

briefing

Nepal

Protecting religious freedom for a new Nepal

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Note on this edition:

This briefing supersedes CSW's earlier briefing, 'Nepal: Religious freedom and the new constitution (3rd edition, June 2011)'. In addition to an updated analysis, it incorporates concerns about proposals for a new penal code.

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I. Executive summary

The Constituent Assembly (CA) of Nepal, created by the Comprehensive Peace Agreement (CPA) and elected in April 2008, took the fundamental decision to abolish the Hindu monarchy and declare Nepal a secular republic.

The CA is currently in the process of drafting a new constitution, having been tasked by the CPA with creating “a political system that fully complies with universally accepted fundamental human rights”. In addition, the 1991 Treaty Act requires that domestic legislation in Nepal should be in compliance with all ratified treaties. Nepal is a state party to the International Covenant on Civil and Political Rights (ICCPR), of which article 18 provides for “the right to freedom of thought, conscience and religion”.

The deadline for the new constitution has been extended twice, and currently stands at 31 August 2011. The Government of Nepal is also reviewing the current civil and penal code, and a new proposal was submitted to the CA in May 2011.

The right to freedom of religion or belief has particular importance in Nepal at this time: this is a pivotal moment in its history, undergoing a transition from a Hindu monarchy to a secular democracy, which entails a significant change in the role of religion in politics and society. The CA therefore needs to consider how to reflect this within the framework of rights in the new constitution.

One of two clauses on religious freedom held in common among the constitutions of 1959, 1962, 1990 and 2007, and the present two constitutional proposals is a provision that “no person shall be entitled to convert another person from one religion to another” (or a variant of this). This leaves no space for interpreting a religious conversion as a positive choice, or taking a rights-based approach, such as that with which the CA is tasked in Nepal.

This briefing argues that it is not appropriate to carry the anti-conversion clause into the new constitution. This is for three main reasons. Firstly, the new social and political circumstances of Nepal demand that the treatment of religion in the constitution should be different (section 3.4). Secondly, this type of measure has a record in south Asia for heightening prejudice and violence against religious minorities (section 4.3). Thirdly, it is in violation of the international human rights framework (sections 5-6).

There is a serious risk that already-drafted clauses which are inconsistent with the international human rights framework may pass through the CA without proper scrutiny. Among them would be the right to religious freedom which, as currently framed in the two proposals, would be seriously curtailed. The specific problems with the new constitutional proposals on religious freedom are detailed in sections 6.2 of this briefing, and CSW makes specific recommendations on how the proposals can be made fully consistent with “universally accepted fundamental human rights”, as the CPA demands, in section 2.

In addition, the proposal on offences relating to religion for the new penal code contains a number of problematic sections, detailed in section 7.2 of this briefing. CSW recommends that section 160, on conversion, should be omitted, and sections 157-159, which stem from the colonial penal code of 1860, should be rethought in the present circumstances of Nepal.

The issues of pluralism and conversion are emotive ones, and the deep sensitivities around them should be addressed, but the question remains whether provisions in the new constitution and penal code are the best means for doing so, as they would curtail rights and strengthen negative attitudes towards religious minorities. Instead, a statutory body for inter-faith dialogue would constitute an innovative and potentially fruitful way forward.

2. Recommendations

2.1. To the constituent assembly of Nepal

CSW makes the following recommendations in relation to the right to freedom of religion or belief in the establishment of a new constitution, penal code and political system in Nepal:

1. In order to be made fully consistent with “universally accepted fundamental human rights”, as the Comprehensive Peace Agreement (CPA) demands, article 11 of the proposal by the Committee for Fundamental Rights and Directive Principles should be amended to the following:
 - (1) *Every person shall have the freedom to profess, practice, preserve and change his or her own religion in accordance with his or her faith, or to refrain from any religion. Provided that no person shall be entitled to act contrary to public health, decent behaviour and morality, to indulge in activities of jeopardizing public peace, or behave in a manner which may infringe upon the rights of others.*
 - (2) *Every religious denomination shall have the right to maintain its independent existence, and for this purpose to manage and protect its religious places and religious trusts, in accordance with law.*
2. In order to be made fully consistent with “universally accepted fundamental human rights”, as the CPA demands, the “Right to religion” in the proposal by the Committee on the Protection of the Rights of Minorities and Marginalized Communities should be amended to the following:
 - (1) *All persons shall have the freedom of religion as given below.*
 - a. *To accept or not to accept a religion,*
 - b. *To profess and practise religion according to one's own faith,*
 - c. *To disseminate the religion of one's own faith and religious belief,*
 - d. *To renounce or convert to another religion,*
 - e. *To open and run religious associations or organizations.*
 - (2) *While exercising the freedom of religion mentioned in Sub-Article (1) (a), (b), (c), (d) and (e), it shall have to be done in a manner which shall not infringe public safety, order, health, or morals or the fundamental rights and freedoms of others,*
 - (3) *Acts contrary to Sub-Articles (2) and (3) shall be punishable by laws.*
 - (4) *Every religious denomination shall have the right to manage and protect religious places and religious trusts in accordance with the law by maintaining its independent existence and religious tolerance.*
3. Within the proposal for a new penal code, section 160 should be omitted, and significant revisions to sections 157-159 should be considered;
4. A statutory, multi-faith religious commission should be established in the model of the Inter-Religious Council (IRC), with representation and involvement of all religious communities, for discussing issues arising among religious communities, and with the power to issue recommendations to the government;
5. The right to own, maintain, protect and have access to sacred sites and burial grounds should be protected by law.

