

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on freedom of religion or belief

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24 July 2015

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and Special Rapporteur on freedom of religion or belief pursuant to Human Rights Council resolutions 25/2 and 22/20.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received regarding the **provisions relating to the freedom of religion or belief in the new draft constitution of Nepal**. An allegation letter had been sent on 7 October 2011 (NPL 2/2011) raising similar concerns of the provisions in both the draft Constitution and Penal Code then. In view that the public consultation of new draft constitution will possibly close today, 24 July 2015, we would appreciate it if you could kindly ensure that our comments are transmitted to the Constituent Assembly of Nepal for its consideration.

According to the information received:

In the beginning of July 2015, a new draft constitution was reportedly submitted to the Constituent Assembly after four main parties agreed on an outline plan for the constitution on 8 June 2015. Reportedly, the new draft Constitution gives a short time frame of about 15 days for public consultation, possibly ending on 24 July 2015.

Article 31 under Part 3 on Fundamental Rights and Duties of current draft Constitution provides for Right to Religious freedom:

(1) Every person shall have the right to profess, practice and protect his or her own religion according to conviction and the freedom to separate oneself from any religion.

(2) Every religious denomination shall have the right to maintain its independent existence, and, for this purpose, to operate and protect its religious sites and religious trusts, in accordance with law.

(3) In exercising right entrusted by this article, any act which may be contrary to public health, public decency or morality or incitement to breach public peace or act to convert another person from one religion to another or any act or behavior to undermine or jeopardize the religion of each other is not allowed and such act shall be punishable by law.

While article 31 subsections (1) and (2) provide for the right to have or practise religion or adopt atheistic views as well as to retain one's religion or belief, however, they do not provide explicitly for the right to change one's religion or belief. Subsection (3) furthermore appears to be an anti-conversion clause that undermines the freedom to manifest one's religion in public or private. Besides, subsection (3) of article 31 would punish any act to convert another person from one religion to another. Furthermore, the reference to "any act or behavior [which may] undermine or jeopardize the religion of each other (...)" in subsection (3) of article 31 that is also punishable by law remains too broad for interpretation and vague to qualify what type of action or behaviour would be considered as undermining or jeopardising religion of another person.

Although Section 22 subsection 2 (a) of the current draft constitution guarantees every citizen: "the right to freedom of opinion and expression", this right may be derogated from on the following grounds, including defamation, or incitement to an offence, or any act which is deemed contrary to public decency or morality (section 22 subsection 2 (1)). Again, this language is too broad and vague in scope to adequately define what action or behaviour could be considered as a legitimate basis for "imposing reasonable restrictions" as provided for in section 22 subsection 2 (1).

We would like to emphasize that freedom of expression plays a central role in the effective functioning of a vibrant democratic political system. International human rights law provides States' responsibility to ensure an environment in which a diverse range of political opinions and ideas can be freely and openly expressed and debated. Freedom of expression also includes sharing one's beliefs and opinions with others who may have different opinions. In all cases, restrictions to the exercise of the right freedom of expression, including on the grounds of defamation, must be provided by law and necessary and proportionate.

At the same time, article 55 (b) subsections (2) and (3) of current draft respectively provide that the State shall adopt policies "maintaining rule of law by protecting and promoting human rights" as well as "implementing the international treaties and conventions related to human rights to which Nepal is a party" such as the International Covenant on Civil and Political Rights (ICCPR). Therefore, article 31 subsection (3) would be contradictory to these provisions and the international obligations of Nepal.

Serious concerns are expressed at the current proposals relating to freedom of religion or belief and freedom of opinion and expression in articles 31 subsection (3) and 22 subsection 2 (1) in the new draft constitution, if adopted in their current draft form, would seriously curtail the right to freedom of religion or belief and freedom of opinion and expression as provided by international human rights norms and standards.

While we do not wish to prejudge the accuracy of these allegations, we wish to appeal to your Excellency's Government to seek clarification of the proposals relating to freedom of religion or belief and freedom of opinion and expression in the draft new constitution.

We would like to recall the rights of individuals to freedom of religion or belief, in accordance with articles 18 of the Universal Declaration of Human Rights (UDHR) and of the International Covenant on Civil and Political Rights (ICCPR), to which Nepal has acceded on 14 May 1991. Article 18, paragraph 1 of ICCPR explicitly provides for the right "in public or private, to manifest [one's] religion or belief in worship, observance, practice and teaching". Article 18 (3) of the ICCPR also emphasises the "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."

The Human Rights Committee in its paragraph 3 of general comment no. 22 on freedom of thought, conscience and religion states that "article 18 does not permit any limitations whatsoever on the freedom of thought and conscience or the freedom to have or adopt a religion or belief of one's choice;" while paragraph 4 stresses that "The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. [...] In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as 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." Paragraph 5 moreover states that "the freedom to have or to adopt a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief."

General Assembly resolution 36/55 of 1981 on the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief provides that the right to freedom of thought, conscience, religion or belief, in article 6 (d) 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" in article 6 (e).

The General Assembly, in its resolution 65/211, urges States to step up their efforts to protect and promote freedom of thought, conscience and religion or belief, and to this end "(a) To ensure that their constitutional and legislative systems provide adequate and effective guarantees of freedom of thought, conscience and religion or belief to all without distinction, inter alia, by providing access to justice and effective

remedies in cases where the right to freedom of thought, conscience and religion or belief or the right to freely practise one's religion, including the right to change one's religion or belief, is violated; (b) To ensure that existing legislation is not implemented in a discriminatory manner or does not result in discrimination based on religion or belief, that no one within their jurisdiction is deprived of the right to life, liberty or security of person because of religion or belief and that no one is subjected to torture or other cruel, inhuman or degrading treatment or punishment, or arbitrary arrest or detention on that account and to bring to justice all perpetrators of violations of these rights; [...] (g) To ensure, in particular, the right of all persons to worship, assemble or teach in connection with a religion or belief and their right to establish and maintain places for these purposes, and the right of all persons to seek, receive and impart information and ideas in these areas."

We would also like to appeal to your Excellency's Government to take all necessary steps to secure the right to freedom of opinion and expression in accordance with fundamental principles as set forth in articles 19 of the ICCPR and UDHR, establishing the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds. We would like to remind your Excellency's Government that any restriction to this right shall be provided by law; may only be imposed for one of the grounds set out in article 19 and subparagraphs (a) and (b) of paragraph 3 and must conform to the strict tests of necessity and proportionality.

It is our responsibility, under the mandate provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. We would therefore be grateful for your observations on the following matters:

1. Are the facts alleged in the above summary of the above mentioned proposals accurate?
2. Please provide further details and a copy of the text, if possible in English, of the proposals of the draft new constitution;
3. Please explain why the period of public consultation is open only for such a limited time; and
4. Please explain how these provisions are compatible with international human rights standards regarding non-discrimination and the right to freedom of religion or belief and the right to freedom of opinion and expression.

We would appreciate receiving a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures be taken to ensure all the concerns raised by different stakeholders through the public consultations are carefully considered and to not rush the process of promulgating the new draft Constitution.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye
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and expression

Heiner Bielefeldt
Special Rapporteur on freedom of religion or belief