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Freedom of Religion and Due Process in Nepal

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ABSTRACT

A constitution is expected to guarantee religious freedom. When a Penal Code, which should similarly manage and protect these freedoms is in conflict with a constitution, the



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courts must address any disharmony that unfairly advantages either the state or its citizens. The authors submit that such a situation exists in Nepal and propose an approach that resolves the conflict. Although all religions are constitutionally protected in Nepal, certain provisions of the Penal Code have opened the door to ill-founded police investigations and biased prosecution of religious minorities. This has led to extended pre-trial detentions and unnecessary trials, resulting in penal sanctions against exercising freedom of conscience, speech, and religion, all of which are protected by the Constitution of Nepal and its international commitments. The authors propose simple solutions to potentially dangerous problems.

Keywords: Pre-trial detention; Freedom of conscience; Freedom of religion; Freedom of speech

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1. Introduction: Nepal and the ‘Rubber Clause’ Issue

Nepal is a diverse and beautiful Himalayan country, unique in many ways. For example, eight of the world’s ten tallest mountains, including Mount Everest, are within its borders. Additionally, in contrast to many of its neighbours, Nepal is a progressive democratic country, its population having clearly defined rights in its constitution. In recent years Nepal has demonstrated its progressiveness, as it has proudly ratified international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR). It has the honoured position of currently being a member of the United Nations Human Rights Council.

1.1 Constitution

The Constitution of Nepal clearly shows that Nepal is a secular state and stipulates that every person has the right to profess, practice, and protect his or her religion.¹ The only limitations imposed on these rights are that individuals may not engage in any acts contrary to public health, decency, and morality or breach of public peace.² In this respect, the Constitution of Nepal aligns with other free democratic societies and is in harmony with international human rights agreements.

However, the Constitution abandons the principle of secularism and respect for individual religious freedom by prohibiting individuals from even exchanging ideas with others around them, which may or may not result in their adopting another point of view. Violations are punishable by law. In doing so Nepal limits the principle of secularism by allowing State ‘protection of religion [and] culture handed down from time immemorial’.³

¹ The Constitution of Nepal (Second Amendment) 2020, pt. 1, arts. 3, 4, 26(1).

² The Constitution of Nepal (Second Amendment) 2020, art. 26(3).

³ The Constitution of Nepal (Second Amendment) 2020, pt. 1, art. 4(1).

Unfortunately, these contradictory constitutional principles have led to imprecise articles in the Penal Code.

1.2 Penal Code

While Nepal's progress in upholding human rights is commendable, the Penal Code of Nepal, which became law on August 17, 2018, replacing and codifying the previous criminal law, all but cancels its constitutional defence of religious freedom. The legislative intent of the Penal Code was to amend and consolidate criminal law into a single document. However, as it stands now, the Penal Code contains a number of imprecise clauses that abandon a toleration of religious minorities. The legislature included ambiguous provisions in the amended Penal Code that have left room for abuse (Acharya, 2018). Clauses open to such broad interpretation and uncertainty of application, as earlier presented, can, at best, be classified as rubber clauses (Editorial, 2018).

With the promulgation of Nepal's Interim Constitution in 2007, the country became a secular state, which gave rise to several legal issues. Although officially a secular State, Nepal still gives Hinduism special status. It appears that Section 158 of the Penal Code on the Prohibition of Proselytizing is just a continuation of Chapter 19 of the 1963 General Code (Muluki Ain), which foresaw the penal provisions when Nepal was not a secular State but a Hindu nation. In this light, it is understandable, although not necessarily appropriate in a pluralistic society, that 'the religion [and] culture handed down from time immemorial' was interpreted by the Supreme Court in 1989 to protect Hinduism, as it was historically the oldest faith in Nepal. Thus, although all religions are constitutionally protected, Hinduism inevitably has priority among the constitutional protections of religion.

Section 158 of the Penal Code is being interpreted and applied with a customary preference for Hinduism and, as will be discussed in detail in this article, this preference results in arbitrary discrimination against other religions.

In particular, Section 158 of the Penal Code, titled Prohibition of Proselytizing, states the following:

- (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 faith of any caste, race, community that has been handed down from the time immemorial⁴ 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.