2.2. To states and regional actors

It is recommended that states and regional actors should:

1. Encourage the Government of Nepal to give due consideration in the constitutional negotiations to the need to protect freedom of religion or belief in a manner

consistent with Nepal's obligations under international law and status as a secular democracy;

2. Encourage the Government of Nepal to implement the recommendations given in section 2.1 above, and to frame laws subsequently in a manner which reflects fully Nepal's commitments under the ICCPR.

2.3. To the UN Special Rapporteur on freedom of religion or belief

It is recommended that the UN Special Rapporteur on freedom of religion or belief should send a clarification to the Government of Nepal, requesting assurances that Nepal's obligations under international law to protect the right to freedom of religion or belief will be met in the new constitution.

3. Introduction: new political horizons in Nepal

3.1. From feudal monarchy to secular republic

Nepal was a feudal monarchy until 1990, with the king at the apex of its hierarchical system of authority. His designation as “King of all Hindus” added religious overtones to the feudal aura of the royal family, and created a situation in which loyalty to the anointed monarch was inextricably bound up with adherence to the dominant established religion. Political and religious authority have traditionally been fused in one person; until recent times, for the majority of citizens, the distinction between a loyal citizen and a loyal Hindu would have been difficult to comprehend.

In 1990, the first successful people’s revolution resulted in a compromise by which the monarchic government was replaced with a constitutional monarchy. The king agreed to the election of a multi-party parliament, but retained full control over the armed forces and the power to shut down parliament. Article 4(1) of the 1990 constitution defined Nepal as a “Hindu and Constitutional Monarchical Kingdom”.

During the period 1990 to 2006, the escalating war between the Communist Party of Nepal (Maoist) and the state challenged the fundamentals of the established state and religious system. The accession and subsequent ruthless actions of King Gyanendra led to the popular revolt in April 2006. In the peace process which ensued after a ceasefire, the CPN (Maoist) was included in the democratic process.

The Constituent Assembly (CA), created by the Comprehensive Peace Agreement (CPA) of November 2006, was elected in April 2008. It took the fundamental decision to abolish the monarchy and declare Nepal a secular republic. However, this decision, with significant implications for religious freedom, is yet to be enshrined in law, and can only be regarded as a statement of intent until it is reflected in a new constitution.

3.2. Towards a new constitution

Nepal is currently in the process of drafting a new constitution: the CA is tasked with creating “a political system that fully complies with universally accepted fundamental human rights”.¹ According to the CPA, “Both sides reiterate their commitment to the respect and protection of human rights and the international humanitarian laws and agree that no individual shall be discriminated on the basis of colour, gender, language, religion, age, race, nationality or social origin, property, disability, birth and other status and thought or belief”.²

The CA has produced a frequently-amended schedule for the making of the new constitution, which now gives a final date of 31 August 2011 for its promulgation. A number of committees have drafted proposals on each section of the final constitution, including the right to freedom of religion or belief, and have now produced their reports. The CA must examine and pass each section of the constitution in order for it to be finalised.

The continuing political situation in Nepal does not bode well for enlightened and far-sighted decisions. The political crisis on 28 May 2010 was avoided by an extension of a year, but the longer time-frame produced little agreement because of the political parties’ inability to elect a prime minister until February 2011. Little progress was made under this coalition in implementing the fundamental building blocks of the CPA, including most notably the

¹ Ministry of Foreign Affairs, Government of Nepal, ‘Unofficial Translation of the Comprehensive Peace Agreement concluded between the Government of Nepal and the Communist Party of Nepal (Maoist) (November 21, 2006)’, article 3.4.

² ‘Unofficial Translation of the Comprehensive Peace Agreement’, Article 7.1.1.

process of integrating the personnel of the People's Liberation Army and the Nepal Army into one reformed national military. The five-point agreement which secured the latest extension of the constitutional deadline to the end of August 2011 also required this issue to be resolved, and there is as yet little evidence of agreement.

Short-term party political advantage has been a factor in dictating party attitudes to crucial constitutional issues. Horse-trading for political advantage could result in compromises being made on fundamental rights. A full guarantee of the right to freedom of religion or belief is one fundamental right which could be endangered by secret political bargaining. According to CSW sources, when the present interim constitution was being framed, a stronger protection for religious freedom was proposed, but in the face of opposition from members of one political party, the proposals were not adopted.

Although over 80 per cent of the new constitution is reported to have been agreed upon, there is little evidence that the most controversial issues are close to being agreed, including the questions of a presidential or parliamentary system, and a specific form of federalism.

The serious risk is that already-drafted clauses which are inconsistent with the international human rights framework may pass through without proper scrutiny. Among them would be the right to freedom of religion or belief which, as currently framed in the two proposals, would be seriously curtailed in the new constitution. These proposals are analysed in section 6.

