

**ROLE OF JUDICIARY AND SOCIAL WELFARE TO COMBAT CORONAVIRUS  
PANDEMIC IN NEPAL: A STUDY WITH SPECIAL REFERENCE TO INDIA'S  
EPIDEMIC LAW**

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**Abstract**

The competent legislature of Nepal has adopted and enacted an epidemic law regime to curtail the transmission of outbreaks. However, these laws have glaring gaps. They are not comprehensive in nature. Nepal's then king Mahendra brought Infectious Disease Act, 1964 into force to deal with the outbreaks. This one-page Act is much similar to that of India's Epidemic Act, 1897 which discusses about the rights of the state but fails to prescribe the duties of the government towards its vulnerable citizens during the period of contagion. The 1964 Act fails to prescribe welfare functions to be carried out by the instrumentalities of the state for the welfare of the people. It means this law does not recognize the rights of the people during an outbreak. The crown's law does not necessarily cast an obligation on the state instruments of Nepal to ensure the availability of food or compensation or financial assistance to the daily wagers, migrant labourers, informal sectors or poor and needy ones who have suffered due to unprecedented Coronavirus pandemic. Unfortunately, the epidemic law of India is also enacted in similar terms. The prevailing epidemic law regimes of India and Nepal neither direct the state to advance research on antibodies/antidotes nor do they oblige the states to set up a common forum of lawyers, economists, sociologists, biologists, bacteriologists, virologists, biomedical scientists and among other experts to devise plans and policies for crisis preparedness and vulnerability reduction.

**Keywords:** epidemic, Coronavirus, COVID-19, outbreak, Nepal, India, law, disaster

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## **I. Introduction**

IT'S OFTEN said that a disaster knows no boundaries. It affects indiscriminately. A pandemic, which is also a disaster, is neither a rich man's disease nor is it an urban phenomenon. If its outbreak ensues, it brings disastrous situations. This is something the world faced at the onset of the current Coronavirus outbreak. The world's mightiest economies, global super powers, or world's least developed countries, like Nepal, marched a global war against the Coronavirus outbreak, which began its journey from China in the last quarter of 2019. It has changed the world order in terms of economy, politics, and healthcare and among others. The world witnessed a universal spread of the virus that has already claimed thousands of lives and the death tally is soaring up by the hour.

As the virus has caused a severe impact on health, it could be termed as one of the major catastrophes of the contemporary world. This unprecedented disaster made the states bound to activate their epidemic laws and adopt measures to contain the spread of the virus. In absence of antidote and proper treatment, it was imperative to implement lockdown measures and quarantine laws to curb the spread of contagion. For this job, it was crucial to give life to the epidemic and disaster management laws to break the chain of transmission. In this process, Nepal brought the Infectious Disease Act, 1964, which was authenticated during king Mahendra's regime, into action to impose a uniform lockdown across the country.

The Himalayan republic, which has officially adopted a formal federal constitution in 2015, lacks a federal epidemic law. It implemented a crown's legislation which was enacted in 20<sup>th</sup> century. It neither addresses federal spirit, nor does it recognize the rights of the people during an outbreak. Still, this law confers ample power on the state authority, i.e., District Magistrates, to adopt every possible measure required to control or abate the transmission. The Act, 1964 does not confer power on the provincial and local governments. This way, it's a central legislation reflecting unitary character. The landlocked country, which enforced its formal federal constitution on September 20, 2015, could have adopted an ordinance or amendment under the Act 1964 to tailor the provisions of the epidemic laws in pursuance of the federal character of the seventh constitution. But, the incumbent government remained reluctant to endorse any bill in this regard. These glaring gaps make the legislation an outdated piece of law.

Under the current epidemic law regime (that is section 3, the Infectious Disease Act, 1964), a person who wilfully violates lockdown would be punished with imprisonment of either

description for a term which shall not be more than one month; or fine of Rs 100; or both. The Federal Democratic Republic Nepal has established seven provinces, 77 districts and 753 local units (local bodies). Section 4 of the Act, 1964 authorizes District Magistrates, who are answerable to Nepal's Home Ministry, to implement the decisions taken in line with the Infectious Diseases Act. Along with the Infectious Disease Act, the Chief District Officers (i.e., District Magistrates) are entitled to implement the Local Administration Act, 1971 in case of urgencies or to address the felt necessities.