⁴ The Constitution of Nepal (Second Amendment) 2020, art. 4 proviso; *Gahatraj et al. v. Prime Minister and Council of Ministers et al.*, Nepal Law Journal 2012 (2068), Vol. 10, Decision No. 8707 [5]. Note that the Supreme Court interpreted this phrase as giving a special status to Hinduism. See also International Commission of Jurists (ICJ), 2018, p. 23).

- (3) A person who commits, or causes to be committed, the offence referred to in subsection (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.⁵

In the next chapter, a brief commentary is provided to explain why section 158 of the Penal Code contains 'rubber clauses'.

2. The Penal Code Section 158(2), the Rule of Law, and the 'Rubber Clause' Concept

2.1 Penal Code Section 158 (2) Violates the Rule of Law Principle of *Lex Certa*

2.1.1 Vagueness

The Penal Code, as it stands, gives rise to several vital issues: (1) Which acts constitute 'an attempt to or abet such conversion'? (2) What activities 'undermine a religion'? (3) What is the legal benchmark for the conversion? (4) If an innocent conversation concerning a person's faith leads another to change their personal beliefs, should this be interpreted as propagating one's religion with the intent of conversion? The list of questions regarding these undefined terms is extensive.

2.1.2 Unclear Application

Considering the constitutional provisions regarding religion, the penal sanctions must identify the religion that section 158 (2) refers to as the religion stated as being 'handed down from time immemorial'. Does this provision refer to Hinduism, Buddhism, Christianity, or Judaism? Can it include modern groups along with these major religions? The constitutional and Penal Code provisions, as 'rubber clauses', create many uncertainties.

Furthermore, section 158 does not specify which conduct is prohibited. The door is thus left open to abusive and selective prosecutions and to interpretations based on the discriminatory policies of government officials and the personal bias of judges. These problems have already been pointed out and criticized as statutory failings by a number of respected international jurists International Commission of Jurists (ICJ, 2018, p. 17).

2.2 Consequences of Vagueness: A 'Rubber Clause' in the Penal Code

The vagueness in the law creates offences relating to religion, which is contrary to the Nepal Constitution.

The National Penal Code, section 158, includes among the offences relating to religion, the prohibition of proselytizing. This makes it a criminal offence to convert or attempt to

⁵ Nepal National Penal Code, s. 158.

convert a person from one religion to another and prohibits any act or conduct that undermines another religion. This prohibition carries a penalty of up to five years in prison.

This law is broad and ambiguous and so has been the basis of numerous prosecutions, as discussed elsewhere in this article, and it also creates an offence that neither the Constitution nor the ICCPR permits. It should never be acceptable, in a modern secular democratic society, to make it a criminal offence for a person to have a peaceful private discussion with another person on a religious subject. Yet that is what this section prohibits and criminalizes.

Thus, in Nepal the right to freedom of religion has a very limited range and is not in harmony with Nepal's ICCPR obligations. This limitation is inconsistent with other provisions of the Constitution, including equality before the law and freedom from discrimination.

2.3 Consequences: Unfettered Discretion of Prosecutors and the Judiciary is Discriminatory

Vague laws undermine the rule of law, and the inherent subjectivity of a prosecutor's discretion enables selective prosecution and interpretation based on the discrimination and personal bias of police, prosecutors, and judges. In contrast, the United Nations Human Rights Committee has emphasised that laws should not confer unfettered discretion on prosecutors and the judiciary but must provide specific guidance to enable the police and the citizen to determine what constitutes an offence. Section 158 of the Penal Code allows both a subjective and a loose application in favour of the majority. This is the exact situation the UN Special Rapporteur recognised as a danger:

... there is a risk that domestic laws prohibiting hate speech may be interpreted loosely and applied selectively by the authorities, which underlines the importance of having unambiguous language and of devising effective safeguards against abuses of the law. She would like to reiterate that legislation on religious issues should not be vague but rather must be all-inclusive, carefully crafted and implemented in a non-biased manner. (United Nations General Assembly [UNGA], 2010, para. 43)

3. Due Process

3.1 The Importance of Due Process

Freedom of religion is closely aligned with procedural due process—indeed, it has been said that 'religious liberty is the progenitor of most other civil liberties' and that '[e]ven procedural liberties incident to our concept of a fair trial grew largely out of the struggle for procedural fairness in heresy and other religious trials' (Pfeffer, 1963). The history of freedom is also 'the history of procedure' and this '[d]ue process of law is the primary and

indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individuals and delimits the powers which the state may exercise'.⁶ This is evident in the prosecution of religious offences in Nepal.