3.3. Towards a new penal code

From 2010, the Law and Justice Ministry has been reviewing the current civil and penal code, and drafting proposals for a revised code. In May 2011, a proposal was submitted to the CA for discussion and approval, and is currently due to be tabled for discussion.

The proposals include several problematic sections on offences relating to religion, which are analysed in section 7.

3.4. Pivotal importance of religious freedom in the new Nepal

Not only is freedom of religion or belief an important contributory factor to any stable, open, pluralist society, but it has particular importance in Nepal at this time.

Nepal is at a pivotal moment in its history, undergoing a transition from a Hindu monarchy to a secular democracy. This entails a significant change in the role of religion in Nepali politics and society. There have also been shifts in the religious demographics of Nepal, including increased numbers of religious minorities.

The CA therefore needs to consider carefully and sensitively how to promote a healthy culture of religious pluralism within the framework of rights in the new constitution. As the nation finalises its peace process, the right to freedom of religion or belief, as defined by international law, must be protected carefully if the transition to a secular democracy is to be successful.

4. Historical legacy: anti-conversion measures

4.1. Anti-conversion measures in Nepal

There are two features on religious freedom which are held in common among the constitutions of 1959, 1962, 1990 and 2007, and the current two constitutional proposals. One is the right to "profess" and "practise" a religion, and the second is a provision that "no person shall be entitled to convert another person from one religion to another" (or a variant of this).

The 1959 constitution in Nepal was the first to provide in a limited way for any specific right to freedom of religion. Article 5 provided that:

“Every citizen having regard to the current traditions, may practice and profess his own religion as handed down from ancient times.

“Provided that no person shall be entitled to convert another person to his religion.”

Similar wording was included in article 14 of the 1962 constitution, article 19(1) of the 1990 constitution and article 23(1) of the 2007 interim constitution. These are reproduced in full in appendix I below, alongside the new constitutional proposals.

This briefing argues that it is not appropriate to carry the anti-conversion clause into the new constitution. This is for three main reasons. Firstly, the new social and political circumstances of Nepal demand that the treatment of religion in the constitution should be different (section 3.4). Secondly, this type of measure has a record in south Asia for increasing prejudice and violence against religious minorities (section 4.3). Thirdly, it is in violation of the international human rights framework (sections 5-6), which the CPA specified should be the basis for the new political system.

4.2. India: a comparative perspective

This anti-conversion language is broadly held in common with legislation in force in five states of India, where it developed from the compulsions of extremist Hindu nationalism.

The Hindu nationalist movement in India has constructed a particular narrative around religious conversion, and the alleged threat this poses to the nation. Opposition to religious conversions has stimulated significant antagonism against the Christian community in particular.

Hindu nationalist ideology begins with a conception that India is a Hindu nation, in which Hinduism is the default ‘way of life’ for all Indians. This ideology makes a distinction between conversions away from Hinduism, which are seen as a threat to the national integrity of India and a contributor to the alleged decline of Hinduism, and conversions to Hinduism, which are described by the term *ghar vapsi*, translated as ‘homecoming’, or ‘re-conversion’. Hindu nationalist discourse has also evolved subtly, from emphasising the possibility that conversions can be brought about through force, to suggestions that conversions are by nature violent.

This narrative has become more entrenched and authoritative in India, as a result of being given official sanction in various forms. In 1956, the publication of the ‘Niyogi Committee Report on Christian Missionary Activities’ introduced into official discourse the Hindutva perspective on conversion. Commissioned by the state Government of Madhya Pradesh to enquire into allegations that missionaries were bringing about conversions “either forcibly or through fraud or temptations of monetary gain”,³ it found that, “Evangelization in India appears to be a part of the uniform world policy to revive Christendom for re-establishing Western supremacy”,⁴ and that, “Conversions are mostly brought about by undue influence, misrepresentation, etc., or in other words not by conviction but by various inducements offered for proselytization in various forms”.⁵ The report paved the way for the introduction of state-level anti-conversion laws, which ban conversions carried out by means

³ Sita Ram Goel, *Vindicated by Time: The Niyogi Committee Report on Christian Missionary Activities*, New Delhi: Voice of India, 1998, Vol. I, Part I, Chapter I, paragraph 2.

⁴ *Ibid*, Vol. I, Part IV, Chapter I, paragraph 7.

⁵ *Ibid*, Vol. I, Part IV, Chapter I, paragraph 3.

of force, fraud or allurement. Such laws are currently in force in the states of Orissa (1967), Madhya Pradesh and Chhattisgarh (1968), Gujarat (2003) and Himachal Pradesh (2006).

4.3. Critique of this concept

There are two rights aspects to conversion: the right of the individual to change their religion, and the rights of those who conduct actions which lead others to change their religion. Both are related to each other.

