

State and Religion

Participatory Constitution Building in Nepal
Booklet Series
NO. 1



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State and Religion

The Interim Constitution of 2007 (BS 2063) defined Nepal as a “secular, inclusive and fully democratic state” and as a “multiethnic, multilingual, multi-religious and multicultural” country. It thereby replaced the formulation of the Constitution of 1990 which had enshrined the 'Hindu' identity of the country and its monarchy. The Constituent Assembly (CA) has begun the process of drafting a new inclusive Constitution in Nepal with broad public participation. Discussions are taking place across the country as to what kind of relations should be there between the State and religion in the changed context.

Nepal is a country with religious, social and cultural diversity. There are several religious and ethnic groups in the country. The 2001 Census classified the population of Nepal into six broad religious categories: Hindu, Buddhist, Muslim, Christian, Kirat, and others. Hindus accounted for 80.62 per cent, followed by Buddhist (10.74 per cent), Muslims (4.2 per cent), Kirat (3.6 per cent), Christians (0.45 per cent) and others (0.4 per cent).

This concept paper outlines the implications of secularism for Nepal and provides hints on how the CA should address the subject while drafting the new constitution. Following the Interim Constitution's declaration of Nepal as a secular state no special effort has been made to make Nepal's legal provisions consistent with secularism or to minimize the relations between government and religion during the democratization process.

Introduction

Defining the relationship between the state and religion and guaranteeing and protecting the freedom of religion and belief are significant challenges for every country. The emotional and cultural affinity of many people with religious beliefs and practices is deep, in particular in Nepal. Historical attempts of the state to interfere in this sphere have often failed. Despite the characterization

of many states as 'secular', almost no state is able to build a watertight division between the two spheres. Both occupy the public space to a large extent.¹

The challenge is to find a balanced relationship, which keeps the state free from undue interference from religious bodies and institutions, and protects the freedom of religion and belief on an equal and non-discriminatory basis. The principles of **non-discrimination** on the basis of religion and the freedom of religion and belief are also enshrined in **international human rights law**.² In most countries the details of this relationship are not regulated in the Constitution itself which often just states the principle of secularism as such. However, it will help subsequent legislators and judicial authorities to understand the intention of the CA if it discusses the subject thoroughly and agrees on a number of guiding principles thereon.

A secular state should not allow any particular religion playing a political role in the affairs of the state. It recognizes and treats all religions and religious communities equally. It does not discriminate against or in favor of any religion or religious faith. Related concepts are the 'separation of church and state'. A non-secular state may recognize a specific religion as a state religion and or make it very influential in a country's governance. For instance, it may base specific legislation on religious preferences and traditions, thereby indirectly favoring a particular religion.

In contrast a secular state does not have a state religion. Nor does it place greater importance to any particular religion. Religious laws have no place in the governance of the country. The constitution of the country does not make any reference to any particular religion. In a secular state an individual has the right to have religious faith of his or her choice. This ensures religious freedom for the people of the state and religious tolerance can actually be felt in practice. Such a policy helps to maintain dignity for all religions and religious groups. It also respects and treats all the citizens of the state equally. As a result people will be free to follow their respective religions according to their religious tradition.

1 Some well-known constitutionally secular states are India, France, the United States, Turkey and South Korea.

2 Cf. the Universal Declaration of Human Rights adopted by the United Nations General Assembly on December 10, 1948, and the International Covenant on Civil and Political Rights, adopted by the General Assembly on 16 December 1966.

In reality, the degree of secularism varies from country to country, however. The central question is whether a state should adopt a merely neutral position vis-à-vis religion, or whether it should try to pro-actively entrench and defend secular principles across society, where they often stand in conflict with long standing religious traditions and practices, and what methods it should apply in doing so. In the past the Nepali state was forced to recognize the caste system, caste hierarchy and untouchability after it had recognized the Hindu religion and followed the norms and values of that religion. In the future, it will not just have to end that practice, but will have to actively work against the persistence of such discriminatory practices and sources of exclusion and marginalization.

Finding the right balance

According to the principle of secularism religion and the state should remain separated. The challenge consists of effectively balancing the state's duty to treat and protect its citizens equally and to ensure the rights of religious freedom as well as certain cultural rights in an effective manner. This will often be the outcome of dialogue and negotiation, including between the state and religious communities and their representatives. The Constitution can only lay down basic principles. But specific legislation, administrative and political practice and eventually societal customs will have to adopt the detailed arrangements for a lasting and mutually respectful relationship between state and religious faith.