In a 2015 report to the United Nations Human Rights Council (HRC), the Government of Nepal justified using the predecessor to the present section 158 of the Penal Code by stating that it would only apply if the religious conduct that was complained about involved the use of force, undue influence or inducement:

128. Nepal considers that the constitution promulgated by the elected Constituent Assembly fully ensures religious freedom for all people and prohibits discrimination of any form on the ground of religious faith and philosophy. Every person is free to choose, adopt, profess, or practice a religious belief.

...

132. However, proselytism by force or undue influence or inducement is prohibited. (United Nations Human Rights Council [UNHRC], 2015, paras. 128 & 132)

The above statement would lead one to believe that Nepal intended that the proscribed acts must include force, undue influence, or inducement to constitute an offence. However, in reality there have been prosecutions and lengthy periods of pre-trial custody even when none of these constituent elements were present, as we will see below.

The law of Nepal conflicts with international human rights norms by including the so-called religious offences in its criminal law.⁷ In spite of these illegitimate provisions, a robust criminal procedure could still protect members of religious minorities. Sadly though, rather than protecting an individual from capricious prosecutions, criminal procedures in Nepal actually enable anonymous intolerant persons to initiate police investigations that may result in lengthy pre-trial detentions of anyone they target.

3.2 Consequences of the Lack of Due Process

3.2.1 Arrests and Detention on Unsubstantiated Accusations

International law places limits on police action by a state for good reason. If the criminal procedures of a State are so relaxed and subjective that the police are allowed, as in Nepal, to arrest and detain a person on the unsubstantiated accusation of violating a religious law that is itself vague and subjective, it would 'amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections' (United Nations Human Rights Committee [UNHRC], 2014, para. 14).

⁶ *Malinski v. New York*, 324 United States Supreme Court 401, 414 (1945).

⁷ Nepal National Penal Code, s 158.

3.2.2 Lack of Remedial Measures

Furthermore, the application of the ‘rubber clause’ will result in a lack of concrete steps to seriously implement the remedial measures recommended by the HRC. No direction was provided to the police, investigators, and prosecutors that Section 158 should not be applied to innocent religious activity protected by the Constitution and international human rights treaties. There is no direction to narrow the meaning of proselytism to provide legal certainty as to whether there is a violation of the Penal Code. In the absence of these measures, no action has been taken to prevent the violation of constitutional rights and thus reduce the number of arbitrary detentions.⁸ Thus, it fails to protect what the Constitution and international human rights treaties guarantee. Disappointingly, the State has taken no action to date.

3.2.3 No Right to Apply for Bail During the Investigation

Nepal has no procedural rights for an accused to apply for bail in such cases. The police can detain individuals on suspicion of a crime before charging them or even disclosing the nature of the investigation for an initial period of 24 hours, followed by up to 25 days, by a simple application to a judge.⁹ In general practice, the police ask for a court order for detention through the Government Attorney’s Office for five to seven days at a time, and then they repeat the process several times over. Usually, during such custody extension, neither the defendant nor the defendant’s lawyer is informed, thus they have no opportunity to ask the judge for judicial review of the detention.¹⁰

For example, consider the case of Ms. Pushpa Ghimire. The police arrested her and a friend, both of whom were Jehovah’s Witnesses, while they were peacefully sharing their beliefs with their neighbours. They were taken into custody and released on bail after spending 14 days in investigatory detention.¹¹

3.2.4 Request for Release Pending Appeal

Additionally, apart from the lack of opportunity to apply for bail prior to the first instance decision, and even though in theory accused persons have access to release in the form of

⁸ The Constitution of Nepal 2015, art. 20(1): No person shall be detained in custody without informing him or her of the ground for his or her arrest.

⁹ The National Criminal Procedure Code 2017, ss. 13–14.