Anti-conversion measures typically ban one person from converting another person. They use a paradigm of conversion which focuses particularly on the role of the agent who causes another person to change their religion. They are often used to portray Christians especially as predators who force vulnerable people to change their religion against their will. This concept of conversion is analysed by sociologists Brock Kilbourne and James Richardson. They argue that it is “likely to be endorsed by status quo groups” and “used to dichotomize the world, simplistically, into good and evil forces”, determined on the basis of whether they support or oppose the status quo.⁶

This concept leaves no space for interpreting a religious conversion as a positive choice, or taking a rights-based approach, such as that with which the CA is tasked in Nepal. Instead, it sees the convert as “deterministically shaped by powerful social psychological forces”, and subject to “group pressure, deception, isolation, fatigue, threat(s), and induced dissociative threats” in order “to obliterate natural ties to the family and community and to instil a new religious identity”. It emphasises the alleged vulnerability of new converts, the powerful recruitment strategies of the new religions, and the negative results arising from this new religious affiliation.⁷

In the report of her 2008 mission to India, the former Special Rapporteur on freedom of religion or belief, Asma Jahangir, indicated that she was “deeply concerned that laws and bills on religious conversion in several Indian states are being used to vilify Christians and Muslims”.⁸ She concluded that these “should be reconsidered since they raise serious human rights concerns”.⁹

A constitution in Nepal which continues to enshrine this narrative would be highly detrimental to a culture of pluralism in Nepal, and therefore to the prospects for a successful transition to a secular democracy.

5. Freedom of religion or belief in international law

The CA is tasked with creating a political system, including a constitution, which “fully complies with universally accepted fundamental human rights”. This includes the right to freedom of religion or belief.

According to the 1991 Treaty Act, all ratified treaties become laws of Nepal, and existing laws must be brought into compliance with them.¹⁰ It is therefore a requirement of domestic law that the provisions on freedom of religion in the treaties ratified by Nepal should be reflected in Nepal’s own body of legislation.

⁶ Brock Kilbourne & James T. Richardson, ‘Paradigm Conflict, Types of Conversion, and Conversion Theories’, *Sociological Analysis*, 50:1 (1989), p. 17.

⁷ *Ibid*, pp. 7-8.

⁸ ‘Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir: Addendum: Mission to India’, paragraph 47, A/HRC/10/8/Add.3, 26 January 2009.

⁹ *Ibid*, paragraph 70.

¹⁰ Centre for Constitutional Dialogue (CCD), ‘Human Rights in the Constitution’, http://www.ccd.org.np/new/publications/Human_Rights_English.pdf, p.3.

Nepal acceded to the International Covenant on Civil and Political Rights (ICCPR) on 14 May 1991, and is therefore legally bound by its provisions. Article 18 provides that:

- (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.*

UN Human Rights Committee General Comment 22 interprets the right to “have or to adopt a religion” as necessarily including the right “to replace one’s current religion or belief with another or adopt atheistic views”.¹¹ General Comment 22 also narrowly restricts the limitations permitted in article 18(3): “The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there ... Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.”¹²

Article 4 of the ICCPR provides that during times of national emergency, state parties are allowed to derogate from certain obligations under the ICCPR; however, it does not permit derogation from article 18 or certain other articles, which are considered so fundamental that they cannot be curtailed.

Article 27 of the ICCPR provides for the rights of persons belonging to minority religions:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

Article 19(2) of the ICCPR provides for the right to freedom of expression:

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and 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 choice.”

¹¹ ‘General Comment No. 22’, paragraph 5, [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9a30112c27d1167cc12563ed004d8f15?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument).

¹² Ibid, paragraph 8.

6. Restrictions on freedom of religion or belief in new constitutional proposals

Two committees have introduced proposals for the right to freedom of religion or belief in the new constitution. These proposals are reproduced and analysed in this section.

6.1. Religious freedom in constitutional proposals

6.1.1. Committee for Fundamental Rights and Directive Principles (CFRDP)¹³

Article 11 of the constitutional proposal is as follows:

- (1) *Every person shall have the freedom to profess, practice and preserve his or her own religion in accordance with his or her faith, or to refrain from any religion. Provided that no person shall be entitled to act contrary to public health, decent behaviour and morality, to indulge in activities of jeopardizing public peace or to convert a person from one religion to another, and no person shall act or behave in a manner which may infringe upon religion of others.*
- (2) *Every religious denomination shall have the right to maintain its independent existence, and for this purpose to manage and protect its religious places and religious trusts, in accordance with law.*

6.1.2. Committee on the Protection of the Rights of Minorities and Marginalized Communities (CPRMMC)¹⁴

The proposed constitutional provision is as follows:

- (1) *All persons shall have the freedom of religion as given below.*
 - a. *To accept or not to accept a religion,*
 - b. *To profess and practise religion according to one's own faith,*
 - c. *To disseminate the religion of one's own faith and religious belief,*
 - d. *To renounce or convert to another religion out of one's own accord,*
 - e. *To open and run religious associations or organizations.*
- (2) *While exercising the freedom of religion mentioned in Sub-Article (1) (a), (b), (c), (d) and (e), it shall have to be done in a manner which shall not affect other religions or religious faith,*
- (3) *No one shall be allowed to convert another person from one religion to another against his or her desire.*
- (4) *Acts contrary to Sub-Articles (2) and (3) shall be punishable by laws.*
- (5) *Every religious denomination shall have the right to manage and protect religious places and religious trusts in accordance with the law by maintaining its independent existence and religious tolerance.*

6.2. Analysis

6.2.1. Improvements over previous constitutions in both proposals

There is one significant improvement over the protection of the right to freedom of religion or belief in previous constitutions, including the 2007 interim constitution. Both proposals have altered the clause, "Every person shall have the right to profess, practise and preserve his or her own religion as handed down to him or her from ancient times paying due regard to social and cultural traditions" by removing the second part. No longer will there be no

¹³ Reproduced by the CCD, http://www.ccd.org.np/new/resources/concept_paper_fundamental_rights_directive_principles.ENG.pdf.

