

COMPENDIUM OF
**SOME LANDMARK
JUDGEMENTS RELATED
TO COVID-19**
RENDERED BY
THE SUPREME COURT OF NEPAL
2021



National Judicial Academy, Nepal
Manamajju, Kathmandu

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Note: It is requested that readers and researchers of the publication refer to the full text of each case for detailed information and judgments rendered by the Supreme Court of Nepal.



राष्ट्रिय न्यायिक प्रतिष्ठान, नेपाल

National Judicial Academy, Nepal

(Estd. under the National Judicial Academy Act, 2006)

"... Center of Excellence for Judicial Education."

Foreword

In 1990, the Constitution of Nepal provided the Supreme Court of Nepal the extraordinary jurisdiction to entertain public interest litigations. As a result, the Supreme Court has laid down ample of judicial principles on various subjects, particularly on human rights and gender equality. During this process, it became clear that Nepal was obligated to create national laws in accordance with international human rights instruments to which Nepal is a party. The Supreme Court of Nepal has continuously been filling up these legal gaps through the remarkable and historical decisions on the different thematic legal issues.

The Supreme Court of Nepal has frequently issued writs and directive orders to the executive and legislative bodies. Such orders have created the situation to bring domestic laws in accordance with the values of the Constitution of Nepal, as well as international standard focusing on the maintaining the rule of law and human rights. The global **COVID-19** pandemic has negatively affected every facet of human life. During this crisis, no aspect of human society remained fully safe and untouched from its impact. Similarly, it has obstructed the judicial process and created many legal vacuums and therefore also been hindered the guarantee of fundamental rights of Nepali people from being their enforcement, guaranteed in the Constitution.

Since the **COVID-19** pandemic began, the Supreme Court of Nepal has issued large number of directive orders and judgments concerning the crisis created from the pandemic in its effort to protect human rights and maintain the rule of law.

Recently, with the support of the National Judicial Academy, Nepal (NJA) and UN Women, the Supreme Court published the "**COVID-19 Special Edition**,"¹ in Nepali language that outlines 48 landmark judgements relating to **COVID-19**. Hence, this English-language compendium outlines 5 of those 48 judgments comprehended in the Nepali version of it.

These are the key landmark judgements made by the Supreme Court of Nepal and out of these; the judgments that were decided relating to the legal and judicial issues concerning **COVID -19** have been published with the name "**Compendium of Some Landmark Judgments related to COVID-19 rendered by the Supreme Court of Nepal (2021)**".

NJA would also like to thank and express sincere appreciation to the tireless contributions made by the District Court Judge and Faculty of the NJA, Honorable Dr. Diwakar Bhatta and Mr. Shreekrishna Mulmi, Director and Business Development Manager, Mr. Rajan Kumar KC. together both to coordinate and manage this publication.

Lastly, we would like to convey special thanks to UN Women Head of Office, a.i., Ms. Navanita Sinha; and, Ms. Subha Ghale, Programme Analyst, Access to Justice for providing technical and financial assistance.

We believe that this publication will help law students, government and non-government agencies, rights activists, international community and who have their interest on the issue of related to **COVID-19** judicial developments of Nepal.

Baidya Nath Upadhyay
Executive Director

¹ Link to the publication, www.njanepal.org.np/public/reports/21021154313-Decisions of the Supreme Court on Covid-19 Special.pdf, accessed on 26 October 2021

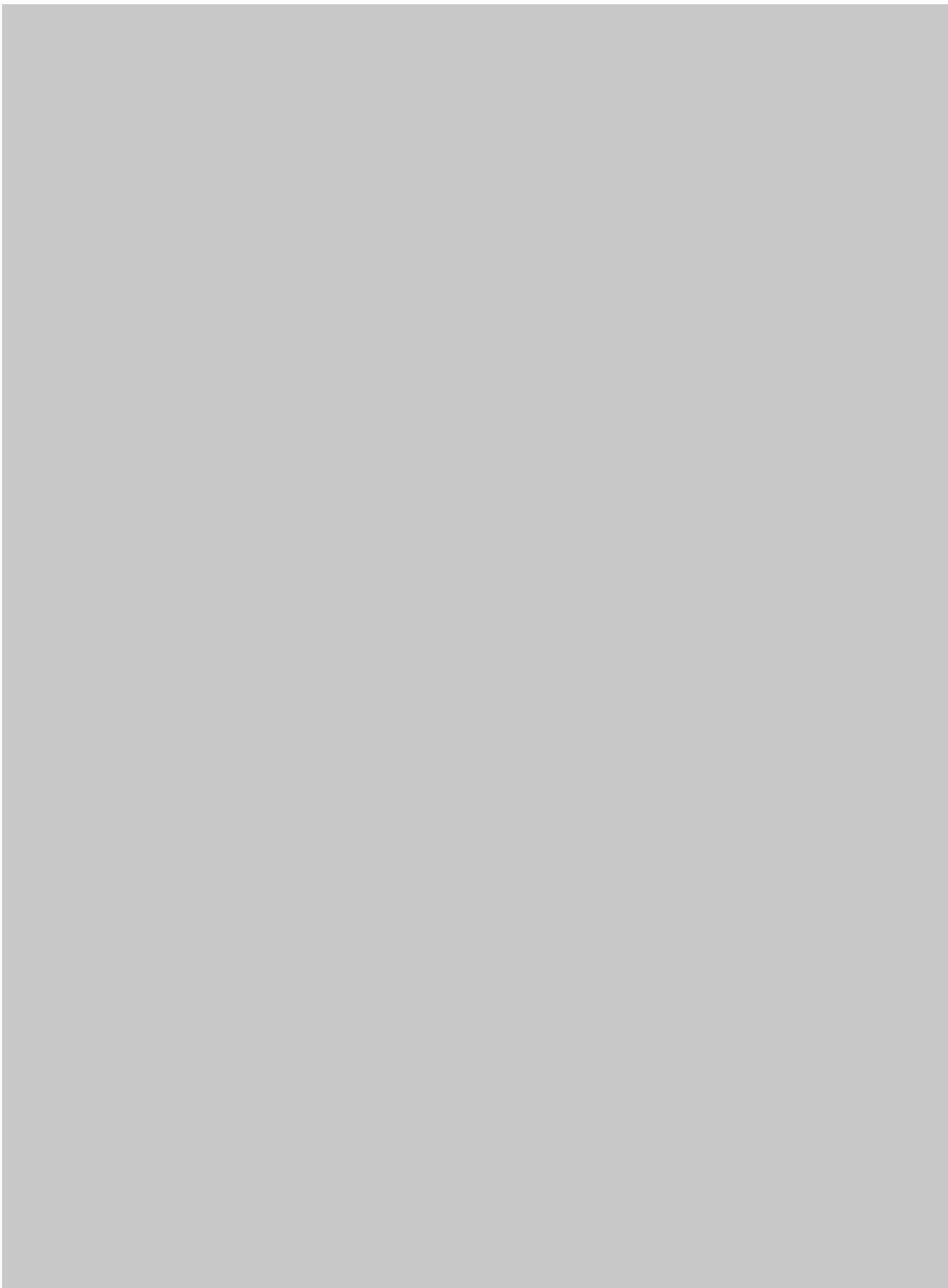


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28 May 2020	076-WO-0944	2020

Supreme Court, Larger Full Bench

Rt. Hon'ble Chief Justice Cholendra Shumsher JBR
Hon'ble Justice Deepak Kumar Karki
Hon'ble Justice Mira Khadka
Hon'ble Justice Hari Krishna Karki
Hon'ble Justice Bishowambhar Prasad Shrestha
Hon'ble Justice Ishwar Prasad Khatiwada
Hon'ble Justice Dr. Ananda Mohan Bhattarai
Hon'ble Justice Anil Kumar Sinha
Hon'ble Justice Prakash Man Singh Raut
Hon'ble Justice Sapana Pradhan Malla
Hon'ble Justice Tej Bahadur K C
Hon'ble Justice Purushottam Bhandari
Hon'ble Justice Bam Kumar Shrestha
Hon'ble Justice Tanka Bahadur Moktan
Hon'ble Justice Prakash Kumar Dhungana
Hon'ble Justice Sushmalata Mathema
Hon'ble Justice Kumar Regmi
Hon'ble Justice Hari Prasad Phuyal
Hon'ble Justice Dr. Manoj Kumar Sharma

Writ No:

076-RE-0392

Subject: Invoking for an order to resolve the deadlock including the statute of limitation, time limit, date for appearance and so on during the **COVID-19** Lockdown.

Reporter: Supreme Court, Case and Writ Division
076-WO-0944

Case: Mandamus

Petitioner: Advocate Maheshwor Shrestha, a resident of Kathmandu Metropolitan City, Ward No. 15, on his personal behalf and as a lawful representative of Advocate Tikaram Bhattarai, a permanent resident of Jhapa District, Gauradaha Municipality currently residing in Kathmandu Metropolitan City, Ward No. 10.

The summary of the Report submitted to the Larger Full Bench as per the order of the Division Bench of this Court upon considering the complexity and importance of the legal questions present in the Report submitted to the Division Bench pursuant to Rule 22 of the **Supreme Court Rules, 2017** to resolve the deadlock arising in the implementation of, *inter alia*, statute of limitation, time-limit, date for appearance during the period of Lockdown, as well as the writ petition **076-WO-0944** filed seeking an Order pursuant to Article 133 of the **Constitution of Nepal**, along with the order of this Bench is discussed below.

Contents of the Report

1. **COVID-19**, the disease caused by coronavirus called **SARS-CoV2**, is spreading in Nepal and across the world. As a result, the **GoN** has made various decisions to control it. It is necessary to manage the work and service delivery of the Court in this pandemic situation, as court happens usually be crowded with the presence of large number of people. During a meeting on 2076.12.07 (20 March 2020), the Full Court of the **Supreme Court** decided on various matters relating to the function and management of regular services and proceedings of Nepal's courts during the **COVID-19** crisis. It was therefore decided that regular court services and proceedings would be suspended from 2076.12.09 (22 March 2020) to 2076.12.21 (03 April 2020), except in the following circumstances: filing a petition of ***habeas corpus***; filing Charge-sheet; preparing statements and orders of detention; approving arrest warrants and accepting urgent arrest warrants; extending time-limits; hearing petitions of "a serious nature" relating to the pandemic; petitions demanding release from prison upon payment of amount; and petitions related to child custody.

To issue the order to deter the spread of **COVID-19**, the **GoN** as per the **Infectious Diseases Act, 2020 (1964)** decided on 2076.12.10 (23 March 2020),

to declare a Lockdown for the first time from 2076.12.11 (24 March 2020) to 2076.12.18 (31 March 2020), along with various other orders. Since then, the lockdown period has been extended many times. In the meantime, the Full Court has made some general changes in service delivery. During this period, the general or regular services provided by the Court have been suspended for service recipients. As a result, services such as registration of cases, appeals, petitions equivalent to cases hearing of cases, providing date for appearance etc. have not been carried out.

2. Section 51 of the **National Civil Procedure Code, 2074 (2017)** states that if the last day of the statute of limitation falls on a public holiday – and the concerned person requests to register a plaint on the first day the Court opens – then the Court must register the plaint immediately after the holiday. In addition to this, Section 52 provides the provision concerning the statute of limitation for minors or person of unsound mind and Section 53 provides for the commencement of statute of limitation of heirs. Section 58 allows plaints to be filed in certain circumstances, even after the expiry of the statute of limitation. However, it does not appear to have a clear or definitive provision to extend the statute of limitation during a situation like the Lockdown. Section 169A of the **National Criminal Procedure Code, 2074 (2017)** mentions that if a provision of the statute of limitation is specified, a case can be filed accordingly; however, if it is not specified, the case can be filed at any time. In proviso clause (5) of Section 59 of the aforementioned Code, it is stated that the Court may extend the time-limit in certain limited conditions arising from *force majeure*. However, the **National Criminal Procedure Code, 2074 (2017)** does not have the provision to extend the statute of limitation. Section 85 of the same Code provides that when the Court appoints a date for someone to appear for a proceeding, the accused or defendant must appear in the Court on that appointed date. It also stipulates that, if any party involved in the case submits an application indicating that they were unable to attend Court on the appointed date due to *force majeure* – and the Court decides their explanation is reasonable – the Court may extend the expired appointed date for appearance up to twenty-one days for a maximum of two times. Section 223 of the **National Civil Procedure Code, 2074 (2017)** provides that a party who fails to appear in the Court within a specified time-limit or on their appointment date due to *force majeure*, may, in case of a time-limit, extend the time-limit once for fifteen days, and in the case of date for appearance, may extend it up to twenty-one days for a maximum of

two times. In addition, Section 225 also provides for the extension of date for appearance in certain instances of *force majeure*. However, there does not seem to be a clear provision highlighting what should happen when a person is unable to appear in Court on the appointed date for appearance for a long span of time, which has been the case during the **COVID-19** Lockdown.

3. According to Section 11 of the **Special Court Act, 2059 (2002)**, in the context of case filed in the Special Court and an appeal filed over the decision of it, if an application is filed to sustain lapsed time along with reason and ground resulting from *force majeure*, the lapsed time may be sustained for a period of up to fifteen days in maximum for one time. Section 8A. of the **Summary Procedure Act, 2028 (1972)** provides that if the court finds that the time-limit or date for appearance has expired due to *force majeure*, it may extend the time-limit or date appointed for presence for a maximum of Fifteen days at One time or Two times. Rule 55 of the **Supreme Court Rules, 2074 (2017)**, Rule 49 of the **High Court Rules, 2073 (2016)** and Rule 38 of the **District Court Rules, 2075 (2018)** also mention provisions to extend the expired time-limit and date for appearance in the court up to fifteen days in cases of *force majeure*.
4. According to the **Infectious Diseases Act, 2020 (1964)**, if there is a contagious disease with high transmission rates in Nepal, then the **GoN** can take necessary actions to eradicate or control the disease, such as issuing orders to the general public or any group. The definition clause of Section 2 of the **Disaster Risk Reduction and Management Act, 2074 (2017)** defines “non-natural disasters” and among other things also includes epidemics, pests or microbial terror, and various types of flu. However, even these Acts do not mention anything about handling court proceedings – such as expired statute of limitation, time-limit or date for appearance – during disasters or a pandemic.
5. Section 26 of the **Administration of Justice Act, 2073 (2016)** provides that even if the Court remains closed for three days or more, courts must hear the writ of *habeas corpus* during their closure. The order issued by the Government of Nepal dated 2076.12.10 (23 March 2020) suggests that government offices do not need to be completely closed during the first **COVID-19** Lockdown with the decision made dated 2076.12.10 (23 March 2020), it does not seem that the government offices be completely closed.

As per the decision of the Full Court of the Supreme Court, Nepal's courts will not be completely closed during this period. Most of the proceedings and service delivery have only been suspended.

6. In view of the above-mentioned context, the **National Civil Procedure Code, 2074 (2017)** states that the statute of limitation may be extended for a maximum of fifteen days if *force majeure* circumstances prevent someone from filing a plaint within the given statute of limitation. However, the **National Criminal Procedure Code, 2074 (2017)** allows the time-limit or date for appearance to be extended during pandemics or other natural disasters – but the Act does not allow for the statute of limitation to be extended in the same circumstances. Therefore, it can be concluded that Nepal does not have any special Act that allows the judiciary to continue during a situation like the current **COVID-19** pandemic. Bearing in mind the aforementioned context – and the complexity and importance of this subject matter – a report is hereby submitted for inquiry and resolving the difficulties accordingly:
 - a. In 2076.12.07 (20 March 2020), the Full Court of the **Supreme Court** decided to suspend the proceedings of the courts, the non-expiration of the statute of limitation, time-limit, and date for appearance during the closure of service delivery, and the cases and other proceedings can be registered if one is present within 10 days of the lockdown being lifted, excluding the time required to travel to the location. **The National Criminal Procedure Code** does not mention any provision about the expiry of the statute of limitation. The court adjudicating the case must decide the statute of limitation; concerned parties cannot raise questions later in this regard. If the statute of limitation is not addressed immediately, then different courts may develop different views on it, so there must be maintained uniformity.
 - b. There seem to be a high number of parties and stakeholders attending court on the hearing date, date for appearance and case registration date. Within ten days of lifting the Lockdown, thereby the **Supreme Court** and courts having heavy workload will facing high risk of **COVID-19** transmission. There should be an appropriate resolution in this regard.
 - c. Since **the National Criminal Procedure Code, the National Civil Procedure Code, the Special Court Act, the Summary Procedure Act** and various rules of the Court have different stipulations about extending time-limit and date for appearance, there should be clarity about these rules and practices in the context of current **COVID-19** pandemic.

- d. Where Lockdown is not lifted nationwide, but is lifted partially or regionally, the public transportation will not be in smooth operation, in such situation resolution should be given regarding the calculation of statute of limitation, time-limit and date for appearance;
- e. Existing provisions in various laws relating to the extension of the statute of limitation, time-limit and the date for appearance may be insufficient in the situation of a partial lifting of the Lockdown. Thus, a resolution should be given in this regard.
- f. In case of the extension of date for appearance due to *force majeure*, the existing legal provision requires that the persons present their application, along with proof of the *force majeure*. However, this procedure causes unnecessary inconveniences to the parties and has increased congestion in courts during the pandemic. A solution should be given in this regard.
- g. Section 8(2) of **the Criminal Offences (Sentencing and Execution) Act, 2074 (2017)** states “Sentence shall be determined not later than thirty days of the conviction”. However, that service has been suspended during the lockdown period and a necessary resolution should be given in this regard.
- h. Prolonged lockdown has also increased the likelihood that a time limit will expire. This situation has caused various dilemmas, particularly in cases of applications relating to the execution of judgments (this includes applications for the enforcement of judgments and reduction in imprisonment and fines in criminal cases). A clear resolution should be given in this regard.

Preliminary order of this Court:

- 7. An order of the Division Bench of this Court, which was issued on 2077.01.24. (06 April 2020), stated that it was necessary to submit this report to the Larger Full Bench considering the complexity and importance of the legal issues included or to be included in the present report. It also states that, for that purpose, the Report would be presented before the Hon’ble Chief Justice as per clause (f) of Sub-rule (2) of Rule 22 of the **Supreme Court Rules, 2074 (2017)** and that, considering the gravity of this issue and its importance, and the legal questions included in the Report, the **Attorney General, President of the Nepal Bar Association** and the **Supreme Court Bar Association** as *Amicus Curiae* must be asked to submit a Pleading Note within three days via email and that one representative from each organization be present upon submitting the case to the Bench for hearing as per the law.

Summary of the Pleading Note of Learned Attorney General Mr. Agni Prasad Kharel:

8. The Full Court of the **Supreme Court** decided on 2076.12.07 (25 March 2020) to allow cases to be filed within 10 days of the Lockdown being lifted – but this has a weak legal basis. Section 169 A of **the National Criminal Procedure Code, 2074 (2017)** provides that if the statute of limitation has been fixed by the prevailing law, it will be fixed accordingly. However, this provision does not extend the statute of limitation if it expires for any reason. As per the decision of the Full Court dated 2076.12.28 (10 April 2020), there would not be any problem regarding the statute of limitation in criminal cases where the Government of Nepal is plaintiff, as the charge-sheet of such cases are being filed since *Chaitra* 28 of year 2078. There remains a question, though, about what to do if the statute of limitation expires after the Lockdown in individual party criminal cases. As Section 59 is solely concerned with the time-limit rather than with the statute of limitation, there seems to be no legal basis to extend the statute of limitation. It seems to be lawful as long as the case is registered on the day that the lockdown is lifted. It does not seem possible to register a criminal case in which statute of limitation has expired without a legal basis. Regarding the extension of the statute of limitation in situations in which the Act clearly defines it, it seems that the interpretation should be done cautiously (**NLR 2070, Vol. 4, Decision No. 9007**). If certain number of days is already determined after an incident occurs, the extension of the statute of limitation on any basis would be taken into consideration. In cases where the statute of limitation expires due to a public holiday, due to the non-operation of public transportation or *force majeure*, there is a legal provision that the case may be registered on the very first day of resuming court service. It seems that the case can be registered on this aforementioned basis. Otherwise, the statute of limitation cannot be extended without making amendments to the law itself. In the case of **Raju Chapagain v. the Office of the Prime Ministers and Council of Ministers, et. al.** (**NLR 2073, Vol.2, Decision No. 9547**), it has been interpreted that the gravity of the crime, the contemporary context, the social and geographical situation of the country and international law and practice must be taken into consideration while determining how and to what extent the statute of limitation of a case is determined. It has also been interpreted that the Supreme Court cannot fix the exact day for statute of limitation as this matter is believed to be determined by the legislature within legislative domain.

9. Section 225 of **the National Civil Procedure Code, 2074 (2017)** states that the statute of limitation can be extended if it expires due to *force majeure*. However, the same provision does not seem to be applicable in criminal cases. Rule 34 of the **National Criminal Procedure Rules, 2075 (2018)** specifies that if there is a public holiday on the last day of the statute of limitation – and the person appears on the very first day on which the Court resumes its services after such holiday, the statute of limitation should not be considered expired. The **GoN** has considered the Lockdown equivalent to a public holiday through its notice. Therefore, if the case is registered on the same day that the Court resumes after the lockdown is lifted, then the statute of limitation should not be considered expired. If cases cannot be registered on a single day, it is just a managerial issue. When the period of limitation seems to be expired, adding an appropriate, extendable time period, it can be addressed by amending the aforementioned provision of the Rules or adding proviso by the Supreme Court to include the provision on special situations (pandemics like **COVID-19**). This option seems to be appropriate and lawful.
10. The issue of management of cases in Courts with higher workload after lockdown is lifted is a managerial question rather than a legal one. Applying ‘Information Technology’ could help to extend the time-limit and the date for appearance in the Court. Service recipients could be pre-informed based on the nature of their cases or the case number in relation to the day; then, the petition could be filed to extend time-limit and the date for appearance the number of services delivered daily could be determined. Further, preventive measures could be adopted for minimizing the risk of **COVID-19** infection in the Court.
11. The **COVID-19** Lockdown periods and halt to public transportation may be considered *force majeure*. It is lawful to interpret in a manner that is more convenient and appropriate to the parties of the case. If the public transportation comes into operation only within a region or partially, the time-limit and the date for appearance could be extended as per the convenience of the party. If the Lockdown is completely lifted in a district, lifted only in certain areas of the district, lifted in the district of residence but not in the district in which case is to be registered or lifted in the district in which the case is to be registered but not in the person’s district of residence, then it is appropriate to interpret what to do as per the convenience of the parties of the case.

12. The law requires submission of proof that a ***force majeure*** has occurred. This provision is not absolute or applicable in all situations. Since Nepal has instituted a lockdown and thereby prohibited public transportation to ply, this is considered ***force majeure*** for the parties to the case. The notice of Lockdown has been published in *Nepal Gazette*, Part 5, dated 2076.12.09 (22 March 2020). This is a matter that must be taken into judicial notice.
13. Sub-Section 2 of Section 8 of **the Criminal Offences (Sentencing and Execution) Act, 2074 (2017)** requires that the sentence length/determination be conducted within thirty days of the conviction. However, if the date of the hearing for sentence determination has already been fixed, but could not be completed due to the Lockdown, the date for appearance shall be considered equivalent to expiration and it shall be lawful to determine the sentence by fixing another date of hearing when the Court resumes after the lockdown is lifted. The problem may also be resolved by extending the time-limit and date for appearance in applications requesting an appeal, review, revision, execution of judgment or reduction in the sentence or fine.

Summary of the Pleading Note presented by Learned Senior Advocate, Mr. Chandeswar Shrestha, President of and on behalf of Nepal Bar Association, as *Amicus Curiae*:

14. The risk of contracting **COVID-19** has spread globally, and the World Health Organization has placed Nepal in a high-risk category. Given this situation, the Nepal Bar Association wrote to the Court on 2076.12.04 (2020.03.17 AD) that conducting the regular services of the courts would naturally heighten the risk of infection. Following this note, on 2076.12.07 (20 March 2020), the **Supreme Court** (pursuant to the decision made by the Full Court) decided to suspend all regular court services, including date for appearances and the hearings of cases, writs and petitions, except those related to personal freedom and highly essential services, from 2076.12.09 (22 March 2020) to 2076.12.21 (03 April 2020). Based on these decisions, the regular services provided by the court have been completely suspended. Nepal Bar Association is of the view that a directive order may be issued to resolve this problem to make service delivery safe and smooth by making necessary amendments to the Rules, and by positively interpreting the provisions of the prevailing law in order to provide legal remedies to service recipients once the Lockdown is lifted.

15. The **COVID-19** disease was first reported in Nepal's neighboring country China on 22 January, 2020, where a Lockdown was enforced on 23 January 2020 to prevent infection. Although the lockdown was eased after 59 days, new cases are still being detected in China. In India, **COVID-19** was first reported on 15th February, 2020 and the number of deaths due to infection is still on rise. In Nepal, the disease was detected on the 10th of *Magh* (24 January 2020) in a student who came to Nepal by flight from China. Now, the number of infected patients in Nepal is on rise. Due to lack of testing equipment, the tests have not been made extensive and it is likely that the number of infected people will rise. People who have moved from one place to another (in different districts and foreign countries) for work are not able to return to their homes due to the lockdown. Some are stranded on roads and others are in quarantine, in foreign lands as there are no flights. Having stayed at home for two months due to the lockdown, as well as the resulting lack of work and food, is causing some people mentally stressed. Nepali people who have gone outside of Nepal and want to return are not able to do so till date. The government has not yet taken measures to bring them back and has asked them to stay in the country in which they are residing. Even after the Lockdown is lifted, it might take some time for people who have been residing inside their homes to manage mentally. Until public transportation becomes fully operational again, it may take weeks for people to reach their homes due to overcrowding. There is a chance that industrial businesses, employment, and the economy will deteriorate in a worrying manner. It is being anticipated that even after the lockdown is lifted, it may take a long time for the country to get rid of the fear of **COVID-19**. New laws – including judicial administration related to pandemics – need to be formulated. The government should have initially made laws by Parliament in this regard by adopting a summary legislative procedure i while Parliamentary session was going on. Even after the prorogation of Parliamentary sessions, this issue could have been addressed through an ordinance. Now, while the Parliament is in session, there is an urgent need to formulate 'Umbrella Acts' related to pandemics by following the summary procedures. If the Parliament is unable to formulate or amend the laws as such, this esteemed Court may find it necessary to resolve these issues through the interpretation of the Constitution and existing laws.
16. Due to the prolonged Lockdown, there may be situations in which the statute of limitation might have expired for service recipients or they were not able to get home, gather evidence, manage Court fees and appoint a

lawyer to prepare the required documents to be submitted to the Courts. In these circumstances – and considering the long suspension period of service delivery from 2076.12.07 (20 March 2020) to the day of lifting of the Lockdown – 10 days to provide services does not seem sufficient. This may have adverse effects on ‘Pandemic-Period Justice.’ Registering cases and hearing thousands of cases, as well as the time-limit, date for appearance of cases that have been on hold for months, *inter alia*, is challenging, especially for the Supreme Court. From an ‘access to justice’ perspective, the 10-day period that has been allocated for the statute of limitation, time-limit and date for appearance seem absolutely insufficient in the present situation.

17. With regard to the statute of limitation, Section 58 (a) to (f) of **the National Civil Procedure Code, 2074 (2017)** provides for conditions under which the statute of limitation shall not expire and will be extended. Section 58 (c) of the Code provides the conditions in which the statute of limitation shall not expire stating “If the route for journey remained closed due to any reason, period of fifteen days, excluding the time required for journey, from the date of resumption of such route or means of public transportation.” Similarly, Section 58(e) states, “If there occurred a disaster, period of ten days, excluding the time required for journey, from the date of occurrence of such a disaster.” According to Section 59, the disputing party has to file the petition, along with the required evidence to prove that the time limit has expired. If the petition is filed without the evidence, there is a provision to give an appropriate time limit not exceeding to more than fifteen days. Based on the legal provision of Section 58 (c), which provides “fifteen days excluding the time required for journey” and Section 59(2) which states that it shall not exceed “fifteen days,” it can be inferred that the legislative intent is to provide a maximum of a 30-day long extension to the statute of limitation. **The National Criminal Procedure Code, 2074 (2017)** does not seem to have any provision regarding the statute of limitation. The Code did not anticipate the situation in which the public has to stay indoors and cannot go outside for months – a standstill situation of industries, businesses, offices, public transportation and air travel all over the world. This is not something that could have been anticipated either. Both the Civil and Criminal Procedure Codes have provisions to extend the time-limit and date for appearance for a certain number of days in the event that they expire. However, the Court now has a vital responsibility to resolve the deadlock by interpreting the laws of Nepal in a way that can help ensure

citizens have simple and easy access to the Courts and its proceedings. This will help citizens exercise their judicial and legal right to remedy, which is ensured by the Constitution and laws, and should continue regardless of people's ability to reach the doors of the Court and judicial institutions due to lockdown.

18. Right relating to justice is an inherent and natural right of people. This right is also guaranteed as fundamental right in the **Constitution of Nepal**. Laws should be interpreted through fair trial by independent, impartial and competent Courts or judicial bodies so that no person is deprived of his/her right to legal remedy. Article 126 of the Constitution provides that rights relating to justice in Nepal shall be exercised by Courts and other judicial bodies in accordance with the Constitution, other laws and the recognized principles of justice. Article 128 states that the **Supreme Court** shall have the final authority to interpret the Constitution and laws. Article 133(2) empowers the **Supreme Court with** extraordinary powers to issue necessary orders and provide appropriate remedies to enforce the fundamental rights conferred by the Constitution or any other legal right for which no other remedy has been provided, or for remedies that may be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern. It is necessary that the **Supreme Court** take seriously its responsibility in providing access to justice, which is guaranteed in Article 20 of the Constitution.
19. People should not conclude that the pandemic has ended based on news that the lockdown has been lifted. Therefore, it is crucial that laws of Nepal be interpreted in such a way that access to justice is ensured and not obstructed. Section 287 of **the National Civil Procedure Code, 2074 (2017)** provides that the Full Court of the **Supreme Court** shall make the necessary provision to remove the difficulty in continuing Court procedures, and Rule 99 of the **National Criminal Procedure Rules, 2074 (2017)** stipulates, "except for the provisions provided for in Acts and this Rule, the Court may make necessary arrangements on its own in respect to other Court procedures without being inconsistent with the Acts and this Rule." The word "disaster" used in the prevailing laws shall be interpreted broadly.
20. No one knows that how long the pandemic will end. It does not seem that it will immediately cease, even after the government lifts the lockdown. Until the situation gets back to normal, it is not possible for service recipients –

many of whom reside both within and out of the country – to be present in Court within 10 days from the date of the lockdown being lifted. It is also not possible for the Courts or other judicial bodies with a high number of cases to deliver their services smoothly within the given time frame. Those who need to be present in Court within their given time-limit or on their date for appearance or those who need to file cases, complaints or petitions, might be in quarantine or isolation. The laws need to be interpreted in such a way that their right to legal remedy is not obstructed.

21. The laws of Nepal cannot be interpreted in a way that obstructs citizens' rights to legal remedy. Service delivery has been suspended with the legitimate intention of protecting judges, legal practitioners, court officials and service recipients from getting contracted with COVID-19. People who have entered or want to enter the Courts and expect justice shall not be deprived of this legal remedy. When the Lockdown is lifted, people residing in Nepal or abroad will need time to get back home – and time to cope with the mental stress related to unemployment and food insecurity. Thus, using the power entrusted by Section 287 of the **National Civil Procedure Code, 2074 (2017)** and Article 128 and 133(2) of the Constitution, the following measures need to be taken to remove citizens' difficulties:
 - a. The time in which the **COVID-19** Lockdown is completely lifted throughout the country, transport becomes fully operational, national and international flights resume, and the **GoN** officially declares that the country is free from the risk contracting **COVID-19**, shall be defined as the "date of lifting the lockdown," and will thus impact limits presently put on the statute of limitation, time-limit or date for appearance.
 - b. Since people will still be in a state of fear due to a lengthy Lockdown – and as it takes time to collect and prepare written evidence for filing the plaint in the Court – it does not seem feasible that cases could be filed within 10 days of lifting the Lockdown. Thus, it is appropriate that this difficulty be removed by defining the "period of suspension of services" as the "pandemic period," which enables people to register complaints, petitions and plaints without an application if brought within 30 days after the date of the lockdown being completely lifted.
 - c. Concerns have been raised that there is no legal provision regarding the non-expiration of the statute of limitation due to *force majeure* in criminal cases. Interpreting that the path to judicial remedy has "ended" during a disaster period, like **COVID-19**, will certainly halt citizens' right to justice, which is guaranteed by Article 20 of the **Constitution of Nepal**. The

Supreme Court does not understand why the legislature did not include provisions relating to extending the statute of limitation while formulating the Codes nor why they did not anticipate that access to courts for criminal cases would cease during disaster situations. It is not the intention of the legislature to prevent a person's means to judicial redress because court services are suspended during disaster. The gap in procedural law can be fulfilled by the courts' interpretations. In all kinds of cases, it is appropriate to interpret the law in a manner so that the statute of limitation, time-limit and date for appearance do not expire due to *force majeure*. Otherwise, a person's right to justice will end. Section 287 of **the National Civil Procedure Code, 2074 (2017)** provides that the Full Court of the **Supreme Court** should make provisions to remove difficulties in relation to the Court procedures while implementing the Code. Further, Rule 99 of **the National Criminal Procedure Rules, 2074 (2017)** stipulates "except for the provisions provided for in Acts and this Rule of procedure, the Court may make necessary arrangements on its own in respect to other Court procedures without being inconsistent with the Acts and this Rule." By relying on the principle of beneficial and harmonious construction, it must be ensured that the statute of limitation does not expire in criminal cases as well as time-limit, date for appearance and statute of limitation do not expire in civil cases during the periods in which services are suspended. Having provisions on extending the statute of limitation in civil cases, but not in criminal cases does not seem to have any rationale. Thus, it is reasonable to have provisions extending the statute of limitation in criminal cases like in civil cases.

- d. Since the decision made by the Full Court of the **Supreme Court** regarding **COVID-19** followed by the Lockdown announced by the **GoN** (which was published in *Nepal Gazette* on 2076.12.09, [22 March 2020]) and can be *ipso facto* taken into notice by the Court. In accordance with Section 5 of the **Evidence Act, 2031 (1974)**, there shall be no difficulties in registering a case, date for appearance or judicial services if a party appears before the Court stating the above justification, even without other evidence or an application.
22. It is clear that after the lockdown is lifted, there will likely be high number of service recipients in the courts. If this situation occurs, it would be appropriate to alter some court services. This can be achieved by minimizing other services provided by the courts, arranging additional spaces with other security arrangements, and securely mobilizing the existing human resources targeted to higher caseloads and service recipients.

23. Provisions regarding the statute of limitation, time-limit and date for appearance during disaster have been incorporated into **the National Civil Procedure Code, 2074 (2017)** and **the National Criminal Procedure Rules, 2074 (2017)**. However, even if no provisions have been incorporated in **the Special Court Act, 2059 (2002)**, **Summary Procedures Act, 2028 (1972)** and other court-related regulations, there is no doubt that there needs to be an application of provisions guaranteed in the Civil and Criminal Codes in those cases too. It has been clearly mentioned in Sub-Section (2) of Section 3 of **the National Civil Procedure Code, 2074 (2017)** and Sub-Section (2) of Section 3 of **the National Criminal Procedure Code, 2074 (2017)** that with regard to the procedural matters not contained in other laws, procedures set forth in the civil and criminal codes shall be applicable. Section 12 of the **Special Court Act, 2059 (2002)** and clause (b) of Section 8 (1) of the **Summary Cases Act, 2028 (1972)** provide that with regard to the matters not mentioned in these Acts, provisions in **the National Civil and Criminal Procedure Codes** shall be applicable. Therefore, it is deemed appropriate to follow procedures in accordance with the aforementioned law, order and direction to remove difficulties in the current crisis situation. Similarly, the statute of limitation, time-limit and date for appearance in applications regarding the enforcement of court judgments should be interpreted in the same way as mentioned above.
24. Notices from the federal, provincial and/or local governments will mention whether the lockdown has been lifted and transportation services have got resumed. By taking such matters into judicial notice, provisions shall be made by applying the aforementioned principle to extend the statute of limitation, time-limit and date for appearance in all courts and judicial bodies only after the lockdown is completely lifted all over Nepal and all public transportation facilities have got resumed.
25. It is not appropriate to resume all regular court services merely on the basis of a partial lifting of the lockdown. In such situation, by making arrangements for hearing only for writs, cases related to prisoners and detainees, the provisions mentioned in the Codes, in the context of geographical areas where the lockdown have not been lifted completely or for parties residing in such areas, statute of limitation, time-limit and appearance date should be interpreted in accordance with the above principles in a manner that they do not get expired until the lockdown is fully lifted.

26. It is not illegal to accomplish the tasks that could not have been completed within the stipulated time since the court proceedings could not be conducted due to the disaster. To determine sentencing within 30 days of lifting the lockdown, it is appropriate to interpret this this way in order to make arrangements to set the date of hearing.
27. When the statute of limitation has not got expired during the lockdown, but the same statute of limitation or time-limit will expire shortly after the Lockdown is lifted, interpreting **the Civil and Criminal Procedure Codes** as mentioned above may not guarantee access to justice. For people who have not been able to come out of their homes for a long time, it would not be possible to submit the plaint, written statement, gather evidence and/or prepare written documents by contacting legal practitioners in just few days. For example, even if the lockdown is lifted on *Jestha* 5 (May 18), it would not be possible for a person whose legal statute of limitation or time-limit expires on *Jestha* 6 or 7 (May 19 or 20) to prepare these documents immediately and adhere to legal redress. Therefore, it seems necessary to resolve the deadlock and ensure access to justice by addressing these serious issues, we must consider the Lockdown as 'Zero Period,' and assure that the statute of limitation and time-limit are not considered to be 'expired' if the person appears before court within 30 days of the lockdown being lifted.
28. Even though legislatures of Nepal did not formulate laws anticipating critical situations like current pandemic, based upon Articles 126, 128 and 133 (2) of the **Constitution of Nepal** – and in accordance with the recognized principle of law and justice – a liberal, just and positive interpretation of the law shall be made. A necessary resolution must be given to the Report of Case and Writ Division. This can be accomplished by managing the court proceedings and not depriving Nepalese citizens, including court users and service recipients from judicial remedy.

Summary of the Pleading Note presented by Learned Senior Advocate, Mr. Khagendra Prasad Adhikari, President of Supreme Court Bar Association, as *Amicus Curiae*:

29. Even though Clause (1) of Article 273 of the **Constitution of Nepal** visualizes situation of natural disaster or pandemic, criminal and civil laws related to court and the administration of justice do not seem to address a pandemic situation. Necessary arrangements must be made immediately

by considering the judicial and quasi-judicial procedure suspended due to Lockdown as equivalent to closure, so that the registration of cases and other court procedures be resumed by extending the statute of limitation, time-limit and date for appearance if the party is present before the court within one month of lifting of the Lockdown completely. A judicial management of the pandemic situation does not seem possible on the basis of existing legal provisions. In relation to the statute of limitation, the **Supreme Court of India** applied Article 141 and 142 of its Constitution, which made legal arrangements relating to the statute of limitation during the pandemic. Likewise, **Supreme Court of Nepal** must issue an appropriate order for the interim management of the statute of limitation, time-limit, date for appearance, hearing and sentencing procedures, by applying Article 126, 128, and 133 of the **Constitution of Nepal**.

