's last rites as a violation of the Hindu community's religious rights. In this context, for example, in its decision in the case the Supreme Court observed:

*In a secular state the Government and its agencies should be separate from religion; however, this does not imply that there shall not be any role of the State apparatus in the protection and preservation of places of religious and historical importance.*⁷⁸

The Supreme Court further elaborated that,

Religious secularism denotes non-interference and respect of religious inclinations of every individual residing within the territory. However, protection of one's

⁷³ Peter Cumper, & Tom Lewis, "Last Rites and Human Rights: Funeral Pyres and Religious Freedom in the United Kingdom", 2010, *Ecclesiastical Law Journal*, 12(2), 131-151, Cambridge University Press, pp 1-2, available at: <https://doi.org/10.1017/S0956618X10000025> [accessed 5 May 2018]. Funeral rites signify commemoration of passing of a life and even signify belief in afterlife in some religious beliefs.

⁷⁴ Roger Grainger, "Let Death Be Death: Lessons from the Irish Wake", 2010, *Mortality*, 3(2), pp 129-141.

⁷⁵ See, for example, US Bureau of Democracy, Human Rights and Labor, International Religious Freedom Report for 2013: "Because of the prohibition, some Christians reportedly drove several hours outside of Kathmandu to conduct secret burials in non-populated areas. Many Christian communities outside of the Kathmandu Valley were able to buy land for cemeteries, or the government has provided them land. Some Christians, however, indicated it was often difficult to start a new cemetery due to opposition from the local Hindu community."

⁷⁶ The *Shleshmantak / Mrigasthali* forest makes up a part of the Pashupat Area covering a total of 264 hectares. The Forest is considered to have great significance for Hindu devotees and was also used to bury a few sub-sects of Hindus, including hermits (sadhus).

⁷⁷ See, *Chirbahadur Gahatraj et. al. v. Prime Minister and the Council of Ministers et. al.*, Nepal Law Journal 2012 (2068), Vol. 10, Decision No. 8707. The public interest litigation was filed by petitioners requesting the SC to issue the writ of Mandamus against concerned Governmental agencies to facilitate establishment of cemeteries by allocate lands.

⁷⁸ *Ibid.*, at para. 5, based on an unofficial translation of the Nepali original.

*religious practice from encroachment/violation by another is well within the rights of a secular state.*⁷⁹

Furthermore, the Supreme Court went on to state that the arrangement of cemeteries was not a State's responsibility, including under the ICCPR, and it was not pragmatic to allocate lands for cemeteries all over the country for different communities.⁸⁰ The Supreme Court issued directive orders to the Christian and other non-Hindu communities to cease burial of deceased in the *Shleshmantak* forest,⁸¹ and to concerned government agencies to arrange for alternative places for burial without hurting anyone's religious sentiments.⁸² Additionally, the Supreme Court suggested that communities that require cemeteries for the performance of last rites of their deceased should buy lands, individually or through institutions, and establish such cemeteries.⁸³ This precedent was upheld by another recent Supreme Court's decision in 2017.⁸⁴

The Supreme Court's ruling raises a number of concerns. First, it held that, albeit people have the right to freedom of religion, it is not the State's responsibility to allocate or manage cemeteries for the discharge of its duties under the ICCPR. Indeed, obligations arising pursuant to the ICCPR do not necessarily result in a positive obligation on the part of States parties to allocate or manage cemeteries for the benefit of religious communities. However, the establishment of cemeteries has various social and environmental ramifications, which require that cemeteries should be established following, among other things, an assessment of their impact on the environment. Therefore, the most suitable sites can only be located in coordination with concerned governmental agencies.

Second, the Supreme Court suggested that individuals or institutions could buy lands for the purpose of establishing cemeteries. This suggestion is based on the false premise that there are indeed Christian religious institutions in existence in Nepal with the necessary economic wherewithal to afford the purchase of land.⁸⁵ This presumption is called into question by the fact that Nepal did not allow the registration of Churches or religious institutions for other minority religions until the promulgation of the Country Civil (Code) Act, which will come into effect on 21 August 2018. At the time of writing, Nepali law does not recognize registration of religious institutions other than Buddhist monasteries.⁸⁶ Thus, minority religious communities, including Christians and Muslims, have been denied the right to establish places of worship, religious associations and charitable institutions, notwithstanding the fact that those activities are integral to the freedom of religion or belief.

Third, while the Supreme Court kept reiterating the State's responsibility to protect "religions and culture handed down from time immemorial" (which the SC interpreted as giving a special status to Hinduism),⁸⁷ it failed to acknowledge even the most basic responsibility for the facilitation of the exercise of the right to freedom of religion or belief by other religious minorities, including Christians. The Supreme Court reasoned: "where

⁷⁹ *Gahatraj et. al. v. Prime Minister and Council of Ministers et. al.*, supra fn 77, para. 6, based on an official translation of the Nepali.