¹⁰ For example: *Government of Nepal by the report of A.S.I. Bir Bahadur Chaudhary v. Dhruva Narayan Bhattarai* (Rupandehi District Court, Case No. 076-GD-0003); *Government of Nepal by the Police Report of Police Inspector Bijay Bhandari et al. v. Reiko Sekiya et al.* (Pokhara High Court, Case No. 077-CS-0139); *Government of Nepal by the complaint of Upendra Giri v. Yam Bahadur Buduja et al.* (Kaski District Court, Case No. 076-C1-0461); *Government of Nepal by the complaint of S.I. Prem Bahadur G.T. et al. v. Hugh Lee et al.* (Kaski District Court, Case No. 076-C1-0591); *Government of Nepal by the complaint of S.I. Prem Bahadur G.T. et al. v. Hugh Lee et al.* (Kaski District Court, Case No. 076-C1-0591).

¹¹ *Ghimire et al. v. Government of Nepal by the complaint of Pom Bahadur K.C. et al.* (Tulsipur High Court, Butwal Bench, Case No. 076-CS-0249).

bail if they take it upon themselves to appeal to a higher court, the accused persons are already under a presumption against release in the first instance courts and, in any event, they have already been subjected to investigatory detention. They are routinely required to appeal to the High Court, by which time they have already been detained for long periods.¹² Furthermore, even when they appeal, their request for release may be refused by the court. It is also insufficient that an accused might have access to the court to bring an application for habeas corpus.

For example, in the same case as mentioned above for Ms. Pushpa Ghimire, she and her friend were found guilty at trial and sentenced to three months of imprisonment. They were initially refused release pending appeal and were sent to prison. After 40 days in custody, they were released on bail pending appeal. The High Court later acquitted the accused of all charges.¹³ The acquittal is what she deserves, and it cannot compensate for the 40 days she spent in custody.

Unfortunately, it must be concluded that arbitrary and malicious prosecution by officials results from a lack of due process.

4. Violation of International Law Resulting From Penal Code Section 158

The deficiencies in Nepal's criminal procedure and vague religious laws come as no surprise to legal scholars. During Nepal's 2015 Universal Periodic Review (UPR) of all United Nations member states, Spain and the United States recommended that Nepal amend its legal provisions. The International Commission of Jurists was similarly concerned about the problems inherent in Section 158 of the Nepal Penal Code (ICJ, 2020, p. 4, para. D). The Supreme Court of Nepal, presented with the opportunity to rule on the constitutionality of this section, declined to do so (ICJ, 2018, p. 16).

In the absence of any executive, legislative, or judicial action to strike down or narrowly construe Section 158 of the Penal Code and to enact procedures and automatic judicial review of pre-trial detention consistent with international standards, Nepal falls far short of its human rights obligations.

Systemic defects in the criminal religious law and in criminal procedure itself violate the Constitution of Nepal¹⁴ and international human rights law, together causing an even greater infringement of fundamental liberties. As seen below, the religion clauses of the Penal Code, when coupled with a complete absence of the entitlement to release on bail or the specific guarantee of a right to judicial review of detention pending trial, result in

¹² *Government of Nepal by the complaint report of police ASI (Assistant Sub Inspector) Tanka Bahadur Thakulla v. Sweta Manandhar et al.* (Bardiya District Court, Case No. 075-C1-0049), pp. 6–7. In this case the aggregate period of detention was 80 days until release pending trial, a period of time so lengthy as to be presumed a punishment in itself. In the case referred to, the accused was ultimately acquitted.

¹³ *Ghimire et al. v. Government of Nepal by the complaint of Pom Bahadur K.C. et al.* (Tulsipur High Court, Butwal Bench, Case No. 076-CS-0249).

¹⁴ See for example, The Constitution of Nepal 2015, arts. 4, 17, 18, 19, 20, 23, 26, 27 and 46.

innocent persons having their freedom taken away for lengthy periods for engaging in entirely lawful acts of religious worship. Despite the provisions of Nepal's organic law and international obligations, religious minorities are abandoned to the tyranny of the majority.

The above discussion clearly shows the vagueness or elusive nature of the 'Rubber Clauses' of section 158 of the Penal Code. It documents the manner in which vague and imprecise terms pave the way to arbitrary and malicious prosecution by officials at the urging of intolerant persons. Subsequent trials are therefore not based on law and evidence, but on whim and imagination.