30. The nation is in Lockdown due to the **COVID-19** pandemic. Since lockdown has been declared in other nations, transport services including air services coming into Nepal, have been suspended and foreigners and Nepalese citizens who are party to various cases have been unable to arrive in Nepal. Even if Lockdown is immediately lifted, there is no way they can arrive in Nepal soon. Other countries have decided to lift their lockdowns gradually on a regional basis in order to minimize the possible impact on their socio-economic sector and citizens' livelihood. During the meeting of the Council of Ministers held on 2077.01.23 (05 May 2020), the **GoN** decided to lift the Lockdown on a thematic basis. However, since the Lockdown in Nepal has been imposed on a regional basis – in which some areas are open and others are entirely shut down restricting people from moving freely – it is evident that people would be unable to come to the court to extend the statute of limitation, time-limit and date for appearance. A separate special arrangement should be made for people abroad and within the country who are unable to present themselves in court due to domestic and international lockdowns. Since Articles 126, 128 and 133 of the **Constitution of Nepal** entrusts the **Supreme Court the responsibility** to administer justice in Nepal, being limited to and based on the same constitutional responsibility, and therefore judicial activism should be exercised to manage the pandemic situation.
31. Considering the extended Lockdown, workload and human health, a minimum of one-month time-limit seems appropriate. The time-limit should only be calculated after the Lockdown is completely lifted throughout

Nepal. Even if the lockdown is lifted in Nepal – and regardless of whether it is lifted in other countries – it seems like situations might arise in which people are unable to exercise their power of attorney as provided by the law due to the non-operation of transportation services, including air services. In such conditions – for people living abroad (including Nepali citizens and foreigners) who are either receiving or willing to receive service from Courts or judicial bodies of Nepal – the statute of limitation and time-limit should be calculated only after the Lockdown is lifted in foreign countries and thereby conditions will become favorable for the service recipients to travel to Nepal.

32. As per the prevailing laws of Nepal, many cases are initiated/registered in quasi-judicial bodies like the District Administration Office, the Land Reform Office, the Forest Office, the Customs Office, the Inland Revenue Department, the Department of Money Laundering, the Rural Municipalities and Municipalities, etc. Since the **COVID-19** pandemic began. The task of extending the statute of limitation, time-limit and date for appearance must also be done in the Courts and judicial bodies of Nepal; therefore, resolution should be given in this regard pursuant to Article 126, 128(2) (3) and Article 133(2), (3) of the Constitution of Nepal.
33. Since medicine and vaccine for **COVID-19** have not been developed yet, and based on the nature of the pandemic observed till date, the pandemic may continue for some time, and the government may continue imposing lockdown to control it. The Order by this Court regarding the extension of the statute of limitation, time-limit and date for appearance should be issued in such a manner that those orders remain effective in the future as well.
34. The courts and bodies under the management of the **Supreme Court** were in operation until 2076 *Chaitra* 7 (20 March 2020), but were later closed from *Chaitra* 8 (March 21) restricting it from extending the statute of limitation, time-limit and date for appearance. Therefore, necessary arrangements should be made with an order so that the expired statute of limitation, time-limit and date for appearance get sustained within one month of the situation of being normalized /the lockdown being lifted nationwide. Further, it is appropriate for the **Supreme Court** to amend the court-related Rules and issue an order of *mandamus* or a directive order in the name of the Federal Parliament of Nepal (Parliament), the Council of Ministers of Nepal, **the GoN**, the Ministry of Law, the Justice

and Parliamentary Affairs and others to amend the current provisions of criminal and civil law of Nepal related to the statute of limitation, time-limit and date for appearance be applicable from 2076.12.08 (21 March 2020), which will give it a retrospective effect on par with the said Order.

Summary of the Writ Application 076-WO-0944 by Petitioner, Tikaram Bhattarai, et. al.:

35. The spread of **COVID-19** became a global pandemic, Nepal government declared a nationwide lockdown on 2076.12.11 (24 March 2020). The lockdown has affected court proceedings. This uneasy situation has prevented people from exercising their legal rights and fulfilling duties if their cases are sub-judice in the courts, established as per Article 127 and the specialized courts and tribunals established as per Article 152 of the Constitution, or who have come to the courts for seeking justice or date for appearance notice or to change their time-limit or statute of limitation. It has had an impact on the employees of the judicial administration who have the duty to provide the date for appearance, notice and time-limit, or those legal practitioners who must represent the parties. The time-limit or statute of limitation of the parties has either expired or is in the process of being expired; meanwhile, the end of the pandemic is uncertain. As the time-limit, statute of limitation, date for appearance or duration of notice seem to be affected continuously because of it, an appropriate judicial resolution from the esteemed Court in this regard is mandatory. However, since there is no any alternative remedy for the uninterrupted use, enforcement and exercise of fundamental, legal and constitutional rights of the citizens, it is my hope that the court will issue the following orders pursuant to Article 133(2) and (3) of the **Constitution of Nepal**:
- a. Arrangements must be made to ensure that the time-limit, statute of limitation, date for appearance and duration of notice (as provisioned in the prevailing laws) do not get expired unless otherwise provided, or up to 15 days after the **GoN** makes a formal announcement declaring the end of pandemic. Further, arrangements for date of appearance must be made for parties unable to attend the court in person, perhaps through an electronic medium.
 - b. Separate interim legal provisions must be made. These must contain a summary process and procedures for filing and hearing petitions related to fundamental rights and a time-limit for submitting written responses or its extension.

- c. After consulting with the Nepal Bar Association and others, an interim arrangement must be created to hear cases by making an appropriate provision on the cause-list management, hearing cases, and workplace security. This is because the provision related to cause-list management and hearing of cases cannot be resumed like normal during the pandemic, however the judiciary cannot remain indifferent from its obligation to protect the fundamental and legal rights of citizens during this period.
 - d. The Chief Registrar of the **Supreme Court** and concerned security agencies must implement arrangements ensuring that there are no obstacles in the movement of legal practitioners representing the parties, attorneys appointed for date for hearing, and human resources working in the court, during the Lockdown. This can be ensured by providing them with permission or a 'pass' through the concerned court or bar units.
 - e. The writ application 076-WO-0944 filed in the **Supreme Court** by Advocate Tikaram Bhattarai, *et.al.* on 2077.01.28 (2020.05.10 AD) sought the formulation of 'Sunset' laws, and after being consulted, the **Supreme Court** made arrangements to send a copy of the Order to the Ministry of Law, Justice and Parliamentary Affairs, regarding them as the sole authority to make laws like this in the Legislature.
36. On 2077.01.29 (11 May 2020), the Single Bench of this Court issued an order in relation to writ 076-WO-0944 to keep the Report of 076-RE-0392 together.

Order Section

37. The aforementioned Report and the writ petition scheduled for rendering a verdict were studied. During the hearing held on 2077.02.05 (18 May 2020), the Learned Senior Advocate, Mr. Chandeshwar Shrestha, Chairman of the Nepal Bar Association, present as "*Amicus Curiae*," presented his pleading. He argued that once the Lockdown is lifted, legal complications and practical problems could arise in terms of the statute of limitation, time-limit, date for appearance, sentencing, and some other aspects of service delivery. He stated that Nepal's prevailing laws and rules do not provide complete solution to the problems arising in judicial process during the **COVID-19** pandemic. The existing provisions are inadequate. The right to justice and access to justice cannot comprise with Lockdown. The Larger Full Bench of the Supreme Court – pursuant to Articles 126, 128 and 133 of the **Constitution of Nepal** – must interpret the laws and provide resolution regarding this issue. While providing resolution, the

situation of lifting of Lockdown should be defined pragmatically; “partial opening” should not be considered like a complete lifting of the Lockdown. Stating that the Lockdown period should be considered and managed as a **“Zero Period,”** he presented the opinion of the Nepal Bar Association in a Pleading Note. Learned Senior Advocate, Mr. Harihar Dahal, present on behalf of Nepal Bar Association as **“Amicus Curiae,”** stated that the provisions in various laws of Nepal (including the Arbitration Act and the Arbitration Rules) regarding the statute of limitation, time-limit, and date for appearance should be taken into consideration while issuing an order. After the Lockdown is completely lifted, one-month extension period for the statute of limitation, time-limit, etc. should be maintained. Consideration should be given to the situation of disruption of transportation and the limitation of daily activities due to the lockdown. The pandemic is different from disasters, such as earthquakes, volcanic eruptions, etc. Taking into consideration the provisions incorporated in the Constitution, he pleaded that the current difficulties should be addressed and the **Supreme Court** can provide a solution.

38. Learned Senior Advocate and Chairman of the **Supreme Court** Bar Association, Mr. Khagendra Prasad Adhikari who was present as **“Amicus Curiae,”** pleaded that while resolving the current issue, the existing judicial system should be considered. The **Supreme Court** is empowered with the ability to administer justice, which could easily address the current complexities arising from **COVID-19**. Citing the recent decision of the **Supreme Court** of India as an example, he argued that the **Supreme Court** of Nepal should exercise judicial activism to maintain access to justice in special circumstances. He also argued that the present situation requires embracing the principle of necessity and should be observed as a matter of public concern. The criminal procedure should also be considered in relation to the **National Civil Code, 2074 (2017)**, which has provisioned for extending the statute of limitation. The **Supreme Court** should issue an Order, including in the name of the government, regarding the deadlock for the time being. He further pleaded by citing the arguments presented in the Pleading Note that the prevailing Nepali laws including the **Infectious Diseases Act** would not solve the current issue alone, and therefore an order must be issued. Learned Senior Advocate, Mr. Shambhu Thapa, present on behalf of the **Supreme Court** Bar Association as **“Amicus Curiae,”** pleaded that the current discussion should not be observed as a matter of law enactment, but as a matter of administering justice.

According to Article 273 of the Constitution, the pandemic can be observed as a state of emergency – it is not a normal situation. The legal gaps seen in the judicial process, including the statute of limitation, time-limit, and date for appearance, should be observed in the context of the nature of the **COVID-19** pandemic. Apart from this, the right to health is also important. To address the current complexities, it is necessary to adopt a “golden” or creative rule of interpretation, not a literal interpretation of the law. Since it is a matter of maintaining access to justice in special circumstances, it should not be viewed as law-making. He argued that, since the service recipients in poverty and deprivation are more likely to be affected by the disease, attention should be given to the mental wellbeing of the service recipients and that this interpretation should be done liberally – keeping in mind their right to access to justice.

39. Learned Advocate, Mr. Tikaram Bhattarai, who is the petitioner of **076-WO-0944**, argued that the order should be given in the context of the writ petition itself and not on the basis of the Report. While issuing this order, concerns of the judicial and local-level bodies, including quasi-judicial bodies, should also be addressed. In addition to this, the time-limit for issuing complaints against the promotion decision in the **Public Service Commission**, as well as the arbitration issue and nine other types of complaints must be considered. The situation requires developing “Pandemic Jurisprudence.” The current situation should be viewed as an eclipse in the law and an interim order should be issued to remove the deadlock. In past decisions, the **Supreme Court** has interpreted that the statute of limitation and time-limit are for the convenience of the parties of cases. Now, these should not be used against the interest of the parties of cases. He argued that an order should be issued to facilitate the parties by considering the period of Lockdown as ‘Zero Period.’ On behalf of the writ petitioner, Learned Advocate, Mr. Govind Sharma “Bandi,” argued that the Court should order a ‘*suo motu*’ directive to make the judicial process efficient, conducive and on par with the interests of service recipients. Pleadings were also heard from other Learned Advocates Mr. Ramesh Badal, Mr. Ambar Bahadur Raut, Mr. Saroj Krishna Ghimire, Mr. Mukunda Adhikari, Mr. Pushparaj Poudel and others present on behalf of the petitioner were heard.
40. Learned Joint-Attorney, Mr. Sanjeeb Raj Regmi, present on behalf of the **Office of the Attorney General**, argued that his office’s views on this issue were expressed in the Pleading Note. He noted that the legal bases for

extending the statute of limitation seemed weak. He argued that amending court rules could address some issues related to the statute of limitation.

41. The Court has to decide, responding to the Report submitted by the Case and Writ Division of the **Supreme Court**, along with the writ petition of **076-WO-0944**, scheduled to be decided today after the hearing held on 2077.02.05 (18 May 2020), on the expiration of the statute of limitation, time-limit, date for appearance, and other such judicial proceedings. This decision will help maintain clarity on the ambiguities and dilemmas that have been appeared and may arise due to the ongoing **COVID-19** pandemic. The Court must decide whether it can issue necessary orders and directives to facilitate access to justice during the Lockdown with nature of order be issued in specific.
42. Before making a legal decision, it seems relevant to highlight facts about **COVID-19** and its impact on human life. The coronavirus, which leads to the **COVID-19** disease, also referred to as “Novel-Corona”, “Coronavirus”, “**COVID-19**», is believed to have started spreading during the last week of December in 2019. It has been almost six months since the **COVID-19** pandemic begun and has spread around the world. According to available data,¹ at the time of deciding this case, 5,788,782 people have already been infected with **COVID-19** worldwide, and 357,425 of them have died. In Nepal, 901 people have been infected and 5 people of them have died as of this date. The transmission of infection is increasing. The exact time for this pandemic to end cannot be anticipated yet. A large number of human fatalities are happening daily, but finding reliable, preventive and curative measures have still been challenging. The transmission of this microscopic **COVID-19** virus is different and frightening, and human beings do not yet understand it. The virus is indiscriminately affecting all population, including children, youth and elders, regardless of their economic status. Some health workers/doctors have also been infected and lost their lives. It is difficult to predict exactly where and how the infection will spread. There are many instances in which the infection spreads in the body even without the person knowing it and, it is sometimes too late for treatment. We are not sure whether we are experiencing the apex of this pandemic or whether there will more horror further and human devastation to come. In brief, the pandemic is currently in a terrifying state.

¹ https://www.worldometers.info/coronavirus/?utm_campaign=homeAdvegas1? - Accessed on: 2077/02/15 at 7:30 AM

43. The **COVID-19** pandemic, which has spread like an invisible enemy of humans, has seriously affected the economies of all countries, rich and poor. Due to this infection, the social, religious and cultural lives of people have hugely been affected. Land, water and air transport are closed; schools and colleges are closed; industry, trade and business have almost come to a standstill; temples, mosques, monasteries, churches, gurdwaras and other places of worship have been closed. **COVID-19** patients as well as other general patients who need to seek hospital care during this time face serious complications. Lockdown has forced people to stay indoors – as a result, social relations are weakening. After the death of a loved one, it has become difficult for families and friends to perform the rituals and mourn according to one's rites. Attendance quotas have been imposed on funerals, resulting in some people refusing to attend a loved one's funeral, always with a heavy heart. Some established rites have collapsed. Our ways of life are disturbed. Now, day-to-day activities are limited and one must memorize the dictates of lockdown – not being able to travel or cross international borders, observing quarantine and social distancing, wearing masks, using sanitizer, abiding by protocols, etc. How many more inconveniences will arise as this continues! It is not easy to estimate the far-reaching effects of these inconveniences on social, economic, political, cultural, religious and other aspects of life. We are now in the midst of these adversities – many of which have naturally affected our judicial system as well. Perhaps the legislature could not have imagined a situation like this while they formulated our laws.
44. It is human nature to seek solutions in the face of adversity and move forward in creative ways. Protecting humankind from the pandemic is challenging – but it is not an impossible task. At times, humankind has successfully tackled the challenges brought on by global pandemics, though certain price had to unwillingly be paid. Our current lockdown, for example, should be viewed as a price we need to pay to tackle this pandemic. To control and prevent the spread of infection and maintain the health and security of stakeholders, almost all court services (with a few exceptions) must be suspended. Our judicial service has been affected by this dire situation. It has become highly essential to address the natural and legitimate expectations of service recipients in a just and reasonable manner due to this impact.

45. It is most likely that humankind will have to fight **COVID-19** for a little longer. In the meantime, it could be difficult to halt the country's socio-economic, religious and cultural activities for a long period. It is obvious that the lockdown, which has been going on for more than two months, has seriously affected various economic activities, including industry, trade, employment and agribusiness. Perhaps, suspending such economic activities until the end of the pandemic will not be considered practical! There might be situations in which certain activities will need to proceed during the lockdown. It is also obvious that court services will have to resume. During this situation, challenges in maintaining health, security and social distancing will also arise. Limitations and bans on working in person will be determined. It seems apparent that all these should be managed using currently available means and human resources. On the other hand, tasks that became overdue because of the lengthy lockdown will pile up. Managing these tasks is not only uncomfortable, but also challenging. In the context of the courts, the challenges facing stakeholders, including judges, employees, legal practitioners and service recipients will come to the forefront. There are more than 23,000 ongoing disputes in the **Supreme Court**. A matter that was unable to be brought to court due to the lockdown for the past two months should also be entertained. Before the lockdown, averages of 400 to 500 cases were added to the cause-list daily. Further, since this process has halted for two months, pressure to complete all these tasks will arise at once. From this point of view, it seems that once the courts resume, thousands of service recipients could gather around at the same time. It is obvious that this number will also be high because of additional judicial human resources and legal practitioners. High Courts and District Courts having more workloads will also have to face similar challenges. It is not wise to assume life or daily activities will return to normal after the lockdown is lifted. We must not ignore these current challenges of time-management as well as the future ones that will arise.
46. Lockdown is unlikely to be lifted across Nepal in a uniform manner. There will likely be situations in which lockdowns are lifted in one city or district, but be continued in other areas, causing service recipients to stay in quarantine. Therefore, it is necessary for us to form a perspective about how situations like this will impact our service recipients. If we continue the prevailing legal provisions that require a statute of limitation for service recipients to file a plaint and petition and appeal within certain time-limit, then how will it be possible for service recipients living in remote places

to do this? They will likely not have access to transportation that would allow them to be present on the day that the court resumes its services. This raises important questions. How can the right to access to justice be maintained for people living in remote places or in quarantine? How and when can their documents be prepared? How can legal aid be received? The list of these difficulties can be lengthy. The available but limited legal principles, as well as pragmatic judicial management, must be considered when analyzing this issue and proposing solutions.

47. Now, it is relevant to mention the legal provisions regarding extending the “statute of limitation, time-limit, date for appearance”². Section 51 of **the National Civil Procedure Code, 2074(2017)** states, “If the last day of the statute of limitation falls on a public holiday and the concerned person requests for the registration of a plaint on the first day on which the court opens immediately after such holiday, the court shall register the plaint.” The phrase as stated above “first day of court opens immediately after such holiday” sets a time-limit and according to this provision, it seems possible to file a complaint only on the first day (one day) after the court resumes.

48. **The National Criminal Procedure Code, 2074 (2017)** does not seem to include any legal provision for the non-expiration of the statute of limitation, which would allow it to be extended. However, Section 58 of **the National Civil Procedure Code** seems to have the following provisions:

Section 58. Statute of limitation not to be expired: If a person who being unable to file a plaint within the statute of limitation as a result of the occurrence of the following *force majeure* thereby statute of limitation expires, tenders a plaint for registration within the following period, setting out the matter of such expiration, the Court shall, notwithstanding anything contained elsewhere in this Chapter, register such a plaint, subject to Section 59:

² The words “statute of limitation”, “time-limit”, and “date for appearance”, do not seem to be defined separately in the prevailing Nepali laws. Considering the use and purpose of these terms, “statute of limitation” is defined as the period of time provided by law to file a plaint, charge-sheet, petition or claim of similar type, before a Court or case adjudicating authority for judicial redress to the claims relating to property, position, authority, or offence. The term “time-limit” refers to the period of time prescribed or provided to present note of defense or to be present for testimony, regarding the plaint, charge-sheet, petition or claim of similar type, filed against someone, for defense or testimony before the Court or case adjudicating body. The term “time-limit” also refers to the period of time prescribed and determined by the law including for appeal, application for revision, application for permission for review, submission of a counter-claim or written response to the claim during the legal proceedings, and application for judgment execution. The term “date for appearance” refers to the day specified for summoning (to be present) the parties to the dispute before the Court or case adjudicating body for a particular work or purpose.

- (a) If a person entitled to file a complaint had to observe obsequies or mourning on his or her own according to his or her tradition, at the demise of any one of him or her, a period of seven days, excluding the time required for journey, after the date on which a period of fifteen days of the death of such person elapsed,
 - (b) If a person entitled to file complaint is a woman and delivered a child, a period of sixty days from the date of delivery, excluding the time required for journey,
 - (c) If the route for journey remained closed due to flood, landslide or snow-fall or means of public transportation did not ply due to declaration of curfew or any other reason, a period of fifteen days, excluding the time required for journey, from the date of resumption of such a route or means of public transportation,
 - (d) If a person entitled to file a complaint was abducted or taken hostage by any one, a period of fifteen days, excluding the time required for journey, from the date of being released from such abduction or hostage-taking,
 - (e) If there occurred a disaster, such as earthquake or volcano eruption, a period of ten days, excluding the time required for journey, from the date of occurrence of such disaster,
 - (f) If the person, because of being unconscious or unable to make movement because of any accident or being unable to make movement due to suffering from any severe disease all of a sudden, had to undergo treatment in a hospital, a period of fifteen days, excluding the time required for journey, from the date of his or her admission to the hospital.
49. Section 59 of **the National Criminal Procedure Code, 2074 (2017)** and Sections 222, 223, 224 and 225 of **the National Civil Procedure Code, 2074 (2017)** contain provisions relating the expiration and extension of time-limit or date for appearance. The above legal provisions that are considered '**force majeure**' include the observation of obsequies or mourning; women giving birth; closed travel routes due to natural disasters like earthquakes, landslide, snowfall or curfews; the occurrences and inconveniences caused by other natural disasters; abduction or hostage situations; and undergoing treatment in a hospital because of an accident or disease. In these situations, time-limit or date for appearance expired due to **force majeure** can be extended on the prescribed day. An application that includes evidence proving the occurrence of a **force majeure** must be submitted to extend the expired time-limit or date for appearance. These provisions do not appear to duly address the special circumstances arising out of **COVID-19**.

This issue should also be considered in the context of Section 287 of the National **Civil Procedure Code, 2074 (2017)** when making the necessary arrangements to remove difficulties.

50. The respective Rules relating to the **Supreme Court**, High Court and District Court provide for a maximum of one-time seven-day extension of the expired time limit or appearance date when a writ of *habeas corpus* is submitted, and a maximum of one-time fifteen-day extension when other types of writ petitions are submitted. In addition to this, there may be the opportunity to extend date for appearance for a limited time; this is usually 15 days for those who have to observe obsequies or mourning or have just given birth or for those affected by the non-operation of transportation or natural disasters. Rule 14 of the **Arbitration (Court Procedure) Rules, 2059 (2002)** provides that in case of *force majeure*, the extension of the expired time-limit or date for appearance is possible within seven days, excluding the time required to travel to the court. Section 11 of the **Special Court Act, 2059 (2002)** states that if an application is filed in a ‘Special Court’ to extend the expired time limit, along with evidence of a *force majeure* and an appeal is then filed over the decision, the expired time may be extended for a maximum of fifteen days (if such circumstances prove to be “reasonable”). Section 8 of the **Summary Procedure Act, 2028 (1972)** also provides that the one-time extension of the expired time-limit or date for appearance for a maximum of fifteen days is possible when the time-limit or date for appearance have been expired due to *force majeure*. However, the aforementioned provisions do not appear to duly address the special circumstances arising out of **COVID-19**. Rule 99 of the **National Criminal Procedure Rules, 2075 (2018)** states that the Court itself can manage judicial proceedings – excluding those written in the **National Criminal Procedure Code, 2074 (2017)** – and that this Rule is not contrary to the Acts.
51. Section 26 of the **Judicial Administration Act, 2073 (2016)** provides that if a court is closed for a period of three or more days, the court must remain open during the period of closure to hear the petition for *habeas corpus*. The **Infectious Diseases Act, 2020 (1964)** stipulates that if any infectious disease develops and spreads or is likely to spread through Nepal or any part thereof, the **GoN** may take actions it deems necessary to root out or prevent the disease by issuing orders applicable to the general public or any group. Section 2 of the **Disaster Risk Reduction and Management Act, 2074 (2017)** defines non-natural disasters as “epidemics, pest or microbial

terror, various types of flu apart from other things.” Although these Acts envision disasters or pandemics, they do not appear to contain provisions dealing with the expiration of the statute of limitation, time-limit or date for appearance during such events.

52. Likewise, in the Civil and Criminal Codes and a few other laws, there are provisions to extend the time-limit, date for appearance for few days if there is a “*force majeure*.” The phrase “*force majeure*” as stated, seems to include situations “beyond personal control.” Generally, “*force majeure*” is understood as a personal circumstance and, as such, the law specifies that it is the responsibility of the concerned party to prove its occurrence. However, not every *force majeure* is of a personal nature. Disasters, such as flood, landslide, heavy snow, curfew, the non-operation of transportation and earthquake, are not merely situations of personal nature. The impact of these situations can exist on the local, regional or national level. The terms used in Section 58(e) of the **National Civil Code** like “disasters such as earthquake or volcano eruption etc.” can be interpreted to include the occurrence of disasters other than earthquake or volcanic eruption. Similar terminologies have been used in other laws as well. However, the full version of the aforementioned expression implies that these disasters have time limits through the use of terms like “commencement and cessation” or “beginning and end.” Although the “beginning or commencement” of the **COVID-19** disaster or pandemic can be stated, there is no way to predict its end or cessation. Likewise, Nepal’s prevailing laws do not seem to anticipate and include any appropriate provision to deal with this.
53. The **COVID-19** pandemic has emerged as an extraordinary and unimaginable situation. Right now, it is not possible to predict when it will end and how many human fatalities will have happened by the time it gets controlled. The terms “disasters such as earthquake or volcano eruption, etc.” are used in Section 58(e) of the **National Civil Procedure Code, 2074 (2017)**. It could even be argued that applying the *Ejusdem Generis Rule* to the phrase “disasters such as...” addresses the situation created by **COVID-19**. However, it does not seem possible to address the current situation or complexity by simply interpreting Section 58(e) using that principle of interpretation of law. This is because the provision only extends the statute of limitation for ten days, which implies a ‘beginning’ and ‘end’ of a disaster. Also, this appears to relate only to civil cases. Further, the duty to present proof of the disaster lies on the concerned person. In brief, Section 58 (e)

of the **National Civil Code** does not seem to cover a disaster like **COVID-19**, which has taken the form of a pandemic.³ Since the provision to extend the statute of limitation in existing laws like **the National Civil and Criminal Procedure Code** does not seem to adequately address the complexities caused by the **COVID-19** pandemic, we cannot assume we can address the problems resulted into by merely interpreting provisions of prevailing Act and Codes of Nepal.

54. In the thematic parts or chapters of **the National Penal Code, 2074 (2017)**, different period for the statute of limitation is prescribed based on the nature and gravity of the offense. **The Criminal Procedure Code** does not seem to mention anything about extending the statute of limitation. If there is no limit on the statute of limitation and the situation persists with no time limit to file the cases, it will create unjust and uncertain situations. It is the legislature's duty to prevent this. Therefore, the law must determine the exact period that the statute of limitation expires. Nevertheless, this does not mean that the same rigid approach to the statute of limitation must be applied in extraordinary circumstances, as it is in regular circumstances. Among all the Codes that Nepal has enacted, the Civil Code seems to have incorporated provisions regarding the inability to register the plaint within the given statute of limitation due to *force majeure*. However, the Criminal Code does not seem to have mentioned anything in this regard. The logical ground for this is not clear either. A *force majeure* is likely to affect parties to all kinds of civil and criminal disputes. If the statute of limitation can be extended in civil cases, but not in criminal cases, this leads to a situation of unequal treatment. In some cases, the subject matter of the same dispute encompasses both civil and criminal components. From the point of view of justice, it would be inappropriate to say that the statute of limitation can be extended in civil matters, but not in criminal matters. In regard to the "time-limit" Section 59(5) of **the National Criminal Procedure Code, 2074 (2017)** has incorporated the provision to extend time-limit in the event of *force majeure*. But a *force majeure* can also affect the statute of limitation. It appears justifiable to adopt the same criteria provided by Section 58 of **the National Civil Procedure Code, 2074 (2017)** for criminal cases. However, there is currently a legal gap on this issue.

³ **The Infectious Disease Act, 2020 (1964 AD)** or the Disaster Risk Reduction and Management Act, 2074 (2017 AD) has made some provisions regarding disasters. However, this does not seem to duly address the issue of the **COVID-19** pandemic.

55. In the present context, there seems to be no immediate problem in regard to the statute of limitation mentioned in **the National Penal Code**, in which a legal suit can be instituted at any time, the period of limitation has not been prescribed in the cases in which the **GoN** is a plaintiff. However, in individual party cases that have fixed, limited or short period for the statute of limitation, the **COVID-19** pandemic must be considered a complex, extraordinary and unjust situation. In the current pandemic situation, also in regard to time limit or date for appearance, legal ambiguity and complexity have aroused and could arise. There seem to be no appropriate provisions in the law to extend time limit or changed date for appearance to duly address the situation of **COVID-19**. It seems necessary to address this legal vacuum in a just manner.
56. In a petition filed by Advocate Tikaram Bhattarai and others, it is mentioned that an order should be issued pursuant to Article 133 exercising the power conferred by Article 126 and Article 128 of the **Constitution of Nepal**. In this context, the Report of the Case and Writ Division is also under consideration and a question has been raised about whether the gap can be filled by interpreting the law on the basis of the Report. The Full Court of the **Supreme Court** issued a decision held on 2076.12.07 (2020.03.20) regarding the statute of limitation, time-limit and date for appearance, which stated that a case can be registered within 10 days of the lockdown being lifted. However, the **Office of the Attorney General** mentioned in their Pleading Note that the legal basis for this decision is “weak.” Learned Joint-Attorney, Mr. Sanjeeb Raj Regmi, pleaded that the current issue should not be viewed as a controversy – and that the Constitution or law regarding this issue should not be interpreted in a way that establishes a system different from the law. Learned Senior Advocates – Mr. Chandeshwar Shrestha, Mr. Harihar Dahal, Mr. Khagendra Prasad Adhikari and Mr. Shambhu Thapa – who were present as “**Amicus Curie**,” pleaded that the Bench is capable of providing a resolution and it should do so. Further, they argued that it seems necessary to examine this issue in the context of Article 133 of the **Constitution of Nepal**.
57. While considering the aforementioned claims, since the Sub-Report under consideration and also the writ petition filed by Learned Advocate Mr. Tikaram Bhattarai and others have sought an order, with regard to the pending cases or the cases that may be filed in the Courts or judicial bodies, it does not seem purposive to assert that this issue is not seen in course

of trial of lawsuits by the Court. While Article 126(2) of the **Constitution of Nepal** provides that all shall abide by the orders or decisions made “in course of trial of lawsuits” by the courts. Article 128(4) of the Constitutional of Nepal provides that the courts must abide by any interpretation of the Constitution and law made by or any legal principle laid down by the **Supreme Court** “in course of trying a lawsuit.” The aforementioned phrase not only suggests cases of an individual nature, but also seems to include other situations that could require judicial interpretation. The issue raised here is not hypothetical – rather, this is a complex issue concerning registered cases and cases that may be registered in courts. To that end, this is also an issue of public interest and concern. There are many examples in which the **Supreme Court** that laid down legal principles *suo motu* and provided judicial remedy considering certain issues of public, interest and concern. The jurisprudential belief that victims must enter the court as a plaintiff or petitioner or their paths to judicial remedy remain closed has become an obsolete concept. The Report presented by the Court officials can be understood as the Court *suo motu* initiative, taking the issue into cognizance. The judiciaries of the United States of America, India, etc., also seem to issue *suo motu* orders in matters of important public interest or for judicial order on the basis of necessity and appropriateness. Given the extraordinary circumstances created by the **COVID-19** pandemic, this Court may also give *suo motu* order regarding important issues of public interest, which could protect the rights of the parties involved in disputes and maintain judicial order. Hence, from a procedural standpoint, there seems to be no hindrance in handing down a resolution to this issue.

58. To apply the law reasonably and purposefully, the principle of ‘**Equitable Tolling**’ is often applied. This notion insists that, in situations where a party could not complete the required case preparation despite various efforts,⁴ the statute of limitation should not be an obstacle in seeking access to justice. This concept could result in delayed cases due to private or individual issues. However, it should not be deemed ‘unfair’ to protect service recipients from the impacts the current state-initiated lockdown has affected on their access to justice – in particular, the statute of limitation, time-limit, date for appearance. The President of the Court of Cassation of France has stated that our modern way of life, human emotions and attitudes should

4 The Doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired - (Bryan A. Garner, Black’s Law Dictionary, 8th ed. Thomson West, USA 2005, page 460)

be viewed liberally while interpreting and using any law.⁵ In addition, the Swiss legal system has stated that justice should be delivered by considering what the legislature would do if it had made the law now.⁶ The **Supreme Court** of India has *suo motu* ordered to extend the statute of limitation due to the **COVID-19** pandemic.⁷ The judicial interpretation used by other nations gives us references as to consider what impact has been realized in such extraordinary circumstances on the statute of limitation, time-limit, date for appearance and other court-related issues.

59. When examining this issue, the Court is not merely considering the statute of limitation, time-limit, date for appearance. We must recognize that these matters are also interdependent and connected with managing the courts/cases and giving fair trial, access to justice and effective remedies, as well as protecting health and security. In extraordinary situations, it is not unnatural to issue an order that helps to manage the aforementioned issues. If the remedies provided in our existing laws cannot adequately enforce the fundamental rights conferred by the Constitution, this Court may, pursuant to Article 46 and 133(2), (3) of the Constitution, issue an appropriate order to provide a proper remedy. Objectively, a “proper remedy” is both a means and an end – it is a substantive, realization and a simple, easy and appropriate medium of such realization. Within the concept of an independent judiciary, in addition to the effective remedy provided by it, judicial process and managerial issues that are self-determined exercising the underlying rights in the process are also included. The provisions of Article 46 and Article 133 also incorporate this notion. In recent times, the legislature has had an attitude to consider the internal

5 “When a text expressed in imperative language is clear, precise, unambiguous, the judge must apply its literal meaning....But when the text is ambiguous, when there are doubts as to its meaning and intent, when it can be either restrained or extended or even contradicted by some other text, then, in my opinion, the judge has the widest power of interpretation; he must not then stubbornly (inflexible) attempt to ascertain what the original thought of the draftsmen of the Civil Code was 100 years ago; he must rather ask himself what their intention would be were that provision to be drafted by them today—in the face of all the changes which have come about in the last century in ideas, social manners, institutions, the economic and social condition of France, he must say to himself that justice and reason require that the text be liberally and humanely adapted to the realities and requirements of modern life”. - Rene David et.al., An Introduction to the Comparative Study of Law, 3rd ed., Stevens & Sons, at 120 (1985).

6 Konrad Zweigert et. al., Introduction To Comparative Law, 3rd ed., Oxford, at 18 (1998)

7 Supreme Court is found to have issued following order on March 23, 2020: “To obviate difficulties and to ensure that lawyers / litigants do not have to come physically to file such proceedings in respective Courts / Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings” (<https://ibclaw.in/sou-motu-writ-petition-civil-nos-3-2020-in-cognizance-for-extension-of-limitation-sc-23-03-2020/>)

procedural issues of the courts. Therefore, if this Court cannot fill a legal gap regarding the management of judicial process, it would contradict the concept of an independent and competent judiciary. During the **COVID-19** pandemic in the United States of America, either state Governors have issued executive orders or courts have issued orders to manage court proceedings, including the statute of limitation.⁸ In democracies that have long practiced constitutionalism, this decision to suspend the legislature's ability to handle the statute of limitation and rely on executive orders, instead has not been said to have a "weak" legal basis, nor these countries' Presidents, Governors or courts been credibly accused of suppressing their constitutions and laws. Considering this fact, there should be no doubts over this Court's ability to issue orders about judicial management using its constitutional authority in a disaster situation.

60. The term "competent judiciary" is used in the preamble of the **Constitution of Nepal**. This is very important terminology and carries a deep jurisprudential meaning. The expression "competent judiciary" implies that a judiciary is capable of interpreting and applying the law to protect the rights guaranteed by the Constitution in accordance with the basic tenets of democracy. The task of removing legal gaps in accordance with the spirit of the Constitution comes under the broader concept of "competent judiciary." Further, the concept of "the rule of law" allows this Court to maintain judicial adjudication, while ensuring that the *force majeure* is not interpreted as a person's personal misfortune. By internalizing this concept, Section 12 of the **National Civil Procedure Code, 2074 (2017)** has included a provision that "no judge may avoid deciding a case on the ground that law is inadequate or unclear" and that the "decision shall be made based on the recognized principles of law and justice." Since Article 128(2) of the **Constitution of Nepal** provides the **Supreme Court** with the "final authority to interpret the constitution and laws," it is necessary for this Court to take the situation of remedy seriously and fulfill its role of a "competent judiciary" as envisaged in the Constitution.

⁸ An example of an order issued as such is as follows:

"I hereby suspend, for the duration of this public health and civil preparedness emergency, unless earlier modified or terminated' by me, all statutory (1) location or venue requirements; (2) time requirements, statutes of limitation or other limitations or deadlines relating to service of process, Court proceedings or Court filings; Executive Order No. 7G (<https://jud.ct.gov/HomePDFs/Executive-Order-No-7G.pdf>)

61. Legal complications about the statute of limitation, time-limit, date for appearance etc. that have arisen due to the **COVID-19** pandemic should be taken into consideration with reference to clause (9) of Article 20 of the **Constitution of Nepal**. The Article states, “Every person shall have the right to a fair trial by an independent, impartial and competent Court or judicial body.” Section 10 of the **National Criminal Code, 2074 (2017)** also has a provision relating to a fair trial. The right to a fair trial also encompasses the right to meaningful and effective judicial remedies, including access to justice. Matters that pertain to ‘access to justice’ include a citizens’ right to receive documents that affect their case, as well as their ability to strategize for their cases or defenses; seek legal consultation; receive legal aid; prepare the necessary documents for their cases; access the court and register a case; prepare a note of defense, write memorandum of appeal; register a petition, etc. A person should have access to justice unless their negligence, indifference or inaction prevents them from accessing courts or judicial bodies, affecting his or her constitutional right to a fair trial. The complications relating to the statute of limitation, time-limit or date for appearance that might arise due to the **COVID-19** pandemic are not merely a private situation or an individual misfortune. Following the decision of the Full Court of the **Supreme Court held** on 2076.12.7 (20 March 2020), the **GoN**, courts and other judicial and quasi-judicial bodies went with lockdown. Various activities, as well as public and private institutions like government offices, schools, colleges, industrial establishments and public transportation were shut down during the lockdown. Even legal service providers, like lawyers, were barred from doing in-person work due to the lockdown. However, in a situation like this, preventing one from accessing courts or other judicial or quasi-judicial bodies on *non liquet*, which is unsupported by law, will adversely affect one’s right to a fair trial ensured by Article 20. Keeping this view in mind, it is seen as this Court’s duty to issue an order to resolve the difficulties that have arisen from this unusual situation.
62. Based on the constitutional capacity to issue an order, Article 133 of the **Constitution of Nepal** makes a provision that, “the **Supreme Court** shall, for the enforcement of the fundamental rights conferred by this Constitution or of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders, provide appropriate

remedies, enforce such right or settle such dispute.” Clause (3) of the same Article further states about the extra-ordinary jurisdiction under clause (2) that the **Supreme Court** may issue appropriate orders and writs including the writs of ***habeas corpus, mandamus***, certiorari, prohibition and quo warranto.” The conditions mentioned in clause (2) of Article 133 are sufficient while issuing an order according to clause (3) of Article 133. The report or writ petition filed reveals the situation like this is just a matter of normal procedure and a secondary issue. There is no dispute over the fact that the **COVID-19** pandemic is an issue of public interest and concern. The Court has deliberated about how our legal provisions do not adequately address the interruption of an individual’s fundamental or legal rights during the current pandemic. Following Article 46 and clause (2) and (3) of Article 133, it is the duty of the Court to issue an order regarding matters of public welfare, interest and concern in the present context, while fundamental or legal rights are being affected or are on the verge of being affected. This can be deemed as an inherent power of the Court and is reasonable to consider as constitutional “way out” addressing the legal complications emerging from the pandemic. There is no reason to question whether the use of “extraordinary power” provided to the **Supreme Court** by Article 133 of the Constitution can aptly address the legal complications and gaps created by **COVID-19** or similar extraordinary situations.