¹⁴ Reproduced by the CCD, http://www.ccd.org.np/new/resources/concept_paper_minority_ENG.pdf.

religious freedom at all for those whose own religion is not “handed down to him or her from ancient times paying due regard to social and cultural traditions”.

However, in their current state, neither constitutional proposal is fully consistent with the right to freedom of religion or belief as defined by the ICCPR.

6.2.2. Concerns specific to CFRDP proposal

There are three main problems with the CFRDP proposal, which should be addressed:

1. The provision that no person should “convert a person from one religion to another” is in violation of the freedom to “manifest” religion or belief under ICCPR article 18(1). This clause could also be invoked against a wide range of legitimate expressions of religious faith, including the charitable activities of religious groups or peaceful evangelism. Successive Special Rapporteurs on freedom of religion or belief have spoken against this type of measure. Reiterating the view of her predecessor, Special Rapporteur Jahangir stated that he “considered ‘constitutional provisions prohibiting proselytism to be inconsistent with the 1981 Declaration [on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief]’”.¹⁵ She also stated that, “any generalized State limitation (e.g. by law) conceived to protect ‘others’ freedom of religion and belief by limiting the rights of others to conduct missionary activities should be avoided”,¹⁶ and recommended dealing with any insensitive missionary behaviour on a case-by-case basis.¹⁷ She further noted that “article 19 of the ICCPR ... is formulated in a way that also covers missionary activities” and that, “The Human Rights Committee’s constant jurisprudence has deemed the protection afforded by article 19 extremely strong”.¹⁸ This provision should therefore be omitted from the constitutional proposal.
2. The stipulation that “no person shall act or behave in a manner which may infringe upon religion of others” is ill-defined, and open to abuse. It could easily be invoked to settle personal scores among members of different religious communities, which would worsen, not improve, inter-religious harmony. The ICCPR permits limitations on the right to freedom of religion or belief only under very specific conditions: “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”. This provision in the constitutional proposal should be amended to include only the language of the ICCPR.
3. Although the proposal specifies that every person is free “to refrain from any religion”, it does not specifically protect the right to change religion. ICCPR article 18(1) includes the right “to have or to adopt a religion or belief of his choice”. General Comment 22 defined the right to “have or to adopt” a religion as necessarily including the right “to replace one’s current religion or belief with another or adopt atheistic views”.¹⁹ Special Rapporteur Jahangir has stated, “The right to change religion is absolute and is not subject to any limitation whatsoever”.²⁰

¹⁵ ‘United Nations General Assembly: Human rights questions: human rights questions including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms’, paragraph 60, A/60/399, 30 September 2005.

¹⁶ Ibid, paragraph 62.

¹⁷ Ibid, paragraph 68.

¹⁸ Ibid, paragraph 61.

¹⁹ ‘General Comment No. 22’, paragraph 5.

²⁰ ‘Human rights questions: human rights questions including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms’, paragraph 58.

The constitutional proposal should therefore reflect this by including specifically the right to change one's religion.

6.2.3. Concerns specific to CPRMMC proposal

The proposal of the Committee on the Protection of the Rights of Minorities and Marginalized Communities is closer to the ICCPR than the other proposal. However, it also has a number of problems which should be addressed:

1. There is a lack of clarity about the right to disseminate religion, which is part of the right to “manifest” religion (see section 6.2.2, paragraph 1 above). The proposal would protect the right “to disseminate the religion of one's own faith and religious belief”, but stipulate that, “No one shall be allowed to convert another person from one religion or another against his or her desire”. A prohibition on coercion is not inconsistent with ICCPR article 18(2), which stipulates that, “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice”. However, the language in the proposal is vague, and could lead to confusion about the nature of religious conversion, as in India where a Supreme Court judgement ruled that the right to “propagate” religion “does not grant right to convert other person to one's own religion but to transmit or spread one's religion by an exposition of its tenets.”²¹ This had led to a distinction between “propagation” and “conversion”, which is difficult to uphold in practical terms. It is also questionable whether it is specifically necessary to prohibit conversion by coercive means, since specific techniques for coercion (such as acts of violence or fraud) would be prohibited under the provisions of civil and criminal law. The proposal should therefore either omit this clause or change it into line with the language of ICCPR article 18(2).
2. The stipulation that the rights granted in sub-section (1) “shall have to be done in a manner which shall not affect other religions or religious faith” is ill-defined and subject to the same problems as the equivalent clause in the other proposal (see section 6.2.2, paragraph 2 above). The ICCPR permits limitations on the right to freedom of religion or belief only under very specific conditions: “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”. This provision should be amended to include only the language of the ICCPR.

7. Restrictions on freedom of religion or belief in penal code proposals

7.1. Offences relating to religion

The following is an unofficial translation of the sections of the proposed new penal code which deal with offences relating to religion. It should not be quoted as authoritative, and is intended only as a guide to the official Nepali text.