Moreover, Nepal's Country Criminal Code, 2017, which is a substantive criminal law like that of India's Indian Penal Code (IPC), 1860, outlaws any act or omission that tends to spread or likely to spread infectious diseases. In this light, Section 104 of the Code envisages for up to 10 years of jail sentence and fine of up to 100,000/- against a person who intentionally spreads the infectious disease. Under this provision, Judicial Magistrates are empowered to impose jail sentence of up to five years and fine of up to 50,000/- on a careless person and up to three years of imprisonment and fine of up to 30,000/- on a negligent person who is found indulged in spreading the infectious diseases.

Nepal's epidemic law, i.e., the Infectious Disease Act, 1964 contains a total of five Sections. Section 2 of the Act confers sufficient powers on the government apparatuses, that is, Chief District Officers, to adopt all necessary measures required to prevent the spread of the infectious diseases. While invoking this law, the district administrators can issue orders, whichever required, to curtailing the contagion. An order could be passed to seal a respective area or locality with rising number of cases.

Meanwhile, the government also implemented the Essential Service Operation Act, 1957 to ensure the distribution of goods and services of daily use and the Local Administration Act, 1971 to adopt necessary measures, like imposition of Prohibitory Orders or Curfew by the Chief District Officers, to stem the spread of virus. For instance, District Administration Office Parsa had imposed a Prohibitory Order in Birgunj metropolis from July 25, 2020 following a rise in COVID-19 cases in the city. Under the prohibitory order, individuals are not allowed to come out of their houses, except for medical emergencies or other unavoidable essential works.

This way, the Act, 1964 confers extensive power on the Chief District Officers (i.e., District Magistrates in India) to give effect to any decision required to frustrate the spread of contagious diseases. But, the Act fails to provide any mandate regarding the rights and

concerns of the people during an outbreak. Also, the epidemic law regime does not lay down a solemn duty on the state apparatus to mandatorily provide relief materials, compensation, or financial assistance to the daily wagers, migrant labourers, informal sectors or poor and needy ones who have suffered due to Coronavirus lockdown. The law is also silent regarding the scheme for waving off interests during the period of lockdown. In nutshell, the epidemic law does not explicitly recognize the rights of the vulnerable people during an outbreak. Nor does it cast an obligation on the state instruments to adopt scientific measures required to break the chain of transmission.

## II. Toward a Legal Framework

In the wake of the recent global spread of Coronavirus, governments across the world moved much closer to a full lockdown in a bid to curtail the spread of Covid-19 by breaking the chain of transmission through physical contact. The world's democracies, autocracies and monarchies stood on the same page in response to the deadly virus. Nepal too cannot remain untouched with lockdown and quarantine measures.

It's often said that legal frameworks constitute the foundation of an effective and well-functioning private or public institution. Legal frameworks comprise a set of documents that include constitution, rules, regulations and other legislations that aim to govern the national life or international issues pertinent to the nation.

In a country that observes the rule of law, domestic activities or instruments of the state rest on the firm foundation of legal frameworks. Nepal effectuated the Infectious Disease Act, 1964 while India brought the Epidemic Act, 1897 and the National Disaster Management Act, 2005 into motion to control the spread of the virus. Still, lockdown to control a pandemic is not a new concept before the world.

The available researches suggest that a pandemic lockdown was for the first time adopted as a part of an organised response to battle plague outbreak in Italy during Renaissance period. These measures were taken in Italy over the 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> centuries to combat the plague outbreak. The Italian government applied lockdown in full force during outbreak of plague in Florence in 1630-1631.<sup>1</sup> The Italian government established quarantines in as early as 15<sup>th</sup>

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<sup>1</sup> "17<sup>th</sup>-Century Florence: When lockdown became the template to fight pandemics." Apr. 7, 2020, *RFI*, available at: <https://www.rfi.fr/en/europe/20200407-17th-century-florence-when-lockdown-became-the-template-to-fight-pandemics-coronavirus-covid-19-plague> (last visited on Sept. 5, 2020).

century to start isolating the patients infected with plague.<sup>2</sup> However, the quarantine regulations were relaxed in the mid-19<sup>th</sup> century.<sup>3</sup> Nevertheless, there are instances when the lockdown was imposed to deal with terrorist attack or address security threats. For instance, three-day lockdown of American civilian airspace was imposed immediately after terrorist attack of September 11, 2001 (popularly known as 9/11 terrorist attack) on World Trade Centre of United States.<sup>4</sup> Further, the Belgian government had imposed a security lockdown of four days at a time when Islamic State organizations attacked Paris on November 13, 2015.