63. During this discourse a question was raised about the appropriateness of this Court to issue an order of a legislative nature, which would normally be addressed by drafting a law. Essentially, this question is related to the concept of separation of power. The **Constitution of Nepal** distributes state power, which includes the concept of the separation of power. Each organ and state body should exercise and perform their rights and duties within the jurisdiction set by the Constitution. There is no reason to dispute this matter. The judiciary is committed to performing its role and responsibilities within the boundaries set by the Constitution. The judiciary has also clarified its sensitivity towards constitutional limitations and responsibilities in the context of past disputes. The judiciary is alert and aware of its respective constitutional limitations. Therefore, we should not anticipate any violations of constitutional limitations while issuing an order in the present context. Bearing this in mind, we must also consider the fact that if the legislature had legal provisions to address the hardships, difficulties and legal gaps caused by **COVID-19**, it would not have been necessary for this Court to step in and deliberate about this matter. Such laws, though, have

not been drafted as of the date we are issuing this order. The context that has compelled us to discuss this issue speaks for itself – this hearing has not been undertaken due to special interests, whims, personal ambitions or intellectual luxury. This order is not intended to alter, amend, repel or displace any laws made by the legislature. This order neither creates new rights, ends existing rights nor creates any new obligations. This Court has always remained committed and sensitive towards performing its constitutional role, while remaining within the limitations set by the Constitution. We have maintained judicial self-restraint. This hearing has been conducted merely because of the adverse situation created by the **COVID-19** pandemic. Its sole aim is to address forthcoming legal complexities and difficulties by maintaining service recipients’ access to justice, protecting stakeholders’ health, ensuring fair trial and protecting the public rights, interests and concerns. This Bench has a clear opinion that it would be unwise – during this time of crisis – to abandon people’s expectations and exacerbate **COVID-19** havoc by hindering justice in the name of technical legal difficulties.

64. This Court also has a track record of making ‘Normative Provisions’ and resolving legal complications by issuing orders during difficult situations. For example, this Court issued a regulatory order to implement the right to information in order to address the legal gap existing in it.⁹ When there was a legal gap that exposed the confidentiality and identity of victims during court proceedings, this Court issued an order to protect their confidentiality and identity, which had a particular impact on women, children and people with HIV-AIDS.¹⁰ Likewise, this Court has issued orders and guidelines on various issues, including bringing up public interest disputes, which was equivalent to a Normative Provision.¹¹ This Court has also issued orders with Normative Provisions for the respect and protection of women working at cabin restaurants and dance bars.¹² These instances show that this Court has been in the practice of issuing orders to make minimum legal arrangements to protect individual’s rights, as well as and in the area of public interest. In situations when the law fails to anticipate the entire

9 Gopal Siwakoti *et. al.* V Ministry of Finance *et. al.* NLR 2051, Issue 4, Decision Number 4895

10 With received authority from the Forum for Women, Law and Development and also on her own behalf Advocate Sapana Pradhan Malla V **Government of Nepal**, OPMCM *et. al.* NLR 2064, issue 9, Decision Number 7880.

11 Bhimsen Pokharel *et. al.* V Secretariat of legislative parliament *et. al.* NLR 2070, issue 1, Decision Number 8940 (Full Court)

12 Prakash Mani Sharma *et al.* on behalf of Forum for Protection of Public Interest V Ministry of Women, Children and Social Welfare *et. al.*, NLR. 2065, Decision Number 8005, p. 999.

circumstance or the enforcement of the law creates injustice, it is the duty of this Court to maintain justice by following a purposive interpretation of the law rather than a literal, narrow and technical interpretation. This Court cannot disincline from performing this duty.¹³ Since extending the statute of limitation or time-limit or date for appearance is a legal facility provided to resolve the problem on the part of the party to a case unless misused, its benefit generally entitles the related party. The judicial system does not intend to hinder an individual from substantial matters in name of “technical problems.” One of the purposes of extending the statute of limitation, time-limit and date for appearance is to ensure that service recipients have access to justice. This Court has also interpreted that it must conduct research on how parties can get justice and to what extent minor technical issues create obstacles for them, and then work towards resolving these problems.¹⁴

65. Hence, to safeguard the concept of an **“independent, impartial and competent judiciary”** as enshrined in the preamble of the **Constitution of Nepal** and ensure the service recipients, right to access to justice and a fair trial pursuant to Article 20(9), the right to health pursuant to Article 35 and the right to constitutional remedies ensured by Article 46 of the Constitution, using the powers vested in the judiciary, along with the powers pursuant to Article 126, 128 and clause (2) and (3) of Article 133 of the Constitution, observing the necessity to manage in an appropriate manner by addressing the hardships, difficulties and inconveniences caused by **COVID-19** and considering the pandemic or grave crisis that may arise in future, in the present matter of public interest and concern, this order is hereby issued, to take or cause to take the following action in the following matters:
- A. Consider the period from 2076 *Chaitra* 9 (22 March 2020) – which is the date when regular court services were suspended as per the decision of the Full Court of the **Supreme Court** on 2076.12.7 (20 March 2020) – until the future date of the lockdown being lifted as “Zero Period.” This **“Zero Period”** shall not be counted in the context of all types of legal proceedings,

¹³ It is relevant to quote the following statements regarding “purposive interpretation”:

- A. “Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary - so as to do what Parliament would have done, had they had the situation in mind” - (Lord Denning in **Nothman v Barnet London Borough Council [1978] 1 All ER 1243**);
- B. “To apply the words literally is to defeat the obvious intention of the legislature and to produce a wholly unreasonable result. To achieve the obvious intention and to produce a reasonable result we must do some violence to the words...” - (Lord Reid in **Luke v IRC [1963] AC 557**).

¹⁴ Yamunadevi Chaudhary et. al. V Chandrakant Mandal et al. , NLR 2066, *Chaitra*, Issue 12, Decision Number 8284, p. 2027

many of which is paperwork that is required to be presented before any court of law or judicial or quasi-judicial body. These legal proceedings include the expiration of the statute of limitation, specific time-limit, date for appearance and filing of Plaint, the note of defense, charge-sheets, appeal and petition that have prescribed time-limit for submission, as well as written responses, applications for the execution of judgment, etc.

- B. If the statute of limitations or the time-limit to present oneself before court or the adjudicating authority (to file a plaint, charge sheet, note of defense or a statement equivalent to the Note of Defense, appeal or petition) did not expire by 2076.12.9 (22 March 2020) when the services provided by the court were suspended, but they expired during lockdown, in such situation, to consider that it is within the statute of limitation or time-limit and not as expired and consider it for adjudication and hearing as per the law, if anyone furnishes, fulfilling all other legal requirements, the plaint, Note of Defense, charge-sheet, statement equivalent to Note of Defense, appeal or petition or presents oneself on the appointed date for appearance within 30 (thirty) days from the date of lifting the Lockdown, excluding the time required for travel. According to the circumstances and context, this provision shall be applied to all types of proceedings including civil, criminal, and writ petitions.

Explanation:

- i. Regarding paragraph 65 (B): unless the subject or context specifies otherwise, a “petition” refers to a petition equivalent to the plaint; a petition made during a court hearing; an appeal against detention order; an interlocutory order made in a case; a petition for revision; a petition for leave to appeal; a petition for review; a petition for the execution of judgment; a petition to reduce penalty or fine; or any other petition of similar nature that has to be furnished before the court within certain period of time for judicial proceedings.
- ii. For the purpose of this Order, the meaning of “lifting the lockdown” shall be interpreted as follows:
 - (1) If the lockdown is lifted in the district where the service recipient resides, but the lockdown continues in the district/rural municipality/municipality where the service will be received, then the lockdown will not be considered lifted.
 - (2) If the lockdown is lifted in both the district/rural municipality/municipality where the service recipient resides and the district/rural municipality/municipality where service is provided, but the lockdown is in effect in districts that the service recipient will travel en route to the court location, then the

- lockdown shall not be considered lifted. **For example**, if a service recipient from Dang has to travel to the court in Kanchanpur, but there is a lockdown in Banke, Bardiya or Kailali, then the lockdown shall not be considered lifted.
- (3) If an order has been issued to lift the lockdown at the national or district level, but the service recipients reside in a local, village municipality/municipality/ward-area or any part thereof where lockdown and travel ban is in effect, then a 30-day extension period as mentioned above in Paragraph 65 (B), shall commence from the date, the lockdown is lifted in that area.
 - (4) If aspects of the lockdown are lifted – like stay-at-home or travel restrictions – but public transportation is not yet in operation, then the lockdown will not be considered lifted.
 - (5) If the lockdown is re-imposed in any rural municipality, municipality or district or in the whole country within 30 days of lifting of the lockdown, then the lockdown should be treated as if it had never been lifted and the same rules will go into effect
 - (6) If a service recipient or their legal representative are in situations outlined in paragraphs (1), (2), (3) or (4) but come for their court services while the court is open, there shall not be any legal impediment to provide services to him or her.
- C. The facility as per this order shall not be provided to those whose date for appearance has already expired before the commencement of the nationwide lockdown (prior to 2076.12.09 [2020.03.22]) as there is no legal merit to extend it. However, if a service recipient's date for appearance is expired due to the lockdown and they present themselves before the court or the related judicial or quasi-judicial body within 30 days from the date of lifted lockdown, the date for appearance shall not be considered expired and other proceedings shall continue by keeping them on recognizance.
- D. Since the lockdown was put into effect on 2076.12.9 (22 March 2020), the concerned court or adjudicating authority shall take this matter into the judicial notice by itself as per clause (f) of Sub-Section (1) of Section 5 and Sub-section (2) of Section 5 of the Evidence Act, 2031 (1974). The concerned parties shall not be required to submit any proof of the lockdown through an application or disclose the causes regarding the expiry of the statute of limitation, time-limit or date for appearance as per Section 59, Section 225 (2) of **the National Civil Procedure Code, 2074 (2017)**, Section 59 of **the National Criminal Procedure Code, 2074 (2017)** or other provisions of the same nature and purpose present in other prevailing laws.

- E. To file an appeal, as per Section 131 of **the National Criminal Procedure Code, 2074 (2017)**, and Section 205 of **the National Civil Procedure Code, 2074 (2017)** and other prevailing laws of Nepal, considering the date of lifting of Lockdown as the authentication date for the judgment that were authenticated prior to the commencement of the lockdown and that had time-limit to appeal till the date of commencement of the lockdown *i.e.* 2076.12.9 (22 March 2020), or for judgments that have been authenticated during the period of the Lockdown, the appeal shall be registered maintaining the time-limit accordingly.
- F. If parties are unable to submit the court fee at the time they register their cases, a facility may be granted that the party may not submit the court fee for the time being; this can only be determined after examining the nature of the dispute, the claimed amount mentioned in the case and the documents presented at the time, including the plaint and petition. If it seems reasonable, the facility may be granted even if there no agency has submitted a recommendation justifying the party's weak financial condition.
- G. If a service recipient still has an unreasonable statute of limitation, time-limit, or date for appearance after 30 (thirty) days from the date of the lockdown being lifted, then the statute of limitation time-limit shall be extended in his or her case as per the prevailing law (*i.e.*, beyond 30 days after the day of the lockdown being lifted).
- H. The facility provided by this Order to the disputing parties (service recipients) in the context of the lockdown shall have no effect upon the matters relating to the extendable statute of limitation, time-limit or date for appearance as per the prevailing law. He or she shall be given the time, chance, opportunity or facility provided by the prevailing laws.
- I. The facilities mentioned in this Order shall be applied to various legal disputes, including both civil and criminal writ petitions heard by all kinds of judicial and quasi-judicial bodies.
- J. No issue mentioned in this Order should have adverse effects on certain matters. These include presenting an arrested person before the adjudicating authority within 24 hours (excluding the time required to travel in criminal cases), keeping the accused in custody and not keeping the accused in detention beyond the prescribed duration of custody/detention as specified by the law. Regarding these matters, the time-limit shall be the same as provided in prevailing laws.
- K. The facility as provided by this Order shall also be provided, as per the context, to court-referred mediation and arbitration-related proceedings.

- L. In cases that require conducting separate hearings within 30 days of sentencing, pursuant to provisions of **the Criminal Offence (Sentencing and Execution) Act, 2074 (2017)**, but the hearing could not be conducted due to the lockdown, the sentencing hearing shall be completed within 30 days from the date of lifting the lockdown, in all related cases. This must be achieved by determining the schedule, along with fixing the date of hearing. However, in cases in which a defendant on recognizance will be sentenced, the sentence determination shall be completed within 30 days of his or her appearance in the court for recognizance.
- M. If a service recipient is in a foreign country affected by the **COVID-19** lockdown and cannot travel to Nepal, the facility as per this Order shall be granted within 30 days from the date of travel services being into operation again that would allow him or her to travel to Nepal. To receive this facility, he or she needs to present an application, along with proof of their stay in the foreign country, proof that travel services were not in operation.
- N. If a person is required to be present in court within 30 days of lockdown being lifted, the service recipient must quarantine before he or she visits the court. In this instance, his or her statute of limitation, time-limit or date for appearance shall not be considered expired if he or she presents to the court within 15 days from the date of being released from quarantine, excluding the time required to travel, along with an authentic written document from the concerned doctor or government bodies proving their stay in quarantine release therefrom.
- O. In case any dilemma arises while implementing the judicial or quasi-judicial proceedings not mentioned in this Order, the matters mentioned in this Order may be applied without adversely affecting its continuous acceptability.
- P. If the party or his or her legal representative is unable to appear before the court due to the **COVID-19** pandemic, the court may make necessary arrangements for them to submit the plaint, a note of defense or petition to the concerned court through electronic means and provide the date for appearance through electronic means. This Order hereby directs the Court administration to determine the necessary procedure and *modus operandi* in this regard and implement it.
- Q. Considering the possibility that a large number of service recipients may come to court after lockdown is lifted, each court shall formulate and implement an action plan in order to manage service delivery. For the first three days, after the lockdown is lifted, internal preparation for the service delivery shall be done and thereafter, arrangements shall be made for an organized and regular operation. The prepared schedule shall be published and broadcasted through the appropriate media channels to inform

stakeholders. This order hereby directs court administrations to make the necessary arrangements in this regard.

66. As mentioned in the **Report of the Case and Writ Division** and the writ petition, this Bench does not need to consider issues related to court and case management that are of an administrative nature, as they can be resolved at the administrative management level.
67. This Bench expresses its heartfelt thanks to the petitioners who submitted the motion of public interest in this regard. This include Petitioners; Reporters; the Learned Attorney Generals who submitted Pleading Note as ***Amicus Curiae***; Learned Senior Advocates; Learned Advocates; the Learned Joint-Attorney, Mr. Sanjeeb Raj Regmi, who pleaded before the Bench, along with submitting a Pleading Note as ***Amicus Curiae***; the Learned Advocate, Mr. Ishwari Prasad Bhattarai, who assisted by providing the Pleading Note; Chief Registrar, Mr. Nripadhowj Niroula; Registrars Mr. Lal Bahadur Kunwar and Mr. Narayan Prasad Panthee; Joint Registrars Mr. Narayan Prasad Regmi, Mr. Bimal Poudel, Mr. Netra Prakash Acharya and Mr. Bed Prasad Upreti; and all related Civil Servants including Mr. Bhim Bahadur Niraula, Mr. Dhruva Raj Karki and Mr. Uddhav Prasad Gajurel who facilitated in the hearing process and preparation of this Order.
68. It is hereby directed that the notice of this order be sent to all subordinate the High Courts, the District Courts, the Special Court, Tribunals, the Office of the Attorney General, Nepal Bar Association, and the Supreme Court Bar. Also, let the ministries associate with various bodies and offices involved in judicial proceedings (Quasi-Judicial Bodies) be notified of this order.
69. Let the case file be handed over to Record Section striking off the registration details of this Petition as per the rules.

Justice

We concur to the above opinion.

Justice	Justice	Justice	Chief Justice	
Justice	Justice	Justice	Justice	Justice
Justice	Justice	Justice	Justice	Justice
Justice	Justice	Justice	Justice	Justice

Done on 28 May 2020.

2

Date of Order	Writ No.	NLR/Year/Decision No.
8 June 2020	076-WH-0364	2020

Supreme Court, Division Bench

Rt. Hon'ble Chief Justice Cholendra Shumsher JBR
Hon'ble Justice Sapana Pradhan Malla

Writ No:
076-WH-0364

Subject: Habeas Corpus

Case: Habeas Corpus

Petitioners: Advocate Ajay Shankar Jha "Rupesh" on behalf of M. Kumar (pseudonym) Petitioner

Versus

Khotang District Court Respondent

The facts in brief and order of the Writ petition filed pursuant to Articles 46 and 133 (2) and (3) of the **Constitution of Nepal** are as follows:

Regarding a case in which the **GoN** was the plaintiff and M. Kumar (pseudonym) was the defendant, the Khotang District Court, on 28 December 2010, convicted a minor of attempted rape and sentenced him to three years and four months in prison under Section 219 (3) (d) and Section 34 (3) of the **National Penal Code, 2017** and Section 36 (4) of the **Act Relating to the Rights of Children, 2018**. Since then, the minor has been imprisoned at Juvenile Reform Homes. However, since the country is currently experiencing pandemic, the petitioners argue that his life, too, is in danger. Pursuant to the decision on 29 March 2020 by the Full Court of the **Supreme Court** regarding the Control, Prevention and Management of the current pandemic, the defendant's guardian, his brother Suresh Rai, filed a petition in Khotang District Court. This petition requested M. Kumar's release into his guardian's custody, with the condition to go to court when summoned. In response to the petition, the Khotang District Court issued an order on 2 April 2020 denying his release. This order encroached the

fundamental rights of the writ petitioner as provided by Articles 17(1), 18(1)(2) and (3), 20(9), 22 (1), 30 (1), 35 (3) (4), 36 (2) and 39 (2) (8) of the **Constitution of Nepal**. Therefore, an order including ***habeas corpus*** pursuant to Rule 34 and 37 of the **Supreme Court Rules, 2017** is sought, stating the release of M. Kumar to his guardian, with the condition to go to court when summoned.

1. On 27 May 2020, this Court issued an order asking the respondent to submit more facts about his case. Why should an order of ***habeas corpus*** be issued? Considering the current circumstances of the lockdown, send a copy of the writ petition, along with a copy of the notice of the time-limit in the name of the respondent. The respondent should also submit a written reply, including the reasons why the order should not to be issued within three days via email through the **Office of the Attorney General**. The case will then be presented after the **Office of the Attorney General** is informed and a written reply is received for further hearing or after the expiry of the time-limit.

2. Rejoinder of Khotang District Court

Regarding the case in which the **GoN** was the plaintiff and M. Kumar (pseudonym) was the defendant, the Khotang District Court, on 28 December 2010, convicted a minor of attempted rape and sentenced him to three years and four months in prison under Section 219 (3) (d) and Section 34 (3) of the **National Penal Code, 2017** and Section 36 (4) of the **Act Relating to the Rights of Children, 2018**. Since then, the minor has been imprisoned at Juvenile Reform Home. However, since the country is currently experiencing a pandemic, the petitioners argue that his life, too, is in danger. Pursuant to the decision on 29 March 2020 by the Full Court of the **Supreme Court** regarding the Control, Prevention and Management of the current pandemic, the defendant's guardian, his brother Suresh Rai, filed a petition in Khotang District Court. This petition requested M. Kumar's release into his guardian's custody, with the condition to go to court when summoned. In response to the petition, the Khotang District Court issued an order on 2 April 2020 denying his release. After analysing the risk of infection in children, as well as arrangements to control that risk and mitigate the impact of the pandemic in Juvenile Reform Homes stated that their homes were safe and were adhering all the health and safety measures. They determined this on the basis of the fact that there were no active cases of **COVID-19** found in their homes, external entry to

the reform homes were controlled, and parental visits were also limited. Thus, there was no need to immediately release the minor from a Juvenile Reform Home into the custody of his guardian.

3. In the present writ petition presented before the bench scheduled in the cause-list as per the rule, the pleading of the Learned Advocates, Mr. Ajay Shankar Jha “Rupesh” and Mr. Pankaj Kumar Karna, were heard. They claimed that the minor defendant M. Kumar had been commencing his imprisonment at the Juvenile Reform Home as per the decision of the Khotang District Court on 29 December 2019. The guardian of the minor petitioned for his release. They argued that denying his release is against the essence of the Constitution and the **Act relating to the Rights of Children, 2018**, and that an order as claimed by the plaintiff should be issued.
4. After studying the petition, along with the case file duly submitted to this Bench, and hearing the argument of the Learned Advocates who appeared on behalf of the petitioner, the Court must decide whether the petitioner’s requested order should be issued or not?
5. While considering upon the question to be decided, according to Khotang District Court’s verdict dated 29.12.2019 in the case of rape having the **GoN** as plaintiff by the FIR of J. Kumar (psydonym) and M. Kumar (psydonym) as defendant, the accused was convicted of attempted rape and was sentenced to 3 years and 4 months imprisonment. Through this writ petition and the rejoinder of the Khotang District Court, it is established that the petitioner is currently put in Juvenile Reform Home. While the juvenile has been serving his sentence there as per the decision of the court, the Full Court of the **Supreme Court** decided held on 20 April 2020 to hand over imprisoned juveniles to their parents or guardians if an application is made giving condition to present them in court when summoned. Pursuant to this order of the Full Court, the guardian of M. Kumar filed an application in the District Court seeking his release. However, the District Court denied the release. A writ petition has been filed on behalf of the petitioner seeking to annul that order.
6. Considering the writ petition filed against the aforementioned order, the country is currently in a state of lockdown due to the corona virus (**COVID-19**) pandemic. The purpose of lockdown is to maintain physical

and social distance to protect the interest of every child, citizen or group of citizens by reducing the risk of infection. Children in Juvenile Reform Homes also need to be protected from the risk of **COVID-19**. Article 39 (9) of the **Constitution of Nepal** states that children who are vulnerable shall have the right to special protection and facilities from the State. Further, Section 16 (1) of the **Act Relating to Children, 2018** provides that officials in every organization and institution that carry out activities related to children shall adopt a child-friendly process by giving priority to the best interests of children while conducting their activities. Section 16(2) adds that it is the responsibility of everyone to instantly help children whose lives are at risk. Further, Section 36(5) of the **Act Relating to Children, 2018** states that the Juvenile Court shall, having regard, inter alia, to the age, sex and maturity of the child who is held, postpone the child's punishment or make decisions about his or her punishment pursuant to subsection (2), (3) or (4) based on the nature of the offence and the circumstances of the commission of the offence, with or without specifying the terms and conditions.

7. This petition was filed under the writ of ***habeas corpus***, claiming the obstruction of alternative remedies because of the pandemic. The right to alternative remedies is also being hampered due to lockdown, preventing access to justice. However, even during the lockdown, no fundamental rights have been suspended and the right to remedy is still available. When the right to remedy remains available, but access to justice is obstructed (in this case, due to the lockdown), a person's inherent human rights are violated. Therefore, precautions should be taken to protect the interest, life and health of the citizen of Nepal from the terror of **COVID-19**. This accountability belongs to every organ and body of the state. The Court, too, cannot refrain from this accountability. Thus, an appropriate order should be issued in this petition of ***habeas corpus*** regarding children who are at risk in Juvenile Reform Home.
8. Children in Juvenile Reform Home have the right to life as per Article 16 of the Constitution. They also have a right to health, for which the state has a responsibility to protect. Since the Juvenile Reform Home where the petitioner stays has no way to safely manage social distancing, and offers no protection in case of a health risk due to excessive number of children staying there, the order of Khotang District Court dated 2 April 2020 does not seem relevant and just during the **COVID-19** pandemic.

9. Sending a child to detention centres or **Juvenile Reform Home** to serve his or her sentence should jeopardise their lives. Rather, the intention behind sending them is to take specific measures to rehabilitate them. Juvenile Reform Homes are the last resort. Section 36 of the **Act Relating to Children, 2018** provides alternatives to keep children in Juvenile Reform Home. This Court already issued an order on 26 April 2020 in the case of **076-WH-0329**, stating that, in this situation of panic due to the pandemic, decision-makers should seek appropriate legal alternatives to prevent and reduce the risk of infection.
10. Therefore, based on the aforementioned foundations and reasons, in today's unusual and difficult situation created by the **COVID-19**, the order of Khotang District Court dated 2 April 2020 has been overturned by the order of *certiorari*. Since the pandemic has hindered people's rights to alternative remedies, an order of *mandamus* is issued in the name of Khotang District Court. This order is issued to protect the health of children who are in a state of risk at Juvenile Reform Home; to search for other legal alternatives as per Section 36 (5) of the **Act Relating to Children, 2018**; and to hand over M. Kumar to his parents after completing the necessary procedures if they agree to present him when sought. Since a brief order has been issued and discussed via letter No. 773-3-333978, dated 9 June 2020, in the name of Khotang District Court as per the aforementioned order to re-order in the matter regarding to release the petitioner to his guardians, there is no need to say anything else regarding the *habeas corpus* petition. Let the case file be handed over to Record Section striking off the registration details of this Petition as per the rules.

Justice

I concur with the above opinion.

Justice

Done on 8 June 2020.

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Date of Order	Writ No.	NLR/Year/Decision No.
3 August 2020	076-WO-0939	10509

Supreme Court, Division Bench

Hon'ble Justice Sapana Pradhan Malla

Hon'ble Justice Prakash Kumar Dhungana

Writ No:

076-WO-0939

Case: Mandamus *et.al.*

Petitioners: Gopal Siwakoti (Chintan), permanent resident of Kathmandu District, Kirtipur Municipality Ward No. 6, currently detained in Central Jail, Kathmandu 1

Ram Sharma, permanent resident of Jumla District, Dolpa Village Development Committee Ward No. 8, now Sinja Village Municipality Ward No.2, currently detained in Central Jail, Kathmandu..... 1

Writ petitioner

Man Bahadur Raut, permanent resident of Jajarkot District, Dasera Ward No. 9, currently detained in Central Jail, Kathmandu 1

Khim Bahadur Sunar, permanent resident of Rukum District, Nuwakot-7, currently detained in Central Jail, Kathmandu 1

Badri Kumar Thapa permanent resident of Kathmandu District, Tokha Municipality Ward No. 12, currently detained in Central Jail, Kathmandu 1

Versus

The Office of the Prime Minister and Council of Minister, Singha Durbar, Kathmandu 1

The Ministry of Home Affairs, Singha Durbar, Kathmandu..... 1

Respondent

The Office of the Attorney General, Ramshahpath, Kathmandu.....	1
Prison Management Department, Kalikasthan, Kathmandu	1
District Administration Office, Babarmahal, Kathmandu	1
Prison Office, Jagannathdewal, Kathmandu	1

The facts in brief and order of the writ petition filed as per Articles 46 and 133 (2) of the **Constitution of Nepal** under the extraordinary jurisdiction of this Court are as follows:

Fact Section

1. Writ Petition

- a) The reports from the **Ministry of Home Affairs**, the **GoN** and the **Office of the Attorney General** have detailed the fact that thousands of prisoners are currently being held in detention centres and prisons at high number that exceeds capacity. This violates national and international standards set concerning the rights, interests, and facilities of prisoners. The lives of detainees and prisoners—which are at risk even during normal circumstances due to dilapidated prison buildings, poor facilities and poor cleanliness – have now become even more dangerous because of **COVID-19**. However, the respondent has been completely silent about 25,000 detainees and prisoners who face these conditions, even in normal situations. .
- b) Article 16 of the **Constitution of Nepal** guarantees the right of every person to live with dignity and Article 18 guarantees their right to equality. This right is intrinsically related to the right to clean environment, which is provided by Article 30, and the right to health, which is guaranteed in Article 35 of the Constitution. These rights apply to detainees and prisoners as well. The provisions of the **Prison Act** and its regulations on the rights, interests and facilities of detainees and prisoners seem to be ignored. As provisioned by Rule 29(1) of the prevailing **Prison Regulations, 1964**, prisoners who show good behaviour may have their sentences reduced by a maximum of 60 per cent of the prescribed sentence. Further, Sub-Rule (2a) of the same Rule provides that prisoners with good behaviour who are at the age of 65 and older may have their sentences reduced by a maximum of 75 per cent of the prescribed imprisonment. In addition, punishment can be reduced for prisoners with certain physical disabilities or illnesses, like seriously impaired vision, disable to walk and/or being bedridden without the possibility of recovery, as verified by the government doctor. Section 2 (a)

of the **Senior Citizens Act, 2006** defines a senior citizen of Nepal as a person at the age of 60 or older. In the case of prisoners, Section 12 (1) of the **Senior Citizens Act, 2006** provides that, in relation to senior citizen who has been imposed the punishment of imprisonment in a state party case serving the sentence, the sentence of imprisonment may be rebated because of his or her age and the nature of offense not exceeding twenty-five percent in the case of senior citizen who has completed the age of sixty-five years, but not completed the age of seventy years, not exceeding fifty per cent in the case of the senior citizen who has completed the age of seventy years, but not completed the age of seventy-five years, not exceeding seventy-five percent in the case of the senior citizen who has completed the age of seventy-five years. However, even in normal circumstances, the respondents have not maintained records concerning these prisoners and have not taken any action to exempt or reduce their sentences.

- c) Facilities provided to the prisoners under the **Criminal Offenses (Sentencing and Execution) Act, 2017** have not yet been implemented. The respondents are completely silent regarding the implementation of the following Sections: Section 22, which orders prisoners to engage in community service; Section 25, which allows some to be sent to reform homes; Section 26, which allows some to be sent to rehabilitation centres; Section 27, which allows some to stay in prison only on the weekends or overnight; Section 28, which allows some to be kept in open prisons; Section 29, which allows some to be kept on parole; Section 30, which stipulates that all prisoners must get time to socialize; Section 3, which allows some to engage in physical labour in lieu of imprisonment; Section 49, which stipulates rules about probation and parole officers; Section 35, which stipulate that prisoners with mental illness may stay in a hospitals or medical centres; and Section 37, which discusses remission of imprisonment. The **GoN** has published some of these provisions in *Nepal Gazette*, which mentions dates for implementing them, but no actions have been taken. The delay of the respondents should not continue to affect the facilities of these citizens.
- d) It is relevant to draw the court's attention to different reformatory systems around the world, which have been used to socialize prisoners and to reduce prison capacities. Many countries, by reason of prisoners being people under the absolute control of the state, have provisions to provide exemption in imprisonment and amnesty by counting the public holidays during the period of imprisonment. In Nepal too, if public holidays are counted as "time served" towards prisoner's sentence, then nearly 33 per cent of their imprisonment could be reduced. This is called a "negative list," and if

these prisoners were to be exempted, then a large per cent of the prison population would be reduced. This would definitely assist in minimizing the number of prisons, thus reducing the state's economic burden. However, it is clear that the respondents have not taken any concrete, positive and constructive steps toward this, even though they are aware that the number of offenders on such a negative list is high in prisons across Nepal.

- e) Article 4 of the **International Covenant on Civil and Political Rights (1966)** guarantees the right to life. It also protects the right of every person to receive prompt justice from an independent and impartial judiciary under Article 14. However, it is undisputed that, due to the respondents' inactivity and silence, prisoners' rights under the Constitution and prevailing laws have been breached.

2. Remedy Claimed

On the basis of the facts, laws and precedents mentioned above, for the issuance of a directive, order or warrant pursuant to Articles 46 and 133 (2) of the Constitution, the claim as per the petition is as follows

- a) An order of **mandamus** is hereby issued for the mandatory compliance and protection of fundamental rights guaranteed under Articles 16, 18, 30 and 35 of the Constitution with regard to prisoners To prevent the spread of **COVID-19**, the order also restricts gatherings of more than 25 people in one place and makes social distancing, masks and other means of sanitation mandatory, as recommended by the WHO and the respondent, the **GoN**.
- b) Three prisons under the Prison Office at Jaggannathdewal hold about 3,137 prisoners, but its holding capacity is only about 1,800. Considering the present situation, for actual and effective adherence to the standards set by the WHO and the **GoN**, the Court sees no other alternatives to reduce overcrowding in prisons, in order to protect prisoners' fundamental rights to live in a clean environment and have good health equal to other citizens. To immediately address these issues, Section 22, 25, 26, 27, 28, 29, 30 and 49 of the **Criminal Offenses (Sentencing and Execution) Act, 2017** must be implemented immediately in accordance with Article 1 (2) of the same Act. Further, keeping in mind modern reformatory principles and the criminal justice system worldwide, especially with relation to parole, necessary legal arrangements must be made to remove the negative lists of offense in regard to the exemption of punishment.
- c) In accordance with the prevailing **Prison Regulations, 1964**, Rule 29 (1) and Section 2 (a) and 12 of the **Senior Citizens Act, 2006**, daily records must be maintained in order to assess prisoners' facilities.

- d) Exemption and amnesty must be provided to offenders who are on the negative list as per the prevailing law, as well as older prisoners who face serious health risks by **COVID-19**, through the declaration of amnesty by the Hon'ble President pursuant to Article 276 of the Constitution
- e) Considering the current situation of heightened risk, arrangements must be made to exempt the sentences of prisoners who have already completed their sentence or are legally eligible for exemption and amnesty, but are compelled to stay in prison because they cannot pay their fine.
- f) After consulting practices applied by other countries, a directive order must be issued to make the necessary laws to exempt prisoners by counting public holidays.
- g) To protect the life and fundamental right to health of prisoners during the pandemic, a directive order must be issued to release and cause to release all prisoners from prisons on the date of their release or spot bail during the trial.
- h) A directive order must be issued to immediately implement the reports of the respondent the **Ministry of Home Affairs** and the **Office of the Attorney General** in order to reduce difficulties and overcrowding in detention centres and prisons.

3. Show Cause Order of this Court (15 April 2020)

What happened in this matter? Why has the order not been issued as per the claim of the petitioner? If there is any reason or grounds for not issuing the order, a summon is hereby issued for the respondent to submit a reply thereof in writing and a copy of the writ petition through the **Office of the Attorney General** within seven days from the date of receipt of the order, and to present the case accordingly after the receipt of the rejoinder or after the lapse of the time limit.

4. Rejoinder from the Prison Office, Jaggannathdewal

The writ petitioners are serving prison sentences for the following reasons. Gopal Siwakoti and Badri Kumar Thapa were detained for cheating, according to a letter dated 13 March, Ref. No. 6433 of Kathmandu District Court. Ram Sharma is serving a sentence for homicide, according to a letter dated 8 April 2016, Ref. No. 860 of Jumla District Court. Manbahadur Rawat was detained for narcotic drugs, according to letter dated 12 May 2010 numbered 2181 of Kathmandu District Court. Khim Bahadur Sunar was detained for cheating, according to a letter dated 9 September 2010, Ref. No. 1726 of Banke District Court/ Omprakash Poudel alias Omprakash

Upadhyaya was detained for forgery, according to a letter dated **22 December 2019, Case No. 075-CI-1849** of Kathmandu District Court. Prakash Ojha was detained for human trafficking, according to a letter dated 2 October 2017, Ref. No. 11891 of Sunsari District Court. The writ petition must be quashed.

5. Rejoinder from the Department of Prison Management

High caution has been taken in all prisons to prevent the spread of **COVID-19**. At present, outside visitors are barred from entering the prisons. Prison transfers have been halted, except in emergencies. Arrangements have been made to keep 15 beds in the prison hospital of Jaggannathdewal and 10 tents accommodating 20 people have been set up for isolation in the prison factory premises with the help of the Red Cross. A quarantine room has been set up in the women's ward of Nakkhu prison to accommodate up to 100 prisoners. The psychosocial hospital within the premise of Nakkhu prison has been converted into an isolation centre able to accommodate 20 prisoners. Quarantine rooms have been set up in Sunsari, Kavrepalanchowk and other prisons. Thanks to Human Rights Council Nepal and the Early Childhood Development Center, 109 units of **personal protective equipment (PPE)**, masks and gloves have also been made available and distributed in the required prisons. Additional distribution is also taking place. As per the decision of the meeting convened by the Hon'ble Attorney General on 16 April 2020.04.16, instructions have been given to all the prisons for giving inmates medical treatment when they are brought in from outside. As per the order/press release of the **Supreme Court** dated 20 March 2021, a total of 426 prisoners have been released from 207 prisons and 219 from juvenile detention centers. As the pandemic management is a nationwide challenge and the entire country is in lockdown, and because certain actions like releasing prisoners/detainees and giving amnesty and exemption are being carried out in accordance with the policy, current legal provisions and norms of the **GoN** will be managed by this department as directed by the **GoN** in the coming days. The writ petition filed against this prison management department must be quashed.

6. Rejoinder submitted from the Office of the Attorney General

The writ petition mentions reports submitted by **the Office of the Attorney General**. Further, the government attorney delegated by the Office to the **GoN** inquired whether prisoners are treated humanely. Therefore, it is clear that the writ petitioners have admitted that the attorney general and

its Office have always been protected the constitutional rights of prisoners. Further, the issue of granting exemption and amnesty as per the prevailing law to prisoners who show good behaviour is a matter that must be taken up by the concerned bodies of the **GoN**. They are taking measures in this regard, and in the present situation of the **COVID-19** pandemic, to prevent infection inside the prisons, the bodies responsible for managing detentions centres and prisons are taking the necessary measures. As such, there has been no violation of the constitutional and legal rights of prisoners by any act of this Office. The writ petition must be quashed.

7. Rejoinder submitted from the Ministry of Home Affairs

The **GoN** is committed to respecting the constitutional and legal rights and interests of the citizen of Nepal by enforcing the Constitution and law. The **Public Health Services Act, 2018** has been issued and is being implemented to make health services regularly available, effective, qualitative and accessible to all. The **National Health Policy, 2019** has been implemented, and work is being carried out accordingly, to immediately manage health-related disasters that may occur at any time, and to promote, protect, improve and rehabilitate the health of citizens by mobilizing resources through responsible and efficient management. This provision has also been applied to the situation of prisoners. In order to prevent and eradicate **COVID-19**, the **GoN**, using the right conferred by Section 2 of the **Infectious Diseases Act, 1964**, issued an order on 22 April 2020 preventing people from leaving their house except for emergency work which has been implemented by directing to the Chief District Officer of all districts. Arrangements have been made to identify and treat those infected with the virus, and to prevent them from coming into contact with others, while also testing whether or not those who have come in contact with someone who has **COVID-19** contracted the virus. Media outlets have disseminated various awareness-raising messages as a precautionary measure to prevent and control the disease, while also managing the **PPE** required for health workers treating the disease. Since the flow of outsiders to prisons has been controlled, **COVID-19** does not seem to have had any negative effects on prisons, like the petitioner claims. Regarding the implementation of the claim of the writ petitioner, as per the provisions of Article 276 of the Constitution, the President may exempt, change or reduce the sentence of any court, judicial or quasi-judicial or administrative officer or body in accordance with the law, in the constitution day and other such day fulfilling certain condition, such prisoner were exempt, during Constitution

Day and other such days, prisoners and detainees who have fulfilled certain conditions have been released from prisons, services have been provided to the senior citizens according to the available resources, legal infrastructure in relation to parole and probation is being prepared by the concerned bodies, prisoners who have served 50 per cent of their imprisonment are being released via the implementation of Exemption Regulations, 2018. In order to implement the **Supreme Court** orders on various writ petitions concerning senior citizens, the **GoN** sent a letter to the **Department of Prison Management** to initiate the process of releasing prisoners from the negative list, according to the law. Since the primary priority now is to prevent and control the spread of **COVID-19**, decisions have been made and implemented to deploy health teams to prepare quarantine sites, build quarantine centres, facilitate the supply of essential medicines, food and carry out awareness-raising activities in the prisons. As a result, prisoners and detainees are getting facilities as per the law. Therefore, we believe the claim regarding the public holiday exemption seems completely unreasonable and irrelevant and the writ petition must be quashed.