Section 157: Harming or inflicting damage upon religious, holy or sacred places

1. *No one shall take any action that would harm, damage, destroy, defile, or tarnish the image of any sacred place, any place of religious worship, prayer or religious rituals, graveyard or crematorium, knowing the consequences of such actions or with the intention of creating hatred, insulting or undermining the religion or religious belief of any caste, race, class, or sect.*
2. *Any person committing an offence under sub clause (1) above shall be liable to imprisonment for up to three years and a fine of up to thirty thousand Nepali Rupees. If*

²¹ ‘Rev. Stainislaus vs. State of Madhya Pradesh and Ors.’

any foreigner commits an offence under sub clause (1) above, the person concerned shall be deported from Nepal within a period of seven days after the completion of imprisonment, as stated under sub clause (2) above.

Section 158: Harming or offending religious feelings

1. No one shall harm, insult or offend the religious feelings of any caste, race, class or sect by way of written or verbal expression or by way of depiction of figure or symbol, or by any other similar means.
2. Any person committing an offence under sub clause (1) above shall be liable to imprisonment for up to two years and a fine of up to twenty thousand Nepali Rupees.

Article 159: Obstructing religious rituals, customs, traditions or practices

1. No one shall deliberately obstruct religious rituals, customs, traditions or practices which have been observed since time immemorial.
2. Any person committing an offence under sub clause (1) above shall be liable to imprisonment for up to one year or a fine of up to an amount of ten thousand Nepali Rupees, or both.

Article 160: engaging in actions leading to conversion

1. No one shall convert another person from his or her existing religion, or nurture such an idea, or instigate the same.
2. No one shall perform any act or behave in any way that will interfere with or deliberately disturb the religion, faith, beliefs, doctrine or creed of any other caste, race, class or sect observed since time immemorial; and no one shall bring about the conversion of a person from his or her religion, or propagate such other religion or faith, either with or without inducement.
3. The person who has committed offence as per sub clause (1) or (2) shall be liable to imprisonment for up to five years and a fine of up to 50,000 Nepali Rupees.
4. If such person is a foreign national and has committed such offence as per sub clause (1), he or she shall be deported from Nepal within 7 days after the completion of the prison sentence.

Article 161: Time limit

There shall not be any valid complaint after the period of six months from the date of such offence being noticed, or, in the case of an offence being committed under Article 160, after the expiry of three months from the date of any offence being committed.

7.2. Analysis

7.2.1. Section 160 on conversion

This briefing is focused specifically on section 160, as the most problematic part of this proposal. The proposed section 160 would negate any remaining freedom in the two constitutional proposals to perform acts leading another person to change their religion.

Having already outlined the position of the UN Human Rights Council on the right to convert or to propagate religion in section 6.2 above, it is unnecessary to repeat this. However, this analysis is relevant to the proposed section 160. The main problems with the proposal are as follows:

1. The proposal would remove altogether the freedom to propagate religion, in violation of the freedom to “manifest” religion or belief under ICCPR article 18(1). The proposal provides that “no one shall bring about the conversion of a person from his or her religion, or propagate such other religion or faith, with or without inducement”. Any form of propagation would be made illegal.

2. The proposal uses language which is extremely broad. It would invite abuse, as it could easily be used against a wide range of legitimate religious activities, and it would restrict the right to freedom of expression:
 - a. The provision that, “No one shall convert another person from his or her existing religion, or nurture such an idea, or instigate the same” is especially problematic. Even a conversation about religious beliefs could be deemed an offence under this provision, if it is deemed to “nurture” or “instigate” an idea in a person which leads to an eventual and voluntary change of religion. This could lead to severe self-censorship and a *de facto* clampdown on the right to freedom of expression, which is protected by ICCPR article 19(2).
 - b. The provision that, “No one shall perform any act or behave in any way that will interfere with or deliberately disturb the religion, faith, beliefs, doctrine or creed of any other caste, race, class or sect observed since time immemorial” is also extremely vague. It is not clear what it would mean to “interfere or deliberately disturb” the religion or another, although in the context of this section on “actions leading to conversion”, it could also be applied even to a conversation about religious beliefs, and lead to the same problems outlined above. The restrictions permitted by ICCPR article 18(3) on the right to manifest religion are very specific: they must be “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”²² General Comment 22 states that “limitations must not be applied in a manner that would vitiate the rights guaranteed in article 18”, including the right to manifest religion.
3. The proposal would create offences that would only exist in the specific context of manifesting religion, which could contribute to stigmatising religious minorities. In addition, since religious belief is a subjective matter, illegitimate behaviour in the manifestation of religion should be raised by the victim rather than prosecuted by the state. This argument has been made by the former UN Special Rapporteur on freedom of religion or belief, Asma Jahangir: “it would not be advisable to criminalize non-violent acts performed in the context of manifestation of one’s religion, in particular the propagation of religion, including because that might criminalize acts that would, in another context, not raise a concern of the criminal law and may pave the way for persecution of religious minorities. Moreover, since the right to change or maintain a religion is in essence a subjective right, any concern raised with regard to certain conversions or how they might be accomplished should primarily be raised by the alleged victim”.²³
4. The penalties permitted would be extremely high, running to imprisonment for up to five years and a fine of 50,000 rupees (equivalent to £420/€480/\$690). This is by far the largest punishment stipulated for any of the offences relating to religion. When the proposal is worded so vaguely, this is particularly concerning.