Even during the current Coronavirus outbreak, Communist Republic of China announced its first step for quarantine of Wuhan, the epicentre of the outbreak, nearly two months after the first case of virus was reported. However, it should be born in mind that by this time, a significant number of Chinese citizens had travelled many countries as ‘asymptomatic, obvious carriers’ of the virus.<sup>5</sup> It is to be noted here that on December 31, 2019, the Chinese officials informed WHO China Country Office about the cases of pneumonia of unknown cause found in the city of Wuhan.<sup>6</sup> The Communist state announced shutdown of city of Wuhan starting from last week of January, i.e. from January 23.<sup>7</sup> On January 11, 2020, China reported its first novel COVID-19 death.<sup>8</sup> After China, the next country that witnessed a rapid rise of COVID-19 case was Italy and the country became the second state to announce a nationwide lockdown starting from March 9 to curb the transmission.<sup>9</sup> So, China is to be credited for forwarding the idea of Coronavirus lockdown. Much like India, Bangladesh government announced its first phase of lockdown for 10 days beginning from March 25.<sup>10</sup> The disease had caused such a harsh impact on human life that led the World Health Organization (WHO) on January 30, 2020 to declare Coronavirus outbreak a public health emergency of international concern. Interestingly, the WHO has made such a declaration for

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<sup>2</sup> Ramin Jahanbegloo, “Life lessons from the history of lockdowns”, *Live Mint*, Mar. 27, 2020, available at: <https://www.livemint.com/news/india/life-lessons-from-the-history-of-lockdowns-11585312953744.html> (last visited on Sept. 5, 2020).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> “Here's how China misled the world on coronavirus for two months”, *The Indian Express*, March 27, 2020, available at: <https://www.newindianexpress.com/world/2020/mar/27/heres-how-china-misled-the-world-on-coronavirus-for-two-months-2122249.html> (last visited on Apr. 20, 2020).

<sup>6</sup> “Half a million COVID-19 cases in India: How we got to where we are”, *The Wire*, June 27, 2020, available at: <https://thewire.in/covid-19-india-timeline> (last visited on Sept. 5, 2020).

<sup>7</sup> Erin Schumaker, “Timeline: How Coronavirus got started”, *ABC News*, July 28, 2020, available at: <https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165> (last visited on Sept. 5, 2020).

<sup>8</sup> *Ibid.*

<sup>9</sup> Shoaib Daniyal, “Not China, not Italy: India’s Coronavirus lockdown is the harshest in the world”, *Scroll*, March 29, 2020, available at: <https://scroll.in/article/957564/not-china-not-italy-indias-coronavirus-lockdown-is-the-harshest-in-the-world> (last visited on Sept. 5, 2020).

<sup>10</sup> *Ibid.*

the sixth time in history.<sup>11</sup> Again on March 11, 2020, the WHO declared COVID-19 outbreak a pandemic.<sup>12</sup> However, the WHO gave formal name of the Coronavirus disease as COVID-19 on February 11, 2020.<sup>13</sup> The two initial letters in upper case, *i.e.*, CO stands for Corona, while VI is to designate the term ‘Virus’ and the last letter ‘D’ is for ‘Disease’. So, as the disease had made its severe impact world over and declared as a matter of serious health concern, the world community became bound to give effect to their epidemic laws to curb the transmission. This way, lockdown is not a new concept but a road less travelled by the world community.

While enforcing epidemic laws, Nepal began lockdown from March 24 to stem the spread of novel Coronavirus, with the Himalayan republic’s 30 million people ordered to stay at home. However, Nepal had reported its first case in January—much before the country went under lockdown. On January 24, the landlocked state confirmed the first case of COVID-19, identifying the infected youth as a Nepali national who had recently returned from China’s Wuhan.<sup>14</sup> He is a PhD research scholar in Chinese city of Wuhan. At the time of writing article, Nepal’s nationwide lockdown, which was on the progress since March 24, was lifted on July 21 with certain restrictions. The cabinet meeting held on July 21 had decided to resume long-route transportation, allow open academic institutions and resume domestic and international flights from August 16 and open hotels, restaurants, travel agencies from July 30. However, the said order could not be implemented due to rising cases of COVID-19 and the country failed to see normalcy.