8. Rejoinder Submitted by the Office of the Prime Minister and Council of Ministers, GoN

The **Public Health Services Act, 2018** has been issued and implemented to make health services regular, effective, qualitative and easily accessible to citizens. The **National Health Policy, 2019** has been implemented and work is being done accordingly to manage health-related crises and promote, protect, improve and rehabilitate the health of citizens by optimally using all resources through accountable and good management. Also, the necessary **PPE** has been organized and given to health workers. Public awareness messages have been disseminated through various media outlets to keep people vigilant and control this disease. Even in prisons, the flow of outsiders has been controlled. Regarding the claim of the petitioner concerning the implementation of the provision of Article 276 of the Constitution concerning the ability of the President to exempt, postpone, change or reduce the sentence of any court, judicial or quasi-judicial body or administrative official or body, the **GoN** has been making decisions in this regard and has released prisoners who have met certain conditions in days such as Constitution Day on public holidays. It has also been attentive towards the improvement and management of prisons and has provided service facilities to senior citizens according to the available resources as per the respective Act. The petitioner has not been able to

back their claims that exemption and parole are being ignored and that negative lists of offenses are being dismissed. The legislature has made a negative list regarding the release of prisoners in accordance with the principle that in offenses of a serious nature, the offender should serve out their full sentence. In other word, their sentence cannot be dismissed without reason. Since the claim of counting public holidays towards prison exemption is irrelevant, and adequate efforts are being taken to free Nepal from COVID-19 and to provide reliable services during this difficult time, the writ petition filed on this subject must be quashed.

9. **Supplementary Petition submitted by the Petitioners**

As per the supplementary petition dated 22 April 2020, discussing the need to protect prisoners from **COVID-19** to reduce its spread in overcrowded prisons, two nurses who work for the Central Prison Hospital have tested positive for **COVID-19** after taking a Rapid Dynamic Test. This was recently made public by the news and has created grave fear and panic situation among prisoners, including the petitioner. Among various prisons of Nepal this prison has the highest number of elderly prisoners and prisoners with mental illnesses and chronic illness due to the facilities provided by the prison's hospital. Prisoners from all over the country are brought to this prison hospital for treatment. As stated, and clearly explained in the writ petition about the impact of **COVID-19** on prisoners, the order of this court dated 15 April 2020 did not address the interim order, because no measures were taken as per the petition. Thus, this petition has been registered as a supplementary petition to the writ petition filed earlier, seeking the issuance of an interim order pursuant to Rule 46 and Rule 49 (2) (a) of the **Supreme Court Regulation, 2017**, to take emergency measures.

- a) To maintain social distancing, no more than 25 prisoners should be kept in one place at a time, prescribed physical distance criteria should be maintained in all prisons, including the Central Prison.
- b) To reduce overcrowding in prisons, exemption of imprisonment and amnesty must be immediately implemented in accordance with the prevailing of Nepal.
- c) To prevent the spread of **COVID-19**, exemption of imprisonment and amnesty – even for offenses prohibited by the prevailing law – should be implemented, through the ordinance that requires government's immediate action as per Article 114 of the Constitution.
- d) All the provisions, including those concerning parole and open prison available under Chapter 5 of the **Criminal Offences (Sentencing and Execution) Act, 2017**, must be implemented.

10. Interim Order issued by this Court in 076-FN-0554 (076-WO-0939)

- a) This interim order has been issued, in the name of the respondent, as per Rule 49 of the **Supreme** Court Regulations, 2017 in an effort to reduce crowding in prisons and protect the health of prisoners. To systemically improve prison conditions, the provisions of Sections 22, 24, 25, 26, 27, 28, 29, 30, 31 and 49 of the **Criminal Offences (Sentencing and Execution) Act, 2017**, according to Section 1 (2) of the same Act must be published in *Nepal Gazette* within seven days to start the implementation process.
- b) The provision stipulating the exemption of imprisonment without discrimination, which is provisioned by in Section 37 of the Criminal Offences (Sentencing and Execution) Act, 2017 and Rule 29 of the Prisons Regulation, 1964 must be implemented.
- c) The **Office of the Attorney General** must submit a report to this Court, within 15 days, detailing their progress towards implementation of the decision on 19 March 2020.
- d) To control the flow of movement in prison and reduce the spread of **COVID-19** in prison across Nepal, carry out additional awareness, disinfection and other activities in all the prisons and submit a report to this court within 15 days by the Prison Management Department. It is the order of this Court made on 29 April 2020, that the opponents of the present order must be informed of this decision as soon as possible and that they must submit their report by 20 May 2020.

Order Section

- 11. In the present writ petition scheduled as per the Rules before the Bench for rendering a verdict, the senior advocates present on behalf of the petitioners Mr. Shambhu Thapa, Professor Dr. Mr. Rajit Bhakta Pradhanang, Mr. Ravi Narayan Khanal, Mr. Ekraj Bhandari and Advocates Mr. Govind Prasad Sharma (Bandi), Mr. Manish Kumar Shrestha, Mr. Kirtinath Sharma Poudel, Mr. Ramesh Prasad Koirala, Mr. Bikas Bhattarai, Mr. Pankaj Kumar Karna, Mr. Anantraj Luitel, Mrs. Shantidevi Khanal, Mrs. Amita Gautam Poudel, Mr. Bhairaja Rai, Mr. Santosh Bhandari, Mr. Janakraj Acharya, Mr. Bishal Kumar Upadhyay, Mr. Saroj Krishna Ghimire, Mr. Navraj Pandey, Mr. Mukunda Adhikari, Mr. Sujan Nepal, Mr. Shailendra Ambedkar, Mr. Birbhadra Joshi argued that there is no alternative to reduce crowding in prisons. They stressed that Nepal should adopt the recommendations of the WHO to reduce crowding in prisons. Further, they focused on the fact that being a party to the United Nations, Nepal should immediately address this critical situation from the viewpoint of protecting prisoners'

rights to a dignified life, a clean environment and health as guaranteed by international human rights instruments and the **Constitution of Nepal**. The **GoN** published in *Nepal Gazette* that it is addressing overcrowding in prisons by implementing Sections 22, 24, 25, 26, 27, 28, 29, 30, 31 and 49 of the **Criminal Offenses (Sentencing and Execution) Act, 2017** as per Section 1 (2) of the same Act from the specified date. However, this has not been done yet. Also, the interim order specified that these provisions needed to be implemented within seven days, which has also not been done yet. In the rape case of ***the Government of Nepal v. Sagar Bhatta, 071-CR-0659***, the Court issued the government with a directive order to create a reformatory punishment system by implementing the appropriate legal and infrastructural requirements – but this effort has not been undertaken yet either. It was argued that excess numbers in prison would greatly reduce if these legal provisions were implemented immediately and the modern reformatory penal system envisioned in the Constitution and the law would be realized. Similarly, as the facility of exemption provided by the previous law cannot be curtailed by keeping it under the negative list by the existing law, it was argued to make legal arrangements for removal of the negative list and provide the facility of exemption/remission in the offence committed prior to the enforcement of the new law, and to waive the fine in the case of prisoners who are in prison for not being able to pay fine ensuring that the facilities are provided to the prisoners by maintaining a record book on a daily basis without any discrimination as per prevailing Rule 29 (1) (2a) of the prevailing Prison Regulations, 1964 as well as Section 2 (a) and 12 of the **Senior Citizens Act, 2006**. Thus, it was argued that an order of ***mandamus***, including a directive order, be issued in the name of the respondent to manage the overcrowding and the poor situation of prisons and detention centres in Nepal.

12. Mr. Shyam Kumar Bhattarai, Joint-Attorney of the **Office of the Attorney General** present on behalf of the Prime Minister of Nepal and the **Office of the Prime Minister and Council of Ministers**, said that the issue of the exemption and remission of imprisonment is an administrative matter – and that those provided by the President are different matters. According to the prevailing law of Nepal, the concerned bodies of the **GoN** must take action accordingly. It is seen from the reports of the **Prison Reform Management Committee** that the number of prisoners in the prisons is increasing at a rate that exceeds its accommodation capacity during the **COVID-19** crisis. **Detention and Prison Management** bodies seem to

be vigilant and are taking the measures necessary to prevent infection inside the prison. Further, it is not true that the government has taken no initiative to protect the constitutional and legal rights of detainees and prisoners as claimed by the petitioners in the writ petition. Work is being done as per necessity. The Department of Prison Management has begun the process of releasing prisoners from the negative list by providing them with legal relief, in order to implement the order issued by the **Supreme Court** in various writ petitions. Further, with regard to senior citizens, important actions are being taken for prevention, control and treatment of **COVID-19** with high caution by the GoN is taking various measures to prevent and control the spread of **COVID-19** all over the country, which includes assigning medical teams, conducting awareness-raising activities, preparing and building quarantine centres ready, supplying medicines and foodstuffs etc. They are taking similar measures in prisons as well. Directive orders cannot be issued and prisoners cannot be released without a legal basis, under the pretext of poor management and physical infrastructure in prison during COVID-19. He argued that the removal of the negative lists for the exemption of imprisonment raised by the petitioner was a matter for the legislature and that the judiciary cannot intervene; thus, the writ petition should be quashed.

13. After studying the petition, rejoinder and other documents in this case file, and hearing arguments on behalf of both the petitioners, legal practitioners and the Assistant Attorney General who represented the respondent, the following questions must be decided:
 - a) Physical distance cannot be maintained in overcrowded prisons during the **COVID-19** pandemic and as a result, prisons are unable to adequately abide by important sanitation standards set by the WHO and the **GoN**. Should an order of **mandamus** be issued to maintain social distancing and ensure safety? In this regard, should an order be issued to immediately implement or cause to implement the detention and prison monitoring report of the **Office of the Attorney General**?
 - b) To reduce overcrowding and the risk of **COVID-19** in prison due to it, should an order of **mandamus** be issued, as per the claim of the petitioner, to implement reformatory penal measures as provisioned by Sections 22, 25, 26, 27, 28, 29, 30, 31 and 49 of the **Criminal Offences (Sentencing and Execution) Act, 2017** pursuant to Section 1 (2), Section 34 and Section 37 of the same Act?

- c) Should an order of ***mandamus*** be issued to provide regular facilities by keeping a daily record of the facilities provided to prisoners who are eligible to get those facilities as per Rule 29 (1), (2a) of the **Prisons Regulations, 1964** and Section (2a) and Section 12 of the **Senior Citizens Act, 2006**?
 - d) Should an order be issued to provide the facilities of exemption and amnesty to offenders on the negative list, by declaring amnesty by the Hon'ble President as per Article 276 of the Constitution? Should an order be issued to make legal provisions in accordance with Article 114 of the **Constitution of Nepal** to remove offenses from the negative list in order for certain prisoners to receive amnesty?
 - e) Should an order be issued to make arrangements for exemption by calculating public holidays? This would specifically apply to prisoners who have already fulfilled their terms of imprisonment and are qualified to get exemption and amnesty, but are still imprisoned not being able to pay the fine, and to release with an order to appear on given date or on bail, all detainees who are in prison for trial?
14. The issues raised in this petition are related to the impact of **COVID-19** on the ones deprived of freedom, and to ensure facilities provided by Constitution, Acts, and Regulations to reduce risks. It is also related to ensure equal access to health to reduce the risk by observing physical distance and other security measures in overcrowded prisons – because children, women, men, and senior citizens living the life of prisoners/detainees in prisons and remand homes are at a high risk of infection. Before entering into a petition, it is reasonable to analyse facts about prison conditions and the risks they present with regard to **COVID-19** transmission.
- a) Although the risk of contracting **COVID-19** exists for everyone today, some sections of society are at a higher risk; in particular, prisoners who are deprived of their liberty and forced to live in confined conditions. Prisoners have higher risk of contracting various diseases; they tend to have poor health than that of other people, which is compounded by stress, malnutrition, poor hygiene, and weak immune system. Further, detainees and prisoners who are senior citizens are at higher risk of contracting **COVID-19** because of their age. There are more than 1.1 million detainees and prisoners in the world, the majority of whom are forced to live in overcrowded prisons in extremely poor sanitation conditions, with inadequate access to healthcare and weak safety measures against the **COVID-19** pandemic. As a result, these prisoners have a real and present

risk. Although many efforts have been made to create vaccines against **COVID-19** infection, the process is still in the research phase. The only reliable way to avoid this pandemic is by maintaining physical distance from others. Social distancing requires staying at least six feet away from other people, not gathering in groups, and staying away from crowds,¹⁵ which is not possible in prisons. As a result, widespread pandemic in prisons and remand homes could have a disproportionate effect on the death rate of prisoners. This endangers not only the lives of the detainees and prisoners, but also the lives of prison administrators, officers, security personnel, and the families of the prisoners who come to visit.

- b) Different countries seem to have adopted different strategies to reduce the risk of the **COVID-19**. Some countries seem to have released prisoners or suspended their sentences. On 13 March 2020 the **Supreme Court** of India issued a *suo motu* order stating that “it is necessary that prisons must ensure maximum possible centre for disease control and prevention, distancing among the prisoners including under trials,” and directed the state and provincial governments of India to set up high-level committees to release prisoners who have been sentenced to seven years imprisonment. The order also requested that they determine a ‘category’ for prisoners based on the nature and severity of their crime, bearing in mind the pandemic situation. The order stated that we also direct that each State/ Union Territory shall constitute a **High-Powered Committee**... to determine which class of prisoners may be released on Parole or an interim bail for such period as may be thought appropriate.... We leave it upon the **High-Powered Committee** to determine the category of prisoners who should be released as aforesaid, depending upon the nature of the offense, the number of years to which he or she has been sentenced or the severity of the offense, the number of years to which he or she has been sentenced or the severity of the offence which he/she is charged with and is facing trial or any other relevant factor, which the committee may consider appropriate.” Based on this order, various states of India have started the process of releasing prisoners; till date 3,000 prisoners have been released from Tihar Jail in New Delhi, the capital of India. Similarly, around 4,000 prisoners are in the process of being temporarily released in the UK and Wales, and the UK Ministry of Justice announced on 4 April 2020 that low-risk offenders would be released from prisons using electronic tags.

15 Centre For Disease Control and Prevention, Available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>

Further, countries such as Indonesia, Iran, Myanmar, Afghanistan, and Morocco have temporarily and permanently released prisoners or are in the process of doing so.

- c) In the case of Nepal, according to the letter No. 2077/078, Ref. no 287 submitted by the Department of Prison Management, the total prison capacity for male prisoners is 6,500, while the prison capacity for women is 1,500. The total holding capacity in the prisons of Nepal is 18,000, but the current number of prisoners in prisons is 22,732 men and 1,431 women, bringing currently the total of 24,163 people being incarcerated in Nepal. Thus, it is clear that the current number of prisoners exceeds the capacity of the prisons of Nepal. . Similarly, according to details submitted in letter No. 2077/078, Ref No. 38 of the Child Protection and Development Branch under the **MoWCSC**, the total capacity of the Juvenile Reform Homes is 495, but the total number of children in juvenile detention centres is currently 659. Regarding the **COVID-19** pandemic situation, a meeting was held on 19 April 2020 under the chairpersonship of the Attorney General to manage the prison-related proceedings, including detentions, extension of time, and filing indictments in criminal cases during the lockdown. This meeting led to a decision to implement the provision of suspending the punishment of children under Section 36 (5) of the Act Relating to Children, 2018 as well as the payment of money in lieu of imprisonment according to Section 155 of **the Criminal Procedure Code 2017**. Similarly, the **Full Bench** of the **Supreme Court** held on 20 April 2020 regarding the precautionary measures to be taken to avoid the situation of **COVID-19** pandemic decided that, in accordance with Section 155 of the **Criminal Procedure Code 2017**, the **Bench** will allow prisoners to write application to seek release and pay fine after one year of the term of imprisonment. On that date, the **Bench** also decided, in accordance with Section 36 (5) of **the Act Relating to Children Act, 2018**, to make arrangements to hand over children in juvenile detention centres to their guardians if those guardians agree to present their children in Court at the time sought by the Court. These decisions led to the release of 219 prisoners and 348 juveniles by the **Supreme Court**, High Courts and District Courts through *habeas corpus* and an application as per Section 155 of **Criminal Procedure Code, 2017** and Section 36(5) of the **he Act Relating to Children Act, 2018**. This data was provided by the **Department of Prison Management** and the **Child Protection and Development Branch of the MoWCSC**.
- d) However, the prisons of Nepal are in a very dilapidated state, with poor sanitary conditions. There seems to be a limited availability of soap, water,

sanitizers, gloves, masks, disinfection etc., which are required y measures against **COVID-19**. Access to healthcare in prison is extremely difficult, even in situation of illness and infection, which has made it even more difficult to prevent **COVID-19** infection. The rejoinder provided by the prison management in this writ petition, mentioned that prisons have undertaken the following arrangement: 15 beds for isolation in the prison hospital at Jaggannathdewal have been set up; 10 tents accommodating 20 people in the prison factory premises have been set up, with help from the Red Cross; an isolation cell that can accommodate up to 100 prisoners has been set up in the women's ward inside the Nakhu Prison; and a psychiatric hospital in the Nakhu Prison premises that can accommodate 20 prisoners has been set up. So far, of the 24,163 prisoners in various prisons, 596 have undergone **PCR** tests for **COVID-19**, out of which 118 tested positive, 118 tested negative, 65 are undergoing treatment, and one has died. The Detention and Prison Monitoring Report 2020 from the **Attorney General's Office** concluded that, in the current situation of rising **COVID-19** infection, recent efforts in prisons are not adequate; the availability of the health treatment is not sufficient and many medical personnel posts have not been filled.

15. Thus, it can be determined that the panic situation in prison during the **COVID-19** crisis is being caused by the aforementioned issues: overcrowding of prisons; the state of infection; the poor condition of health infrastructure in prisons; weak safety measures; and the inability to maintain physical distance in prisons. It is therefore necessary to discuss the state's responsibility to prevent, control and treat COVID-19 in prisons, since prisoners face inadequate medical treatment and poorer health conditions of the prisoners than that of other citizens.
- a) Nepal is committed to respect, protect and fulfil the human rights enshrined in the **Universal Declaration on Human Rights (UDHR)**. Nepal is also party to the **International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)**. In that Covenant, **General Comment No. 14** 'The Right to the Highest Attainable Standard of Health' provides that, "States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services." Although the **International Covenant on Civil and Political Rights, 1966 (ICCPR)** does not explicitly mention the right to health, the **UN Human Rights Committee** grants the

right to life under Article 6 of the ICCPR, the right against torture under Article 7 and the right to health under Article 10 imply that states party to this document must supply “adequate or appropriate and timely medical care... to all detainees.” Article 6 of the **ICCPR** mentions that **“No one shall be arbitrarily deprived of his life.”**

The General Comment No. 21 of the ICCPR on Article 10 (Human Treatment of Persons Deprived of their Liberty) by stating, “Article 10, paragraph 1 imposes on State parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty. It also thanks them for banning torture and other cruel, inhuman or degrading treatment or punishment, which is contained in Article 7 of the Covenant...[and] neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.” This has been interpreted to mean that the state must guarantee rights to all prisoners, except those that prisoner cannot exercise while staying within confinement. This very notion is also been reiterated by Principle 5 of the **Basic Principles for the Treatment of Prisoners, 1990** which mentions that, “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain all the human rights.” This means that prisoners inside the custody of prison will get to enjoy all human rights except for those that cannot be enjoyed while staying within the limited confinement of prisons. The **Committee against Torture** has also stated, **“Failure to provide adequate medical care can violate the convention against torture, prohibition of cruel, inhuman or degrading treatment.”**

- b) Similarly, Rule 24 of the UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), 2015, states that the provision of healthcare for prisoners is a state responsibility. Prisoners should enjoy the same standard of healthcare that are available in the community, and should have access to necessary healthcare service free of charge without discrimination on the ground of their legal status. that” This means that, regardless of a prisoner’s legal condition, the state has to guarantee the health rights of prisoners on par with other citizens. This is also provided in regard to women prisoners in the **UN Rules for the Treatment of Women**

Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), 2010; the UN Principles of Medical Ethics, 1982; and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988. Regarding the rights of children, the **UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990** states the same principles. Put simply, prisoners and detainees have the right to receive the same health services as non-prisoners without discrimination and limitation. They cannot be restricted from enjoying their right to health just because they are incarcerated. Similarly, the **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988** provides that all prisoners or detainees have an equal right to live in dignity. It provides that all persons under any form of detention or imprisonment shall be treated humanely and with respect to the inherent dignity of the human being.” The **UN Human Rights Committee**, in the case of *Lantsova v. Russian Federation*,¹⁶ determined that the State party by arresting and detaining individuals takes the responsibility to care for their life... it is incumbent on States to ensure the right to life of detainees, and not incumbent on the latter to request protection.” This means that states have a responsibility to actively provide sufficient medical services to prisoners. In *Fabrikant v. Canada*,¹⁷ the **UN Human Rights Committee** mentioned that the State remains responsible for the life and wellbeing of its detainees.

- c) On 13 May 2010, during a meet on ‘**COVID-19 in Prisons and Other Closed Settings**,’ a Joint Statement released by the **UNODC, WHO, UNAIDS** and **OHCHR** mentioned that overcrowding constitutes an insurmountable obstacle for preventing, preparing for or responding to **COVID-19.**” The same joint statement calls upon states to adopt non-custodial measures and release mechanisms. The United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) also encourage the use of non-custodial alternatives, as well as the basic principle of providing minimum protection to all offenders, even those serving alternative sentences without imprisonment.
- d) Nepal is party to the Second Optional Protocol to the **ICCPR**, which discusses the **Abolition of the Death Penalty, 1991.** In Article 1 (2) of this protocol, it is stated that, “**Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction,**” and that state parties

16 (26 March 2002) UN Doc CCPR/C/74/763/1997 para 9.2.

17 Communication No. 970/2001, U.N. Doc. CCPR/C/79/D/790/2001 (2003),

need to take all measures necessary to abolish the death penalty. As a party of the covenant, Article 16 (2) of the **Constitution of Nepal** provides that “...no law shall be enacted to punish anyone with the death penalty.” Thus, Nepal has already abolished the death penalty. Thus, the state also has the responsibility to create a safe and healthy living environment even inside prisons. Due to that, the state has the responsibility of not putting anyone to death and protecting lives. Serving a prison sentence does not mean that one must be prepared to suffer the most extreme form of punishment – death. The state’s decision to imprison juveniles or keep adults in custody for committing crimes merely restricts their rights to freedom of movement for a certain period of time; it should not deprive them of other rights. The state’s choice to keep adults in custody, control or detention or children in correctional facilities is only to restrict their free movement for certain period of time. It should not mean that they will be deprived from living a dignified, respectful and healthy life.

- e) Article 16 (1) of the **Constitution of Nepal** guarantees the right of every person to live with dignity. Article 18(1) of the Constitution of Nepal provides that “all citizens shall be equal before the law. No one shall be deprived of the equal protection of the law.” Article 18 (2) of the Constitution provides that, “No discrimination shall be made in the application of general laws on grounds of origin, religion, race, caste, tribe, sex, physical condition, condition of health, marital status, pregnancy, economic condition, language or region, ideology or on similar other grounds.” Also, Article 18(3) of the Constitution provides that the State shall not discriminate citizens on grounds of origin, religion, race, caste, tribe, sex, economic condition, language, region, ideology or on similar other grounds. Similarly, the proviso clause of Article 18 (3) of the Constitution provides that “nothing shall be deemed to prevent the making of special provisions provided by law for the protection, empowerment or development of citizens, including socially or culturally backward women, Dalit, indigenous people, indigenous nationalities, Madhesi, Tharu, Muslim, oppressed classes, Pichhada class, minorities, the marginalized, farmers, labourers, youths, children, senior citizens, gender and sexual minorities, persons with disabilities, pregnant , incapacitated or helpless people, people from backward regions and indigent Khas Arya.” Also, the Constitution guarantees the right to health as a ‘fundamental right’ in Article 35 (1), which states that “every citizen shall have the right to free basic health services from the State, and no one shall be deprived of emergency health services;” in Article 35 (2), which states that “every person shall have the right to get information about his or her

medical treatment;” in Article 35 (3), which states that “every citizen shall have equal access to health services;” and in Article 35 (4), which states that “every citizen shall have the right of access to clean drinking water and sanitation.” Thus, the **Constitution of Nepal** has provided the right to live in a dignified manner without discrimination, equal access to basic health and equal access to healthy drinking water and sanitation, which should be provided to prisoners and detainees as well, without discrimination.

- f) Now, it seems necessary to discuss provisions that have been made in the prevailing law of Nepal. The **Public Health Services Act, 2018** was drafted to establish access to free basic healthcare and emergency health for all, and Section 2 (a) of the Act relates to the subject of providing immediate services to save people from life-threatening situations in the event of an emergency or during critical situations. Section 12 of the Act states that this treatment should be provided equally, without discrimination. Section 49 (6) of the Act provides that health institutions should make necessary arrangements to treat sick patients. Similarly, the **Infectious Diseases Act, 1967** was enacted to eradicate or prevent infectious diseases – which may spread or show possibilities of spreading – from taking colossal form. Section 2 of the Act provides that the **GoN** may issue necessary orders applicable to any group of persons under the right to make special arrangements. At present, using the same Section, the **GoN** is issuing various orders at different times to prevent and control the **COVID-19** pandemic.
- g) Pursuant to Section 6 (1) (e) of the **Prisons Act, 1963**, sick detainees or prisoners should be kept separately as much as possible, and Section 6 (2) of the same Act provides that prisoners convicted in criminal cases may be kept in separate rooms as required. Article 11 (1) of the Act provides that “**detainees or prisoners who are mentally or physically ill shall be treated by a government physician.**” Section 12 of the same Act states that, “If any woman Detainee or Prisoner is pregnant, the woman, other than the woman Detainee or Prisoner detained or imprisoned in a case relating to state affairs or sentenced to life imprisonment or branding or the murderer woman, shall be released on bail after she has become six months pregnant, and such a woman who has been so released on bail shall be held in Prison again after two months of her delivery, except in cases where she is not required to be detained or the term of her imprisonment has expired.” The **Criminal Offence (Sentencing and Execution) Act, 2017** provides for a reformatory penal system, and Rule 16(b) of the **Prisons Regulations, 1964** states that the **GoN** should make arrangements for open prisons as required. Rule 16(c) discusses operating and managing community services

and open prisons and Rule 16(d) provides that the Ministry of Home Affairs, the ability to assign a community service officer and open prisoner officer to monitor and inspect the conduct and work of convicts in open prisons. In the case of juveniles, Rule 16 (e) states that the jailer can increase a juvenile's time of stay in remand homes even after they have reached 16 years of age, upon the recommendation of the remand home on grounds of good behaviour. Rule 29 provides a maximum reduction up to 60 per cent for well-behaved prisoners and up to 75 per cent to prisoners over age 65. Section 15 (1) (h) of the **Police Act, 1955** provides that necessary action should immediately be taken in cases in which an arrested or detained person sustains injuries or falls ill, and proper care should be given to him or her during their incarceration or transport. Section 3 (1) of the **Torture Compensation Act, 1996** stipulates that a person in custody shall not be subjected to any form of torture. And, Section 3 (2) provides those physical examinations are required while detaining and releasing a person.

- h) Similarly, in the **case of Jung Bahadur Singh v. The Office of the Prime Minister and Council of Ministers (NLR 2063, Issue 3, Dec. No. 8631, Page 986)**, the **Supreme Court** propounded the principle that, "imprisonment does not mean the automatic suspension or curtailment of all fundamental rights. Other rights of an imprisoned person, except freedom of movement, cannot be suspended or taken away by the state."
- i) Thus, in analysing the aforementioned national and international laws and instruments, the responsibility to take care of a person after their arrest, detention, or punishment for breaking the law remains with the state. The right to health treatment and life are considered to be inalienable human rights. The right to health also includes medical treatment for one's physical and mental well-being. Even though prisoners do not have the right to choose who will medically treat them, the state has a duty to ensure that they receive a proper treatment by doctors according to professional standards. The state also has a duty to provide prisoners with access to medical treatment without discrimination, along with protecting their privacy. Among these rights, the state has the responsibility to take special measures to protect women, senior citizens, pregnant women and those who are at high risk of chronic diseases.
- j) The **COVID-19** pandemic is on the rise and no cure has yet been found. There is not yet a vaccine or known cure or antiviral treatment to prevent its spread. Therefore, even in the case of prisoners and detainees, the only important strategy to avoid this pandemic is to adopt preventive measures, including maintaining physical distance and safety measures in prisons,

and to resort to an alternative reformatory penal system. Even under normal circumstances, overcrowding in prison and forcing prisoners to live in difficult conditions inside the prison is a violation of their human rights as well as their constitutional and legal rights. Now, during this pandemic, it is necessary to be serious about fulfilling the responsibility to protect the health and right to life of prisoners and detainees, who are at high risk and in unequal positions.

16. In light of prison conditions (in which physical distance cannot be maintained, even during the pandemic), and bearing in mind the responsibility of the state, we must consider the first question: as physical distance cannot be maintained in overcrowded prisons during the **COVID-19** pandemic and as a result, prisons are unable to adequately abide by important sanitation standards set by the WHO and the **GoN**, should an order of *mandamus* be issued to maintain social distancing and ensure safety? Further, should an order be issued to immediately implement or cause to implement the detention and prison monitoring report of the **Office of Attorney General**? The rejoinder states that since actions are being taken in accordance with the **Public Health Services Act, 2018** and the **National Health Policy, 2019** to make health services regular, effective and qualitative for prisoners and other protective and awareness measures have been adopted, (such as putting in isolation beds in female wards), the writ petition should be quashed.
17. According to the report submitted by the Department of Prison Management, the total capacity of our prisons is 18,000 and the number of inmates in our prisons is 24,163. The **Office of the Attorney General's Detention and Monitoring Report on COVID-19** states "Due to overcrowding of prisoners and detainees in prisons and detention centres, it has not been possible to maintain social distance as specified by the WHO in the case of **COVID-19**, and healthcare has been hampered due to the unavailability of health workers as needed." The report states that due to the prevalence of infection-inducing factors (such as the lack of gloves, masks and hand sanitizer; multiple prisoners living in the same room; lack of ventilation in rooms; situation to take in the same room and using the same toilet; and lack of sanitation and limited healthcare), prisoners and detainees are at high risk of **COVID-19** infection.
18. Prisoners have all kinds of rights, except for few basic freedoms that cannot be enjoyed by reason of being incarcerated. Article 6 of the **ICCPR** states that, "**Every human being has the inherent right to life. This right shall**

be protected by law.” Article 7 provides that, **“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”** Further, according to Article 16 of the **Constitution of Nepal** that **everyone has the right to life with dignity,”** Article 18 states that **all citizens shall be equal before the law, no one shall be deprived of the equal protection of the law.** Article 30 guarantees that, **Every citizen shall have the right to live in a clean and healthy environment** and according to Article 35 that **Every citizen shall have the right to free basic health services from the State, and no one shall be deprived of emergency health services.**

19. It is not the case that the rights enshrined in international documents and the Constitution do not apply to prisoners. Other rights remain the same except for those naturally barred by detention. Prisoners are incarcerated for the crimes they committed and detainees are remanded in custody before their trials. Even though they are serving their sentences in prisons, it is the responsibility of the state to keep them safe. The State should take responsibility for the life and health of those who are forced to live in confinement due to state orders or decisions. This is a constitutional obligation of the state. In this context, in the case of *mandamus* of the petitioner ***Charles Gurumukh Sobhraj v. The Office of the Prime Minister and Council of Ministers*** (NLR 2073, Dec. No. 9722, Issue 11) it was propounded that, “the state should take responsibility for the health of the people who are forced to live as prisoners due to state order or decision. The constitutional right to live with dignity does not end by reason of being in captivity.” In the case of Sunil Watra, Justice Krishna Iyer said that a person inside prison should not be deprived of the rights guaranteed by laws in a judicial and impartial manner and it has been further stated that: ...fundamental rights do not flee the prison as he enters the prison although they may suffer shrinkage necessitated by incarceration... whether inside prison or outside, a person shall not be deprived of his guaranteed freedom save by methods right, just and fair. “
20. The WHO’s Interim Guidance on preparedness, prevention and control of **COVID-19** in prison and other places of detention states that, to take personal safety measures in prison, such as washing hands with soap and water, using a sanitizer, wearing a mask, and maintaining a physical distance of at least 1 meter, applying environmental cleaning and disinfection process regularly and properly, and keeping prisoners who come from outside in a single isolation centre for 14 days, if single isolation is not possible, keeping

in group quarantine and observation of health of such prisoners, checking for signs of infection at least 2 times a day.” In the **UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), 2015** Rule 12 provides that a single room should be provided for inmates to sleep; Rule 13 provides that the health, climatic conditions and particularly the cubic content of air, minimum floor space, lighting, heating and ventilation of the rooms should be kept in consideration; Rule 14 says prisons must have large windows that allow natural light and fresh air to enter and if that is not available, artificial light or artificial ventilation should be constructed to make it easier for prisoners to read or work; and Rules 15 and 16 provide for proper sanitation. As per clause (e) of Sub-Section 1 of Section 6 of the **Prisons Act, 1963**, detainees or prisoners should be kept in separate areas as much as possible and in Section 11 (1) stipulates that government doctors should treat detainees and prisoners experiencing mental or physical illnesses.

21. Similarly, in the **Prisons Rules, 1964**, Rule 38 (1) states that jailors should provide food and water to the prisoners or detainees for their health; Rule 38 (2) states that there should be daily cleaning of toilets and urinals with lime powder, phenol, potash etc., in prisons. Rule 39 states that prisoners and detainees should receive medical treatment from prison doctors if available, and if not, then they must receive it from doctors from nearby government hospitals, dispensary doctors, or other qualified physicians; and Rule 60 states that a patient with a serious illness should be hospitalized. A press release issued by the Ministry of Health and Population, **GoN** on 23 March 2020 regarding the prevention and control of **COVID-19** infection states that “it has been decided that no more than 25 people can gather.” The **Health Sector Emergency Response Plan: COVID-19 Pandemic**, which was issued by the **GoN**, also emphasizes the need to maintain social distancing by stating, “Physical distancing at workplace social and cultural gatherings will be extensively promoted.”
22. Although in the rejoinder of the respondent, the **Prison Management Department**, it was stated that prisons have been provided with insulation beds, quarantine areas, women’s wards and other necessary medical supplies to prevent the spread of **COVID-19**, and that adequate awareness has been adopted regarding prison reform and management, the Custody and Prison Monitoring Report with reference to **COVID-19, 2020** of the **Office of the Attorney General** and its subordinate Public Prosecutor’s Office issued the following recommendations:

- a) As there is no presence of health workers in prison and juvenile remand homes, special priority should be given to provide healthcare services.
- b) Regular meetings should be held with prisoners and detainees in prisons with legal practitioners, and necessary measures should be taken to improve healthcare and conduct awareness programs.
- c) There should be an additional management of healthcare materials including masks, sanitizers, gloves and soapy water.
- d) Overcrowding and the infrastructural conditions in prisons, juvenile remand homes and detention centres have increased the health risks of prisoners and detainees.
- e) There is a need for awareness-raising programs and counselling services about health risks and precautionary measures.
- f) Necessary arrangements should be made to properly sanitize and clean prisons and detention cells, as well as daily meeting rooms and vehicles transporting prisoners to courts and hospitals.
- g) Decisions should be made to prioritize senior citizens.
- h) Arrangements should be made to expand **COVID-19** testing in prisons and reform homes, and isolation rooms should be provided in case of infection.

23. Similarly, the meeting of the **Committee on State Management and Good Governance of the Parliament** held on 6 November 2019 for the construction and management of prisons gave recommendations to the **GoN** to immediately start the necessary maintenance work to improve detention and prison cells and ensure that all prisons meet basic requirements in terms of the facilities they provide, such as providing drinking water, sanitation, energy and fuel, basic health check-ups and observing other international practices. Similarly, arrangements should be made to create separate spaces for prisoners and detainees (depending on the severity of their offense and health condition); create more **COVID-19** testing, with priority given to high-risk prisoners; and coordinate speedy trials for qualified cases. It is also suggested that the food expenditure of prisoners be reviewed in a timely manner, according to the market price.

24. There is a need to be highly vigilant in prisons, in consideration of a given things how sensitive they are during **COVID-19** pandemic. The Constitution guarantees the right to life, equality and health of every citizen. International instruments state that the state has a duty to respect, protect, promote and fulfil the rights of prisoners as enshrined in the Constitution. However, it is seen from the **Detention and Prison Monitoring Report, 2020** of the

Office of the Attorney General that these rights are not being fulfilled in Nepal's prisons. If a person contracts **COVID-19** in prison, the infection can spread like wildfire and may result in death. The state has an obligation to ensure safe living conditions inside prisons. In view of the risk of overcrowding and infection in prisons, in addition to long-term strategies, such as capacity building to physically improve prisons, the state needs to take immediate security measures to prevent infection. Therefore, in the context of **COVID-19**, an order of ***mandamus*** is issued in the name of the **GoN** to increase the number of **COVID-19** tests (out of the 24,163 prisoners currently in prison, only 596 have been tested); increase the number of isolation beds in prisons (there are 118 infected people, but only 15 isolation beds); create more quarantine spaces (only 20 people can be accommodated as per the current arrangement); arrange for tents to solve immediate problems regarding maintaining physical distance; transfer prisoners to prisons where there are less prisoners according to capacity; take **COVID-19** infected people to special hospitals; follow the laws, regulations and directives of WHO to observe and cause to observe all measures of safety as per the guidelines given by the Ministry of Health and the **GoN**; and allocate the necessary budget for all these activities.

25. Now, we must consider the second question: Should an order of ***mandamus*** be issued, as per the claim of petitioner for the implementation of a reformatory penal system as provided in Sections 22, 25, 26, 27, 28, 29, 30, 31 and 49 of the **Criminal Offences (Sentencing and Execution) Act, 2017** pursuant to Section 1 (2), Section 34 and Section 37 of the same Act to reduce overcrowding and the risk of pandemic in prisons? The rejoinder provides that the order should not be issued because the work – including amnesty, imprisonment exemption and imprisonment exclusion – is being carried out in accordance with the policy of **GoN**. Another reason that the order should not be issued is that the concerned bodies are carrying out the current legal provisions and norms, as well as the work of preparing the legal infrastructure for probation parole.
26. Since the petitioner has made claims regarding the implementation of the legal provision that concerns alternative prison systems associated with the reformatory penal system, the Court must consider the concept of the reformatory penal system. In recent times, the justice system has put forth the concept of 'restorative justice' and outlined an obligation on the part of the offender. Restorative justice is focused on increasing the needs of

victims and the responsibility of the perpetrators by addressing the effects of violence, and stating that victims, perpetrators and society can be brought together to correct the mistakes and move forward. Restorative justice focuses on the rehabilitation of not only the victims, but also the perpetrators. It aims to rehabilitate the guilty and help them become better citizens by emphasizing the need to determine punishment based on a progressive point of view, and by reforming the guilty on the basis of corrective principles. A reformatory penal system treats the offender as means of committing crime and assumes that the criminal act harms the offender themselves as well. It also encourages alternative prison systems, emphasizing that those convicted of criminal offenses should be given a chance to improve.