Section 160 should therefore be omitted from the proposed new penal code.

7.2.2. Sections 157-159

Sections 157-159 are similar in form to the colonial penal code of India, which dates from 1860 and also forms the basis for the present penal codes in Bangladesh, Burma, India, Pakistan (where the provisions have been extended to include the notorious blasphemy

²² General Comment 22, paragraph 8. The same paragraph discusses the definition of “morals”, and determines that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”.

²³ ‘Human rights questions: human rights questions including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms’, paragraph 65.

laws) and Sri Lanka. A key underlying question is whether it is appropriate for Nepal, crafting a new penal code for a newly democratic and pluralist society, to reflect language tailored to colonial rule 150 years ago. The drafting of a new penal code provides an opportunity to rethink this language, and the Government of Nepal should be encouraged to do so.

Several aspects of these sections are problematic. Section 157(1) criminalises “insulting or undermining the religion” of any group, and can be criticised for approximating to measures combating defamation of religion, as in the recent campaign at the UN by the Organisation of Islamic Conference (OIC). Section 158 provides that, “No one shall harm, insult or offend the religious feelings of any caste, race, class or sect”. This is similar to section 295A of the Pakistan Penal Code, which is used in the vast majority of blasphemy cases in Pakistan, alongside sections 295B and C.²⁴ This provision takes no account of whether there was any intention to cause offence, and is therefore subject to arbitrary implementation. Section 159 is subject to similar concerns.

8. Non-legislative alternatives to restrictions on conversion

Proposals for both the new constitution and the new penal code would enshrine restrictions on religious conversion. The issues of conversion and pluralism are emotive ones in south Asia, including in Nepal where there has been a significant change in the place of religion in society and politics through the transition from a Hindu monarchy to a secular democracy. It is important that the deep sensitivities which exist around conversion should be addressed, particularly where questions arise of unethical behaviour or coercion to bring about the conversion of others.

However, the question remains whether provisions in the new constitution and penal code are the best means for addressing these sensitivities, as they would curtail rights and would be likely to strengthen negative attitudes towards religious minorities.

Rather than restricting freedom of religion or belief in the new constitution and the penal code, the new political system in Nepal could deal with these issues much more effectively by establishing a mechanism for developing mutual understanding and co-operation among different religious communities. Since 2004, the National Council of Churches of Nepal (NCCN) has been working to consolidate dialogue between representatives of all other religions in Nepal towards common goals of peace, justice and human rights, through the Inter-Religious Peace Committee, which was later officially recognised as the Inter-Religious Council (IRC), with a Hindu named as its president, and a Christian as its vice-president.

A statutory body for inter-faith dialogue, with the representation and active involvement of all religious denominations, and with the power to make authoritative recommendations to the government, would constitute an innovative and potentially fruitful way forward. It would offer a means for discussing and tackling grievances among religious communities, and for promoting non-legislative means for dealing with inter-religious concerns. It would also provide a forum for discussing the particular legal protections needed for the customs of minority religions, such as the need to own land for the purpose of burial, a major difficulty for Christian churches in a land where cremation is the norm.

To this end, after widespread consultations across Nepal, the NCCN and IRC have proposed that the constitution should establish a multi-faith religious commission. They have argued that this would be more effective than separate consultative bodies for each faith, which would risk entrenching religious differences and would not create the required

²⁴ For further information on Pakistan’s blasphemy laws, see CSW’s briefing, ‘Pakistan: Religious freedom in the shadow of extremism’, <http://dynamic.csw.org.uk/article.asp?t=report&id=139>.

opportunities and momentum for inter-faith co-operation, which will be urgently needed in the new, secular republic of Nepal.

A climate of dialogue and mutual respect among religious communities could help to foster unilateral action to prevent causing offence to members of other religions. For example, the Christian community in Nepal could follow its counterpart in Sri Lanka by promoting a code of conduct for its members. A useful global precedent has been set in 2011 by the recommendations for conduct published jointly by the World Council of Churches, Pontifical Council for Interreligious Dialogue and World Evangelical Alliance.²⁵

²⁵ 'Christian Witness in a Multi-Religious World: Recommendations for Conduct', http://www.oikoumene.org/fileadmin/files/wcc-main/2011pdfs/ChristianWitness_recommendations.pdf or http://www.worldevangelicals.org/pdf/1106Christian_Witness_in_a_Multi-Religious_World.pdf.

9. Appendix I: Freedom of religion in past constitutions and current proposals

The following chart shows the evolution of language dealing with the right to freedom of religion or belief in successive constitutions of Nepal, and in the present proposals for the new constitution. The 1948 constitution did not deal specifically with the question of religious freedom, while the 1951 constitution only contained simple non-discrimination clauses.