Religious practice sometimes conflicts with secular law creating debates on religious freedom. For instance, the prohibition of polygamy is handled differently in one secular state from another. Some countries also regulate religious matters in Personal Laws which are applicable only to persons belonging to a particular faith. Other questions relate to the provision of educational services, the permission of political parties to be openly adhering to any particular religion, the role of senior state representatives at religious functions and the role of the judiciary in adjudicating on secularism and religious freedom as a subjective right.

Relations between State and Religion in Nepal

Religion has traditionally been an important part of public and private life, including the state system ever since Nepal came into being. The religious/

cultural heritage of Nepal is one of its distinguishing features and represents one of its significant tourism potentials. Popular dynasties of Nepal such as the Lichchhvi dynasty, the Malla dynasty, and the Shah dynasty had given special importance to the Hindu religion in relations to governance. In this sense, Hindu religion has always had some kind of privileged influence on almost all the affairs of the state and in political decision making. The 19th century civil code (Muluki Ain) was not free from religious influence, as it created a legal basis for caste system based on Hindu caste hierarchy. The discriminatory influence of the law in Nepal's multi-religious and multi-cultural society has continued ever since, although caste discrimination was formally abolished following the 1990 democratic changes. The practice continued even after the popular uprising of 2006 (Jana Andolan 2063).

Religious communities traditionally also fulfill a number of important socio-cultural functions such as the preservation of cultural monuments and the disposal of the dead. However, recent years have seen an increased involvement of the state in the management of properties or trusts (Guthi) associated with Hindu gods/goddesses and temples. Laws that support Hindu religion and rituals and protection of Hindu religious sites (Endowment Act-Guthi Sansthan Ain) still continue (with special provisions). Revenue from the government sources is still spent in some religious functions.

Despite Nepal's officially secular status, the principle has not been consistently applied throughout the state and society. The state continues to broadcast religious programmes on state-run radio and television. The Nepali calendar and various festivals are based on religious beliefs. In an effort to treat religions more equitably, instead of reducing the number of national holidays on Hindu festivals and special days the Government has recently declared a number of Buddhist, Muslim and Christian festivals as government holidays as well. The practice of giving Dashain allowance (an additional salary to celebrate the Hindu festival of Dashain) to civil servants still continues.

The impact of the principles influenced by the Hindu religion can still be seen in the legal system of Nepal. Several laws relating to individual and family matters are based on patriarchal Hindu norms and values. Several laws of modern Nepal regarding relations between debtor and creditor, the practice of business transactions, interest, collateral, naso (entrusted deposit), deposit

and court proceedings have acquired some aspects of the Hindu law. Likewise, legal provisions relating to *aputali* (property of couples with no children for inheritance), family planning, divorce, consumption of liquor and gambling also have religious dimensions.

Topics of discussion for the Constituent Assembly

Although the new Constitution is expected to declare Nepal a secular state, such a declaration alone will not be enough to achieve the special objectives of secularism. There is a need for change in the constitutional and legal system along with changes in various aspects of government policies to achieve the goal. It can only be achieved through dialogue with religious communities and with due regard to the cultural and social traditions of the people of Nepal.

Secularism is not a provision against religion. It only separates the state from religion. It recognizes state and religion as two different spheres. Secularism nurtures the democratic rights of all social groups and individuals. It promotes equality and social justice. In this context, the CA should hold extensive discussions as to what kind of secularism Nepal should adopt in the context of framing the new constitution. It may also draw up a roadmap to institutionalize secularism in the country and implement it in practice.

The Following could be the Possible Points for Discussion:

- » Separating State from religion.
- » Protecting religious freedom (right to religion or faith, freedom of voluntary conversion to any religion, protection of those with different religious faith, no discrimination against any religious groups, ensuring equality among all religious organizations and institutions, maintaining equal protection of law, right to practice individual religion, faith, and religious activities).
- » Matters relating to possible (religion-related) discriminations against lingual, cultural, or religious minority groups.
- » Matters relating to the right of religious organizations or institutions to maintain their independent existence, and matters pertaining to construction, protection or management of temples, mosques or other sites of religious importance.