27. The judicial system of Nepal has entered a system of restorative justice and reformatory punishment. Article 20 of the **Constitution of Nepal** ensures the right to justice and Article 21 (2) ensures that “victims of crime shall have the right to social rehabilitation and justice including compensation in accordance with the law.” On the other hand, the **National Criminal Code, 2017** and the **Criminal Offenses (Sentencing and Execution) Act, 2017**, which came into force on 17 August 2018 to provide guidance to restorative justice system, with victim-centred compensation for each offense. The **Criminal Offenses (Sentencing and Enforcement) Act, 2017** envisages about an alternative prison system to assimilate the reformatory penal system in the case of certain crimes, under which Section 22 provides for community service, Section 25 provides for remand homes, Section 26 provides for rehabilitation centres, Section 27 provides for imprisonment only on the last day of the week or at night, Section 28 provides for open prison, Section 29 provides for the socialization of those on parole, Section 31 provides for engagement in physical labour in lieu of imprisonment, Section 34 provides for hospitalization, and Section 37 provides for the remission of imprisonment.
28. With regard to creating the infrastructural and legal arrangements for a reformatory penal system, in the rape case of the **GoN v. Sagar Bhatta, et al. (071-CR-0659)**, the **Supreme Court** stated that it is important to make the perpetrators realize about their wrong, correct them and reintegrate them into society. Punishment is for crime. The purpose of the state and the law is to prevent such crimes. Since those involved in crime are only symbolic forms of crimes, their rehabilitation and reintegration into society

is a fundamental part of the state's penal policy. Focusing on issues, such as prisons, open prisons, community service and family reunions, a directive order was issued in the name of the **GoN**, the **Office of the Prime Minister and Council of Ministers** and the **Ministry of Home Affairs** to make the necessary legal and structural arrangements to adopt a reformatory penal system, which is provided by the **Criminal Offenses (Sentencing and Execution) Act, 2017**. The order also states that progress in this regard must be sent to the Monitoring and Inspection Division of this Court in every three months. However, the court has not yet received any information stating that the work as per this order has been completed.

29. Three years after this law on the reformatory penal system was enacted, and two years after its implementation, this provision has not yet been implemented effectively. As claimed in petition Sections 22, 24, 25, 26, 27, 28, 29, 30, 31 and 49, the provisions are implemented after the GoN publishes a notice in the *Nepal Gazette* pursuant to Section 1 (2) of the same Act. Due to the delay happened in the decision of the government, the aforementioned clauses have not been implemented so far and prisoners in Nepal prisoners seem to be deprived of the rights and benefits availed under the reformatory penal system.
30. The **COVID-19** pandemic is taking a complex form and it seems necessary to implement reformatory measures immediately to maintain physical distance in prisons. Immediate implementation of an alternative prison system will reduce overcrowding in prisons and help facilitate prison management. The **Detention and Prison Monitoring Report of 2020** regarding **COVID-19**, which was prepared by the **Office of the Attorney General** and the subordinate Public Prosecutor's Office, states that the pandemic has increased health risks in prisons due to a lack of adequate physical infrastructure, dilapidated infrastructure and overcrowding. Similarly, a meeting held by the **State Management and Good Governance Committee of the Parliament** on 14 July 2020 concerning the construction and management of prisons, made the following decisions regarding prison reform and prisoner management:
 - a) As per the provisions of the **Criminal Offenses (Sentencing and Enforcement) Act, 2017**, the following arrangements for prisoners must be made as soon as possible: ensure that more prisoners are involved in income-generating activities after their release; send more prisoners to reform centres, open prisons and rehabilitation centres; increase prisoner

- employment in social and community services; keep more prisoners on parole; encourage socialization among prisoners; and employ prisoners in manual labour and appoint some as probation and parole officers.
- b) Immediately complete the Probation and Parole Board and make it operational.
 - c) Make the necessary arrangements to make prisons resourceful by developing and expanding them.

31. In the supplementary petition (registered after the submission of the petition), this **Court** issued an interim order on 29 April 2020 to start the process of immediately implementing the provisions of Sections 22, 24, 25, 26, 27, 28, 29, 30, 31 and 49 of the **Criminal Offenses (Sentencing and Enforcement) Act, 2017** to systematically improve prisons by publishing a notice in *Nepal Gazette* within 7 days pursuant to Section 1 (2) of the same Act. However, it is not known whether the process of implementing these provisions started without publishing the information in *Nepal Gazette*. The alternative prison system provided for in Sections 22, 24, 25, 26, 27, 28, 29, 30, 31 and 49 of the **Criminal Offenses (Sentencing and Enforcement) Act, 2017** can only be initiated once the **GoN** publishes in *Nepal Gazette* pursuant to Section 1(2) of the same Act. However, before publishing these sections in the *Gazette* and implementing them, the government should make the prior preparations for some sections.

32. Conditions/procedures should be formulated

Section 28 of the **Criminal Offenses (Sentencing and Execution) Act, 2017** states, “The judge of the concerned District Court may, on recommendation of the chief of Prison Office, make an order to hold in open prison an offender who has served two-third of the term of imprisonment and has good conduct.” It seems that procedure has to be formulated pursuant to Section 28(2a) to send prisoners in open prison. Similarly, Section 30, regarding socialization, states “Notwithstanding anything contained in this Act and other law, a prison may release an offender who, upon being sentenced to imprisonment for a term exceeding one year, is serving the sentence and bears good conduct, from prison on monthly or daily basis, for the following purpose, six months before the expiry of the term of imprisonment imposed on him or her.” To implement the aforementioned provision, conditions are set pursuant to Section 30 (2) and (3). Further, Section 31 of the same Act allows for engagement in physical labour in lieu of imprisonment mentioning that “If an offender who is above the age of 18 and physically fit, and has been sentenced to imprisonment for a term

of three years or more so desires, the offender may be engaged in physical labour for public work.” It seems that the procedure has to be formulated to enforce the aforementioned provisions pursuant to Section 31(3).

33. Probation and parole officer should be appointed.

As per Section 26 of the **Criminal Offenses (Sentencing and Execution) Act, 2017**, the recommendation of the Probation Officer is required to send prisoners to rehabilitation centres. Section 29 of the **Criminal Offenses (Sentencing and Execution) Act, 2017** states that, “The judge of the District Court may, on recommendation of the concerned District Probation and Parole Board, make an order to put an offender on parole who, upon being sentenced to imprisonment for more than one year, has served two-third of the sentence and has good conduct.” This means that the Probation Officer’s recommendation is required for sending prisoners to rehabilitation centres. It is necessary to appoint a probation and parole officer for the implementation of the provision of Section 29 of the aforementioned Act. Furthermore, Section 49 of the said Act states that, “The **GoN** may appoint or designate those persons who are experienced in rehabilitation or community service as the probation officer or parole officer.” However, the rejoinder of the respondents makes it clear that no officer has been appointed in line with the legal provisions, and that the related work is being carried out under the coordination of the **Attorney General**. As a result, the alternative prison system has become inactive due to the fact that no probation officer has been appointed within the three years after the law came into force.

34. Consideration to be made by the court while sentencing.

Section 24 of the **Criminal Offenses (Sentencing and Execution) Act, 2017** provides for the suspension of imprisonment. Section 27 of the **Criminal Offenses (Sentencing and Execution) Act, 2017** states that, “If, in relation to an offender sentenced to imprisonment for a term not exceeding one year, having regard to, inter alia, the offence committed by the offender, his or her age conduct, the gravity of the offence and the manner of the commission of the offence, it appears to the court that it is not appropriate to hold him or her regularly in prison, the court may, for reasons to be recorded, so determine the sentence of imprisonment that such offender is required to remain in prison only on the weekend or only during the night on daily basis.” This means that courts can consider whether to let offenders serve their sentence by staying at prison only on the last day of

the week or at night. This clause should be enforced immediately. Similarly, Section 22 of the same Act provides that, “If, in relation to an offender who is sentenced to imprisonment for a term not exceeding six months, having regard also to the offence committed by the offender, the age, conduct of the offender, the circumstances and the manner of the commission of the offence, it appears to the court that it is not appropriate to imprison the offender, the court may order the offender to do the community service or to do the community service for the remaining period after the offender has served the sentence of imprisonment for such period as the court deems appropriate in relation to such offence’ conceptualizing for social/community services.” Even though these provisions could have been implemented immediately, these sections have been inactive because they were not published in the *Nepal Gazette*.

35. Provisions that can be implemented immediately.

The provision in Section 34 (1) of the **Criminal Offenses (Sentencing and Enforcement) Act, 2017** states that, “If any offender sentenced to imprisonment pursuant to this Act becomes of unsound mind, the prison shall keep such offender in a hospital or similar other medical centres.” This has the nature of immediate implementation. In addition to Section 37, if the offender improves his or her conduct while in prison and completes 50 per cent of his or her sentence – excluding cases in which the prisoner is on the negative list – his or her sentence length can be reduced. Further, since the **Criminal Offence (Imprisonment Exemption) Regulation** has already been formulated with the procedure to keep records of prisoners’ conduct, there should be no difficulty in implementing the aforementioned section.

36. The **GoN** may, in the case of juvenile reform centres, appoint a person who has worked in community service or rehabilitation centre as a probation officer or parole officer. To exercise the powers conferred by Sub-Section (2) of Section 79 of the **Act Relating to Children, 2018** and to observe and exercise the duties and rights mentioned in Rule 43 of the **Juvenile Justice (Procedure) Rules, 2019** in a way that ensures that the **GoN** does not have to bear any additional financial burdens, probation officers have been appointed to the Gazetted Officer-level bailiff working in all the District Courts. Further, in places where there is no Gazetted Officer-level bailiff, the registrar of the court has been appointed as probation officers. The **MoWCSC** published the information in the *Gazette* on 16 March 2020. Similarly, the government has drawn attention to the fact that

some alternative prison systems can be managed during the pandemic by providing more temporary probation or parole officers, as well as the need to conduct corrective programs, which would implement the reformatory penal system.

37. Now, it is time to consider whether the order should be issued as per the request of the petitioner. Three years after the alternative prison system provision was put forward, the necessary structural conditions for its implementation have not been formulated. No probation or parole officers have been appointed. Considering the present havoc created by the **COVID-19** pandemic and the non-publication of an alternative prison system in *Nepal Gazette*, an order of **mandamus** is issued to conduct the following measures. Pursuant to Section 28 of the **Criminal Offences (Sentencing and Execution) Act, 2017**, an alternative prison system should be adopted to reduce overcrowding in prisons by socializing as per Section 30 and by giving prisoners the option of doing physical labour instead of prison as per Section 31. To accomplish this, procedures should be prepared within one month. Also, to enforce the provision about rehabilitation centres as per Section 26 and parole as per Section 21, the qualifications for probation and parole officers should be prepared within one month and the officers should be appointed accordingly. Information, conditions and procedures mentioned in Section 26, 28, 29, 30 and 31 of the same Act should be prepared within seven days and published in *Nepal Gazette*. To implement the order concerning community service pursuant to Section 22, the suspension of prison orders pursuant to Section 24, and measures about staying at the prison on the last of the week or at night pursuant to Section 27, a notice should be published within seven days in *Nepal Gazette* stating the enforcement procedures. Similarly, considering the question of immediate enforcing the transfer of some prisoners to reform centres pursuant to Section 25, the process to construct the physical infrastructure for these reform homes should be expedited.
38. Now considering question No. 3, the petitioner claimed that the facilities provided to the inmates as per Rule 29 (1) (2a) of the **Prison Rules, 2020** and Sections 2(a) and 12 of the **Senior Citizens Act, 2006** should be maintained on a daily basis. However, the respondents presented a rejoinder stating that the writ petition should not be issued as the appropriate service facilities has been provided to senior citizens according to the available resources, as per the provisions made by the Act.

39. Since the number of prisoners is diverse, they are at high risk of being infected **COVID-19**. This diversity relates to age, health status, gender, physical condition, pregnancy status etc. Therefore, prisoners who are senior citizens are at higher risk due to their age, physical condition, chronic illness and overall health condition. According to WHO, these include prisoners who are “over 60 years of age and those with cardiovascular disease, diabetes, chronic respiratory disease and cancer are most at risk.” The UNODC, WHO, UNAIDS and OHCHR, in their joint statement on **COVID-19** in prisons and other closed settings, mentioned that, “These efforts should encompass release mechanisms for people at particular risk of **COVID-19**, such as older people and people with pre-existing health conditions, as well as other people who could be released without compromising public safety, such as those sentenced for minor, non-violent offenses, with specific consideration given to women and children.” Similarly, the **GoN** has declared that people above age 60, children and the chronically ill are at high risk and should be given priority during this time. The Annual Report of the **Office of the Attorney General 2018/19** and the **Detention and Prison Monitoring Report 2020** with reference to **COVID-19** also suggest that priority of sentence exemptions should be given to senior citizen prisoners that qualify.
40. Article 41 of the **Constitution of Nepal**, which recognizes the rights of senior citizens, states that, “The senior citizen shall have the right to special protection and social security from the state.” The proviso clause of Article 18(3) of the **Constitution of Nepal** states that, “Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or development of the citizens including the socially or culturally backward women, Dalit, indigenous people, indigenous nationalities, Madhesi, Tharu, Muslim, oppressed class, backward class, minorities, marginalized, farmers, labourers, youths, children, senior citizens, gender and sexual minorities, persons with disabilities, pregnant women, people who are incapacitated or helpless, people from backward regions and indigent Khas Arya.”
41. The **Senior Citizens Act, 2006** is a special Act issued for the benefit, convenience and welfare of senior citizens. Section 12 (1) of the said Act states that, “Notwithstanding anything contained in the prevailing laws, in relation to a senior citizen who has been imposed the punishment of imprisonment in a state party case and serving the sentence, the sentence

of imprisonment as follows may be rebated in view of his or her age and the nature of offense:

- (a) Not exceeding twenty five per cent in the case of the senior citizen who has completed the age of Sixty Five years but not completed the age of Seventy years,
- (b) Not exceeding Fifty per cent in the case of the senior citizen who has completed the age of Seventy years, but not completed the age of Seventy Five years,
- (c) Not exceeding Seventy Five per cent in the case of the senior citizen who has completed the age of Seventy Five years.”

42. Although the **Senior Citizens Act** allows for the sentences of senior citizens to be waived in certain cases, this policy has not been implemented. In the ***habeas corpus*** writ of ***Pemba Gurung vs. The Prison Office, Nakhu (NLR 2076, Dec. No 10219)***, this court has ordered that, “To immediately determine the officer who will exempt the imprisonment and also to make rules/procedures for granting exemption as per law, as there is no clear provision in the law and rules as to who has the authority to exempt the sentence of a senior citizen who has been sentenced to imprisonment.” However, a year after this order was issued, the Constitution and legal rights remains ineffective due to the non-determination of the authority and procedure as per the order. Although the Joint-Attorney pleaded for that, according to the order in the same writ, the judges of the high court and the district court have released the senior citizens during the inspection of the prison, in other cases, the decision-making body remained silent without making a decision.

43. Now, as the writ petitioner claimed, Rule 29 (1) of the **Prisons Rules, 1964** states that, “The imprisonment of a well-behaved prisoner may be reduced to a maximum of 60 per cent of the prescribed imprisonment.” However, Sub-rule (1) of Rule 29 (1a) of the same regulation contains a negative list that stipulates the sentences of prisoners in the following case cannot be reduced:

- a) Human Trafficking
- b) Rape
- c) Escaped from captivity
- d) Customs evasion involving import and export
- e) Drug dealing
- f) Corruption-related offences
- g) Espionage

- h) Protected wildlife related offences
 - i) Offences regarding archaeological objects
44. Thus, even if these offences are kept on the negative list, Rule 29 (2a) of the same regulation states that, “Notwithstanding anything contained in sub-rule 29 (1) and 29 (1a), reduce the sentence of up to seventy-five per cent in the case of well-behaved prisoners who are above the age of sixty-five. Or in the case of a prisoner recommended by a government doctor who has lost both eyesight or cannot walk on both legs or is crippled in bed, and cannot be recovered ever, the remaining sentence may be exempted.”
45. The aforementioned legal provision seems to allow for the exemption of prison sentences depending on prisoner conduct. The amendment of the **Prisons (Fourteenth Amendment) Rules, 2015** has clarified that the negative list will not be applicable in cases of prisoners who have reached to the age of 65 as per Rule 29 (2a) of the Rules. Also, in the writ petition (*habeas corpus / Mandamus*) of **Naradhvaj Gurung v. High Court of Pokhara (NLR 2075, Dec. No. 9998)**, the court has laid the principle that, “**Senior Citizens Act, 2006** is a special Act issued for the benefit, convenience and welfare of senior citizens. Even if there is a provision in any rule that is contrary to the provision made by the Act enacted by the legislature, such provision cannot be recognized. The provisions of the Act must be followed.” In the case of “**well-behaved**” and “**65-years old**” prisoners mentioned in Rule 29 (2a) of the **Prisons Rules, 1964**, even if they are imprisoned in cases listed as negative in Rule 29 (1a), the **Senior Citizens Act** is still applicable because it’s viewed as a special Act. Thus, elderly prisoners have the possibility of getting exemption from imprisonment as per Section 12 of the **Senior Citizens Act** even if one’s case is on the negative list.
46. Thus, it is clear that the **Constitution of Nepal** can make special arrangements to protect and empower senior citizens. Similarly, to ensure the welfare of the senior citizens, Section 12 (1) of the **Senior Citizens Act, 2006** has the provision to give age-based exemption to prisoners above age 65 depending on their age and the nature of their offense. Rule 29 (2a) of the **Prisons Rules, 1964** also clearly states that the sentence can be waived in the case of a senior citizen who is older than 65. Likewise, the case of **NLR 2076 Dec No. 10219**, states that the authority responsible for implementing the rights and conveniences provided by the law should be active and sensitive. Also, the case of **NLR 2075 Dec No. 9998**, states that it

is the duty of the concerned authority to make a factual decision regarding waiving the sentences to senior citizens in due course. According to the Constitution, Act, Rules and orders made in various cases by this Court, prison sentences can be exempted up to 25 per cent for senior citizens below age 70 and above age 65 years, up to 50 per cent for senior citizens under age 75 and above age 70, and up to 75 per cent for senior citizens over age 75. Recently, the **Department of Prison Management** issued letter No. 2077/078 Ref. No. 93 recommending imprisonment exemption for senior citizens who have been imprisoned as per Section 12 of the **Senior Citizens Act, 2006**, since the negative list is not applicable to Section 2. Also, the Joint-Attorney arguing on behalf of the **GoN**, pleaded before this Court that some senior citizens have already been acquitted pursuant to an order issued in the case of **Pemba Gurung, NLR 2076 Dec. No.10219**, and that Ref. No. 186 of letter number 077/78 gives a list of 31 inmates who were imprisoned until 27 May 2020 who can be released from prison because of their age.

47. To reduce overcrowding in prison and prevent the spread of **COVID-19** among high-risk senior citizen prisoners and detainees, the Constitution and the law have options. They make it clear that special protection should be given to senior citizens by allowing imprisonment exemptions. In a previous decision, in the case of Pemba Gurung and Nardhwaj Gurung, it was found that no one is allowed to disregard the provisions of the Constitution and the Act by making a decision in contradiction with the law. This allowed an order of **mandamus** to be issued in the name of the Department of Prison Management, Kalikasthan to protect senior citizen prisoners who are at high risk of contracting **COVID-19** due to their age, physical condition, health condition etc. Further, the order requires that a list be made of senior citizens who can be released pursuant to the facility given by Section 12 of the **Senior Citizens Act, 2006**. Even though the Department has prepared a list of the senior citizen prisoners who can be released on 27 May 2020, the order required an update on the number of senior citizens who can be released within three days of receiving the order. Considering the current risk of **COVID-19**, an appropriate and immediate decision needs to be made. Therefore, an order of **mandamus** has been issued in the name of the **Ministry of Home Affairs** to release senior citizen prisoners within ten days of receipt of this order, based on the list provided by prison departments, which consider the age of the prisoners and the seriousness of their offense.

48. Now, we must consider question four. Should an order be issued to provide the facilities of exemption and amnesty to offenders on the negative list by declaring amnesty through the Hon'ble President as per Article 276 of the Constitution? Should an order be issued to make the necessary legal provisions, including ordinances, to remove offenses from negative list in order to receive amnesty, in accordance with Article 114 of the **Constitution of Nepal**? According to Article 276 of the **Constitution of Nepal**, the President may, according to law, pardon, defer or change the sentence of any court, judicial or quasi-judicial body or administrative official or body. The rejoinder from the **GoN** states that the decision is sometimes being implemented as per the law and that the petitioners have not been able to disclose the reasons for removing offenses on the negative list.
49. First of all, regarding the President's declaration of amnesty from punishment for criminal offenses, Article 276 of the **Constitution of Nepal** states that, "The President may, in accordance with law, grant pardons, suspend, commute or remit any sentence passed by any Court, judicial or quasi-judicial body or administrative authority or body." Now, it seems necessary to consider the laws under which the prisoners can get amnesty and imprisonment reduction. Section 37 of the **Criminal Offenses (Sentencing and Enforcement) Act, 2017** has placed the following offenses on the negative list, meaning that sentences cannot be reduced for the following cases:
- a) Sentenced to life imprisonment
 - b) Convicted of a rape-related offence
 - c) Convicted of a corruption-related offence
 - d) Convicted of human trafficking and transportation
 - e) Convicted of kidnapping and hostage-taking
 - f) Convicted of organized crime
 - g) Convicted of money laundering
 - h) Convicted of torture or cruel, inhuman or degrading treatment
 - i) Convicted of crimes against humanity
50. Section 159 (4) of the **National Criminal Procedure Code, 2017** states that the following offenses cannot be pardoned, suspended, altered, changed or reduced:
- a) Corruption
 - b) Torture
 - c) Rape

- d) Murder in a cruel and inhumane way or by taking control
- e) Genocide
- f) Explosives
- g) Kidnapping, hostage-taking or disappearance
- h) Human trafficking and transportation
- i) Money laundering
- j) Narcotic drug trafficking or transactions punishable by a sentence of imprisonment for a term exceeding three years

51. Sub Rule (3) of Rule 3 of the **Criminal Offence (Imprisonment Exemption) Regulation, 2019** states that if an offender (other than offenders mentioned in Section 37 of the **Criminal Offences (Sentencing and Enforcement) Act, 2017** improves his or her conduct or serves 50 per cent of imprisonment, his or her prison sentence can be reduced as prescribed by the prison. Therefore, other than those on the negative list, there seems to be a legal provision to reduce the imprisonment if the offender improves his or her conduct while in prison or if he or she serves 50 per cent of their sentence.

52. In the case of *the GoN v. Ram Krishna Banjara*, NLR 2075, Dec. No. 9941, the court stated that Rule 29 of the Prison Rules, 1964 makes it clear that it is not a matter of choice whether to evaluate the behaviour of a prisoner. The use of the word “will/may” in the rules does not make it a discretionary right. It is imperative that the conduct of every prisoner be regularly and realistically evaluated. In such assessments, the prison sentence of those who show “good conduct” should be shortened, while inmates with “bad conduct” should not be given the convenience as per Rule 29. In making these assessments, discretion has to be exercised.

53. With regard to replacing prison sentences with physical labour, pursuant to Rule 29 (2) of the **Prisons Rules, 1964**, each prison must “faithfully” maintain records of “conduct” in relation to each inmate in its own prison and make the assessment process regular and realistic. After considering these limits and procedures when assessing a case, an order can be issued to reduce a prisoner’s sentence.

54. Following the aforementioned decision, in relation to the offenses that can be pardoned and adjourned, the **Criminal Offence (Imprisonment Exemption) Regulation, 2019** has been implemented. And, there is a provision mentioned by Rule 4 that each prison shall keep a record of

prisoners' conduct according to Section 37 of the **Criminal Offenses (Sentencing and Enforcement) Act**. Also, pursuant to Rule 6, after investigating the application and proof that a prisoner has served 50 per cent of his or her sentence and records of the prisoner's conduct, the recommendation should be submitted to the Chief District Officer. Then, the Chief District Officer should openly recommend imprisonment exemption to the **Department of Prison Management**. While examining the application and recommendation if it seems reasonable to exempt the sentence of the culprit as per the Act and Rules, the Department should prepare a comprehensive statement and send it to the **Ministry of Home Affairs** to make a decision. They should also recommend the case to the President for approval as per Rule 7 of the Same Rules. After receiving approval from the President, as per the rules, the Ministry should send a letter concerning the reduction of the sentence to the concerned prison through the Department. The **Department of Prison Management**, presents as the respondent said that the amnesty of the prisoners was given in accordance with the government's policy and the current legal provisions. Even the respondent, the **Ministry of Home Affairs**, claimed that the **Criminal Offence (Imprisonment Exemption) Regulation, 2019** has been implemented and that prisoners who have served 50 per cent of their sentences have been exempted from further imprisonment as per the rules. Thus, there is no need to consider the issue of imprisonment exemption.

55. Now, considering the question as to whether or not the President can grant amnesty for offenses on the negative list pursuant to Article 276 of the Constitution? Article 276 of the Constitution provides that the President may, according to law, pardon, defer, change or reduce the sentences imposed by any court, judicial or quasi-judicial body or administrative official or body. It is up to the legislature to decide whether to grant punishment for offenses of a particular type. . Further, Article 126 of the **Constitution of Nepal** states that, "Powers relating to justice in Nepal shall be exercised by courts and other judicial bodies in accordance with this Constitution, other laws and the recognized principles of justice." Since the law mentions that offenses on the negative list cannot be pardoned, it is not possible for the court to go beyond the law and issue imprisonment exemption and amnesty for offenders on the negative list.
56. In this regard, the meeting of the **State Management Committee of the Parliament** held on 17 June 2020 decided to review the list of offenses that

are not supposed to be commuted according to Section 37 of the **Criminal Offences (Sentencing and Execution) Act, 2017**. After their review, they decided to proceed with amending the Act. Even the responsible committee of Parliament seems to have taken this issue seriously. This resulted in a claim from the petitioner for an order of *mandamus* to remove the offenses from the negative list and give amnesty for these offenses, and to make the necessary legal provisions, including ordinances, in accordance with Article 114 of the **Constitution of Nepal**. Since the President can issue an ordinance on the recommendation of the Council of Ministers while the Parliament is not in session due to **COVID-19**, it is not necessary to comment on this subject matter.

57. Although the prevailing law has put offenses that involve life sentences on the negative list, Rule 29 (1) of the **Prisons Regulation, 1964** does not put these offenses on the negative list. However, as Section 37 (a) of the **Criminal Offences (Sentencing and Execution) Act, 2017** and Section 159 (4) of the **National Criminal Procedure Code, 2017** have listed offenses with life imprisonment on the negative list., Prisoners and detainees incarcerated before the aforementioned new Acts were enacted should *not* be deprived from the facilities entitled to them pursuant to the previous laws. It is a universal principle of criminal justice that ‘the law should not have retrospective effect.’ Article 20 (4) of the **Constitution of Nepal** provides that, “No person shall be liable for punishment for an act which was not punishable by the law in force when the act was committed nor shall any person be subjected to a punishment greater than that is prescribed by the law in force at the time of the commission of the offence.” Thus, an order of *mandamus* is issued in the name of the Department of Prison Management and **Ministry of Home Affairs** to provide pardon to prisoners convicted of offences not listed on the negative list before the enactment of the current laws.
58. Now, we must consider the fifth question. Should an order be issued to make arrangements for exemption by calculating public holidays? This would specifically apply to prisoners who have already fulfilled their imprisonment tenure and are qualified to get exemption and amnesty, but are still imprisoned by not being able to pay the fine, and to release on the condition to appear in the court-on-court date or bail, all detainees who are in prison for trial? There is a claim in the petition to waive the fine and release all detainees kept in prison for trial on bail. The rejoinder states that

the claim for reducing prison sentences by counting the number of public holidays is unreasonable and irrelevant and that 50 per cent of prisoners who have served their sentences have already received exemption after the implementation of the **Criminal Offence (Imprisonment Exemption) Regulation, 2019**. The petitioners have failed to mention which countries allow public holidays to be counted towards imprisonment exemption. Section 40 of the **Criminal Offences (Sentencing and Enforcement) Act, 2017** seems to have a legal provision regarding the computation of the period of imprisonment stating, “The period of imprisonment shall be computed from the date of custody or detention of the offender, if so held in custody or detention, and from the date that the offender is held in prison, if not held in custody or detention.” Thus, since the law clearly allows the calculation of sentences, and not the calculation of public holidays, it is not possible to order imprisonment exemption by calculating public holidays. Such an order is beyond the law.

59. The **Prisons Act, 1963**; the **Senior Citizens Act, 2006**; the **Prisons Rules, 1964**; and the **Criminal Offence (Imprisonment Exemption) Regulation, 2019** have been implemented to exempt prisoners who have fulfilled certain criteria. In addition, Rule 5 (1) (c) of the **Criminal Offence (Imprisonment Exemption) Regulation, 2019** states that a prisoner may file an application with documents proving that he or she paid the fine or served his/her term of sentence. The **National Code, 1963**, by Section 38 of the Chapter on Punishment states that, “In determining the term of imprisonment in consideration for failure to pay fine where both punishment of fine and imprisonment have been imposed, the term of imprisonment shall not be so determined as to exceed the term of more than four years. Provided that in determining the term of imprisonment for a minor in consideration for failure to pay fine, the term of imprisonment shall be so determined as not to exceed half the term of imprisonment that can be imposed on a person having attained majority.” Section 162(4) of the **Criminal Procedure Code, 2017**, states that, “Except in cases where the provision for payment of the amount of fine in instalment is made pursuant to Sub Section (2) or the service of sentence has already been made by remaining in detention or custody in the course of the proceedings of the case or the amount of fine is recoverable from the bail/bond or guarantee furnished pursuant to Chapter 7 or Section 137, the court shall order the concerned prison to imprison the offender in lieu of the fine if he or she fails to pay the amount of fine immediately.” Thus, an order should be issued pursuant to Section

162(4) of the **Criminal Procedure Code**. Also, if an offender does not pay the fine, only pays certain amount, certain amount is remaining, or the case involves remission of the imprisonment, the fine amount should be waived and the offender should be imprisoned according to the proportion of the fine left to be paid.

60. Regarding the petitioners' request to release prisoners on bail before their trial due to **COVID-19**, the **Attorney General** pleaded that this is not possible as per the law. Sections 67, 68, 69, 70 and 71 of the **Criminal Procedure Code, 2017** have made provision for bail. Even though Section 67 of the Act provides that the accused should be kept in custody for crimes of a certain nature if found guilty, Section 67 (3) states that, "Notwithstanding anything contained in Sub-Section (1) or (2), the court may, in relation to an offence other than that is punishable by a sentence of imprisonment for a term exceeding ten years, put in remand on bail/bond or guarantee any accused who is a child or infirm due to physical or mental disease or woman with pregnancy of more than seven months or the person aged above seventy-five years.." Section 68 provides for bail except in the case of Section 67, and Section 71 mentions for 'power to remand in detention' or on guarantee at any stage of proceedings stating that, "In the course of examining evidence, the court may, irrespective of the stage of the proceedings of a case, and in the light of the circumstances of the case, put the accused in remand detention pursuant to Section 67 or demand a bail/bond, guarantee or bank guarantee from the accused pursuant to Section 68; and nothing shall be deemed to prevent the court from keeping the accused in detention or demanding a bail/bond, guarantee or bank guarantee from the accused subsequently by the reason only that the accused was not put in detention or that a bail/bond, guarantee or bank guarantee was not taken from him/her earlier." Also, Section 72 (2) states, "If the court has any reasonable ground to prove that the accused put in detention pursuant to Section 67 or 68 is not guilty of the offence, the court may, irrespective of the stage of proceedings of the case, hear such matter and order to release such accused from detention." Therefore, since the existing law allows judges to evaluate the case and make decisions accordingly, no further comment needs to be made regarding bail during the **COVID-19** pandemic.
61. Considering the legal provisions mentioned in the case above, the issue of granting amnesty to prisoners who are unable to pay fine by calculating public holiday is clearly legal, as per the **Criminal Procedure Code, 2017**;

the **Criminal Offenses (Sentencing and Enforcement) Act, 2017**; the **Prisons Act, 1963**, the **Prison Rules, 1964**; and the **Criminal Offence (Imprisonment Exemption) Regulation, 2019**. Thus, as the limit of the law cannot be changed without reviewing and amending the law itself, it is not the jurisdiction of the court to issue an order stating so. Thus, the order cannot be issued.

62. Today, the world has recognized that detainees and prisoners are high-risk group and has accepted that “prison health is public health” due to the **COVID-19** pandemic. Therefore, it is imperative to protect the lives of detainees and prisoners by ensuring their access to healthcare and treatment without discrimination, which will help prevent further spread of **COVID-19** in overcrowded prisons. Thus, in today’s situation of high-risk, in the backdrop of various orders and decisions being issued by the **GoN**, a directive order has been issued pursuant to Section 2 of the **Infectious Disease Act, 1964**, to grant immediately release or reduce the sentence or to take any other appropriate special decisions to immediately reduce overcrowding in prisons to protect the lives of prisoners and detainees. This should be one while carefully identifying children in critical conditions, pregnant women, breastfeeding women and inmates with complex health issues on a priority basis, while balancing the vulnerability of detainees and prisoners with public safety. Also, it is hereby directed that a report be submitted within two months to the Research and Planning Department of the **Supreme Court** through the **Office of Attorney General**, discussing the implementation of the orders issued in this writ petition. The respondents should be notified through the **Office of the Attorney General**. Let the case file be handed over to Record Section striking off the registration details of this Petition as per the rules.

Judge

I concur to the above opinion:

Judge

Done on the 3 August 2020.

4

Date of Order 5 August 2020	Writ No. 076-WO-0962	NLR/Year/Decision No. 10526
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Supreme Court, Division Bench

Hon'ble Justice Sapana Pradhan Malla
Hon'ble Justice Prakash Kumar Dhungana

Writ No:
076-WO-0962

Case: Certiorari/Mandamus

Advocate Roshani Poudel, resident of Lalitpur District, Mahalaxmi
Municipality, Ward No. 2 1
Advocate Saroj Krishna Ghimire, resident of Lalitpur District, Mahalaxmi
Municipality, Ward No. 2 1

Versus

The GoN, Secretariat of the Prime Minister and Council of Ministers,
Singhadurbar, Kathmandu 1
Secretariat of the Federal Parliament, New Baneshwor, Kathmandu 1
High Level Coordinating Committee on Novel Corona Disease Prevention and
Control, *Mukam*, The Office of the Prime Minister and Council of Ministers,
Kathmandu 1
The GoN, Ministry of Health and Population, Ramshahpath, Kathmandu 1
The GoN, Ministry of Law, Justice and Parliamentary Affairs, Singhadurbar,
Kathmandu 1
The GoN, Ministry of Women, Children and Senior Citizens 1
The National Information Commission, Devinagar, Kathmandu 1
The Ministry of Home Affairs, Singhadurbar, Kathmandu 1

The summary of the facts and order of the given writ petition filed under the
extraordinary jurisdiction of this Court pursuant to Article 46 and Article 133
(2) of the **Constitution of Nepal** are as follows:

Fact Section

1. Content of the writ petition

The protection of women's rights as guaranteed by the **Constitution of Nepal** has been hampered by the fact that women and girls, especially those affected by gender-based violence, have been denied access to emergency and immediate rescue services and other judicial services. Similarly, women's reproductive health has been severely affected and the needs and problems of women in relief distribution, quarantine management and essential services have not been properly addressed. In addition to this, women and children living in foreign countries and various checkpoints in India are forced to live at risk while entering Nepal and are thus affected psychologically. The **Novel Corona Disease Prevention and Control High Level Coordinating Committee** set up by the federal government has excluded women, which provides evidence that the government has not been sensitive to the importance of women's participation even though the Constitution guarantees it. Further, a press release issued by the **National Information Commission** held on 19 May 2020 ordering the disclosure of permanent addresses of person who have been infected or died from **COVID-19** has seriously impaired Nepalese citizens' rights to privacy.

Constitutional and Legal Question

The government has violated the right to a dignified life, the right to privacy, the right to equal access to free and emergency health services, the right to safe motherhood and reproductive health; the right against violence or exploitation, and the fundamental right of women to participate in all state bodies on the basis of proportional inclusion as provided by the Preamble and Articles 16, 28, 35 (1) (3), 38 (2) (3) (4) (5) and 42 (2) of the **Constitution of Nepal**. Similarly, the legal rights guaranteed by Section 6 of the **Domestic Violence (Offence and Punishment) Act, 2009**; Section 3 (1), and 4 of the **Public Health Service Act, 2018**; and Sections 3, 5, 7, 8, 15, 20 of the **Right to Safe Motherhood and Reproductive Health Act, 2018** have also been impaired. Likewise, the rights guaranteed by Article 12 of the **Universal Declaration of Human Rights, 1948**, Article 17 of the **International Covenant on Civil and Political Rights, 1966**; Article 12 of the **International Covenant on Economic, Social and Cultural Rights, 1966**; and Articles 7 (b), 12, 14 (2) (b) of the **Convention on the Elimination of All Forms of Discrimination against Women, 1979** have also been violated.

Remedy Claimed

In order to guarantee, protect and promote the rights of women during the **COVID-19** lockdown, an order of **Mandamus/Certiorari** in the name of the opponent is sought, to address the following:

- 1) The press release issued by the **National Information Commission** on 19 May 2020, which ordered the disclosure of the permanent addresses of people who have been infected or died of **COVID-19**, has seriously encroached the right to privacy of Nepalese citizens and may cause social discrimination. An order of Certiorari is sought to revoke the order/press release.
- 2) Not a single woman was included in the high-level committee formed by the federal government on 29 February 2020. This disregarded women's rights to participate in the policy-making process on the basis of proportional inclusion. An order of **mandamus** is hereby sought to ensure women's participation.
- 3) An order of **mandamus** is sought to guarantee women's rights to safe maternity and reproductive health during the **COVID-19** pandemic and lockdown, by ensuring adequate and effective access to emergency and immediate rescue services and prioritize women in judicial services, especially women affected by gender-based violence.
- 4) In order to ensure the health and security of female frontline health workers, security personnel, journalists and emergency service workers – who are all playing a lead role in the health sector – an order of **mandamus** is sought to immediately provide them with health and security equipment, including **PPE**.
- 5) An order of **mandamus** is sought to prioritize women and children who are entering Nepal from abroad or at border points due to foreign employment, education and various other reasons, along creating gender-friendly quarantine spaces.
- 6) An appropriate order is sought to prioritize the flow of effective psychosocial services to reduce and control the impact of **COVID-19** on women, and to ensure their participation in every government policy-making process.
- 7) Since women and children are the most affected or vulnerable groups during health pandemics, such as **COVID-19**, and other natural or human-made disasters, there is a need to create a 'Pandemic Law.' Thus, an appropriate order including **mandamus** is sought to formulate a law that integrates pandemic and disaster management which ensures gender-friendly management and access to justice.

2. Show Cause Order of this Court dated 29 May 2020:

What happened in this matter? Why should the order not be issued as per the demand of the petitioner? If there are any reasons or grounds for not issuing the order, it is hereby requested that the respondents submit a reply thereof in writing through the **Office of the Attorney General** within 15 days from the date of receipt of this order and carbon copy of the writ petition. Considering the nature and importance of this subject matter, it seems reasonable to reach to a decision about whether or not to grant interim order by discussing it with both the parties. Therefore, a summon is issued in the name of both parties to be present on 2 June 2020.

3. Rejoinder of the Ministry of Home Affairs:

Since the **Constitution of Nepal** establishes health as a fundamental right of the people, this Ministry is keen on managing health-related disasters to promote, protect, improve and rehabilitate the health of Nepalese citizens by maximizing all the necessary resources and means through accountable and efficient management. The **Ministry of Home Affairs** is committed to realize the rule of law by enforcing the constitution and the law, and protect and promote the rights and entitlements of the citizens under them. Since the writ petitioner did not indicate how the Ministry of Home Affairs is allegedly causing distress to the writ petitioner, the writ petition should be quashed.