In India, the first case of Coronavirus was detected on January 30 in a Kerala dweller who is student at Wuhan University.<sup>15</sup> He had returned his home in January. Still, the lockdown began from March 25 in India and concluded with the ending date May 31. Yet, the normalcy did not come after June 1. The government brought ‘Unlock’ strategies to put relaxations in lockdown, allowing the state and private parties to carry out certain functions as prescribed. As it was not an actual extension of full lockdown, the government termed it ‘Unlock’ to ensure a sort of movement or normalcy in green zones. The government of India brought

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<sup>11</sup> *Supra* note 9.

<sup>12</sup> Jamie Ducharme, “World Health Organization Declares COVID-19 a ‘Pandemic.’ Here’s what that means”, *Time*, March 11, 2020, available at: <https://time.com/5791661/who-coronavirus-pandemic-declaration/> (last visited on Sept. 5, 2020).

<sup>13</sup> *Supra* note 9.

<sup>14</sup> “Nepal confirms first case of deadly Coronavirus”, *The Economic Times*, Jan. 24, 2020, available at: <https://economictimes.indiatimes.com/news/international/world-news/nepal-confirms-first-case-of-deadly-coronavirus/articleshow/73590302.cms> (last visited on Sept. 5, 2020).

<sup>15</sup> *Supra* note 8.

policies for lifting the lockdown in non-containment zones in a phased manner. Then, the states, based on the cases of Covid-19, were empowered to adopt measures—either to lock or unlock—for fighting against the pandemic. For example, Nagaland government had announced a seven-day total lockdown in its capital city Kohima from July 25 to July 31 to break the chain of the spread of virus<sup>16</sup>. Interestingly, Nepal too adopted similar move, allowing the district administration to impose Prohibitory Order or curfew in their respective jurisdiction to prevent the spread of the virus.

India has invoked a 123-year-old colonial legislation to combat the outbreak of Coronavirus. Constitution experts in India emphasize that it is imperative to amend or repeal the 1897 Epidemic Act, for the century-old-blunt law has understandable gaps. The government of Nepal has invoked the Infectious Disease Act, 1964 to impose a lockdown to fight the pandemic. The epidemic laws in both states fail to define what infectious or contagious disease is.

Unlike Nepal, the Epidemic Act, 1897 does not confer power on the centre to play any role in pandemic, epidemic or health emergency-like situations. The 2008 guidelines issued by the Management of Biological Disaster had recommended replacing the long-stayed colonial law. In this respect, Public Health (Prevention, Control and Management of Epidemic, Bio-terrorism and Disasters) Bill, 2017 is under consideration in the House to substitute the 1897 Act. Section 2 of the Act, 1897 obliges the state governments to adopt measures to curtail the outbreak of epidemic or disease.

This way, the law does not provide a legal mandate to the Union government. The Union falls short on regulating the transfer of swabs or samples from one state's lab to another state's well-sophisticated laboratory. Under the current epidemic law regime, it would be an uphill task for the centre to prosecute a person found stealing or misusing samples so collected to test Covid-19.

Apart from this, the government of India invoked the National Disaster Management Act, 2005 to declare Covid-19 outbreak as a national disaster. Section 3 provisions for the formation of the National Disaster Management Authority, a 9-member body, under the leadership of the Prime Minister. The Authority is shouldered with the responsibility to adopt

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<sup>16</sup> “Coronavirus July 24 Updates: Nagaland announces 7-day total lockdown in Kohima”, *The Indian Express*, July 25, 2020, available at: <https://indianexpress.com/article/india/coronavirus-india-news-live-updates-covid-19-tracker-corona-cases-in-india-latest-news-today-update-6518884/> (last visited on July 25, 2020).

measures or direct the states to adopt measures to prevent the outbreak. The Government of India invoked Section 6(2)(i) of the Act, 2005 to implement a uniform lockdown in India. Section 6(2)(i) of the Act, 2005 confers power on the National Authority to take such other measures for the prevention of disasters or for adopting mitigation or preparedness strategies. There is also provision for the creation of Disaster Management Authority at state and local level and the law allows the second and third tier of the governments to play a constructive role against the outbreak of infection or disaster. Understandably, the COVID-19 pandemic is also a disaster. Yet, India's disaster law would have further strengthened federal spirit had the Act, 2005 hosted provisions allowing the state governments to adopt policies at their own discretion, not at the pleasure of the central government. The disaster laws in Nepal are also scripted under the similar terms. Still, various state governments from June 8 adopted measures to put an ease in the lockdown. For instance, Maharashtra government allowed private offices to carry out their business with up to 10% of the total staff strength or 10 persons, whichever is higher. Similarly, the Kerala government had announced that the state government offices as well as public sector and quasi government entities will resume its functioning from June 8. This way, various states started putting a level of relaxation in the lockdown.