- » Matters relating to laws that directly or indirectly promote a particular religion within the State.
- » Matters relating to the tradition of appointing the Chief Priest (Mool Purohit), or other priests by the State.
- » Matters relating to the use of State funds to promote a particular religion (funds provided to religious organizations/institutions for the maintenance of sites of historical, archaeological or cultural significance).
- » Matters relating to reassessment of the special rights granted to the religious institutions or groups associated with different faiths.
- » Matters as to what should be the new policy towards schools operating on the basis of a particular religion or faith.
- » Whether or not to impart education that is not related to any particular religion but to all religions and faith.
- » Matters relating to teaching methods in schools that present religion as a historical fact or teach a particular religion as superior to others.
- » Matters relating to public holidays (relating to different religions).
- » Review of religious programs that are broadcast by the State-owned radio or television and providing similar facility to all religions on an equitable and fair basis.
- » Matters relating to the justifiable prohibition of certain religious activities and practices.
- » Matters relating to the evaluation of rules and procedures on religious conversion.

Constitutional Options

There are several options before the CA with regard to adopting and/or formulating secularism. Historically, factors which are given great importance while institutionalizing secularism include: the protection of religious freedom; non-existence of state religion, (state) budget support for the benefit of a particular religion; freeing the state's legal system from religious influence; modernizing and opening the educational system; formulating clear and simple rules and procedures for religious conversion; and providing opportunity to hold public office irrespective of religious faith. Some alternatives could be presented in the following way:

Alternatives	Strengths/Advantages	Major Challenges
<p>1. An assumption that State and Religion should be completely separated.</p>	<ul style="list-style-type: none"> » Conceptual clarity. » Freedom of religion equally protected. » Religious organizations/ institutions are free from state interference. » State remains unaffected by any interpretations made by religious authorities. » No restriction on religious practices. 	<ul style="list-style-type: none"> » State is denied of important sentiments (patriotism, social harmony, public morality, noble cause etc.) from various religions that may contribute to nation building. » Problems emanating from harmful, yet religiously guarded practices such as discrimination against women or discriminating against some social groups.
<p>2. A notion that the State should maintain neutrality regarding religion matters.</p>	<ul style="list-style-type: none"> » Acknowledging the fact that religion is a personal matter. » Religious autonomy. » Freedom of religion equally protected. 	<ul style="list-style-type: none"> » Upholding a neutral position for a society committed to social transformation may be very challenging. » Difficulty to remove social inequalities. There should be a strategy that will have to be developed with coordination among religious organizations.
<p>3. A notion that all religions should have equal protection. The State neither establishes nor prohibits any religion.</p>	<ul style="list-style-type: none"> » Religious freedom; All religions are equally protected. » Admitting that religion has positive impacts on humans. » Secularism protects people from discriminatory religious activities or discriminatory public policies. 	<ul style="list-style-type: none"> » The concept of providing equal protection to all religions is not easy in practice.

Actually, several models of secularism exist, and they evolve over time according to societal needs and characteristics. There are ample opportunities for constitution makers to choose and adopt the right model of secularism for Nepal and for later lawmakers to formulate. Nepal's unique situation as a nation will have to be taken into consideration while at the same time ensuring international standards of human rights and non-discrimination.

About this booklet series

This series of papers is intended to provide a basic background for Constituent Assembly members and the interested public on issues related to the constitution building process. They are not position papers, proposals or intend to preempt any constitutional outcome in any other way. They are the result of a cooperative effort of Nepali and international constitutional experts, coordinated by UNDP's Support to Participatory Constitution Building in Nepal project.

These papers are living documents, and feedback and comments are strongly encouraged. The more they will lead to informed, engaged and constructive discussion and exchanges, the more will their objective be attained. As comments are received further versions of this document or additional issues may be prepared.

In translating them into some of Nepal's major national languages, all effort has been made to achieve a high level of quality standards and the correct terminology, which will be understood by a majority of the speakers of those languages. However, future debates within the various linguistic communities on the proper and correct use of terms can be expected. CCD did not want to preempt that discussion in any way, but rather sought to maximize the reach and inclusiveness of this effort by including those languages.

This booklet is part of a series of documents to be developed by the Centre for Constitutional Dialogue (CCD) on themes relevant to the constitution building process in Nepal.

The objective of this series is to engage Constituent Assembly members as well as the interested public with key constitutional concepts and issues. Each document is available in the major languages used in Nepal – Nepali, Maithili, Bhojpuri, Tharu, Magar, Tamang, Newar and English. Each document is also available in audio format as well as online.

In the first phase it is envisaged that the publication series will include the following themes: State and Religion, Federal System, Human Rights in the Constitution, Rights of Indigenous Peoples, Minority Rights, Systems of Government, Independent Judiciary, Local Self-Governance, Diversity and Social Inclusion, and Participatory Constitution Making Process.

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