4. Rejoinder of the Ministry of Law, Justice and Parliamentary Affairs:

First of all, since the writ petition could not state what action or decision this Ministry took that violated the writ petitioners' legal and constitutional rights, it is not possible to file a writ petition against this Ministry. There is no basis or reason. **COVID-19** is spreading globally and neighbouring countries have also been affected by it. To prevent and control the spread of infection, the **Council of Ministers** on 1 March 2020 – with coordination of the **Prime Minister and Minister of Défense** – formulated a **High-Level Coordinating Committee for the Control and Prevention of Novel Corona**. Since then, the committee has been working distinctly. In addition, an order has been issued by the **GoN** on 22 March 2020 pursuant to Section 2 of the **Infectious Diseases Act, 1964** to prevent the spread of this contagious disease which was published in *Nepal Gazette*, with additional orders published time and again. Controlling violence against women and children during the extreme situation of the pandemic and ensuring women's participation in the state machinery are both issues. In this regard, the **GoN** has been implementing a zero-tolerance policy against violence against women. As far as the

enactment the **Unified Law on Pandemic and Disasters** is concerned, determining new laws, amendments or modifications to existing laws is a matter of legislative wisdom or exclusive legislative competence. Thus, the order should not be issued, and the writ petition should be quashed.

5. Interim Order of this Court dated 10 June 2020:

Concerning the request for the issuance of an interim order on behalf of the petitioner, Learned Senior Advocates and Learned Advocates pleaded that woman was not represented in the “**High-Level Coordinating Committee for Control and Prevention of Novel Corona.**” They said that cases of domestic violence are on the rise, women are not being prioritized while entering Nepal from abroad and while receiving health examinations, and that no provision has been made for them to have separate quarantine areas.

The Constitution of Nepal envisions an inclusive state mechanism that prioritizes women’s representation. Regarding the guarantee of women’s participation in high-level mechanism as guaranteed by the Preamble of the Constitution; the Proviso Clause of Article 18 (3); Article 38 (4); Article 42; and Article 43, the respondents are responsible for committed to the constitutional provisions. Having said that, the final hearing will consider the issue of whether the aforementioned provisions have been adhered to or disregarded.

Since the interim order concerns security, protection and privacy with regard to reproductive health issues, an Interim Order is ordered, pursuant to Article 133 of the **Constitution of Nepal** and Rule 49 of **Supreme Court Rule, 2017** to do as follows:

- 1) This Court has issued various orders concerning the **COVID-19** pandemic. The main purpose of these orders is to figure out how to effectively protect people affected by the pandemic. It is the duty of this Court to protect citizens’ constitutional rights. Orders have been issued based on the belief that the constitution can protect all of us, while we simultaneously defend it. These orders are not the product of any judicial ambition or inclination. In this context, when the order was issued on 17 April 2020, it was mentioned that while providing safe and free transportation to the people returning home on foot, special protection and priority should be given to women, children, senior citizens and physically ill people. The main reason for this is that although the covid

virus infects everyone, its effect is unequal. As special protection has to be given especially to women including pregnant women, infants, the elderly, the unhealthy and people entering Nepal from various borders, from the pandemic, people should be kept in separate quarantine or isolation providing special care.

- 2) During the Lockdown, women, in particular, are vulnerable to domestic and other forms of violence. Article 38 (3) of the **Constitution of Nepal** criminalizes acts of violence and exploitation. This right can only be exercised when women have easy access to justice. Therefore, the respondent should be informed to take their complaint as per Section 4 of the **Domestic Violence (Offenses and Punishment) Act, 2007**, and carry out the investigation action as per the law. They should also write to all the district courts from the **Supreme Court** to immediately register complaints pursuant to Sub-Section (2) of Section 5 of the same act, and take necessary action as per the law.
- 3) Even though the **National Women's Commission** has a helpline for victims of domestic violence (number 1145), no action on cases and call-ins have been taken. Therefore, a letter should be sent to the **MoWCSC** asking them to look into what is happening; not continue allowing it to happen, since it has impacts on women's safety; and to arrange an additional, Ministry-level helpline.
- 4) The petition alleges that **COVID-19** has adversely affected women's reproductive health. Article 38 (2) of the **Constitution of Nepal** guarantees safe motherhood and reproductive health as women's rights. The exercise of this right should be smooth, and should not be halted under any circumstance. Regular health check-ups for pregnant women, as well as immunization, and injection for them and their infants should not be affected by the pandemic.
- 5) The petition also raised the issue of the right to privacy of those infected with **COVID-19**. On the one hand, the right to privacy is inviolable. On the other hand, the government has to issue information in the public interest. Therefore, personal information should be disseminated only with the consent of the concerned person, considering the possible impact this information could have on the person or their family. The current writ petition should be viewed in line with other orders given in writ petitions, including **076-WO-0933**, **076-WO-0938** and **076-WO-0958**. Let it be written to the respondent through the **Office of the Attorney General** stating the same and conduct the further proceedings as per the rules.

6. Rejoinder Presented by the National Information Commission

The **National Information Commission** is informed and sensitive about protecting the privacy of patients who are infected or have died from **COVID-19**. However, in many instances, personal information has been published, broadcasted or circulated on social media, resulting in painful and long-term effects on the concerned individual or their family. Since the permanent and current address of people infected with **COVID-19** or the place where they got infected may vary, mentioning only one of those places will create public fright and confusion. Deeming it necessary to control and clarify the flow of information on this issue, the **National Information Commission** issued an order on 19 May 2020 as per Section 19 (k) of the Right to Information Act, to allow the current place of residence and permanent address of **COVID-19** patients to be published. This decision was made by considering the provision of Section 28 of the **Right to Information Act, 2007**, which states that public bodies should protect citizens' personal information from unauthorized publication and dissemination. Therefore, the **National Information Commission** did not issue any order or decision that affected citizens' privacy. Since the order issued by the **National Information Commission** using the discretion accorded to it by Section 19 (e) of the **Right to Information Act, 2007** did not violate citizens' privacy, this writ petition should be quashed.

7. Rejoinder Presented by the Secretariat of the Federal Parliament

Since the writ petition does not clearly mention which constitutional and legal rights of the petitioners were violated by what actions or decisions of the Secretariat of the Federal Parliament, the writ petition should be quashed immediately. With regard to the request for the formation of a '**Pandemic Law**' that integrates the needs of women and children and ensures gender-friendly services, a bill can be passed according to parliamentary procedures. If the GoN submits a draft bill on this issue to **the Federal Parliament**, this Secretariat will provide administrative assistance as per parliamentary rules and procedures. Therefore, there is no need to issue an order as sought by the petitioner in the name of this Secretariat. This writ petition should be quashed.

8. Rejoinder Presented by the Ministry of Health and Population

While the Ministry has always been mindful about protecting the privacy of those infected with **COVID-19**, their right against discrimination and privacy rights in general, it is the jurisdiction of the Ministry to provide reliable

details by tracing and tracking people who have come in contact with an infected person. This effort is undertaken to prevent the infection from spreading and to keep society safe because **COVID-19** spreads rapidly from one person to another. In doing this, the Ministry is acting in accordance with WHO standards.

Even during the **COVID-19** pandemic, the Ministry has repeatedly been directing and issuing press release to hospitals and medical institutions urging them to continue their services in order to ensure the constitutionally-mandated right of citizens. This includes their rights to free access to basic healthcare; the right of women to safe maternity and reproductive health; and the right of all citizens to receive healthcare, including those who have experienced sexual violence, mental health problems or are in need of emergency medical care. In this regard, the **Nepal Medical Council** issued a press release to make arrangements for health treatment by all hospitals. It sought an explanation from hospitals that have disobeyed the government's directives. To facilitate the management of treating patients during lockdown, guidelines about patient transfer teams have been prepared and the work is being done accordingly.

The **Council of Ministers** has approved and implemented a quarantine procedure as per the WHO guidelines, and made arrangements for the **Central COVID-19 Crisis Management Centre, Provincial COVID-19 Crisis Management Centre** and the District **COVID-19** Crisis Management Centre to do quality monitoring. Meanwhile, the Ministry, state governments and concerned local-level bodies have coordinated to manage health workers during quarantine. A 'Procedure Rules Form' while staying in quarantine has been developed and uploaded for everyone to access.

It is not reasonable for the **GoN** to formulate a separate law on pandemic and disaster control based on the current context of **COVID-19**. Doing so will create an additional financial burden on the state and, more importantly, the **GoN** already has laws regarding this issue. The prevailing **Infectious Diseases Act, 1964** allows the **GoN** to make necessary arrangements during a pandemic to punish those who obstruct or violate these provisions, and the **Public Health Service Act, 2018** provides adequate provisions for the management of emergency health services, public health disaster declaration management, infectious disease prevention, information

management and treatment management. Therefore, the writ petition requesting additional provisions should not be issued as per the claim. The writ petition should be quashed.

9. Rejoinder Presented by the Ministry of Women, Children and Senior Citizens

With regard to the writ petition in which the **Ministry of Women, Children, and Senior Citizens (MoWCSC)** is a respondent, the petitioners claim that the needs and problems of women and children must be better managed during the pandemic, and that women and children must be recognized as a special class during this time. The Ministry is committed to respect the rights conferred by the constitution and the law. To implement the rights provided to women in Article 38 of the **Constitution of Nepal**, the Ministry has been doing the following tasks:

- 1) The MoWCSC sent a letter to the Ministry of Health and Population on 2 June 2020 about special protections for pregnant and breast-feeding mothers.
- 2) The MoWCSC sent a letter to the Ministry of Industry, Commerce and Supplies, Ministry of Agriculture and Livestock and the Ministry of Labour, Employment and Social Security on 2 June 2020 about prioritizing women and their families who lost their jobs due to the **COVID-19** pandemic.
- 3) Correspondence was initiated with 753 local-level governments on 3 April 2020 through the **Ministry of Federal Affairs and General Administration** about prioritizing certain areas for relief distribution.
- 4) The MoWCSC has coordinated public awareness through mass media, including Nepal Television, about the impact of **COVID-19**; preventing sexual violence; and promoting safety among children and people with disabilities.
- 5) The Gender In Humanitarian Action (GIHA), which operates in times of disaster, is facilitating institutional coordination about reducing gender-based violence, as per the issues raised by the stakeholders.
- 6) The MoWCSC and UN Women collaborated to prepare a gender and social inclusion checklist for quarantine site monitoring.
- 7) The **National Women Commission** has been taking various initiatives to prevent the impact of **COVID-19**, including the following measures:
 - a) A total of 1,907 complaints of violence against women have been received over the phone, out of which 989 were information calls and 918 were follow-up calls.

- b) As per the appeal of the **National Women Commission** and non-governmental organizations (NGOs), various services, including psychosocial counselling (to 483 people), legal counselling (to 192 people), legal case work (to 16 people), immunity in court (to 8 people), protection 3 out of 4 in *Saathi* organization and one in Child Workers in Nepal), mental healthcare (to 7 people), emergency relief (to 16 people), and recreational activities (to 8 people) have been provided.

The MoWCSC has continued to provide emergency and immediate rescue services to women and girls during the lockdown, and arrested **alleged culprits**. Since this Ministry has been working as sensitively as it possibly can during this time of crisis, the claims of this writ petition on account of this Ministry should be revoked.

10. Rejoinder presented by the Directive Committee of COVID-19 Crisis Management Center on account of the already dissolved High Level Coordinating Committee on Novel Corona Disease Prevention, and the Office of the Prime Minister and Council of Ministers

The **GoN** is committed to fully realize the rights of citizens under the constitution and the law. **The Public Health Services Act, 2018** was issued and implemented to make health services regular, effective, qualitative and accessible to all. To control **COVID-19**, the **Infectious Disease Act, 1964** can be referenced and special provisions regarding infectious disease have already been made in accordance with this Act. Similarly, the **National Health Policy, 2019** was also implemented. Further, the **National Health Policy, 2019** is being used to immediately manage health crises; promote, protect, improve and rehabilitate the health of citizens by accountable and efficient management; optimally mobilize all resources and means; and appropriately address new challenges present in the health sector. An **Order relating to the Facilitation of Repatriation, 2020** has also been issued and implemented for those who are facing difficulties abroad and want to come back to Nepal. As per this order, people have been repatriated to Nepal on a priority basis. A fund has also been created to control and treat **COVID-19**.

To prevent, control, treat and make medicine and health equipment available in a coordinated manner, the **Novel Corona Virus Control and Prevention High Level Coordination Committee** was formed under the Deputy Prime Minister and the Défense Minister by the **Council of Ministers** on 1 March 2020. Since then, the committee has been undertaking necessary tasks.

However, the GoN later dissolved this committee in order to streamline these processes, by allowing a single body to coordinate all these tasks. As a result, the Council of Ministers issued an order on 10 June 2020 to restructure to create and make operative a **Board of Directors of the COVID-19 Crisis Management Center**.

Chapter 6 of the **Public Health Services Act, 2018** has provisions about health services, including emergency healthcare and management, which have been carried out. Following the protocols set by the **Ministry of Health and Population**, the government has organized quarantine centres for foreign returnees. Keeping in mind the impact of **COVID-19**, special arrangements have also been made to prevent women and children from being affected. During this difficult time, infants and pregnant women have been prioritized, and the respective ministries and subordinate offices are carrying out the necessary tasks, including immediate treatment and rescue. The identification and treatment of individuals who have **COVID-19**, as well as identifying and giving health check-ups to those who have been in contact with them, is being done through contact tracing. Health professionals, security professionals and other employees who are involved in these efforts have been provided with **PPE**. Since **COVID-19** testing and treatment are done free of cost, there is no reason to raise an issue about properly managing **PPE** for female health workers. Therefore, since the **GoN** has been doing all the aforementioned tasks, the writ petition should be quashed.

Order Section

11. In the present writ petition scheduled as per the Rules before the Bench for rendering a verdict, the petitioners Roshani Poudel, Saroj Krishna Ghimire and the Learned Senior Advocates present from the side of petitioners – Harihar Dahal, Raghav Lal Vaidya, Ravinarayan Khanal, Khagendra Prasad Adhikari, Narayan Prasad Adhikari, Sher Bahadur KC, Usha Malla Pathak and Chandra Kant Gyawali, and Learned Advocates Tikaram Bhattarai, Sunil Kumar Pokharel, Meghraj Pokharel, Khamma Bahadur Khati, Kirtinath Sharma Poudel, Saraswoti Shrestha, Bikash Bhattarai, Anantaraj Luitel, Anju Kayastha, Shreedhara Kumari Pudasaini, Manish Kumar Shrestha, Rameshwor Neupane, Bishnu Basyal, Shanti Devi Khanal, Bishnumaya Bhusal, Laxmi Devi Rawal, Subash Budhathoki, Rakshya Basyal, Laxmi Thapa Khadka, Mukunda Adhikari, Rajita Thapa, Santosh Bhandari, Indira

Silwal, Amita Gautam (Poudel), Sujan Nepal, Laxmi (Nani) Thapa, Nawaraj Pandey, Kamal Koirala, Subhan Raj Acharya, Bina Pandey, Pankaj Kumar Karna, Janak Raj Acharya, Bishal Kumar Upadhyaya, Birbhadra Joshi, Janak Singh Saud, Farsamaya Devi Magar, Hasina Pradhan, Shristi Nyachhyon – argued that although **COVID-19** affects everyone, women are affected even more acutely. Domestic violence, rape and sexual violence, along with cybercrimes have increased during the pandemic. Since priority has not been given to the constitutional and legal rights of pregnant women during the pandemic, several women have even lost their lives. Thus, the government does not seem to be effective and gender-sensitive when testing, preventing, treating, rescuing and rehabilitating **COVID-19** patients.

Further, the **Infectious Disease Act, 1964** and the **Public Health Service Act, 2018** do not seem to effectively address the needs of women. The **Constitution of Nepal** stipulates that, women should not be discriminated against and their equality should be ensured. Nepal has adopted a substantive model of equality that contains a corrective approach. The UN systems, including the WHO, have developed guidelines to prevent discrimination and violence against women and deal with the stigma and mental stress caused by **COVID-19**, even during the pandemic, women are having different experiences than men. It is the responsibility of the state to ensure – on the grounds of ‘Preparedness,’ ‘Response’ and ‘Recovery’ – an effective, gender sensitive and accountable system to guarantee the aforementioned services to women. Nepal has not yet implemented the **Disaster Risk and Management Act, 2017** during this pandemic. Meanwhile, foreign countries like Singapore, Ireland, the New Zealand, the Philippines, the United Kingdom, China, the United States of America have formulated new pandemic-related acts. **The Infectious Disease Act, 1964** does not have the ability to address the multi-faceted issues brought forth by the pandemic, but the government does not seem to be concerned about this.

12. The advocates further argued that women’s constitutional rights to remedy and justice have been violated during the pandemic since lockdown has curtailed timely judicial remedies. It is the duty of the state to manage registration and complaint hearings concerning violence. However, the state has not given special priority to women, children, pregnant and breast-feeding women, persons with disabilities, senior citizens and

other high-risk groups. As a result, the reproductive health of women has been severely affected and women-specific issues in essential services; relief distribution and quarantine management have not been properly addressed. In the absence of gender-friendly quarantine spaces, there have been reported instances of rape in the quarantine facilities. Women have not been included in the **High-Level Coordinating Committee for Control and Prevention of Novel Corona** formed to deal with the pandemic, leading one to believe that the government has not been sensitive towards women's rights to participate in policy-making processes, which is guaranteed in the constitution. To ensure women's rights to safe maternity and reproductive health, health institutions should provide priority services to pregnant and breast-feeding women and infants. However, this has not been done – and the writ petition seeks the provision to provide relief items, safe maternity and reproductive health packages to women.

The petitioners argue that an appropriate order – including *mandamus* – should be issued to provide psychosocial counselling and employment to women because many women have faced psychological effects and have lost their jobs due to the pandemic. The writ petition also seeks to declare the **National Information Commission's** 19 May 2020 press release void by an order or *certiorari*, arguing that it has humiliated the infected people and their families and is against the right to live with dignity and the right to privacy. The petitioners claim that it violates the following Articles of the **Constitution of Nepal**: Article 16, right to equality; Article 18, right to privacy; Article 28, right to health; Article 35, rights of women; Article 38, right to justice; Article 20, right to compensation; Article 21, right to social justice; as per Article 42. The petitioners also claim that it violates rights ensured by Article 12 of the **Universal Declaration of Human Rights**; Article 17 of **ICCPR**; Articles 7(b), 12, 14 (2) (b) of the **Convention on Elimination of All Forms of Discrimination Against Women** have also been violated. To protect the right to safe motherhood and reproductive health of women by ensuring emergency and rescue related services including priority in access to judicial services following the aforementioned national and international legal provisions; and to formulate and cause to formulate a 'Pandemic Law' having access to justice, and gender-friendly management and judicial addressing of health pandemic like the **COVID-19** and other situations of crisis, disaster or pandemics as women are most affected during such situations of disaster.

13. Learned Joint-Attorney, Mr. Shyam Kumar Bhattarai, representing the respondent, stated that the Council of Ministers established the **High-Level Coordinating Committee for Control and Prevention of Novel Corona** on 1 March 2020, which is in operation. He further argued that the **Supreme Court** has already made significant contributions towards controlling the pandemic by issuing an interim order in this writ petition and orders in other writ petitions, as well. He also emphasized that the government is committed to controlling violence against women and children during the pandemic. The issue raised by the petitioners about creating integrated legislation on pandemic and disaster situations is a matter of legislative wisdom and jurisdiction. During the pandemic, the **National Women Commission** has received complaints of violence against women over the telephone, and a list regarding gender and social inclusion has been prepared in collaboration with UN Women for quarantine site monitoring.

There has been increased public awareness through the mass media i.e., Nepal Television, about preventing **COVID-19**, reducing gender-based violence, protecting children and caring for persons with disabilities. The notice of the **National Information Commission** on 19 March 2020 states that Article 28 of the **Right to Information Act, 2007** stipulates that public bodies must protect personal information in a way that does not allow unauthorized publication and dissemination. The order about disclosing personal information of about **COVID-19** patents including their place of residence was issued pursuant to Section 19 (k) of the Right to Information Act. The Learned Joint-Attorney Bhattarai stated that the **National Information Commission** has not issued an order affecting the personal privacy of individuals. Since the Commission's order about exercising its powers through Section 19(e) of the Right to Information Act, 2007 does not violate citizens' rights to privacy, the issue raised by the petitioner does not exist. Thus, the writ petition is to be quashed.

14. Upon studying the petition, rejoinder and other documents included in the case file, and hearing the arguments of petitioners, the Learned Legal Counsels representing the petitioners and the Learned Joint-Attorney representing the respondents, a decision must be issued regarding the following questions:

- 1) Should an order of **mandamus** be issued in name of the **GoN** to ensure women's participation in government committees formed to prevent and control the **COVID-19** pandemic, based on the principle of inclusion?

- 2) Should an order of **mandamus** be issued to ensure that women affected by domestic violence and other forms of gender-based violence receive fair, adequate and effective access to judicial services during the **COVID-19** pandemic, including emergency and immediate rescue services?
 - 3) Should an order of **mandamus** be issued, to bring back to Nepal, on a priority basis, the citizens who are in India or other countries for reasons including foreign employment and studies, and to manage safe quarantine and isolation wards for women, children, pregnant women, women in post-natal period, persons with disabilities, senior citizens and other high-risk groups with special priority?
 - 4) Should an order be issued to provide and cause to provide priority services to pregnant women, women in post-natal period and infants, to ensure the right to safe maternity and reproductive health, and should an order be issued to provide safe maternity and reproductive health relief package to women in quarantine?
 - 5) Should an order be issued to provide psychosocial counselling to those psychologically affected by **COVID-19**?
 - 6) Should an order be issued to ensure the employment of women who have lost their jobs due to the socio-economic impact of the **COVID-19** pandemic?
 - 7) Should an order be issued to provide special health security to the health workers and security personnel who are at the frontline of providing health services?
 - 8) Should the press release of the **National Information Commission** dated 19.03.2020 ordering to make public the personal details of the permanent and temporary addresses of the people who are infected or have died due to **COVID-19** be declared void?
 - 9) Should an order of **mandamus** should be issued to formulate a gender-friendly unified law to properly address the **COVID-19** pandemic?
15. While considering the decision, it seems necessary to mention facts about how **COVID-19** has impacted women. The pandemic, which is believed to have started in the last week of December 2019, has had an impact on people worldwide. There are no medicines for its prevention and treatment; everyone is at risk, but senior citizens and patients suffering from other diseases are at high risk, and many people have lost their lives due to the disease. As a result, people are going through fear, panic, stress and crisis. **COVID-19** is causing health complications and human losses on a daily basis and causing terror all over the world. The first **COVID-19** infection in Nepal

was recorded during the last week of January 2020, and it is still on the rise. To control and prevent this, the **GoN** decided to declare a lockdown for the first time from 24 March 2020 to 31 March 2020. Since then the lockdown has been extended several times. Although there is currently no complete lockdown, there are still cases of infection in different parts of the country. Based on the intensity of risk and the number of infected people, policies concerning partial detention and territorial confinement are still intact, which has affected the social, mental and economic facets of human life. Sealing off the house and area of the infected or deceased people and publicizing their personal details including their place of residence, temporary and permanent addresses and has caused them and their families to experience stigmatization and abusive behaviour. This is pushing society towards unrest. As a result, people suspected of infection do not get tested or infected people hide their infection, which increases the risk.

16. The pandemic has indiscriminately affected people all over the world, but it is aggravating existing gender inequalities in different societal, political and the economic systems. Women face additional difficulties during the pandemic by virtue of their gender. Economic burdens have increased for women living in poverty as well as those who have lower incomes, little savings and employment insecurity. Women face more gender-based violence, especially domestic violence, sexual violence, cybercrime, reproductive health, mental health and employment security problems. Instances of gender-based violence, especially domestic violence, are increasing on a regular basis. Even access to safe motherhood and reproductive health services are being affected. The first person died due to **COVID-19** in Nepal was a woman in her post-natal period. Due to lack of safe maternity services, maternal mortality is also on the rise.¹⁸ Moreover, women tend to bear the responsibility of household chores due to social structures, so the workload of most women during the lockdown has increased significantly, adversely affecting their physical and mental health. Hence, **COVID-19** has gendered effects. Thus, it is extremely necessary to ensure women's health and access to justice by addressing the adverse and disproportionate effects of **COVID-19** on women.

18 UN Women, Surveys show that **COVID-19** has gendered effects in Asia and the Pacific, UN Women Official Website, April 2020 available at , <https://data.unwomen.org/resources/surveys-show-COVID-19-has-gendered-effects-asia-and-pacific>

17. Even though the current situation in Nepal is abnormal not normal due to the pandemic, citizens' fundamental and constitutional rights have not been suspended nor can they be in the future. However, in the absence of addressing the multifaceted effects of the pandemic on women, their various rights are not being realized – and are on the verge of being curtailed. These rights include the right to non-discrimination, the right to equality, the right against violence, the right to safe motherhood and reproductive health, the right to repatriate, the right to a life of dignity, the right to privacy and the right to employment. Since no one should be deprived of their right to justice, the order of the extended Full Bench of 19 judges of this Court in case No **076-RE-0392** and **076-WO-0944** (dated 1 June 2020) regarding obstructions in access to justice, developed 'Pandemic Jurisprudence,' which declared lockdown as 'zero hour.' The order stipulates that it is necessary to address the complex situation and adversities caused by the pandemic in a just manner so as not to infringe upon constitutional rights. Therefore, it is necessary to mobilize the resources of the state during this pandemic to ensure the rights granted by human rights instruments, the constitution and various laws. It is necessary to coordinate with national and international bodies to develop immediate and long-term systems that can ensure citizens' freedom from fear and want, and ensure full and equal economic and social rights to marginalized groups.
18. Considering the first question about the lack of women in **COVID-19** management committees, the petition claims that women's participation in these committees should be ensured, whereas the rejoinder states that ex-officio members are automatically appointed to these committees in accordance with legal provisions and inclusiveness based on the capacity of the state, and that women's representation cannot be immediately implemented because it is a matter of progressive realization.
19. The **High-Level Coordination Committee for Control and Prevention of Corona** formed by the federal government on 29 February 2020 has representatives from various ministries. However, it does not include any representatives from the **MoWCSC**. This has resulted in an over-representation of men on the Committee, and no participation of women since, historically, men have dominated most institutions due to societal norms.
20. In every crisis or disastrous situation, women face different problems by virtue of their gender. Even during this pandemic, women's different

experiences have been seen. Many problems are increasing for women, including gender-based violence, limited access to reproductive health, poor mental health and employment insecurity. Thus, the process of formulating and implementing plans related to **COVID-19** must consider the different and complex experiences that women have gone through. In order to effectively address the adverse and disproportionate effects of **COVID-19** on women, pandemic management plans need to be women-friendly and must include a 'feminist response' against the pandemic. To protect the rights of women affected by the pandemic and minimize its gender effects, women's participation is essential in all pandemic-control activities. However, women's participation has not been taken seriously and women have been excluded from these institutional responses due to social and historical marginalization.

21. The **Constitution of Nepal** has adapted the principles of equality and inclusion. The **UN Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW)** also recognizes substantive equality by ensuring "temporary special measures aimed at accelerating de facto equality between men and women" by Article 4. Similarly, Article 7 of CEDAW mentions the right of women to participate in policy-making activities of the state stating that, "States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal basis with men, the right to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government."
22. The preamble of the **Constitution of Nepal** and Article 18 (2) states that there shall be no discrimination on any grounds of origin, including religion, caste, gender, physical condition, disability, health status, marital status, pregnancy, economic status, language or region, ideological belief or on other similar grounds, in the application of common law. Further, the proviso clause of Article 18 (3) reads that the state can take special measures for women as per the law. Article 38 (4) guarantees the right of women to participate in all state bodies on the basis of proportional inclusion. Article 38 (5) states that women have the right to obtain special opportunities in education, health, employment and social security on the basis of 'positive discrimination.' Every state has to uphold the essence of inclusion upheld by the **Constitution of Nepal**. No one is above the constitution nor can

they be so. A directive order has been issued in name of the **GoN** to ensure meaningful participation of women in all decision-making processes related to **COVID-19** prevention including discussion, planning, management and monitoring, and in all committees formed in this regard by ensuring inclusiveness in accordance with the essence of proportional inclusion and the concept of gender equality of the constitution.

23. Now, moving on to the second question. The petition claims that an order of **mandamus** should be passed requiring the government to provide appropriate, adequate and effective access to judicial services to female victims (or potential victims) of domestic and sexual violence during the pandemic, which would include emergency and rescue services. The rejoinder stated that the order should not be issued because laws concerning gender-based violence are being implemented, and the victims are already getting justice.
24. In any disaster or emergency situation, women, children and people with disabilities are at greater risk and face more challenges.¹⁹ As **COVID-19** spreads across the world, women are not only becoming victims of the pandemic, but also of widespread gender discrimination and violence. Research indicates that despite a decline in the rate of other crime rates globally, violence against women, especially domestic violence, has been on the rise.²⁰ Various studies suggest an increase in domestic violence during lockdown, due to increase in stress levels and toxic social practices and gender inequality across the world.²¹ The UNFPA estimates that 1.5 million more women will likely become victims of gender-based violence in the next three months if the lockdown continues.²² While **COVID-19** has forced people to stay inside their homes for safety, many women have become even more insecure inside their own homes due to domestic violence. Escalating rates of gender-based violence during COVID-19 have been labelled as a “**Shadow Pandemic**.”²³

19 António Guterres, United Nations Secretary-General, Opening Remarks of the Secretary-General's Appeal for Global Ceasefire, (Speech at the UN Headquarters on 23 March 2020) available at <https://www.un.org/sg/en/content/sg/speeches/2020-03-23/secretary-general-appeal-for-global-ceasefire>

20 According to UNDP, In France, for example, cases of domestic violence have increased by 30 per cent since the lockdown on March 17. Helplines in Cyprus and Singapore have registered an increase in calls by 30 per cent and 33 per cent, respectively. In Argentina, emergency calls for domestic violence cases have increased by 25 per cent since the lockdown started.

21 Human Rights Watch (HRW), Women Face Rising Risk of Violence During COVID-19, Official Website of HRW July 2020 available at <https://www.hrw.org/news/2020/07/03/women-face-rising-risk-violence-during-covid-19>. See also, UN Women, *COVID-19 and Ending Violence Against Women*, UN Women, 2020.

22 United Nations Population Fund, *Impact of the COVID-19 Pandemic on Family Planning and Ending Gender-based Violence, Female Genital Mutilation and Child Marriage*, 2020.

23 UN Women, *COVID-19 and Ending Violence Against Women*, UN Women, 2020.

25. In Nepal, even though the rate of crimes has generally decreased compared to last year, incidents of rape, domestic violence and cybercrime against women have increased significantly during the lockdown. According to crime statistics of the Nepal Police, a total of 4,448 incidents against women, children and senior citizens were reported from 26 April to 31 July alone. In total, 717 of these crimes were rape, 199 were attempted rape and 1,931 were domestic violence.²⁴ Even in their own homes, which is considered as the safest place, women have to live in a constant state of fear, unrest and insecurity. Under normal circumstances, women could move to safer places, seek help from organizations or individuals, file complaints or take other measures to protect themselves. However, access to support systems during lockdown has been difficult. Thus, even in instances of gender-based violence, access to emergency rescue services and judicial services have not been effectively available.
26. Considering this situation, the state must be sensitive and proactive in preventing violence against women and ensuring justice. This can be achieved by increasing women's access to support systems. In addition to addressing the pandemic, the government must also keep women safe. Given this critical situation, women should be kept at the centre of **COVID-19** response, preparedness and recovery, which can help reduce the additional adverse effects of **COVID-19** on them.²⁵ The adverse and disproportionate effects of **COVID-19** have been felt deeply around the whole world and various nations have taken exemplary steps against it. The UK has made arrangements for postal workers to look out for domestic violence and report any suspicion of domestic violence to the police while France has made it possible for women victims of domestic violence to go to medical and grocery stores to report violence against them and has also made arrangements for women to stay in a hotel away from the abuser if violence is reported. Similarly, Canada, China and the USA are providing necessary counselling legal aid through **virtual media**.²⁶ In India, the High Court of Jammu and Kashmir issued a *suo motu* order to address increasing rates of domestic violence. This led to the creation of a fund to prevent sexual violence, increase call-in-services to facilitate complaints, provide

24 Nepal Police, Women, Children and Senior Citizen Service Directorate, Nepal Police Official Website available at <https://cid.nepalpolice.gov.np/index.php/cid-wings/women-children-service-directorate>

25 United Nations Development Programme (UNDP), *Gender-based Violence and COVID-19*, UNDP, 2020.

26 United Nations Development Programme (UNDP), *Gender-based Violence and COVID-19*, UNDP, 2020, p.3.

online counselling services, allow victims to lodge complaints in grocery and medical stores, provide victims with safe accommodation in hotels and various other measures.²⁷

27. Article 16 of the **Constitution of Nepal** guarantees the right of every person to live with dignity; Article 18 guarantees the right to equality against discrimination; Article 20 provides for the right of every person to justice; Article 21 guarantees justice to crime victims, including social rehabilitation and compensation; Article 29 ensures the right against exploitation; and Article 38 (2) guarantees the rights of women not to be subjected to physical, mental, sexual, psychological or other forms of violence or exploitation. Although Section 4 of the **Domestic Violence (Offenses and Punishment) Act, 2009** stipulates that victim can lodge domestic violence complaints in the police offices, the **National Women Commission**, district courts or at any local-level body, victims have had difficulty of being able to leave their houses and file complaints due to the lockdown. The **National Women Commission** set up a helpline number (1145) for taking complaints, but a single helpline number does not seem sufficient for the entire country. During a situation like this, many women's right to access to justice, right against violence, right to live without exploitation and right to live with dignity including victim's right to justice and remedy have been in question. Similarly, Section 6 of the **Domestic Violence (Offenses and Punishment) Act, 2009** contains the provision to issue an interim protection order to victims of domestic violence when they need immediate protection. For certain period of time, victims were not been able to seek relief from the court since the court had been providing limited services during lockdown. However, as per an interim order issued by this court on 9 June 2020, complaints of domestic violence are now being heard, but many victims of domestic violence still need to be guaranteed access to justice since the lockdown has not been completely lifted. An immediate provision of interim protection should be put in place, providing victims with shelter and relief in accordance with the law as well as coordination and access to support system. There is also a need for victims to receive emergency rescue services and immediate access to justice in cases of rape, cybercrime and other forms of gender-based violence.

27 *Suo Motu* Order of the High Court of Jammu and Kashmir dated 16.04.2020.

28. Paragraph 15 of **General Recommendation No. 35 of CEDAW** on Gender-Based Violence against Women, 2017 states that ‘**Women’s rights to a life free from gender-based violence is indivisible from and interdependent with other human rights.**’ Paragraph 21 discusses the state obligation, stating that, “Overarching obligation of States parties is to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, including gender-based violence against women. This is an obligation of an immediate nature; delays cannot be justified on any ground....”
29. Similarly, **General Recommendation No.33 of CEDAW** on Women’s Access to Justice, 2015 explains that, “Justiciability requires the unhindered access by women to justice and their ability and empowerment to claim their rights as legal entitlements.” To fight the ‘shadow pandemic’ created by the increase in gender-based violence during the **COVID-19** pandemic, the judicial system must ensure justiciability, availability, accessibility, good high-quality, accountability along with legal remedies as envisaged in this recommendation. This structure should be accessible to all women and must be able to address women’s different needs.
30. Since the pandemic has not suspended citizens’ rights against violence and right to remedy, women’s rights to access justice cannot be compromised under any circumstance. It is uncertain how long this unusual situation of the pandemic will last. It is the duty of this Court to protect the fundamental rights enshrined in Articles 16, 18, 20, 21, 29, 38 and 46 of the constitution. This Court should also be active in enforcing the **Domestic Violence (Prevention and Control) Act, 2009**. Therefore, this Bench completely agrees that immediate and effective justice must be ensured, particularly in instances of domestic violence and other forms of gender-based violence, which have escalated due to **COVID-19**. The state, along with all its judicial bodies, must be prepared to ensure women’s access to justice even during lockdown, and to ensure access to shelter, psychological treatment, medical treatment, legal aid and other support systems including emergency and immediate rescue.
31. During this pandemic, the state needs to show even more sensitivity towards women. Article 273 (10) of the **Constitution of Nepal** lists Rights of Women provided in Article 38 as a non-derogable, fundamental right, even during a state of emergency. Similarly, Article 4 of the **ICCPR, 1966**, deems the right to non-discrimination on the basis of sex as a

non-derogable right. Since violence against women is discrimination, no institution should be restricting women's access to justice, even during a crisis situation like the pandemic.

32. It is very difficult for domestic violence victims to lodge complains against their abusers, whether it is a husband or a different family member. This has become even more complicated due to the lockdown; victims are not able to access the means and institutions they need to file such complaints. Therefore, it is very important to facilitate a complaint procedure for women. To reduce gender-based violence and ensure access to justice, it is necessary to create a 'virtual media' system allowing victims to file complaints and hear cases concerning gender-based violence. Many countries have already adopted this method in today's unusual situation. In Nepal, it is necessary to make arrangements for online case reporting and online hearings, which will help ensure women access to justice and their safety from gender-based violence.
33. The lockdown has prevented the police, the courts, the **National Women Commission**, local bodies and other service-providing institutions from fully functioning, which has hampered victim's rights to access justice. The registration and hearing of domestic violence cases were interrupted because the services provided by the police, courts and local bodies were suspended for a period of time, although they have now resumed. Since these services have not been able to operate effectively yet, an order of *mandamus* is issued in name of the **GoN** to resume and cause to resume the services immediately and uninterruptedly by adopting measures. These measures must include an online case registration system for domestic violence, case hearings, immediate interim relief, victim protection to the victims and a special fund to create a coordination system handling these matters.
34. Regarding violence against women, the **National Women Commission** is the only institution with a helpline (1145). It is undeniable the state machinery must improve its effectiveness to control the pandemic and protect the life and health of citizens. The pandemic has highlighted the contemporary need to use digital media to provide victims with immediate safety and monitoring. The **National Women Commission** in neighbouring India made arrangements for victims to be able to loge complaints over WhatsApp, for reference. Similarly, in Spain, domestic violence can be reported at pharmacies using the code word "Mask-19." Therefore, an order is hereby

issued in name of the **GoN** to make the necessary arrangements to assist all 753 local governments with setting up helplines or Facebook mechanisms to disseminate information about online services, and take other special measures to rescue and provide relief to women and children affected by gender-based violence during the **COVID-19** pandemic.

35. Now, we must consider the third question, which deals with whether an order of ***mandamus*** should be issued to repatriate various high-risk groups with special priority, as per the petitioner's claim. The rejoinder stated that the **Supreme Court** issued an order in Writ No. **076-WO-0938** to prioritize women, children, senior citizens and physically unwell people in repatriating safely as well as citizens abroad who want to come back to Nepal. The rejoinder claimed that people are being repatriated in this manner. This Court believes that the process of prioritizing these groups will continue. Therefore, a directive order is issued in the name of the **GoN** to document and publicize gender-disaggregated data on the number of women, children and senior citizens who have been rescued or repatriated on a priority basis.
36. The petition also seeks an order of ***mandamus*** to provide safe quarantine and isolation spaces, with special priority given to high-risk groups. The rejoinder states that, since the existing legal provisions provide for special protection to high-risk groups, the order of ***mandamus*** should not be issued. To avoid **COVID-19** infection, people who meet certain criteria are being placed in designated quarantine centres (this includes people who have been in contact with infected people, have just come from infected areas, or are at risk due to being stayed in hotels). People in quarantine centres should be provided with basic needs, such as adequate and healthy food and water, along with financial, social and psychosocial support. Further, it is equally important to prioritize the needs of women, children and senior citizens since they are in need of special protections during the pandemic. Guideline No. 3 (1) (g) of the Guidelines **for the Operation and Management of Corona Virus Quarantine Facilities, 2020** mention that, "Separate quarantine should be provided for pregnant women, children up to ten years of age, senior citizens and persons with disabilities."