4.1 Defects in the Criminal Procedure

The Nepal criminal process, or rather the lack of due process, in form as well as practice (as illustrated by the case law discussed in this paper), violates numerous norms of international law: (1) any detention must be reasonable and subject to automatic review by a judge without requiring the discretion of the prosecutor and not be conducted by police or prosecution); (2) detention procedures must not only be clearly established by law but also observed in practice by the administration; (3) officials authorised to arrest must be identified; (4) warrants must be obligatory and issued on the basis of reasonable belief there has been a breach of law before any detention; and (5) there must be mandatory judicial authorisation for any continued detention after arrest. These international safeguards come into effect upon arrest—they protect from 'any apprehension of a person that commences a deprivation of liberty'. While general provisions may exist under the Penal Law addressing some of these international standards,¹⁵ in reality investigative detention prior to issuing an arrest warrant and without a judicial order is often the case under Nepal's procedures and constitutes unlawful arbitrary detention.

4.2 The Absence of Legal Safeguards for Religious Freedom Violates the International Treaties

The absence of legal safeguards for religious freedom also violates the international treaties that Nepal has ratified and the principles of customary international law. These principles of customary international law apply whether ratified or not: '[W]here treaties reflect customary law then non-parties are bound, not because it is a treaty provision but because it reaffirms a rule or rules of customary international law' (Shaw, 2008, p. 95; see also, Lawyers' Rights Watch Canada [LRWC], 2013, p. 15).

By signing and ratifying an international human rights treaty, a State undertakes not just to aspire to the rights it enunciates, but the State then obligates itself to positive action to advance those rights and to shield individuals and groups from any violation of those rights. The most comprehensive international human rights treaty is the ICCPR. Nepal ratified this

¹⁵ For example, in the National Criminal Procedure Code 2017, ss. 9(2, 3, 6, 7), 13(2), 14(3) and 14(6).

treaty on 14 May 1991. Moreover, Nepal has formerly sat on the United Nations Human Rights Council.¹⁶

The United Nations Human Rights Committee recently issued two decisions addressing factual situations in the Republic of Azerbaijan that are almost identical to those recurring in Nepal. The Committee unequivocally stated in the Communication on one of these factual situations that ‘arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary, including freedom of religion’. Although this factual situation involved a brief period of investigative custody (six hours), the Committee found that ‘the authors’ [alleged victims] arrest and detention constituted punishment for the legitimate exercise of their right to manifest their religious beliefs’¹⁷ and was in violation of article 9 of the ICCPR.

4.3 Lack of Due Process Violates International Requirements

First, a State does not perform its obligations under Article 9 of the ICCPR by putting the burden on the accused to initiate the process. The State has a positive duty to bring an accused to court promptly and to have a system to review the legitimacy and necessity of a pre-trial detention.¹⁸

In addition, no opportunity to apply for bail is not in harmony with the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), adopted by the United Nations General Assembly, which recommends that Member States resort to non-custodial measures as alternatives to pre-trial detention, to promote increased access to justice and legal defense mechanisms, to reinforce alternatives to imprisonment and to support rehabilitation and social reintegration programs, in accordance with the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules).

5. Consequence of the Rubber Clauses in Section 158

5.1 Arrest, Prosecution, and Detention of Innocent People

The excessively broad application of section 158 of the Penal Code has resulted in the arrest, prosecution, and detention of innocent people for the lawful exercise of their constitutional rights. Please see a list compiled at **Appendix A**.

For example, consider the case of *Government of Nepal v. Sweta Manandhar*.¹⁹ On 12 November 2018, the accused visited Gulariya, Bardiya, with some friends. She is a Jehovah’s

¹⁶ Nepal’s term expired December 31, 2023.

¹⁷ *Mammadov et al. v. Azerbaijan*, Communication No. 2928/2017 (15 October 2020) United Nations Document CCPR/C/129/D/2928/2017, para. 7.9; see also *Huseynova v. Azerbaijan*, Communication No. 2845/2016 (14 October 2020) United Nations Document CCPR/C/130/D/2845/2016.

¹⁸ *Berry v. Jamaica*, Communication No. 330/1988 (7 April 1994) [United Nations Document number], para. 11.1. Amnesty International (AI, 2014, Chapter 5.1).