⁸⁰ *Ibid.*, para. 13.

⁸¹ *Ibid.*, para. 24

⁸² *Ibid.*, para. 26(f).

⁸³ *Ibid.*

⁸⁴ *Tulasi Simkhada v. Governmnet of Nepal, Office of the Prime Minister's Office et. al.*, Nepal Law Journal 2017 (2074), Vol. 7, Decision No. 9849, pp. 1291-1314. The SC in this case issued a Mandamus for the implementation of the SC verdict upholding Decision of 29 December 2010 of the Pashupati Area Development Trust to disallow burial of deceased persons of other religions apart from those that have been using the land with prior approval. See also, *Gahatraj et. al. v. Prime Minister and Council of Ministers et. al.*, supra note 77.

⁸⁵ *Gahatraj et. al. v. Prime Minister and Council of Ministers et. al.*, Supra note 77, para. 13.

⁸⁶ Bureau of Democracy, Human Rights and Labor International Religious Freedom Report for 2017, accessed at:

<https://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2017&dliid=281030#wrapper>

⁸⁷ Constitution of Nepal, Article 4 proviso; *Gahatraj et. al. v. Prime Minister and Council of Ministers et. al.*, supra note 77, para. 5; *Simkhada v. Governmnet of Nepal, Office of the Prime Minister's Office et. al.*, supra note 84, para. 4.

more than 80 per cent of the population are Hindu and Hindu culture and religion has been ongoing since ancient times, it is the duty of the State to preserve / protect such religion and culture".⁸⁸ This interpretation appears to be discriminatory and indicates a preference for Hinduism over other religions and beliefs, and thus falls foul of one of the basic tenets of secularism that Nepal purports to have embodied in its Constitution.⁸⁹

Overall, the ruling of the Supreme Court in this case gives rise to concern about the authorities' commitment to complying with Nepal's obligation to take the necessary measures to fulfill the right to freedom of religion or belief in this context.

The Christian community in Kathmandu staged a protest in Kathmandu in 2010 and signed a "Three Point Agreement", and then a "Six Point Agreement" with the then Minister of Culture on 1 May 2011, regarding Government's facilitation in establishment of cemeteries.⁹⁰ However, any assistance on the part of the Government has yet to materialize even after seven years.

The Right to Freedom of Religion or Belief of Tibetan Refugees

There are over 15,000 long-staying Tibetan refugees in Nepal, as estimated by the United Nations High Commissioner for Refugees (UNHCR),⁹¹ living in various camps throughout the country. According to reports received by the ICJ, Tibetans in refuge⁹² in recent years have been facing serious obstacles in the exercise of their right to freedom of religion or belief in the country, particularly in manifesting their religious beliefs through practices as a religious community.⁹³

For example, reports indicate that, as a result of surveillance and intimidation by the police, Tibetan refugees in Nepal are prevented from holding a religious ceremony, "*Chiwey Shabrim*", which consists in a big religious ritual for world peace, and which is supposed to be held every other month. Similarly, the police have prevented the Tibetan community in Nepal from observing other religious occasions and ceremonies, including the commemoration of the birthday of their religious leader, the Dalai Lama.

In July 2016, for example, 28 Tibetan refugees were arrested from a public school in Bouddha, Kathmandu, when they were participating in a peaceful religious function celebrating the birthday of the Dalai Lama.⁹⁴ A number of other such interventions by State authorities unjustifiably impeding Tibetan refugees from practising their religion have also been reported.

Taken together, the reported incidents restricting free exercise of the right to freedom of religion by long-staying Tibetan refugees in Nepal reveal that Tibetans are prevented from manifesting and practising their faith mostly in the context of public gatherings with their fellow believers. Any such restrictions would be inconsistent with the right to freedom of religion, which includes manifestation of one's religion in practice "either individually or in community with others and in public or private."⁹⁵

⁸⁸ *Simkhada v. Government of Nepal, Office of the Prime Minister's Office et. al.*, supra note 84, para. 11.

⁸⁹ See, *Gahatraj et. al. v. Prime Minister and Council of Ministers et. al.*, supra note 77, para. 4(b).

⁹⁰ Copies of the agreement can be accessed through the website of the Federation of National Christian Nepal (FNCN) at <http://fncnp.org/about/resources/>.

⁹¹ United Nations High Commissioner for Refugees (UNHCR), 'Nepal Factsheet', March 2016, available at: <http://www.unhcr.org/50001f3c9.pdf> [accessed 20 May 2018].

⁹² Not all of them have been given refugee status by the GoN.

⁹³ See also, Tibet Justice Center, "Tibet's Stateless Nationals: Tibetan Refugees in Nepal", June 2002, available at: <http://www.tibetjustice.org/reports/nepal.pdf> [accessed 20 May 2018].