The 2017 Disaster management law of Nepal aims to create mechanisms like Council for management of disaster risk reduction under the leadership of Prime Minister, an executive body under the chairmanship of Home Minister, and the similar bodies at provincial levels. But, these authorities are yet to be formed. Importantly, government of Nepal did not execute disaster law to contain the spread of Coronavirus.

In a significant move, the incumbent government of India issued an ordinance to amend the Epidemic Diseases Act making an act of violence on doctors, paramedic staff and nurses a non-bailable and cognisable offence punishable (from six months to) up to seven years in prison and fine of up to Rs. 5 lakhs. Now, the police will have to investigate the case within 30 days and the case will be fast tracked with the final judgement to come within a year. Also, those found to be vandalising the private clinic or a car belonging to a doctor will be asked to pay twice. The ordinance entered into force on April 22, 2020.<sup>17</sup> Still, the ordinance may become ineffective after the pandemic is declared over. The government at the helm

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<sup>17</sup> The Epidemic Diseases (Amendment) Ordinance, 2020 (5 of 2020), available at: <http://egazette.nic.in/WriteReadData/2020/219108.pdf> (last visited on Sept. 9, 2020).



should assure that those who attack healthcare workers would be dealt with strictly in future too.

The ordinance was issued at a time when medical professionals, particularly those involved in battling COVID-19, were attacked by relatives of Coronavirus patients in various places when they went to quarantine those testing positive.

Like India, the healthcare staffs and doctors too faced extraordinary situations in Nepal amid Coronavirus pandemic. The incidents reported in media suggest that some of the Kathmandu-based landlords asked their tenants, who work with hospitals, “to choose the hospital job or their rented room”, saying that “their job at the hospital placed” them “at risk of contracting COVID-19” and they could “not take risk”<sup>18</sup>. Similarly, media reports also suggest that many landlords obstructed their tenants to enter their rented houses just because they were out of the Kathmandu valley during the pandemic.<sup>19</sup> Beyond this, at least 20 doctors and health care workers of the Tribhuvan University Teaching Hospital, Kathmandu had to stay at their friends’ and relatives’ houses as their landlords had disallowed them to enter the rented room.<sup>20</sup> These are just representative incidents. These unwelcome incidents demonstrate that Nepali society—like that of Indian society—has been uncooperative and insensitive with Corona warriors. These incidents suggest that the societies in the two countries are not much different.

However, the said act of the Kathmandu landlords is a criminal offence in the eyes of law. An aggrieved tenant may file a complaint before the nearest police station against his landlord at the instance of mistreatment. In this regard, section 166 of the Country Criminal Code, 2017 envisages that anyone who obstructs or cause to obstruct a person from using private and public property, and discriminates against anyone, shall be liable to up to three years of imprisonment; or a fine of Rs. 30,000/- or both. Like India, Nepal remained reluctant to adopt any special law to protect the rights and interests of doctors and other healthcare professionals who stood as forefront warriors against the global Coronavirus pandemic.

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<sup>18</sup> Arjun Paudel and Aditi Aryal, “As Covid-19 fears grow, some medical personnel face eviction from their homes”, *The Kathmandu Post*, March 30, 2020, available at: <https://kathmandupost.com/national/2020/03/30/as-covid-19-fears-grow-some-medical-personnel-face-eviction-from-their-homes> (last visited on Sept. 5, 2020).

<sup>19</sup> Anup Ojha, “Tenants forced to take Corona tests as city deals with rising corona cases”, *The Kathmandu Post*, May 16, 2020, available at: <https://kathmandupost.com/valley/2020/05/16/tenants-forced-to-take-corona-tests-as-city-deals-with-rising-corona-cases> (last visited on Sept. 5, 2020).

<sup>20</sup> “Landlords evict more than 20 TUTH medical staffers”, *Republica*, May 18, 2020, available at: <https://myrepublica.nagariknetwork.com/news/landlords-evict-more-than-20-tuth-medical-staffers/> (last visited on Sept. 5, 2020).