Witness and was talking with someone about her beliefs. It was a peaceful conversation. However, a group of persons nearby took exception to her private conversation and forced her against her will to go to the local District Administration Office (DAO).

The DAO accepted unsubstantiated evidence and, without questioning the unruly mob, illegally searched the accused, found some personal religious literature, and ordered the police to arrest her as well as her brother and two friends who had come to her aid. The police detained Sweta with her friends for 25 days in pre-trial detention. Following a bail hearing, the court released one of her friends but denied bail for the others and ordered them to be held in pre-trial custody. They were finally released after appealing to the High Court and spending 80 days in detention. Months later they were found not guilty and acquitted.

Imagine the horror and humiliation for this young woman to be unjustly jailed in criminal prison for over 80 days without having committed a criminal offence or even being charged with violating a legitimate law. This experience would have been terrifying. It is a small comfort to be acquitted after that length of time. This raises the question of whether investigation, prosecution, and pre-trial custody became handy tools in the hands of biased state representatives to punish members of minority religions. If this is not the case, it becomes the result.

To the credit of the judicial bodies ultimately hearing these cases, most of the accused were found not guilty and released. But in the meantime, these accused individuals suffered the humiliation of arrest, bore the expense of defending themselves in court and, in many cases, spent lengthy periods in pretrial custody because of other defects in Nepal criminal procedures (discussed below). The consequence is that innocent persons have lost their freedom to exercise a fundamental right, despite the fact that the purpose of criminal law and procedure is to protect them from arbitrary State action. The criminal processes these people experience harm them morally and socially. They are now viewed and stigmatised in society as persons who have been accused as criminals.

The above example clearly shows the vagueness, or rubberlike, elasticity of section 158 of the Penal Code. It documents the manner in which vague and imprecise terms pave the way to arbitrary and malicious prosecution by officials at the urging of intolerant persons. Subsequent trials are therefore not based on law and evidence, but on whim, bias, and imagination.

¹⁹ *Government of Nepal by the complaint report of police ASI (Assistant Sub Inspector) Tanka Bahadur Thakulla v. Sweta Manandhar et al.* (Bardiya District Court, Case No. 075-C1-0049).

5.2 Discrimination Against Minority Groups

The International Commission of Jurists saw the absence of protection from arbitrary detention, combined with the lack of protection of freedom of religion, as an alarm that signalled 'the potential to allow the law to be used by organised religious groups against minority religions' (ICJ, p. 18).

5.3 This Conflicts With the Freedom of Religion Protected by the Constitution

It is inconsistent with the Constitution that Nepal's courts, including the Supreme Court, refused to strike down or find Section 158 void. Freedom of religion is an overriding human right guaranteed by the Constitution. When it is recognised that the Constitution includes the right to 'profess, practice and protect his or her religion in accordance with his or her conviction',²⁰ this may prevent blind accusations and prosecutions for supposed acts of proselytism that are actually lawful. This understanding is in line with Article 18 of the ICCPR, which includes freedom of thought, conscience and religion, and the right to manifest a person's religion or belief in worship, observance, practice, and teaching. As the United Nations Human Rights Committee (UNHRC) has recognised:

... the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as, inter alia, 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. (UNHRC, 1993, p. 4)

Religious freedom has both internal and external aspects. These two aspects cannot be separated. It is not enough for a court to recognise that a person has freedom to believe without allowing him the right to manifest his beliefs. Everyone must be free to practice what is required by his or her religion, subject only to those limitations in which social order requires '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',²¹ which is a hallmark of a free and democratic society. For example, as noted earlier, forcing others to profess a religion is certainly an unlawful violation of one's constitutional rights as set forth in Article 18. It is unfortunate that Nepal does not limit the prosecutions to the rare instances where such coercion occurs but, on the contrary, allows the police and intolerant members of the community to cast a broad net that catches even the most innocent of religious worshippers.

Speaking to others who willingly listen to what one believes should not be considered a form of force or undue influence or inducement or proselytism. This is part of the freedom to express one's thoughts and opinions, as also protected by the Constitution,²² especially

²⁰ The Constitution of Nepal 2015, art. 26.

²¹ International Covenant on Civil and Political Rights, art. 18(3).