Similarly, Standard 5 (3) of **the Standards for Shelter Operation during Corona Virus Pandemic, 2020** approved by the **Ministry of Women, Children and Senior Citizens** provides that, "Quarantine rooms should be

persons of disability, senior citizens, women and children-friendly”. The WHO’s guidelines related to **COVID-19** state that, “the needs of vulnerable populations should be prioritized.”²⁸ However, a report by the **National Human Rights Commission (NHRC)** on the preliminary monitoring of human rights situation in Nepal during lockdown found that “quarantine facilities did not have arrangements for special focus on women, children, pregnant women, women in their post-natal period, persons with disabilities and senior citizens as required.” There seems to be an urgent need for gender-friendly, high-quality and safe quarantine centres in Nepal based on multiple factors. For example, many quarantine centres have lacked basic necessities, like healthy food and water. They have few female security guards and lack separate toilets and rooms for women, increasing the risk of rape and gender-based violence. It is a bitter reality that we cannot yet assess whether the pandemic is being controlled in Nepal. Therefore, an order of *mandamus* is issued in name of the **GoN** to arrange well-managed quarantine and isolation facilities. These centres must give special priority to women, children, pregnant women, women in their post-natal period, persons with disabilities and senior citizens, and provide healthy food, safe drinking water and adequate space to maintain physical distance while eating, sleeping and defecating.

37. The fourth question deals with whether to issue an order requiring health institutions to provide and cause to provide priority services to pregnant women, post-natal women and infants requiring quarantine centers to provide safe maternity and reproductive health products in their relief packages. The rejoinder in this regard states that Nepalese legal provisions have already addressed these issues and there is no need to issue an order in this regard.
38. Now considering the question as to whether or not a decision should be provided as per the claim of the petition, Article 12 of the **International Covenant on Economic, Social and Cultural Rights (ICESCR)** guarantees the right of people to enjoy the highest attainable standard of physical and mental well-being. This includes preventing, treating and controlling pandemics and other diseases to attain this right. Similarly, Article 12 of the **CEDAW, 1979**, has a provision that state parties must take all appropriate

²⁸ World Health Organization, Considerations for quarantine of individuals in the context of containment for coronavirus disease (COVID-19), Interim Guidance, 19 March 2020.

measures to eliminate discrimination against women in healthcare, in order to ensure, on the basis of equality of men and women, women's equal access to healthcare services, including those related to family planning. The WHO recently published guidelines regarding essential health services during the **COVID-19** pandemic, which includes maternal and new-born care. The guideline states that, "women's choices and rights to sexual and reproductive healthcare, however, should be respected regardless of **COVID-19** status."

39. The right to safe motherhood and reproductive health is not only human right, but also a fundamental right enshrined in Article 38 (2) of the **Constitution of Nepal**. Rights against acts of violence that affect women's sexual and reproductive cycles fall under 'reproductive health rights.' Reproductive health services must include at least four foetal screenings during pregnancy, abortion services as per legal standards, scientific obstetric services, care to prevent HIV transmission from an infected mother to her unborn baby, maternal vaccination, treatment services and postnatal care and treatment.
40. Article 35 of the **Constitution of Nepal** provides that "Every citizen shall have the right to free **basic health services** from the State, and no one shall be deprived of emergency health services." The Right to **Safe Maternity and Reproductive Health Act, 2018** has been promulgated to make maternity and reproductive health services safe, qualitative, available and accessible, and to respect, protect and fulfil the rights of women to safe maternity and reproductive health as provided by the **Constitution of Nepal**. Part 8 of this Act prohibits discrimination against people who have been infected or are at risk of disease or infection. In addition, the **Ministry of Health and Population** has already issued an interim guideline for "**Reproductive, Maternal, Newborn and Child Health Services during the Corona Virus (COVID-19) Pandemic.**"
41. Despite the aforementioned constitutional and legal provisions, women's reproductive health and other health conditions have been negatively affected due to the lack of adequate reproductive healthcare women receiving during the pandemic. For example, women have been giving birth at home because they have been unable to visit health centres or hospitals during lockdown. This has posed health risks on pregnant women – and a high increase in the maternal mortality rate. The first person to die from

COVID-19 in Nepal was a woman in her post-natal period. According to the Department of Family Welfare of the **Ministry of Health and Population**, there were 62 maternal and pre-natal deaths in hospitals across Nepal, and 25 in non-hospital areas during the period from April to August 2020. Although some women were rescued by helicopter and brought to hospitals for treatment, not all women have had access to these services.

42. Considering the fact that **the Safe Maternity and Reproductive Health Act, 2018** is already in force to implement women's constitutional rights to safe motherhood and reproductive health, an order of *mandamus* is hereby issued to further ensure women's safe maternal and reproductive health and manage for the protection, care, distribution of nutritious food and medicines to pregnant women, women in post-natal periods and newborn babies and for the state to ensure regular health check-ups for pregnant women and newborn bodies along with their vaccinations; and to incorporate reproductive health products into care packages for women while distributing COVID-19 relief.

Further, the constitution ensures reproductive health rights as fundamental rights, but **the Safe Motherhood and Reproductive Health Act, 2018** has **not incorporated** certain regulations. Thus, an order of *mandamus* is issued in the name of the **GoN** to immediately formulate a regulation related to the **Safe Motherhood and Reproductive Health Act, 2018**.

43. **Now, we must consider the fifth question.** The petition claims that an order should be issued to provide psychosocial counselling to people whose mental health has been affected by **COVID-19**. The rejoinder argues that the **GoN** has been implementing psychosocial counselling programs and there is no need to issue further orders. Since **COVID-19** is still spreading rapidly and affecting people in various ways, it is important to pay attention to people's mental health. Being healthy does not merely entail physical health – it also includes being mentally healthy. The WHO includes both physical and mental health in its concept of health, defining it as a “state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity.” The WHO further explains that, “Being able to recognize your abilities, cope with the stresses of life, work productively, and contribute to the community is the key to be mentally healthy.” Article 35 of the **Constitution of Nepal** guarantees the right to

health, while Section 2(b) of the **Public Health Services Act, 2018** includes rehabilitation services in its definition of **basic health services**.

44. Due to the **COVID-19** pandemic, people are suffering from various mental problems, such as anxiety, depression and stress. The “Interim Briefing Note Addressing Mental Health and Psychosocial Aspects of **COVID-19** Outbreak,”²⁹ which was prepared by the **Inter-Agency Standing Committee on Mental Health Support**, stated that stress, anxiety and other mental problems are common responses to the fear of being infected or having family members become infected, the threat of social stigmatization, the fear of losing jobs and the fear of degrading treatment amongst frontline workers. Depression and stress among people in Nepal during the pandemic have been caused by social distancing; social isolation; constant news updates on the virus; the increasing death toll; the stigmatization of patients and their family members, as well as the doctors treating them; and employment loss.
45. According to the Crime Investigation Department of Nepal Police, the number of suicides between 24 March 2020 and 25 July 2020 increased by 6 per cent among women and 19 per cent among men.³⁰ In that same period, the suicide rate for female children increased by 41 per cent among male children by 46 per cent. A total of 3,411 people have committed suicide in the period from March 24, 2020 to July 25, 2020.
46. In order to treat and mitigate the psychological effects of the pandemic, it is important that concerned institutions show solidarity and sensitiveness when providing the necessary information. This can be achieved by creating telecommunication services through the phone and other digital means to help people for social distance, but still feel close to relatives, friends and family. The institutions should also work together to support infected patients, without making these patients feel stigmatized. Since rehabilitative health services, like psychotherapy, will help mitigate the psychosocial trauma caused by **COVID-19**, a directive order is hereby

29 IASC’s Reference Group on Mental Health and Psychosocial Support, Interim Briefing Note Addressing Mental Health and Psychosocial Aspects of COVID-19 Outbreak, 17 March 2020. Available at: <https://interagencystandingcommittee.org/iasc-reference-group-mental-health-and-psychosocial-support-emergency-settings/interim-briefing>

30 Crime Investigation Department, Nepal, Women, Children and Senior Citizen Service Directorate. Available at <https://cid.nepalpolice.gov.np/index.php/cid-wings/women-children-service-directorate> Accessed on 20th August, 2020

issued in name of the **GoN** to make arrangements to ensure psychosocial counselling services at every quarantine site, healthcare centre and at the local level, in accordance with the WHO standards.

47. The sixth question concerns ensuring the right to employment to women who have lost their jobs due the pandemic. The defendant in regard to this claim has submitted that an order should not be issued because the pandemic has decreased men's employment as well. **COVID-19** has indiscriminately affected the economy and employment prospects of people all over the world. The economic crisis caused by this pandemic has particularly affected marginalized groups, including women. A large number of female employees have been working in service industries and educational institutions, which have closed since the outbreak began. Also, women are at high risk of losing their jobs since most of them work in the caregiving business (e.g. domestic work, teaching, etc). Thus, it is evident that women are comparatively more vulnerable and are at high risk of losing their jobs. The loss of men's employment has also exposed women to additional stress in managing household affairs.

48. Social and economic inequalities increase the likelihood of violence against women. When women living in a violent environment lose their income, it becomes even more difficult to escape and break the vicious cycle of violence. Article 11 of **CEDAW** states that, "Discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." This prohibits discrimination against women on any basis. Likewise, Article 11(1)(a) calls the right to work "an inalienable right of all human beings" and Article 11(2)(a) states, "In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work. States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status."

Article 18 of the **Constitution of Nepal** guarantees the fundamental right against discrimination (right to equality) in Article 33(1). The Constitution states, "Every citizen shall have the right to employment. The terms and

conditions of employment and unemployment benefits shall be provided for in the Federal law.” Article 38(5) states, “Women shall have the right to obtain special opportunities in education, health, employment and social security, on the basis of positive discrimination.”

Likewise, Section 6(1) of the **Labour Act, 2017** states, “No employer shall discriminate any labour on the ground of religion, colour, sex, caste, tribe, origin, language, ideological conviction or other similar ground.” Section 6(2) of the same Act states that preferences for certain people in employment do not amount to discrimination; these include preferring any person for employment on the basis of the inherent requirement of a work or service; placing a female labourer who is pregnant in any work or service that is easier and suitable to her physical condition, without reducing her pay or benefits; or preferring a labourer with a physical disability for a job responsibility that is suitable to his or her physical condition. In this regard, the **MoWCSC** circulated a notice to the Ministry of Labour, Employment and Social Security and other ministries to address the issue of women who have lost their jobs due to the **COVID-19** pandemic. However, none of the ministries have formulated any concrete plan of actions to implement assistance. Thus, a directive order is issued in the name of the **GoN** to take special measures to ensure alternative means of employment and earning livelihoods for women who have lost their jobs at home or abroad.

49. The **seventh question** considers whether an order should be issued to provide special security to frontline health workers and security personnel. The defendants have asserted that the **GoN** has already made proper security arrangements for frontline workers and that there is no need to issue an order.
50. Globally, there has been an increase in the number of people who have been infected from **COVID-19** infection and patients in hospitals whose diagnosis is not yet disclosed. In this context, the frontline workers – especially healthcare providers, nurses, testing physicians, cleaning staff, emergency-service personnel and police – are at high risk of infection. According to the study ‘Gender Equity in the Health Workforce: Analysis of 104 Countries’ by the WHO in 2019, 70 per cent of the world’s health workers are women. With more women working as nurses than that of men due to the gender stereotypes, female frontline workers seem to be at higher risk of infection.

51. It is commendable that the doctors and health workers, currently at the forefront of the **COVID-19** pandemic, are continuously providing the services and putting their lives at risk and the lives of their families as well. However, the health of these workers and their families are equally important. It is necessary to prioritize their health to keep patients safe and healthy. For the first time in Nepal, a nurse working at a hospital in Kapilvastu tested positive for **COVID-19** on May 12, and now the number of infections in people working in the frontline including doctors, health workers and security personnel seems to be high.
52. Although the WHO urges member states to ensure that all frontline workers and caregivers receive proper access to training, **PPE** and other essential products, the increasing rate of infection among these workers in Nepal suggest that adequate and effective security measures do not appear to be in place. Poor management like this can lead to disruptions in the flow of healthcare, and many patients can become infected by service providers or have no access to services, which can lead to health complications and death.
53. There is a need to ensure an environment where the motivation and safety of frontline workers is given high priority, and that a high morale is maintained. Therefore, a directive order is issued in the name of the **GoN** to provide the necessary PPE and other materials and equipment to frontline workers, according to the criteria set by the **WHO**. These frontline workers include doctors, nurses, health workers, cleaning staff and people in emergency services who provide health services directly to **COVID-19** patients. The **PPE** materials must be high-quality and also available free of charge and arranged according to the number of female frontline workers.
54. The **eighth question** considers whether the press release issued by the **National Information Commission** on 19 May 2020, which publicizes the personal information including the place of residence and permanent address of **COVID-19** patients, should be revoked because it violates privacy rights and may lead to social discrimination. The press release was issued pursuant to clause (e) of Article 19 of the Right to Information Act 2007 by the **National Information Commission** to the **Ministry of Health and Population**. The petitioners argue that an order of *certiorari* should be issued declaring the press release null and void, and that an order of *mandamus* should be issued in the name of the respondent to effectively protect the legal rights provisioned in international treaties and

Constitution of Nepal. The respondents have submitted a rejoinder stating that the press release issued by the **National Information Commission** does not violate the right to privacy, and that the press release should not be invalidated as publicizing information is needed to reduce **COVID-19** infection rates.

55. The right to information is considered as an integral part of a person's right to freedom of expression. Article 19 of the **Universal Declaration of Human Rights, 1948** guarantees freedom of speech and expression to all people. Article 27 of the **Constitution of Nepal** states, "Right to information: Every citizen shall have the right to demand and receive information on any matter of his or her interest or of public interest. Provided that no one shall be compelled to provide information on any matter of which confidentiality must be maintained in accordance with law." The law also allows for the obtainment of information of public importance. The **Right to Information Act, 2007** has been promulgated and Section 4 of this Act emphasizes that the activities of the state should be open and transparent. Section 3 emphasizes that citizens should have access to information disseminated by various public bodies.
56. Factual information is important to everyone. The world could not have imagined the **COVID-19** pandemic. The first duty of the State is to make people aware of by disseminating correct and appropriate information. Information helps the general public prepare to fight against the virus. Since the infection spreads quickly from one person to another, it is mandatory to trace, track and treat infected patients, according to WHO standards, in order to prevent the spread of infection.
57. The right to information is not absolute; it has limits. The restrictive phrase of Article 27 of the **Constitution of Nepal** provides that, "No one shall be compelled to disclose information which is required by law to be kept confidential." Sub-Section (3) (e) of Section 3 of the **Right to Information Act, 2007** prohibits the publicizing of information that may endanger one's rights to personal privacy or affect their life, property, health or safety.
58. Therefore, while enforcing the right to information, the right to privacy should be equally respected. Article 12 of the **Universal Declaration of Human Rights, 1948**, and Article 17 of the **ICCPR, 1966**, states that no one shall be subjected to arbitrary interference of their privacy, and that they

have a right to legal protection against such interference or attacks. Article 28 of the **Constitution of Nepal** states, “The privacy of any person, his or her residence, property, document, data, correspondence and matters relating to his or her character shall, except in accordance with law, be inviolable,” which ensures right to privacy of every individual. Further, Nepal has already promulgated the **Privacy Act, 2018**.

59. The **Privacy Act, 2018** is used to explain the protection and safe use of personal information in public bodies or institutions and to promote a dignified standard of living without encroaching on privacy. Section 3(2) of the Act, states, “The matters of privacy of the body of any person shall be inviolable without the consent of the person concerned, except in cases of conducting his or her health examination, health treatment or emergency relief work.” This corresponds with the Article 35 of the **Constitution of Nepal**, which ensures the right to health as a fundamental right. Section 3(3) of the Act states that, “Every person shall have the right to maintain the privacy of the matters such as biological or biometric identity, gender identity, sexuality, sexual relation, conception or abortion, virginity, potency, impotency or physical illness related to his or her personal life.” Section 7 of the Act guarantees the right to maintain privacy about one’s residence. Article 16 of the **Constitution of Nepal** guarantees the right to live with dignity.

Disclosing personal details about **COVID-19** patients and victims has resulted in social exclusion, stigmatization and discrimination. Further, targeted violence against physicians, health workers, security personnel and staff has led to discrimination against infected people, health workers and their families, and encroached their rights to privacy, self-respect and anti-discrimination. With regard to the ways to address social stigma, the WHO states that the stigma and fear associated with infectious diseases should be properly addressed by empathizing with the infected person, understanding the disease correctly, and adopting effective and practical strategies. It should be of a constructive nature so that people can keep themselves and their loved ones safe.³¹ Similarly, an environment should be

31 Evidence clearly shows that stigma and fear around communicable diseases hamper the response. What works is building trust in reliable health services and advice, showing empathy with those affected, understanding the disease itself, and adopting effective, practical measures so people can help keep themselves and their loved ones safe.’ A guide to preventing and addressing social stigma associated with COVID- 19. [hereafter WHO Social stigma guideline]

created in which there is open, honest and effective discussion regarding the effects and management of this disease.³² In order to reduce the stigma associated with **COVID-19**, the practice of defining a person's identity in conjunction with his or her infection should be removed.³³

60. Therefore, various rights including the right to information guaranteed by the **Constitution of Nepal** in Article 27, the limit on the right to information pursuant to Article 27, the right to privacy provided by Article 28, the right to live with dignity provided by Article 16 (1), and Article 18 (2) stating “discrimination in the application of common law on the grounds of origin, religion, caste, , creed, sex, physical condition, disability, health status, marital status, pregnancy, economic status, language or region, ideological belief or any other such ground” thus maintaining the right to non-discrimination based on health status should also be considered and looked as interrelated subject matters. Due to the **COVID-19** pandemic, stigma; hatred crimes targeted at certain individuals, families and communities’ hatred; and exclusion are occurring rampantly. The right to privacy needs to be ensured to protect against discrimination and stigma. If a citizen’s highly personal information is disclosed (except when required for a legal purpose), then many of their rights will likely to be violated. This includes the established jurisprudence regarding the right of an individual or citizen against exploitation, the right against violence, the right to privacy, the right to live with self-respect and the right to non-discrimination on the basis of health status. These are all provisioned in various international laws, the **Constitution of Nepal** and Section 3 and 7 of the **Privacy Act, 2018**.
61. This Court issued an order in the case of ***Sapana Pradhan Malla v. the GoN, Office of the Prime Minister and Council of Ministers*** (NLR 2064 Decision No. 7880), which established the principle that “if a person or a citizen’s highly personal information is to be disclosed except for a specific legal purpose, the person or citizen will unnecessarily be defensive and may not be able to do what he or she wants with full confidence.” Hence, when personal information about **COVID-19** patients is made public for legal purposes, it should be ensured that the patient and their families do not face any negative effects due to the published information.

32 ‘An environment needs to be created in which the disease and its impact can be discussed and addressed openly, honestly and effectively.’ **WHO Social stigma guideline**.

33 ‘It is important to separate a person from having an identity defined by COVID-19, in order to reduce stigma.’ **Mental health and psychosocial considerations during the COVID-19 outbreak- WHO**.

62. Furthermore, Section 160 of the **National Penal Code, 2017** states, “Unless otherwise provided in the law, an officer exercising his right in accordance with the law, should not deliberately discriminate against any citizen while exercising such right or general law... health status... or any other such ground.” Section 294 of the **Criminal Procedure Code, 2017** prohibits the disclosure of confidential information obtained in connection with business, except as required by law or as permitted by an involved person. Therefore, it is important to consider the fact that the health status of the infected person might invite discrimination and encroach his or her right to equality, right to a dignified life and right against violence. On the other hand, it is important to acknowledge the obligation of the **National Information Commission** to disseminate information. Section 28 of the Act provides an exception, stating that information should be protected pursuant to clause (a) of Sub-Section (2) of the same Section. It states that, “Information may be provided to avert a serious threat to the life or health or safety of the public.” Regardless of this exception and legal provision, we must consider that **COVID-19** cases have been rising and its treatment has not yet been discovered, which has created confusion, anxiety, fear, social discrimination and stigma among infected people. It has also discouraged people from getting tested and many people have hidden their illness and not received immediate treatment. As a result, the risk to public health and security seems to be on the rise. It is therefore the constitutional and legal responsibility of the state to protect citizens’ rights to privacy, while protecting citizens from social stigma, discrimination and hatred crimes while preventing the of COVID-19.

63. Accurate and accessible information about **COVID-19** is important because it can help reduce the risk of transmission and prevent misinformation from spreading across society. However, this information must be disseminated in a manner that reduces the risk of stigma and prevents risk groups and the infected from harm. Otherwise, the disclosure of personal and identifying details could lead to additional risks in combating **COVID-19**. Therefore, an order of certiorari is hereby issued to overrule, nullify and invalidate the press release issued on 19 May 2020 by the **National Information Commission**. The press release will affect the tracing, tracking and treatment methods adopted by the **GoN** to prevent the pandemic.

To prevent people from hiding their health status due to the fear of stigma, which can further spread **COVID-19**, and to make infected people and

their families feel comfortable coming forward, an order of *mandamus* is hereby issued in the name of the **GoN** to collect, use, and disclose personal details of **COVID-19** patients only by the concerned in required instances for pandemic prevention and management. There is a need to find and disclose personal details of infected people (i.e., place of residence and permanent address at the time of infection or death); to keep such information received by the body concerned for maintaining privacy in order to protect the family of the infected person from discrimination and stigma; and to stop the publication of the personal details disclosing the identity (place of residence and permanent address at the time of infection or death) of the infected without their permission by social media, newspapers and other media.

- 64. The final question** concerns the absence of a comprehensive ‘Pandemic Law’ to address the multifaceted effects of the pandemic on society and whether an order should be issued to enact a unified, gender-sensitive law as per the petitioner’s demand. Representing the defendant, the Learned Joint-Attorney pleaded that Nepal’s existing legal system has managed the pandemic so far, and the Court’s interference by ordering the formulation of new laws would be against ‘legislative wisdom.’
65. Considering this context, it is necessary to elaborate on whether the existing constitutional, policy and legal provisions are adequate in addressing the effects of the pandemic, and whether the existing laws are gender-sensitive.
66. Article 16 (2) of the **Constitution of Nepal** allows everyone to live with dignity. Article 18 (2) does not allow discrimination on the basis of gender, health status and pregnancy. The ‘restrictive phrase’ in Article 18 (3) guarantees a special provision for women and marginalized groups. Article 38 (5) gives women the right to special privileges in education, health, employment and social security on the basis of positive discrimination. Article 29 discusses the inviolability of a person’s body, home, property, documents, data, correspondence and character. Article 33 guarantees every citizen the right to employment and Article 35 guarantees every citizen the right to receive free basic healthcare from the state, and that no one shall be deprived of emergency healthcare. Similarly, Article 20 guarantees the right to justice, Article 21 provides for the rights of victim and Article 46 provides for the right to treatment. In addition, Article 38 (4) guarantees women the right to participate on the basis of proportional inclusion.

The **National Health Policy, 2019** seems to have a long-term vision to create “healthy and happy life-oriented, aware and conscious citizens.” The policy aims for quality healthcare, production, acquisition, development and utilization of skilled manpower, institutional strengthening, public participation, public-private partnerships, quality health research (in line with international standards), policy-making/planning, medicine and treatment. It seems that strategies have been formulated to adopt integrated measures on disaster management preparedness and response as well. In the light of the aforementioned constitutional and policy provisions, it seems necessary to evaluate the existing legal provisions.

67. The preamble of the **Infectious Disease Act, 1964** states, “Whereas, it is expedient to make provisions for the root out or prevention of any infectious disease which spreads or is likely to spread throughout Nepal or any part thereof so that such disease cannot reach to its climax.” To issue an order to take necessary action in accordance with the objectives of the Act, to issue necessary orders applicable to the general public or any group of persons, to take passengers on foot or by vehicle, to bring them in, to inspect traveling passengers, to hospitalize animals, birds or passengers suspected of infectious diseases, Section 2 and Section 2A of the Act, respectively, authorize the **GoN** and the State Government, as well as the staff assigned to carry out investigations, to issue necessary orders to inspect and control, even in isolation or travel. Likewise, Sections 3, 4 and 5 of the Act, which have a total of six Sections, dealing with punishment for contempt of the order, the right to take action against the offender and the right to stand aside, and the provision related to the protection of those who act in good faith while performing their duties. It seems that the **GoN** and the provincial governments have been issuing various orders on the basis of these provisions.
68. The aforementioned Act, which was issued about 56 years ago in 1964, gives the **GoN** the right to take necessary action and order by making general provisions about preventing infectious diseases. In addition to this, Section 2A was added in the Act through an amendment on 3 March 2019 pursuant to **the Act for the Amendment to Laws of Nepal, 2018**. This amendment changed the Act in line with the **Constitution of Nepal**, conferring the right and power to the Provincial Government. This Act is applicable to the current pandemic since **COVID-19** is a contagious disease. However, since this dangerous infection spreads through breath, people being in

proximity, through touch, or even via the surface touched or objects used by the infected person, it has taken the form of a pandemic throughout the world. Its cure has not been found and it has created a situation where lives are lost at the national and international level. The enormity by which it is affecting the multidimensional aspects of human life and affecting the protection of vulnerable and high-risk groups like women, children, senior citizens, differently-abled people and also those who already have various diseases. Therefore, it is clear that current laws of Nepal do not enable the concerned bodies to envisage the necessary approaches and programs to prevent and respond to a pandemic situation of a unique nature. The government has not been able to coordinate well among various bodies. The nature of this disaster also seems indefinite and the existing law do not specify strategies on how to manage a disaster like this.

69. Likewise, the **Public Health Service Act, 2018** was promulgated in line with Article 35 of the **Constitution of Nepal**, which states that, **“Every citizen shall have the right to free basic health services from the State, and no one shall be deprived of emergency health services.”** Section 2(a) of the aforementioned Act defines emergency health services as “the initial and immediate service to be provided as it is necessary to free the lives of the persons from risk, save the lives or organs from being lost, whose lives are in the risky condition upon falling into unexpected incident or emergency condition.” Although **COVID-19** has prompted emergency situations around the world, the aforementioned definition of emergency healthcare in the **Public Health Service Act, 2018** is narrow in scope as it only focuses on primary and immediate care.
70. Another objective of the **Public Health Service Act, 2018** is to provide free basic healthcare to citizens. This Act defines “basic health services” as promotional, retributive, diagnostic, remedial and rehabilitative services that are easily and freely available from the state to fulfil the health needs of citizens, pursuant to Sub-Section (4) of Section 3. Considering whether the list covers **COVID-19**, it must be noted that Sub-Section (4) of Section 3 specifically mentions “services related to contagious disease.” Although communicable diseases can include ‘corona infections,’ this infection has taken the form of a pandemic and has a different nature than normal infections. Thus, more healthcare measures are needed. However, such health measures and services are not explicitly mentioned, and Sub Section (7) of Section 3 of the Act states, “Other provisions and processes relating

to detailed descriptions, service flow and management of the services referred to in Sub-Section (4) shall be as prescribed by the Ministry,” which is a very basic provision conferring the power to the **Ministry of Health and Population**. According to the same responsibility, the Ministry seems to have prepared and implemented some criteria to prevent **COVID-19**.

71. Similarly, the **Disaster Risk Reduction and Management Act, 2017** has been formulated “to amend and consolidate the existing laws related to disaster risk reduction, management and mitigation; in order to protect the livelihood of the people and to protect public, private and personal property, natural and cultural heritage and physical infrastructure from natural and non-natural disasters by coordinating and effectively managing all disaster management activities.” Sub-Section (d) of Section 2 of the Act defines a pandemic as a “non-natural disaster.” Regarding the effective management of disasters, it visualizes making institutional arrangements, including ‘**National Council for Disaster Risk Reduction and Management**’ under Section 3, an ‘Executive Committee’ pursuant to Section 6, an ‘Expert Committee’ under Section 9, ‘**The National Disaster Risk Reduction and Management Authority**’ as per Article 10, ‘The Provincial Disaster Management Committee’ as per Article 14, a ‘**The District Disaster Management Committee**’ as per Article 16 and ‘**The Local Disaster Management Committee**’ as per Article 17.

The duties and rights of the concerned bodies are also provisioned by the Act. In addition to these general arrangements for disaster management, the functions, duties and powers of the Executive Committee under Article 8 (d) include: “To formulate special plans and programs for women, children, senior citizens, Dalits, marginalized groups and communities, persons with disabilities and persons with disabilities at risk.” However, these special plans and programs have not been able to cover high-risk patients of other diseases. Although the **Disaster Management Act** aims to address all types of natural and non-natural disasters, including pandemics, it does not seem to cover all of the **COVID-19** pandemic’s unique impacts and high-risk groups. Even though the **GoN** has been adopting health measures by issuing various criteria, procedures and guidelines, the number of infected and dying people seems to increase every day due to the failure in management and effective mitigation of the pandemic.

72. National and international statistics show how the **COVID-19** is not only affecting human health but other aspects of human life as well. Loss of employment, entrepreneurship and extreme economic chaos are only few examples of the pandemic's devastation. Other potential effects are yet to be seen. Under the **Public Health Service Act**, emergency healthcare is limited to primary and immediate services and is listed only to provide basic services free of cost.
73. Sub-Section (1) of Section 104 of the **National Penal Code** stipulates that, infectious diseases should not be spread intentionally. This provision has criminalized the spreading of the infection by stating that, "No person shall do any act that spreads or is likely to spread any kind of infectious disease which is dangerous to life of anyone." Likewise, Sub-Section (2) provides a punishment and fine for such acts. However, there is no provision in the Code for infectious diseases other than the provision for criminal punishment and fine.
74. Since many laws and regulations do not properly address the **COVID-19** pandemic, the **GoN** recently issued some related measures. The **Office of the Prime Minister and Council of Ministers** formulated the "**Standard Operating Procedures for Quarantine Operation for Corona Virus Management (COVID-19), 2020**," which has the objective of protecting citizens from COVID-19 and keeping suspected patients in quarantine for at least 14 to 17 days in a safe and orderly manner to protect both them and the society. Similarly, the **Ministry of Health and Population** formulated an **Interim Directive for Case Research and Contact Search Team Operations for COVID-19, 2020**, which calls for the formation of a team of technical human resource experts at every local level to conduct case research on suspected, probable and confirmed cases of **COVID-19** and to conduct contact tracing. Likewise, the **Ministry of Health and Population** issued various guidelines including, the **Guidelines on the Management of Health Workers and Other Staff Directly involved in the Treatment of COVID-19 Patients, 2020**; the **Service Delivery Standards for Senior Citizens during COVID-19 Pandemic, 2020**; the **Health Standards Regarding Isolation of COVID-19 Infected Patients, 2020**; the **Health-Related Provisions for Persons in Quarantine 2020**; the **Precautionary Measures in Case of Emergency During the COVID-19 Pandemic, 2020**; the **Brief Procedure on the Management of Corpses of People who have Died due to COVID-19, 2020**; and a **Health Sector Emergency Response Plan: COVID-19 Pandemic**.

75. Similarly, the MoWCSC formulated the **Standards for Operation of Shelters during COVID-19 Pandemic, 2020** with the objective of creating the “safe and orderly delivery of services by adopting complete safety measures to prevent the spread of coronavirus worldwide to the dependents of shelters, including service centres and rehabilitation centres.” This criterion appears to have been made using the authority conferred by Section 14 of the **Good Governance (Management and Operations) Act, 2008**. Section 14 of this Act stipulates that this procedure must be adopted while carrying out administrative functions. It further states that, “Officials authorized to make decisions pursuant to this Act or other prevailing laws, while making decisions in any subject, shall follow the procedure prescribed by prevailing laws; and in absence of such procedure shall follow a reasonable procedure taking into consideration of the subject matter to be decided.” It was found that the standards formulated were based on the aforementioned provision to manage the **COVID-19** pandemic because, prior to this, Nepal had no procedural laws regarding the management of infectious diseases or coronaviruses.
76. Since there is no unified law to address the **COVID-19** pandemic, various bodies of the **GoN** have been issuing standards and orders as temporary and immediate measures. According to the above analysis, there is a necessity to give special priority to people who fall under high-risk groups, and make special arrangements for them. In the absence of a unified law to address these issues, the **GoN** has made various executive decisions to temporarily address the issue by conducting studies to prevent pandemics, such as **COVID-19**, and to effectively respond to its effects; compensate for **COVID-19** victims’ losses and help them reintegrate into society; and to help them recover by reducing stigmatization in society. Thus, a unified law that creates a harmonious environment by mitigating conflicts in society is necessary.
77. Now, considering the issue raised by the Learned Joint-Attorney that the **Supreme Court** lacks the jurisdiction to formulate laws about managing the **COVID-19** pandemic because it is a matter of legislative discretion, there is no doubt that the right to formulate laws is an inherent right of the legislature. It has come to the Court’s notice that even in the absence of unified laws, the **GoN** is very keen to manage the pandemic situation by formulating and implementing standards on par with existing laws and executive orders. However, the aforementioned initiatives of the **GoN** do not seem to be able

to properly manage this crisis and the dire, adverse effects caused by it. Although the Court lacks jurisdiction to formulate laws to mitigate the ***non-liquet*** situation, the Court is well aware of such matters through various petitions invoking the extraordinary jurisdiction of the Court. In this regard, considering the writ about resolving the deadlock of **076-RE-0392** and the petition demanding ***mandamus*** of **076-WO-0944**, a 19- justices Larger Full Bench of this Court issued an order on 8 May 2020 pursuant to Articles 126, 128, and 133 (2) of the **Constitution of Nepal** addressing the ***non-liquet*** situation in an amicable manner. The order acknowledged the fact that the various provisions regarding the statute of limitations incorporated in the **National Civil Procedure Code, National Criminal Procedure Code** and other various laws do not adequately address the legal complexities arising in the current pandemic. Thus, there is a judicial practice of issuing directive orders in the name of the **GoN** in various petitions³⁴ and issuing directives to temporarily fill the legal vacuum by making the necessary arrangements to create laws on issues that do not yet have laws or in which there are inadequate laws.³⁵ With regard to the present writ petition, an order in the name of the **GoN** is issued to prepare a study report regarding the adequacy and effectiveness of existing laws, such as the **Infectious Disease Act, 1964**, in mitigating the current challenges due to **COVID-19**, and to formulate laws that prioritize gender-friendliness and high-risk groups. Let the case file be handed over to Record Section striking off the registration details of this Petition as per the rules.

Justice

I concur to the above opinion.

Justice

Done on 5 August 2020.

34 NLR 2071, Decision Number 7449; NLR 2062, Decision Number 7498; NLR 2065, Decision Number 7973; NLR 2065, Decision Number 8083; 068-WO-0046

35 NLR 2064, Vol. 9, Decision Number 7880; NLR 2065, Decision Number 8005, Page No. 999; NLR 2070, Vol. 1, Decision No. 8940

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Date of Order	Writ No.	NLR/Year/Decision No.
1 October 2020	077-WO-0130	2020

Supreme Court, Division Bench

Hon'ble Justice Dr. Ananda Mohan Bhattarai

Hon'ble Justice Tanka Bahadur Moktan

Writ No:

077-WO-0130

Case: Certiorari, Mandamus

Petitioners: Advocate Keshar Jung KC, resident of Pyuthan District, Pyuthan Municipality Ward No. 10, currently living in Bhaktapur District, Madhyapurthimi Municipality..... 1

Advocate Lokendra Bahadur Oli, resident of Dang District, Tulsipur Sub-Metropolitan Ward No. 13 Phulwari Ghar, currently living in Kathmandu District, Kathmandu Metropolitan, Anamnagar 1

Versus

The GoN, Ministry of Health and Population, Kathmandu 1

The summary of the facts and order of the writ petition filed under the extraordinary jurisdiction of this court pursuant to Articles 46 and 133 of the Constitution of Nepal are as follows:

Fact Section

COVID-19, a serious communicable disease that transmits easily from one person to another, is now rapidly spreading across the world. This disease came into existence abruptly. The Constitution of Nepal guarantees access to free emergency services as a fundamental right. Article 35, Sub-Article 1 of the Constitution provides that every citizen shall have the right to receive basic healthcare for free from the State and that no one shall be deprived

of emergency healthcare. **The Public Health Service Act, 2018** has been formulated to implement fundamental rights. The only way to know if a person is infected with **COVID-19** is to test them by using **Real Time Polymerase Chain Reaction ‘RT-PCR’** technology. It is the primary duty and responsibility of the government to care for the health of the general public free of cost, which includes identifying **COVID-19** infections. Although the test was free in the early days, the **Ministry of Health and Population** decided to make people to pay for the test and as a result, the hospitals have been charging people up to **Rs. 4,400 for PCR** tests. Article 18 (1) of the Constitution guarantees all the citizens the fundamental right of being treated equally before the law. This provision constitutionally guarantees that there should be no discrimination.

However, high-ranking government officials – including the **President, Vice President, Prime Minister** and **Ministers** of Nepal – are receiving **PCR** tests free of cost because they are able to avail government facilities on behalf of the state. Meanwhile, poor people who live hand-to-mouth are subjected to high **COVID-19** testing fees, which deprive many from getting tested. Not being able to get tested means accepting death while being alive. The decision of the **Ministry of Health and Population** to allow laboratories to charge fees for **COVID-19** testing is against the fundamental rights of Nepalese citizens to get free health services, and is thus discriminatory and unlawful.

The decision of the **Ministry of Health and Population** to allow laboratories to charge money for **COVID-19** testing is contrary to the provisions of Article 35 (1) of the Constitution and Section 3 (4) (c) of **the Public Health Service Act, 2018**. An order of certiorari should be issued to make **PCR** tests free of cost and declare the Ministry’s unlawful decision null and void. The decision to allow laboratories to charge up to Rs. 4,400 for the **PCR** test, which was made during a meeting held by the **Ministry of Health and Population**, the respective minister and the ICS officers on 30 August 2020, is unlawful and is in contravention with the fundamental rights of citizens to get free health services as guaranteed by the Constitution and Section 3 (c) of the **Public Health Service Act**. Therefore, the decision to charge fees runs contrary to the fundamental rights guaranteed in Article 35 (1) of the Constitution. The provision of Section 3 (4) (c) of the **Public Health Service Act, 2018** should be revoked and an order of *mandamus* safeguarding the right to free health services, check-up and treatment to all people should be issued in the name of the respondent.

Show cause order of this court

This Court has issued an order imploring the respondent to explain certain facts about this case. Why should the order not be issued as per the claim of the petitioner? If there are reasons for not issuing the order, the respondent is hereby summoned to submit a reply thereof in writing and a copy of the writ petition through the **Office of the Attorney General** within 15 days from the date of receiving this order, and to present the case accordingly after receipt of the rejoinder or after the lapse of the time limit.

Regarding the demand for an interim order, considering the nature and importance of the subject matter, it seems reasonable to discuss and reach a decision with both parties as to whether **COVID-19** comes under a 'communicable disease' pursuant to Article 35(1) of the Constitution and Section 3(4)(c) of the **Public Health Service Act, 2018**. Should the **PCR** test service be given to every citizen? How many **PCR** tests have been conducted to date? What is the minimum price of **PCR** tests and how much would they cost for every citizen? Is it manageable? Pursuant to Section 3 (4) (c) of the **Public Health Service Act, 2018**, to what extent can the state provide such services bearing mind our economy? A separate report in this regard from the respondent **Ministry of Health and Population** through the Ministry's Spokesperson Secretary is sought and, thus a summon is issued in the name of the respondent to be present on 24 September 2020 for the discussion of the interim order. Thus, an order is hereby issued to inform the Attorney General's Office on 15 September 2020 about the hearing of the interim order.