Salmond has rightly said that man is by nature a fighting animal and force is the *ultima ratio* of all mankind. He believes that without a common power to keep them all in awe, it is impossible for men to cohere in any but the most primitive form of society. Without it, civilisation is unattainable. It is because of this reason, the implementation of a coercive law is necessary. Naturally, without punishment, many will break the quarantine laws in Nepal. So, it's crucial to lay down criminal laws and punish the outliers accordingly.<sup>21</sup> The Infectious Disease Act, 1964 envisages that the outliers would be punished with imprisonment of either description for a term which shall not be more than one month; or liable to fine of Rs. 100; or both (section 3). The Chief District Officer (i.e., executive Magistrate) has been empowered to implement the Act, 1964 (section 4).

The officials are permitted to check or inspect any person, pedestrian, goods, vehicles or any if they have a suspicion or reason to believe that the person or goods may carry infections. Despite this, the Act, 2020 BS (1964) nowhere prescribes welfare functions. The legislation does not necessarily oblige the government to ensure arrangement for food or other essential goods or services to its citizens.

In India, section 3 of the 1897 Epidemic Act envisages that any person found disobeying any regulation or order passed in line with this law shall be deemed to have committed an offence punishable under section 188 of the Indian Penal Code (IPC), 1860. Section 188 provisions for the jail term of one month, or fine of up to Rs. 200, or both against a person who wilfully disobeys the public servant's order. This provision further clarifies that if the disobedience of a person causes danger to human life, health or safety, then in that case, the person in question can be punished with six months of jail term, or a fine of Rs. 1000, or both. Moreover, section 269 of the IPC prescribes imprisonment for a term that may extend to six months, or fine, or both against a person convicted for a negligent act of spreading infectious disease dangerous to life. Section 270 prescribes for fine or imprisonment for a term which may extend to two years against a person's malign act of spreading infectious diseases dangerous to life. Likewise, section 271 sets out fine or imprisonment for a term which may extend to six months or both against a person's act of disobedience to quarantine rule. The Criminal Procedure Code, (CrPC) 1973 under section 144 prohibits assembly of five or more

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<sup>21</sup> Jivesh Jha, "बेलायतमा बन्थो विश्वकै पहिलो कोरोना कानून, यस्ता छन प्रावधान" (England tops the world in enacting Corona Code; here are the provisions), *Nepal Khabar*, April 27, 2020, available at: <https://nepalkhabar.com/opinion/25477-2020-04-26-13-30-42> (last visited on Jul. 20, 2020).

people in an area. It prohibits public gathering. The provision has been brought into effect to maximize public safety and to minimize the human-to-human transmission of the virus.

In England, the latest law on Coronavirus, i.e., the Coronavirus Act, 2020 (section 52 and schedule 22) authorizes the state to issue directions in relation to events, gatherings and premises. Under these provisions, events and gatherings may be prohibited and orders can be made in respect of specified premises imposing prohibitions, requirements or restrictions in relation to the entry into, a departure from, or location of persons within them. Unambiguously, these powers could be invoked to restrict the movement of people, goods or services or vehicles to impose a lockdown in a whole or part of the country. The similar power has been conferred on the state in India and Nepal as well under the current epidemic law regime.

In absence of proper medication and antidote against the virus, the lockdown was the need of the hour to battle COVID-19 outbreak. The only remedy was to practice social distancing to contain the pandemic. “The three-tier governmental machinery is struggling to provide food to poor and marginalized sections of our communities. All these nuances must be adequately addressed by the law. We need to go beyond traditional parameters. To put it simply, we are in dire need of a comprehensive legislation showing a clear roadmap to deal with unprecedented outbreaks,” observes much-admired commentator of Constitutional Law Dr Bipin Adhikari.<sup>22</sup> In this way, Nepali state is failing to protect and promote the concept of social welfare. A welfare state deserves to recognize the rights and interests of its (vulnerable) people. In a democracy, there should be a fair adjustment or a reasonable nexus between the rights (of the people) and duties (of the government towards its subjects) during an unprecedented health emergency-like situation.<sup>23</sup>

The meeting of Legislative Management Committee of Parliament held on April 26 has urged the government of Nepal to amend the (outdated) laws relating to epidemic and disaster management. The Committee has said that Nepal is in warrant of a progressive law to battle the epidemic-like situations. In fact, a law which does not prescribe the rights of the citizens and duties of the state towards their citizen deserves to be amended or substituted with fresh enactments showing a clear roadmap of obligations and civil liberties.

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<sup>22</sup> “We are in dire need of a comprehensive legislation to deal with pandemics”, *Lokaantar*, April 14, 2020, available at: <http://english.lokaantar.com/interview/dire-need-comprehensive-legislation-deal-pandemics/> (last visited on Jul. 20, 2020).