²² The Constitution of Nepal 2015, art. 17.

where this speech is the lawful manifestation of his or her religious belief. Where there is no evidence of harm to another person's rights, it defies common sense to consider the peaceful exercise of one's freedom of religion as against the law.

On its face, section 158 of the Penal Code, which prohibits religious conversion regardless of whether the person wanted to be converted, conflicts with the right to freedom of religion as provided for in Article 26 of the Constitution. If a person is free to profess, practice, and protect his or her religion, then his or her decision to change religions is a constitutionally protected right. To insist on any other conclusion is tantamount to insisting that an individual be held as a slave to the religion of his birth, which is the antithesis of religious freedom.

However, Section 158 of the Penal Code goes further and is a clumsy statutory attempt to implement Article 26 (3) of the Constitution, which states:

'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 of 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.'²³

Unless the Constitution of Nepal is read down, or amended by the State of Nepal, it is internally inconsistent. How can you have freedom of religion if you are not free to convert? Furthermore, how can one have freedom of religion if one does not have the freedom to be exposed to the religious beliefs of others? If a member of a minority religion is not free to exchange religious ideas with a member of the majority ancient religion of Nepal, how can the member of that religious minority be considered free? If one person is not free to manifest his religion within the State of Nepal, no one is free. In effect, religious freedom has been denied to both the majority and minority.

6. Remedies Available to the Nepal Courts

6.1 Solutions to Section 158 itself: Void or Better Interpretation

The State of Nepal must act to harmonise section 158 of the Penal Code with the Constitution and with its international obligations. In the meantime, it is left to the courts to protect the individual citizen from the unjust application of this law. Currently, the State is exercising this protective power by entering acquittals. This is a very rough form of justice because of the impact it has on the individuals who are accused. How can courts redress the injustice of the law itself? At least two avenues are available.

One option is that the court can find section 158 to be void; it is inconsistent with the Constitution. Understanding that freedom of religion as guaranteed in the Constitution

²³ The Constitution of Nepal 2015, art. 26(3).

includes the right to 'profess, practice, and protect his or her religion in accordance with his or her conviction' as an overriding human right may prevent blind accusations and prosecutions for supposed acts of proselytism that are actually lawful.

Another option to avoid arbitrary detention and violations of constitutional rights is to formulate penal laws clearly and precisely. Only then can individuals regulate their conduct accordingly. Crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offence. This means there must be a clear definition of the criminal conduct that spells out the elements and factors that distinguish it from lawful conduct.

The court has the power to read down section 158 by giving it an interpretation that is consistent with the Constitution and the ICCPR. Such reading down would include requiring the prosecution to produce credible evidence that there was force, undue influence, or inducement to conversion before admitting any case in the first place.

6.2 Law Enforcement: Presumption of Innocence and Duty to Establish A Bail Option

'[A]ll presumptive evidence of felony should be admitted cautiously, for the law holds that it is better that ten guilty persons escape than that one innocent suffer' (Blackstone, 1753/1893, p. 356, para. 4). This concept, known as Blackstone's ratio, has been accepted as a principle of common law for centuries. This fundamental legal doctrine reminds law officers of the duty of care implicit in exercising their authority. Not only must they avoid punishing an innocent person but they must also respect the principle of the presumption of innocence. This common law principle is so widely accepted as a basic concept of criminal law that it is applied in civil law jurisdictions. Any country, including Nepal, has adopted this as a guiding principle automatically through its ratification of international treaties, such as the Covenant, and through the adoption by the United Nations General Counsel of instruments, such as the Tokyo Rules. These important safeguards of personal liberty are not simply aspirational philosophical concepts that reside only in the rarefied regions of international diplomacy. They are real and practical principles that must be applied by the local policemen and the magistrates at the outset. Failing to do so constitutes not only an abuse of process, but an affront to justice.

By virtue of the presumption of innocence principle, a court may not proceed in any manner involving a detention of a citizen without providing the opportunity to request pre-trial release on bail or by refusing the petition of an accused. Although not currently practiced, it is clearly the law in Nepal. Moreover, the onus is on the prosecution to show that it is necessary to detain a person pending trial, and even in such cases, a court has a duty to inquire whether some other form of release may be used, such as a release on bail or a personal guarantee, before continuing detention.