Rejoinder submitted by the Ministry of Health and Population

In light of the fact that the **WHO** has declared **COVID-19** a contagious disease, the Ministry is working day and night to protect Nepalese citizens from **COVID-19** being involved in prevention and response. The Ministry is continuously treating the infected, arranging quarantine for people thought to be infected and conducting contact tracing. To make people aware and mindful of **COVID-19** transmission and other diseases, public awareness programs concerning the management, operation and storage of essential medicines and essential health items have been conducted. In addition to these efforts, basic health services are provided to the citizens through free and regular testing and treatment. To achieve this effort, the Ministry has formulated and is currently implementing standards for health products and services for public and private health institutions, on par with standards set by the WHO.

COVID-19 is a contagious disease caused by the **SARS-COV-2 virus**. It is a new, contagious disease first thought to have been discovered on 31 December 2019. The laboratory test for diagnosing **COVID-19** is the **PCR** test. The **GoN** is providing free **RT-PCR** tests to people with **COVID-19** symptoms, including frontline health workers, sanitation workers, security personnel and people with any serious health-related problems, including vulnerable citizens. The **GoN** is also providing cost-free **PCR** tests to suspected **COVID-19** victims and people who have been in direct contact with the infected people. For those who are not suspected of being infected with **COVID-19**, but want to be tested voluntarily. For visa purposes, arrangements have been made for them to receive **PCR** testing at private and community hospitals with a fixed fee. In addition to this, the **PCR** test is still being conducted free of cost for anyone coming to designated government health institutions and laboratories.

Therefore, the **PCR** test is still being provided free of cost to destitute citizens, people with **COVID-19**-related symptoms, frontline health workers, sanitation workers, security personnel and people with compromised immunity. The **GoN** is giving the **PCR** test free of cost to the extent that it can based on its economic situation. Therefore, this writ petition should be quashed. A written rejoinder is submitted to this Court on behalf of the **Ministry of Health and Population** requesting the denial of issuing the claimed order.

Order Section

In the writ petition presented before the Bench scheduled in the cause list as per the rule, the pleading of Learned Senior Advocates Dr. Surendra Bhandari and Dr. Chandra Kant Gyawali; and Learned Advocates Dr. Shiva Kumar Yadav, Mr. Pankaj Kumar Karna, Mr. Shalikram Sapkota, Mr. Khimananda Adhikari, Mr. Lokendra Bahadur Oli, Mr. Ram Prasad Poudel, Mr. Surendra Bikram K.C., Mr. Santosh Bhandari, Mr. Navaraj Pandey, Mr. Rajendra Maharjan, Mr. Sujan Nepal, Mr. Surya Bahadur Oli, Mr. Gyanendra Ghale, Mr. Janak Singh Saud, Mr. Bir Bhadra Joshi, Mr. Hari Prasad Dahal, Mr. Bhairaja Rai, Mr. Kirtinath Sharma Poudel, Mrs. Yamuna Gautam Poudel and Mr. Keshar Jung K.C. was heard. The learned advocates argued that as per that Article 35 (1) of the **Constitution of Nepal** states every citizen shall have the right to receive free basic healthcare from the state and that no one shall be deprived of emergency healthcare. **The Public Health Service Act, 2018** was formulated to execute these fundamental rights. Sub-Section 4 (c) of Section 3 of the **Public Health Service Act, 2018** stipulates that, “Every citizen shall have the right to receive free basic health services as prescribed under the following headings,” which also include

communicable diseases. The **COVID-19** disease, which is caused by the **SARS-CoV-2 virus**, is not mentioned on the list of services related to communicable diseases in Schedule-1, Part 3 of the **Public Health Service Regulations, 2020**, which was formulated to execute the **Public Health Service Act, 2018**. Since the WHO has declared **COVID-19** as communicable disease, not including the coronavirus on the list of communicable diseases in the aforementioned regulations seems a complete flaw in policy and intent. The government should move ahead to coordinate for prevention and treatment of **COVID-19** with every district and local-level health worker and hospital while keeping in mind that a deceased's life will not return. While **COVID-19** devastates the country, it is clear that many people are taking advantages from the healthcare service sector availing this pandemic situation as business. To eliminate this situation, health institutions must take 'the principle of social responsibility' – the government, citizens and the private sector must share the risk and cooperate with each other. Since more pandemics could occur in the future, the government needs to focus on preparation. Therefore, fundamental rights provided by the constitution are not guaranteed therein unconditionally, an order of *mandamus* should be issued in the name of the **Ministry of Health and Population** to provide free emergency healthcare to every citizen equally.

Learned Joint-Attorney Mr. Sanjeeb Raj Regmi, presenting on behalf of the **Ministry of Health and Population**, pleaded that the Ministry is continuously treating the infected, arranging quarantine and conducting contact tracing. Also, for those who are not suspected of being contacted **COVID-19**, but want to be tested voluntarily, and for visa purposes, **PCR** testing has been managed with the provision of fix charge. In addition, anyone who comes to a designated government health facility and laboratory can access to free **PCR** testing. The fee for the **RT-PCR** test is fixed Rs. 2,000 (Nepali rupees), which was determined based on its cost in other countries of the world. At present, Uttar Pradesh in India charges 1,600 Indian Rupees and the United States of America charges \$ 100 USD for the test; therefore, the fee set in Nepal seems low-cost. Since **COVID-19** is a new disease and facts about it are being noticed every day, this Ministry is conducting public awareness programs under the standard of WHO, arranging the necessary medicines and essential health items, and preparing and implementing basic healthcare standards for citizens. In addition, the **RT-PCR** test for people with symptoms, frontline health workers, sanitation workers, security personnel, people with compromised immunity and employees working in high-risk areas is being conducted by the

GoN free of cost. Mr. Regmi pleaded that the writ petition should not be issued as per the petitioner's request. Furthermore, the spokesperson of the **Ministry of Health and Population**, Dr. Jageshwar Gautam stated that the Ministry is continuously treating the infected, arranging for quarantine, and conducting contact tracing. Also, arrangements have been made to conduct **PCR** tests with a fixed fee for those applying for a visa and want to test voluntarily. He added that the **PCR** test is still being conducted free of cost for those who come to the designated government health institutions and laboratories.

After studying the petition, along with the case file duly submitted to this Bench, and hearing the argument of the learned advocates appearing on behalf of the petitioners and the respondents, the Court has to decide whether the order as requested in the petition should be issued or not

While considering the question to be decided, the petition filed under Article 133 (2) (3) of the **Constitution of Nepal** relating to public rights about **COVID-19** was registered before this court. **COVID-19**, a contagious disease that is currently spreading all over the world as a pandemic, has also spread in Nepal. The main claim of the petitioners is that the **RT-PCR** test should be made completely free of charge, but the respondent has fixed a charge for it. According to the petitioners, Article 35, Sub-Article 1 of the Constitution provides that every citizen shall have the right to receive free basic healthcare from the state and no one shall be deprived of emergency healthcare. **The Public Health Service Act, 2018** was formulated to execute the fundamental rights. To provide basic and emergency services free of charge to few people and to charge few others is contrary to Article 18 (1) of the Constitution. The decision of the **Ministry of Health and Population** to allow laboratories to free of charge for testing is in contravention with the provisions of Article 35 (1) of the Constitution and Section 3 (4) (c) of the **Public Health Services Act, 2018**. Therefore, the petitioners request for revocation of the decision of the meeting made by the **GoN, Ministry of Health and Population**, the respective minister and the ICS officers on 30 August 2020. The decision for the control and mitigation of **COVID-19** regarding the levying the laboratories charges up to **Rs. 4,400** for the **PCR** test is unlawful and in contravention with the fundamental rights of the citizens to get free health services as guaranteed by Article 35 (1) of the Constitution and Section 3(4)(c) of the Public Health Service Act. Therefore, the issuance an order of *mandamus* ensuring free **RT-PCR** testing for all people is requested in the name of the respondent.

The rejoinder of the respondent, the **Ministry of Health and Population** states that “the Government is conducting free **PCR** tests for people with **COVID-19** symptoms, especially health workers on the frontline, sanitation workers, security guards, people with any problem related to disease resistance, vulnerable citizens and employees working in risky areas. The state is conducting free **PCR** testing for all citizens suspected of being infected with **COVID-19** or in direct contact with the infected. Thus, for those who are not suspected of being infected with **COVID-19**, but want to be tested voluntarily and for visa purposes, arrangements have been made for **PCR** testing at private and community hospitals with a certain fee.”

At first glance, the writ petition and the rejoinder from the respondents seem to pose questions about the differences in their demands. However, in this petition filed as a matter of public interest and concern, in addition to the statement of the petitioner, an order has to be issued considering the ground-level reality. Thus, the Court needs to make a decision about this writ petition based on various contexts. These include the statements made by the spokesperson of the **Ministry of Health and Population**, Dr. Jageshwor Gautam; the fact that the Public Health Service Regulations, 2020 was formulated to implement the **Public Health Services Act, 2018**, but Annex-1 of the Rule does not consider **COVID-19** a contagious disease; and various other orders given by this Court.

What needs to be clarified at the outset is that all the writ petitions filed in this court regarding the **COVID-19** pandemic are registered as petitions of public interest and concern. The manner in which the Learned Senior Advocates and Learned Advocates have actively participated in the presented petitions and the writ petitions is very positive. The bench appreciates the concern, interest and professionalism shown by them regarding the health of the Nepali people.

During the pleading, the Learned Senior Advocates and Learned Advocates have presented the previous orders and judgments of this Court before the Bench. It is clear that the Court was reviewing and issuing orders based on the rapid pace at which **COVID-19** was spreading in Nepal and scientific facts about it were coming out. While hearing these petitions of public concern, this Court did not limit itself to what extent the petitioner demanded regarding the measures to be taken by the government regarding the pandemic, but gave a broader decision and directive order on how to deal with the pandemic properly and collectively; how to protect the fundamental rights and freedom of the people, how to make inhibitory, immunity-based and rehabilitative

healthcare services easily accessible; how to revive the country's economy; and how to ensure that the government works in accordance with the spirit of the constitution in a transparent and accountable manner, while adhering to the guidelines, standards and norms relayed by the WHO. Prior to the issuance of the interim orders, it seems that order has been issued considering the statements, arguments and assessing the situations as provided by the Learned Attorney General, Learned Attorneys, the spokesperson of the **Ministry of Health and Population**, Dr. Bikash Devkota, and Director General of Department of Health Services, Mr. Mahendra Prasad Shrestha, in the writ petition of **076-WO-0933**, and by Senior Health Administrator, Dr. Gunanidhi Sharma, in the writ petition of **076-WO-0973**. The issues raised in the writ petition, as heard by the Court and discussed with the spokesperson of the **Ministry of Health and Population**, Dr. Jageshwar Gautam. In other words, in matters of public interest, this Court has seen the issue of adjudication as an opportunity and obligation of cooperation rather than as a competitive action. The Learned Senior Advocates and Learned Advocates present on behalf of the petitioner, and the Learned Joint-Attorney present on behalf of the government, have shown the same cooperative spirit during the hearing.

The purpose of the order made by this Court is to effectively protect the people affected by the pandemic. When questions arise about observing the rights guaranteed by the constitution and whether actions of the government are in accordance with the constitution, this Court shall observe its constitutional duty by looking into words, sentiments and constitutional goals. It is the duty of this Court to protect the rights guaranteed by the constitution. The Court is saddened when even a single person in the country is neglected, and thereby its interest and concern increase. The Court cannot remain silent in the absence of the protection of rights. Only by defending the constitution can the constitution protect all of us. The observance of the constitution is like saying, "Dharma-av hato hanti, dharmo raksati rakshit: tasmadharmo na hantabhyo, ma no dharmo hatotravadhit." ["धर्म-एव हतो हन्ती, धर्मो रक्षति रक्षितः तस्माधर्मो न हन्तभ्यो, मा नो धर्मो हतोऽवधीत्"]³⁶ Therefore, in carrying out its judicial duty, various orders have been issued by this Court following the words and spirit of the constitution. These orders are not the product of any judicial whim or ambition. This Court has no other intention than fulfilling its constitutional duty. If the situation of **COVID-19** had been effectively controlled,

³⁶ The phrase means, "He who destroys duty, duty itself destroys him; he who is devoted towards duty, duty also protects him. So, duty should never be abandoned.

this Court would not have had to issue orders. Therefore, non-compliance with court orders is never acceptable, and such matters become the matter of serious concern to the Court. The Court does not even want to imagine that the provisions of the constitution have to be relied upon to enforce its orders. Just as the constitution has provisioned for the separate rights and duties of the executive, the legislature and the judiciary respectively, the Court will comply with its obligations and order others to do the same. As the guardian of the constitution, it is the duty of the Court. The provisions of Article 126 and Article 128 of the constitution are also related to the observance of the judicial duty. We do not have the privilege of reading and accepting the constitution in leisure and forgetting it in times of calamity. Nor is it a document read only during auspicious times or moments. Therefore, no one can say that it is “not the time” to read the constitution. The constitution seeks complete loyalty and dedication from officials of the state machinery. Because the path to our development and prosperity is the constitutional path, there is no unconstitutional shortcut. Ownership of the constitution can only be enhanced through conduct in accordance with the constitution, which is and should be the current goal of Nepal. In the course of the hearing of the writ petition related to **COVID-19**, this Court in its writ petition **076-WO-0962** stated that, “Every organ of the state y has to uphold the spirit of the **Constitution of Nepal**. There is no one above the constitution and it cannot happen as well.”³⁷ The court does not believe that the **COVID-19** pandemic can be addressed and dealt with in an unconstitutional way. Therefore, before making a decision about questions raised in the writ petition, it is necessary to take a look into what questions were raised in this Court regarding the pandemic, and what orders it issued as well.

In March of last year, when the **COVID-19** pandemic began to spread in Nepal and the country began to lockdown, we were confused. We did not have the resources to fight this invisible enemy. When the nation slowly moved forward on this topic, questions were raised in this Court about the lack of transparency in the distribution of relief, the lack of quarantine in accordance with WHO standards, the lack of expansion in testing in proportion to the spread of the disease, the lack of public access to healthcare and the neglect of health workers. During the hearing on the issue of whether to issue an interim order, it was learned that **COVID-19** testing was mainly concentrated in Kathmandu and was conducted in very small numbers. The condition of

37 Roshni Poudel et. al. v Prime Minister and Ma.Pa.Sa. et. al. 076-WO-0962 decision date 5th August, 2020

health infrastructure outside Kathmandu was very critical and the government was not in a position to face the pandemic. In light of this, after hearing the views of all the parties, this court on 6 April 2020 in the writ petitions **076-WO-0933**, **076-WO-0934** and **076-WO-0936** provided the verdict and directive order to ensure transparency while distributing relief so that it is not misused, and to distribute relief by correctly identifying the target person and family. Similarly, it decided to establish quarantine centres in line with WHO standards, monitor “Home Quarantine,” expand testing centres to other urban centres outside the Kathmandu Valley due to the low number of tests and make emergency services other than **COVID-19** accessible to as many people as possible. It also decided to provide security and relief to farmers involved in the agricultural sector, expand the ICU beds in Health Science Academy and state-level hospitals, and increase access to these services as soon as possible. While hearing the aforementioned writ petition on 6 April, it was not clear as to what the pandemic would look like and what its impacts would be, so the Division Bench also ordered to hear the writ petitions within 15 days of receiving the rejoinder.

The country was under lockdown when the Court issued the aforementioned order on 8 April 2020. As the lockdown period extended, many people and institutions in Nepal were affected: small businesses; labourers earning their daily wage by working in private sectors, such as hotels and restaurants; students and others in urban areas of Nepal, including the Kathmandu Valley. When a large number of innocent people were seen walking on the streets to reach their homes despite the lockdown, another petition of public concern (**076-WO-0936**) raising the issue of their life, livelihood, health, dignity and security was registered in this Court. After the hearing of this case, on 17 April 2020, this Court ordered to mobilize groups to conduct health check-ups and to make arrangements for free transportation on highways for people compelled to leave Kathmandu and other urban areas on foot in absence of other alternatives. The order also demanded that special protection be provided to women, children, senior citizens and physically unwell people. In the same order, it was also stated that, “Human resources responsible for providing beds and quality healthcare must be expanded and testing centres are to be set up in urban areas with high population density. Keeping in mind the need to access healthcare and health-related machines, materials and medicines should be procured that meets the **WHO** standards.” It also stated that, “As there is availability of people in rural areas because they have returned back due to closure of industries and factories, and loss of employment, they can be

used as an opportunity to revive the agriculture sector. Thus, seeds, fertilizers, agricultural tools, etc. are to be provided free of cost at the local level or at concessional rates, and necessary actions should be taken and be caused to be taken in coordination with the state and local levels to develop the rural economy as a self-sufficient economy by providing insurance for crops and livestock.” After that, other writ petitions were registered and this Court issued orders on them. These writ petitions concerned the protection of children in reform homes (decision of Full Court dated 24 February 2020 and the subsequent orders of **mandamus** from the Bench), protection of prisoners and detainees (**076-WO-0330, 076-WO-0939**); the behaviour of security personnel towards the general public (**076-WO-0941**); the repatriation of labourers stranded in foreign lands (**076-WO-0940**); the participation of women in COVID-related agencies (**076-WO-0962**); the education of students, concession loans to farmers, tax concessions and food security (**076-WO-0937**); and the re-testing of COVID-19 patients to make sure that they are free from the disease (**076-WO-0973**). In matters concerning the labourers stranded in foreign countries, it is the responsibility of the state to rescue them via diplomatic missions or labour associations. These include workers who could prove that they could afford to return to Nepal using their own money, and were determined based on the nature of their employment, the source of income and their inability to get a flight ticket from the destination country or employer. In this regard, this Court issued an order to immediately start the process of repatriating these workers in a way that balances the legitimate expectations of the contributors and a just use of funds, by formulating procedure with the assistance from the concerned stakeholders, including the writ petitioner.

Overall, there have been various interim orders related to COVID-19 precautions and safety regarding **COVID-19**. These include increasing testing facilities and access to it; improving the quality of testing and quarantine centres; developing infrastructure, including ICU beds at the district level; protecting the life and health of persons engaged in treatment and of persons at additional risk due to health issues or social neglect; rescuing stranded workers and other citizens; repatriating citizens stranded in foreign countries; providing transparency in relief distribution; showing humane behaviour towards citizens; reviving the agricultural industry; and protecting livelihoods, equity, non-discrimination, inclusiveness, social justice and social protection etc. In addition to this, after hearing the report of **076-RE-0392** and the petition of **076-WO-0944**, the Extended Full Bench of this Court declared the period of lockdown as ‘**zero hour**’ in which the time limit and statute of limitation would not expire, thus

preventing any hindrances in access to justice.³⁸ In the writ petition filed by Roshni Poudyal, an order has been issued from the Division Bench of this Court in the name of the government to issue an integrated act to address the **COVID-19** pandemic.³⁹

The government has certainly exhibited more actions now to combat with **COVID-19** than that was in the initial stages of the pandemic. Important steps have been taken to increase testing capacity, identify hospitals for treatment, increase **PCR** tests in cities outside the Kathmandu Valley, and distribute relief. Further, various directives, standards and orders have been issued to deal with the situation created by the **COVID-19** pandemic.⁴⁰ Also, as per the order of this Court, the **Public Health Service Rules, 2020** were issued on 21 September 2020. Awareness regarding this disease, to some extent, has spread out at the grassroots level as well. The situation of testing and **COVID-19** treatment is not the same as it was at the beginning of March 2020. But now, the infection rate is on the rise, it is not the time to sit idle. Looking at the current situation, it seems that the infection has overtaken us and we are running behind it, struggling to surpass it. In this context, the questions have been raised about whether the government has been adhering to the constitution and the rights of the people have been protected. This Court, while requiring to the government, also has to fulfil its constitutional duty. The purpose of the writ petitions, orders of the court, regulations issued by the government, directives, standards and orders is to enforce the rights enshrined in Part 3 of the Constitution that are required for a dignified life, and to implement the directive principles, policies and obligations of the State as described in Part 4. This Court is to direct the government by issuing orders in light of these provisions that it is not reasonable for anyone to interpret it otherwise and consider it an unnecessary hassle.

38 See the order dated 28.05.2020 regarding removal of difficulties

39 Roshani Poudel *et.al.*, v. Prime Minister and Secretariat of Council of Ministers 076-WO-0962 decision date 5.08.2020

40 Order including, the order concerning the easy repatriation of Nepali people stranded abroad, 2020; Standards concerning the Management of place of residence during Covid pandemic, 2020; Interim Directive for the operation case searching and contact tracing team for COVID-19, 2020; Directive for the management of health professionals and other employees involved directly in the treatment of COVID-19 patients, 2020; Standard regarding the service delivery to senior citizens in the context of the COVID-19 pandemic, 2020; Health Standard for the isolation of COVID-19 infected, 2020; Health arrangements for people in quarantine, 2020; Precautions to be taken at the point of emergency during the COVID-19 pandemic, 2020; Brief procedure for the management of corpses of people who have died due to COVID-19, 2020;; Health Sector Emergency Response Plan: COVID-19 Pandemic, have been implemented.

In this writ petition and other petitions related to **COVID-19**, it has been alleged that the government has acted against citizens' rights, including those guaranteed in Article 18 (1) and Article 35 (1) of the constitution. In previous petitions, questions have been raised regarding the provisions, including Article 16, Article 18, Article 35, Article 36, Article 38, Article 39, Article 42, Article 43, Article 44 of the **Constitution of Nepal**, as well as Acts, such as the **Infectious Diseases Act, 1964**; the **Public Health Services Act, 2018**; and the **Foreign Employment Act, 2008**. These constitutional provisions relate to the dignity, equality and inclusion of the Nepali people; their health, education, participation and security; and the protection of special classes, such as women, children and senior citizens.

Although **COVID-19** can affect anyone – from the nation's elites to the general public – it is even more important to protect these rights during the pandemic, given how **COVID-19** will impact the rights of the most vulnerable and neglected in society and those at greater risk of physical and mental illnesses. Wealthy and privileged people in society can also get the disease and die if they do not get good treatment, but the poor and the destitute are afflicted with both disease and hunger. They may die being trapped within the two. For this reason, stranded and vulnerable citizens should be saved not only by ensuring them equality, but also by carefully bringing them with the non-discrimination and protectional measures of the state created by the rights guaranteed in the constitution. Looking at the rights enshrined in our constitution, it is clear that the constitution is sensitive towards the protection and enforceability of rights of not only the "capable," but also of the incapable and disenfranchised. These basic philosophies of the constitution cannot be ignored by the state system, which considers social justice and social security as enforceable rights and is committed to an egalitarian society and socialism. It is the primary responsibility of a welfare state to protect the fundamental rights of citizens enshrined in the constitution.

Rights are meaningful only when citizens are able to enjoy them; when they can apprehend that the facilities provided by the state or the achievements in their personal lives are made possible by good governance and the rights enshrined in the constitution. Therefore, it is not enough to say that positive provisions have been made for the exercise of these rights – citizens must actually be able to exercise these rights by citizens and realize they are doing so. For example, it is not enough to have a just state that there must be the provision for health centres and medicines free of cost. It is also important

to conduct an end-means test to carefully examine whether citizens have been able to use those facilities; whether they are easily accessible; whether adequate human resources and medicine are available, and if they are, whether or the community is aware of their availability; whether institutional negligence or irregularities have hindered the use of these facilities; whether the facilities only benefited people who do not need the help of the state; and whether the facilities have been distributed or have failed to reached the target group due to corruption and spillage. The primary responsibility for examining these questions lies in the executive. The judiciary never wishes to replace the executive branch, but if entrusted state bodies do not fulfil their responsibilities, the judiciary, in the course of fulfilling its constitutional duty, must look at factors like these and consider what has been done or what needs to be done.

Today, rights are not only means of empowerment; they are also the values associated with equality and respect. The state machinery was created to realize the values embedded in the rights of sovereign people. The state machinery should be oriented towards achieving happiness, peace and long-term prosperity in society without any deception, delay or sluggishness in achieving these constitutional values. The state machinery will have observed constitutional morality only if it remains goal-oriented and follows the constitutional objectives set by the sovereign people through their representatives in the constitutional assembly.

The constitution does not implement itself; the state machinery implements it. To say that the rights of sovereign people are “respected,” but not to respect them in practice involves not implementing rights in a planned manner nor formulating a plan to implement them; not bringing about timely, positive changes in the lives of citizens; neglecting the people for whom the constitution was made; treating elections as a system to elect a certain limited class of people to government and allow them to enjoy the unlimited power of the welfare state; and treating social justice and social protection are as merely words. This system and treatment is not conducive to the essence of democracy and is, instead, against constitutional morality. Constitutionalism prevents the appropriation of power and deception of all kinds, and views prosperity achieved through the protection of rights as the only objective of government. Therefore, today, the extent to which rights are protected – and the quality of the protection of rights– is given special importance. Further, a ‘rights audit’ must also be done in relation to the structure of the state and

the steps taken to protect rights. These elements need to be looked at with special caution, especially in the context of economic, social and cultural rights. In addition to these, the issue of whether the government has acted in accordance with proper constitutional ends becomes a matter of judicial review, and the attention of the justice system should also be directed towards this issue. Only then, will the constitution's system of checks and balances be function; the people will be able to exercise their rights; the rule of law will be transformed into a living reality; and the government machinery, including the judiciary, will be behaved in accordance with the constitution.

In the present writ petition, the petitioners have drawn the attention of the Bench towards Article 35 (1) of the **Constitution of Nepal**. Learned Senior Advocates and Senior Advocates present working on behalf of the petitioners have also strongly raised this provision, and have claimed that the practice of paying for **COVID-19** tests is against Article 35 (1). Article 35 (1) of the Constitution provides that, "Every citizen shall have the right to free basic health services from the State, and no one shall be deprived of emergency health services." The term "**emergency health service**" used in the constitution is not only an emergency service, but also a service to be provided during emergency situations. Since healthcare provided during the **COVID-19** pandemic is both an emergency service and a basic service, it should be provided immediately and free of cost. Citizens can stay healthy and active only if both basic and emergency health services are the utmost priority of the state. The country moves forward with the investment and participation of these healthy and active citizens; no one should forget this living reality.

In this very context, looking at what is incorporated within the term "**basic health service**", Section 2(b) of the **Public Health Service Act, 2018** provides that, "A '**basic health service**' means a promotional, retributive, diagnostic, remedial and rehabilitative service easily and freely available from the state for the sake of the fulfilment of health need of citizens generally, pursuant to Sub-Section (4) of Section 3." Further, Section 3 (4) (c) mentions that a "service relating to communicable disease" and sub clause (g) of the same mentions a "service of general emergency condition," as both being a basic health service, the **Ministry of Health and Population**, in its rejoinder, admitted that "Coronavirus disease caused by **SARS-CoV-2 Virus (COVID-19)** is a communicable disease." Therefore, there is no doubt that all kinds of promotional, retributive, diagnostic, remedial and rehabilitative services related to **COVID-19** should be free of cost.

The main issue is whether the **PCR** test of **COVID-19** should be free of cost. The petitioners have claimed that this service falls within the basic healthcare and general emergency services and that, as such, it should not be provided free of cost to some people and with charge to others; doing so would be against Article 18(1) of the constitution. The rejoinder of the respondent, the **Ministry of Health and Population**, provides that, “The state is conducting free **PCR** testing for people with signs and symptoms associated with **COVID-19**... citizens who are suspected of being infected with **COVID-19** and who have been in direct contact with the infected. In case of those who are not suspected of being infected with **COVID-19**, but want to get tested voluntarily or for visa purposes, arrangements have been made for **PCR** testing at private as well as community hospitals at a fixed rate. Besides this, anyone who visits a designated government health facility or laboratory is still receiving free **PCR** test.”

The rejoinder suggests the following ideas:

- (a) Free testing will be conducted for people who have symptoms of **COVID-19** or for those who have been in direct contact with the infected.
- (b) Arrangements will be made for paid **PCR** testing through private and community hospitals at a fixed rate for those who are not suspected of having the infection, but want to get tested voluntarily and for visa purposes.
- (c) Anyone who goes to the designated government health facility and laboratory will still be given a **PCR** test free of cost.

Although the answer provided in (a) is clear, the ones provided in (b) and (c) are unclear. First, people do not just come to the hospital or health centre for testing, because they have likely been exposed to **COVID-19** or have reason to believe they have been exposed. There is no such thing as ‘desire’ here. Second, the purpose of a **PCR** test is to find out if the person is infected and to dispel suspicions if they are not infected. Therefore, if someone comes to the government institution for a test in order to obtain a visa for travelling abroad, free test should be conducted without asking the recipient why he or she is getting a test. It is necessary for people travelling abroad to get these tests. As Nepal wants to prevent infected people from visiting here, it is not unusual for other countries to do the same. Given the fact that the basis of international relation is brotherhood, interdependence and cooperation, it is only natural to expect this.

However, the **Ministry of Health and Population** has not submitted any statistics concerning this issue in a report or the rejoinder. Given the manner in

which the tests are done – and the amount of time it takes to get one – it can be easily assumed that people applying for visa will rarely go to the government hospital or laboratory for a test. From both legal and practical point of view, denying governmental the ability to conduct tests for visa purposes is not in line with the constitution and laws, because the **Public Health Services Act, 2018** considers these facilities promotional, preventive and diagnostic services and **basic health services**. Also, in course of the argument, it has come to light that the citizens have to wait in queue starting at 2:00 AM in the morning to get a **PCR** test for visa purposes. It is thus the government’s responsibility to make appropriate and reasonable arrangements concerning this issue immediately.

Regarding the issue of only giving **PCR** tests to people who exhibit symptoms, the rejoinder and other writ petitions filed in this court, as well as officials of the **Ministry of Health and Population** make it clear that symptoms and infection do not show in everyone, as asymptomatic people can transmit **COVID-19** to others. Therefore, only conducting tests of symptomatic people is against the provisions of the constitution and the **Public Health Services Act**. The government may issue asymptomatic people a token for returning them to the testing centre and get another test after several days, but people who visit government health centres or laboratories cannot be told to come back and to visit private laboratories instead. Based on the rejoinder of the respondent, the **Ministry of Health and Population** stating that, “Anyone who visits a designated government health facility or laboratory is still receiving a free **PCR** test,” the government cannot charge for tests because it has agreed to conduct free testing for anyone who comes to a designated government health institution or laboratory. The tests done in government health institutions have to be done free of cost.

Private hospitals and laboratories that have permitted by the government are not respondents in this writ petition. According to the report submitted by the **Ministry of Health and Population** to this Court on 22 October 2020, there are currently 50 laboratories conducting **PCR** tests across the country, which include 35 government laboratories and 15 private laboratories. In the report, the price of a **PCR** test was mentioned to be Rs.2000 which suggests that the fee was reduced even after the date of filing the writ petition. Even though private hospitals and laboratories are profit-based organizations, they have to abide by the government’s guidelines and fee-determination rules during the pandemic. Under their corporate social responsibility, they cannot deny providing this service. When it comes to the implementation of the rights

guaranteed by the constitution, even private institutions cannot say that they will not respect rights or that they do not care about the constitution. If they say so, it is the responsibility of the government to issue the appropriate orders to enforce their compliance and if the government does not do so, this Court can issue such orders. In constitutional jurisprudence, this is called a 'horizontal enforcement of rights' and a 'radiant effect of rights.' It is the duty of the Court to contribute to such an effect. But, in the context of the pandemic, and regarding the question of enforcing rights guaranteed by the constitution, the government must bear these obligations. Therefore, it seems constitutionally necessary to increase the scope of testing and to ensure that it is done conveniently and completely free of cost by the government machinery. Earlier, the Court had time and again issued interim orders to expand the scope of testing and increase the number of testing centres in urban and densely populated areas. It is expected that the government will follow those orders and establish additional testing centres and mobilize human resources by mapping out and developing standards based on population and population density. The government can prioritize these tasks based on the immediately available resources, but it cannot pass over its primary duty regarding public health. Therefore, since the testing and treatment of **COVID-19** is the primary responsibility of the government, no additional order is issued to the private health institutions, with the expectation that the government will coordinate with the necessary stakeholders and fulfil its duty.

Without the development of health infrastructure, public health cannot be protected. No country has been able to do this. It is now public knowledge that the countries best suit to fight this invisible evil are accomplishing this only through infrastructure development and human resource mobilization. However, the right to health cannot be seen merely as a single right, disconnected with other rights. Rights are interdependent. When this right is adversely affected, rights related to education, employment, business etc., are also affected and eventually the country is pushed back. Keeping this reality in mind, the respondent is directed to view this national crisis as an opportunity to develop health infrastructure at the grassroots level, and to work in a planned and expeditious manner.

In this context, the Report dated 23 September 2020, citing Rule 3 and Schedule 1 of the **Public Health Service Regulation 2020**, view that, "The list of 'services related to infectious diseases' enlisted in Schedule-1, Clause 3 does not mention Coronavirus disease (**COVID-19**) caused by **SARS-CoV-2 Virus**,

i.e., it is not included in the service which should be provided free of cost.” There is a wide contrast between the views of the report and the statement by the respondent, the **Ministry of Health and Population**, that **COVID-19** is a contagious disease. While making such a claim, the Ministry did not even consider Section 3 (4) (c) of the **Public Health Services Act, 2018** which considers services related to communicable diseases as ‘basic services.’ Since the Act itself considers communicable disease related to service as a basic service, the fact that **COVID-19** is not mentioned on the list of communicable diseases in the regulation does not hold any legal meaning and significance. As it is a matter of general sense that rules should be made in accordance with the Act, and since this subject is not covered in Schedule-1, Clause 3 of the Rules, an order of *mandamus* is issued in the name of the **Ministry of Health and Population** to immediately include the Coronavirus (**COVID-19**) caused by **SARS-CoV-2 Virus** on the list of services related to infectious diseases in clause (3) of Schedule 1.

At present, the government has admitted that huge number of people is visiting government hospitals and laboratories to get PCR tested; especially at Teku Hospital and the Laboratory of Kathmandu. Since testing centres and hospitals are not available in proportion to the population and population density of the Kathmandu Valley, people with few options, upon receiving information regarding the availability of services, naturally end up queuing in those places. But the infection can spread in the testing centre if so many people are gathered there. Considering this, the crowd of people should be managed immediately. And, since there has recently been a spike in cases, it is necessary to increase testing services and treatment by immediately mobilizing test centres and human resources in Kathmandu and other densely populated cities in a planned and systematic manner. Considering that the speed of transmission and the government’s current healthcare abilities, it is not impossible to develop infrastructure by developing computer modelling with the use of information technology. Thus, given the current multitude of infected people, an order of *mandamus* is issued in the name of the **Ministry of Health and Population**, to handle the queuing people as soon as possible, refer them to places where crowd is minimal, and manage a token system for testing. This will involve making arrangements for getting the test results as soon as possible; limiting the waiting time at hospital and testing centres to 10 to 15 minutes; ensuring social distancing during waiting periods; and adding free testing and treatment in high-pressure urban centres.

In summary, although the main claim of this writ petition registered as per Article 133 (2) (3) of the **Constitution of Nepal** concerns free of cost testing, this claim has come during the **COVID-19** pandemic, so an appropriate order should be given considering the situation on the ground, in line with previous orders. It has already been mentioned that this Court has been issuing various orders on public interest petitions regarding constitutional and legal rights during the pandemic. This court expects the government to implement all those orders after a positive summarization and review. It is not yet clear as to what form the disease will take, and what kind of damage it will cause in Nepal. But, while discussing this writ petition, the **COVID-19** outbreak seems to be heading towards an explosive state. Unless medicine or vaccines are developed and made available, it will not be easy to overcome the health and humanitarian crisis caused by this pandemic. Therefore, it has now become imperative to mobilize additional resources and develop more health-related infrastructure. This Bench is of the view that orders previously issued by this Court have become more relevant during this health crisis. In the context of the claim of this writ petition, the respondent **Ministry of Health and Population** which is the nodal agency for health is directed by an order of *mandamus* as aforementioned, to send a copy of the decision to the respondent through the **Office of Attorney General** to implement this order, and let the case file be handed over to the Record Section, striking off the registration details of this petition as per the rules.

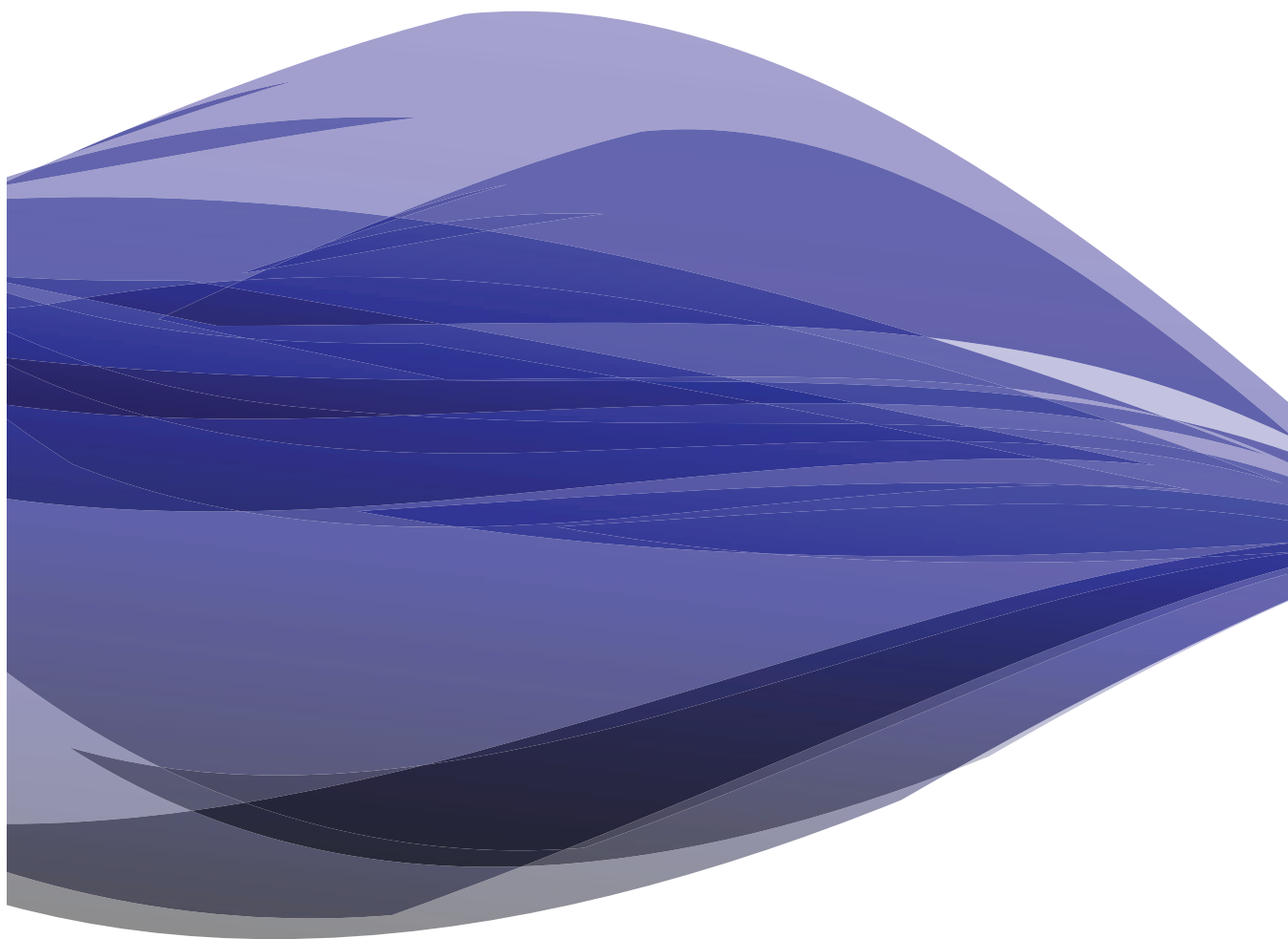
Judge

I concur to the above opinion.

Judge

Done on the 1 October 2020.

SERIAL NO. 101



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