⁹⁴ International Institute for Human Rights, Environment and Development (INHURED International), "Press Communiqué: Arbitrary Arrest of Tibetan Refugees in Kathmandu", 6 July 2016, available at: <http://inhuredinternational.org/blog> [accessed 5 June 2018].

⁹⁵ HRC, GC 22, supra note 27, para. 4.

The Human Rights Committee has clarified that, "[refugees] have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them", and that States must ensure that refugees "receive the benefit of the right of peaceful assembly and of freedom of association".⁹⁶ Therefore, as a State party to the ICCPR, Nepal is under an obligation to respect the rights of Tibetan Refugees to peacefully practise their religion in community with one another.

Furthermore, Article 4 of the 1951 UN Convention Relating to the Status of Refugees (the Refugee Convention),⁹⁷ states that:

States shall accord to refugees within their territories treatment at least as favorable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

Although Nepal is not a State party to the Refugee Convention, the UN Human Rights Committee, the UN General Assembly,⁹⁸ as well as various Special Procedures⁹⁹ have also referred to the rights recognized by Article 4 of the Refugee Convention.

According to authoritative interpretations of Article 4, the rights of refugees to the freedom of religion or belief should not be inferior to that accorded to a State's nationals.¹⁰⁰ Similarly, refugees should not be prohibited from practising their religion in private or in public by arranging ceremonies with fellow believers as long as they do not disturb or harm the locality.¹⁰¹

Government's practice in Nepal falls short of these standards. The Constitution of Nepal recognizes every individual's right to freedom of religion and the right as such is not exclusive to "citizens" or nationals of Nepal,¹⁰² which also makes the Government's failure to facilitate the right of Tibetan refugees to manifest their religion in community with their fellow believers incompatible with Article 26 of the Constitution.

⁹⁶ UN Human Rights Committee (HRC), General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, para. 7, available at: <http://www.refworld.org/docid/45139acfc.html> [accessed 20 May 2018]

⁹⁷ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Article 4, available at: <http://www.refworld.org/docid/3be01b964.html> [accessed 20 May 2018]. There are currently 145 States Parties to the Convention, Status as at 20 May 2018, see, United Nations Treaty Collection, available at: https://treaties.un.org/Pages/ViewDetailsII.aspx?src=IND&mtdsq_no=V-2&chapter=5&Temp=mtdsq2&clang=en [accessed 20 May 2018].

⁹⁸ UN General Assembly resolution 65/211, Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UN Doc. A/RES/65/211, (2010), para. 8. ("Recognizes with concern the situation of persons in vulnerable situations, including [...] refugees, asylum-seekers and internally displaced persons [...], as regards their ability to freely exercise their right to freedom of religion or belief".)

⁹⁹ See Rapporteur's Digest on Freedom of Religion or Belief, pp 72-76. The Digest is a compilation of Excerpts of the Reports from 1986 to 2011 by the Special Rapporteur on Freedom of Religion or Belief.

¹⁰⁰ United Nations High Commissioner for Human Rights (UNHCR), Commentary on the Refugee Convention 1951: Articles 2-11, 13-37, 1997, Division of International Protection, p. 11, available at: <http://www.unhcr.org/3d4ab5fb9.pdf> [accessed 5 May 2018].

¹⁰¹ Ibid.

¹⁰² See, Constitution of Nepal, Article 26(1).

RECOMMENDATIONS

In light of the concerns detailed in the present briefing, the ICJ makes the following recommendations to the authorities of Nepal:

- Coordinate with Christian, Muslim, Baha'i and other affected religious communities, including by establishing a commission or working group with a view to locating appropriate sites for use as cemeteries in harmony with environment and development planning as soon as possible;
- Facilitate the free exercise of Tibetan refugees' right to manifest their religion in community with their fellow believers;
- Repeal or substantially amend Sections 155 and 156 of the Penal Code, 2017, so that they be consistent with international standards, including on freedom of expression; freedom of thought, conscience or religion; and equality before the law and equal protection of the law without discrimination, as guaranteed under the ICCPR;
- Expressly include the requirement of proof of deliberate and malicious intent in all offences related to religion that are retained in the short or long term, particularly Sections 155 and 156 of the Penal Code;
- Revise Section 158 of the Penal Code, 2017, criminalizing converting anyone from one religion to another, to ensure that only "forceful conversion" be proscribed and, at the same time, provide that "forceful conversion" entail elements of coercion and/or undue influence;
- Amend Article 26(1) of the Constitution to harmonize the scope of the right to religious freedom provided therein with the right to freedom of religion or belief guaranteed in Article 18 of the ICCPR, including by express recognition of the right to manifest one's religious beliefs in teaching; and
- Amend Article 26(3) of the Constitution to prohibit only forceful conversion, and remove any clause prohibiting conversion per se.

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