6.3 Provide Legal Assistance

The role of an independent bar is an essential element in protecting the liberty of a citizen and is an essential check on the investigator's decision to detain someone, so as to prevent arbitrariness. Therefore, from the beginning of the legal process, accused persons must have access to legal assistance.²⁴ Sadly, in spite of the constitutional right to legal advice, exercising that right is difficult to put into practice. This is where the criminal justice system in Nepal is severely handicapped. Suspects are effectively and deliberately prevented from access to a lawyer on arrest. Generally, an accused is only allowed to consult a lawyer after his or her statement has already been taken by police. The accused is often coerced into signing this statement without carefully reading it and is compelled to use the phrasing and words chosen by the investigating policeman. The statement is later produced before a court. Frequently, accused persons are subjected to cross-examination before court officials, without the judge paying much attention to the procedure, and this statement is then relied on to obtain a conviction. As a result, such interrogations end up in extracting forced confessions (Sangroula, 2003).

7. Conclusion

Nepal is in many ways an example to other States struggling to reconcile long-held values with the aspirations of a modern, diverse world community. By simply harmonising domestic law and procedure with the Constitution and international human rights commitments, the courts of Nepal will position the country firmly within the jurisprudence of other free and democratic nations. This will inure to the benefit of the state as well as every Nepali citizen, who will then proudly profess, practice, and protect his or her religion with dignity.

Appendix A: Examples of arrest, prosecution and detention of innocent persons for lawful exercise of their constitutional rights

Salyan District Court, *Government of Nepal by the complaint of Dharma Bahadur Bi. Ka. v. Chandra Kali Kami (Rawat) et al.*, Case: Offence relating to religion; Case No.: 076-C1-0019 [were arrested and case was filed for sharing religious faith]

Dang District Court, *Government of Nepal by the complaint of Nara Bahadur Bhandari and Damodar G. C. v. Dilli Ram Poudel et al.*, Case: Offence relating to religious conversion; Case No.: 075-C1-0281 [were arrested and case was filed for participating in a religious program organized by the church and for distributing religious literature to the attendees]

²⁴ The Constitution of Nepal 2015, art. 20(2): Any person who is arrested shall have the right to consult a legal practitioner of his or her choice from the time of such arrest and to be defended by such legal practitioner. Any consultation made by such person with, and advice given by, his or her legal practitioner shall be confidential.

Kaski District Court, *Government of Nepal by the complaint report of Sub-Inspector Sushil Ghimire v. Cho Yoosang (a Korean citizen)*, Case: Offence relating to religion; Case No.: 076-C1-0039 [was arrested and case was filed for having conversation with people and for distributing religious literature]

Kaski District Court, *Government of Nepal by the complaint report of Sub-Inspector Tikaram Wagle v. Jam Bahadur Pun*, Case: Offence relating to religion; Case No.: 076-C1-0105 [was arrested and case was filed for preaching to people who were Christians]

Rupandehi District Court, *Government of Nepal by the complaint of Pom Bahadur K.C. et al. v. Pushpa Ghimire et al.*, Case: Offence of preaching for religious conversion; Case No.: 075-C1-0186 [were arrested while walking on the road and case was filed for having peaceful conversation with neighbors]

Kaski District Court, *Government of Nepal by the complaint report of Inspector Bijay Bhandari et al. v. Jiro Sekiya et al.*, Case: Offence relating to religion; Case No.: 076-C1-0050 [were arrested and case was filed for having peaceful conversation with neighbors]

Kaski District Court, *Government of Nepal by the complaint of Upendra Giri v. Yam Bahadur Buduja et al.*, Case: Offence relating to religion; Case No.: 076-C1-0461 [were arrested and case was filed for peacefully offering religious literature in public]

Kaski District Court, *Government of Nepal by the complaint report of Sub-Inspector Prem Bahadur G.T. et al. v. Hugh Lee et al.*, Case: Offence relating to religion; Case No.: 076- C1-0591 [were arrested at their friends' residence on the charge that they were preaching to neighbors for the purpose of religious conversion]

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The authors declare no conflict except as to the authors, Mohan Giri and Durgeswori Shah, who were counsels to a party in certain cases but this did not influence their research.

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