<sup>23</sup> Alok Kumar Yadav and Jivesh Jha, *Socio-legal Impacts of COVID-19: Comparative Critique of Laws in India and Nepal* 13 (Rajmangal Publishers, Aligarh, 2020).

However, the mere presence of law does not make much difference unless it's implemented in letter and spirit. An amendment or fresh enactment aims to replace the "laws of imperfect obligation" which includes laws defining what a contract is, what a crime is or a law prescribing the right and duties of the subjects. Perhaps, it is because of this reason the concept of the amendment was introduced to make the legislation up-to-date. But could amendment or fresh enactment work as pills to cure all ills? If foreign precedents are taken into consideration, it gives a message that mere enactment is not a solution to every problem. In fact, the problem lies in implementation.

Take the example of India. The Unorganized Workers' Social Security Act, 2008 is brought into effect to provide for the social security and welfare of unorganised workers and other matters connected therewith or incidental thereto. The Act, which is home to as many as 17 sections, in its section 3 (1) envisages for the welfare schemes for the unorganized workers that include: life and disability cover; health and maternity benefits; old age protection; and any other benefit as determined by the Central Government. The legislation does not leave state governments without responsibilities.

Section 3(4) casts an obligation on the state governments to ensure provident fund; employment injury benefit; housing; educational schemes for children; skill upgrading of workers; funeral assistance; and old age homes. This way, the legislation casts a shared responsibility on the centre and states to introduce welfare schemes for the betterment of people engaged in unorganized sectors.

However, section 10(3) provides "Every unorganised worker shall be registered and issued an identity card by the District Administration which shall be a smart card carrying a unique identification number and shall be portable." Regrettably enough, India is yet to see a centralized database even after 12 years after the enactment of the Act, 2008. The legislation is yet to fulfil its aims and objectives. It appears like a flower without fragrance. The government of India has had an opportunity to register the unorganized workers and realize the goals of this legislation by providing social welfare schemes to them but the government's insolence for the daily wagers or migrant workers has been understandable throughout the Coronavirus lockdown period.

Meanwhile, the inter-state migrant workmen (Regulation of employment and conditions of service) Act, 1979, which features as many as 36 sections, aims to regulate the employment of inter-State migrant workmen and to provide for their conditions of service and for matters

connected therewith. Section 2 (1)(e) defines who the “inter-state migrant workman” is. It says “inter-State migrant workman” means any person who is recruited by or through a contractor in one State under an agreement or other arrangement for employment in an establishment in another State, whether with or without the knowledge of the principal employer in relation to such establishment.

Section 12 of the Act, 1979 obliges the contractors to issue identity cards to every inter-state migrant workman. The contractors are under an obligation to ensure regular payment of wages, accommodation or ensure suitable conditions of work. Section 15 casts a mandatory duty on the employer/contractor to provide journey allowance of a sum not less than the fare from the place of residence of the inter-State migrant workman in his State to the place of work in the other State both for the outward and return journeys and such workman shall be entitled to payment of wages during the period of such journeys as if he were on duty. Apart from this, section 12(1)(c) obligates the contractors to pay journey allowance to every migrant worker.

However, hundreds of thousands of migrant workers’ right to work and earn bread for their family members have been compromised due to unprecedented lockdown. Their hard times due to unpaid journey allowance and salaries, penniless situations, hunger or journey for home on foot miles away made national and international headlines. But, the government at the helm grossly failed to take cognizance of this legal mandate and the concerns of migrant workers and daily wagers remain unaddressed.

The governments should be more liberal about allocating budgets to rescue the vulnerable population facing poverty due to loss of earning. In this way, the Indian experience suffices to conclude that mere enactment is not enough. Political commitment and strong determination to implement the laws in letter and spirit is required.

At this backdrop, the state deserves to adopt a comprehensive legal and policy regime. Nepal’s National Health Policy, 2076 BS (2019) aims to achieve sustainable development goals. The Health Policy envisages for a comprehensive and integrated framework for the overall development of Ayurvedia, Homeopathy, Allopathy or natural medicine to control and abate the health hazards. It also aims to adopt the risk reduction mechanisms, preparedness plans and other mechanisms to control or abate infectious diseases, pandemics, and climate change.

In a major breakthrough, the policy aims to advance the principles relating to Universal Health Coverage (UHC). The UHC means that all people and communities can use the promotive, preventive, curative, rehabilitative and palliative health services they need, of sufficient quality to be effective, while also ensuring that the use of these services does not expose the user to financial hardship.