1959	1962	1990
<p>Every citizen having regard to the current traditions, may practice and profess his own religion as handed down from ancient times.</p> <p>Provided that no person shall be entitled to convert another person to his religion.</p>	<p>Every person may profess his own religion as handed down from ancient times and may practice it having regard to the tradition.</p> <p>Provided that no person shall be entitled to convert another person from one religion to another.</p>	<p>Every person shall have the freedom to profess and practise his own religion as handed down to him from ancient times having due regard to traditional practices; provided that no person shall be entitled to convert another person from one religion to another.</p> <p>Every religious denomination shall have the right to maintain its independent existence and for this purpose to manage and protect its religious places and trusts.</p>
2007	CFRDP proposal	CPRMMC proposal
<p>Every person shall have the right to profess, practise and preserve his or her own religion as handed down to him or her from ancient times paying due regard to social and cultural traditions.</p> <p>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.</p> <p>Every religious denomination shall have the right to maintain its independent existence, and for this purpose to manage and protect its religious places and religious trusts, in accordance with law.</p>	<p>Every person shall have the freedom to profess, practice and preserve his or her own religion in accordance with his or her faith, or to refrain from any religion.</p> <p>Provided that no person shall be entitled to act contrary to public health, decent behaviour and morality, to indulge in activities of jeopardizing public peace or to convert a person from one religion to another, and no person shall act or behave in a manner which may infringe upon religion of others.</p> <p>Every religious denomination shall have the right to maintain its independent existence, and for this purpose to manage and protect its religious places and religious trusts, in accordance with law.</p>	<p>All persons shall have the freedom of religion as given below.</p> <ul style="list-style-type: none"> To accept or not to accept a religion, To profess and practise religion according to one's own faith, To disseminate the religion of one's own faith and religious belief, To renounce or convert to another religion out of one's own accord, To open and run religious associations or organizations. <p>While exercising the freedom of religion mentioned in Sub-Article (1) (a), (b), (c), (d) and (e) [above], it shall have to be done in a manner which shall not affect other religions or religious faith,</p> <p>No one shall be allowed to convert another person from one religion to another against his or her desire.</p> <p>Acts contrary to Sub-Articles (2) and (3) shall be punishable by laws.</p> <p>Every religious denomination shall have the right to manage and protect religious places and religious trusts in accordance with the law by maintaining its independent existence and religious tolerance.</p>

10. Appendix 2: CSW's proposed language for the new constitution

The following chart shows the present proposals for the right to freedom of religion or belief in the new constitution, alongside CSW's proposed alternative language.

CFRDP proposal	CSW's alternative
<p><i>Every person shall have the freedom to profess, practice and preserve his or her own religion in accordance with his or her faith, or to refrain from any religion.</i></p> <p><i>Provided that no person shall be entitled to act contrary to public health, decent behaviour and morality, to indulge in activities of jeopardizing public peace or to convert a person from one religion to another, and no person shall act or behave in a manner which may infringe upon religion of others.</i></p> <p><i>Every religious denomination shall have the right to maintain its independent existence, and for this purpose to manage and protect its religious places and religious trusts, in accordance with law.</i></p>	<p><i>Every person shall have the freedom to profess, practice, preserve and change his or her own religion in accordance with his or her faith, or to refrain from any religion.</i></p> <p><i>Provided that no person shall be entitled to act contrary to public health, decent behaviour and morality, to indulge in activities of jeopardizing public peace, or behave in a manner which may infringe upon the rights of others.</i></p> <p><i>Every religious denomination shall have the right to maintain its independent existence, and for this purpose to manage and protect its religious places and religious trusts, in accordance with law.</i></p>
CPRMMC proposal	CSW's alternative
<p><i>All persons shall have the freedom of religion as given below.</i></p> <p><i>To accept or not to accept a religion,</i></p> <p><i>To profess and practise religion according to one's own faith,</i></p> <p><i>To disseminate the religion of one's own faith and religious belief,</i></p> <p><i>To renounce or convert to another religion out of one's own accord,</i></p> <p><i>To open and run religious associations or organizations.</i></p> <p><i>While exercising the freedom of religion mentioned in Sub-Article (1) (a), (b), (c), (d) and (e) [above], it shall have to be done in a manner which shall not affect other religions or religious faith,</i></p> <p><i>No one shall be allowed to convert another person from one religion to another against his or her desire.</i></p> <p><i>Acts contrary to Sub-Articles (2) and (3) shall be punishable by laws.</i></p> <p><i>Every religious denomination shall have the right to manage and protect religious places and religious trusts in accordance with the law by maintaining its independent existence and religious tolerance.</i></p>	<p><i>All persons shall have the freedom of religion as given below.</i></p> <p><i>To accept or not to accept a religion,</i></p> <p><i>To profess and practise religion according to one's own faith,</i></p> <p><i>To disseminate the religion of one's own faith and religious belief,</i></p> <p><i>To renounce or convert to another religion,</i></p> <p><i>To open and run religious associations or organizations.</i></p> <p><i>While exercising the freedom of religion mentioned in Sub-Article (1) (a), (b), (c), (d) and (e), it shall have to be done in a manner which shall not infringe public safety, order, health, or morals or the fundamental rights and freedoms of others,</i></p> <p><i>Acts contrary to Sub-Articles (2) and (3) shall be punishable by laws.</i></p> <p><i>Every religious denomination shall have the right to manage and protect religious places and religious trusts in accordance with the law by maintaining its independent existence and religious tolerance</i></p>