While rest of the world managed to implement existing quarantine laws to battle COVID-19, the British government adopted and enacted special legislation, known as the Coronavirus Act, 2020, to break the chain of the transmission of the deadly virus. The preamble of the Act reads as: “An Act to make provision in connection with Coronavirus; and for connected purposes.” The preamble itself gives a message that the Act, 2020, which received royal assent on March 25, is special legislation enacted to contain the Coronavirus. This Act features as many as 102 sections and 29 schedules.

The Act, 2020 casts an obligation on the state to increase the manpower in health and social care sectors. Sections 2-7 and their incidental Schedules provide for the emergency temporary registration of various regulated healthcare professionals and social workers for the duration of the emergency. Sections 11 to 13 of the Act provide indemnity against clinical negligence claims for healthcare professionals assisting in the response to the outbreak, who would not otherwise be so indemnified. Section 9 makes arrangement for the compensation to emergency volunteers who may have incurred loss of earnings or for travel and subsistence. The medical doctors and healthcare professionals, who are forefront warriors against the pandemic, have been urging the government of India to bring a comprehensive compensatory scheme or policies for the families of medical staffers who have lost their lives. In August, the Indian Medical Association (IMA) has urged Prime Minister Narendra Modi to treat all the doctors who have lost their lives due to COVID-19 at par with martyrs of the armed forces and their dependents be provided with government jobs in accordance with their academic qualifications. The IMA, in its letter, has cited a data and said 87,000 healthcare workers had been infected with COVID-19 and 573 of them had died. In the letter to the Prime Minister, the country’s largest statutory body of doctors said that only an “inclusive

national solatium” for all doctors, who have died combating the Coronavirus pandemic, would provide justice to the sacrifice of their families.<sup>24</sup>

Also, the Coronavirus Act, 2020 prescribes for procedures of registering deaths and still-births (sections 18 to 21) and temporary arrangements in respect of the transportation, storage and management of the bodies of the deceased (section 58, read with 28). The Act hosts plethora of measures to combat and contain the spread of the virus. These include: powers in respect of the provision of education, training and child-care (sections 37 and 38; read with (R/W) schedules 16 and 17); powers to suspend port operations (section 50 R/W Schedule 20); allowing for the use of video and audio technology by Courts and Tribunals to facilitate remote hearings (section 53 to 57); and the postponement of upcoming elections (sections 59 to 70). The law provisions for the compensation to the victim—be it natural or artificial person-- of Coronavirus.

Much like section 53-57 of the Coronavirus Act, 2020, the apex courts of Nepal and India invoked their plenary powers to temporarily suspend/halt the non-urgent court proceedings amid the outbreak. The Supreme Court of India on March 23, 2020 invoked its plenary powers under article 142 of the Constitution to extend limitation period of appeals from high courts or tribunals at the onset of Coronavirus (COVID-19) pandemic. The bench of Chief Justice of India (CJI) SA Bobde and Justices LN Rao and Surya Kant said that the court, while taking a *suo motu* action, has decided to halt non-urgent proceedings and to extend a period of limitation in all such proceedings with effect from March 15, 2020 till further notice. In doing so, the bench clarified that limitation in all such proceedings, irrespective of the limitation prescribed under general law or special law whether condonable or not would be extended.

The learned bench of apex court of India further said that they have exercised this power under article 142<sup>25</sup> read with article 141<sup>26</sup> of the Constitution of India and declared that the

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<sup>24</sup> “Treat doctors who died due to COVID-19 at par with martyrs of armed forces: IMA to Narendra Modi”, *First post*, Aug. 31, 2020, available at: <https://www.firstpost.com/india/treat-doctors-who-died-due-to-covid-19-at-par-with-martyrs-of-armed-forces-ima-to-narendra-modi-8771721.html> (last visited Sept. 5, 2020).

<sup>25</sup> Art. 142 of Indian Constitution is commonly known as “Complete justice clause.” The Constitution of India, art. 142(1): The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

<sup>26</sup> The Constitution of India, art. 141: “The law declared by the Supreme Court shall be binding on all courts within the territory of India”.

said order would be binding to all the courts and tribunals and authorities within the meaning of article 141.<sup>27</sup>

In Nepal, the full court meeting of the Supreme Court (SC) on March 20 decided to halt non-urgent court proceedings of all the courts and tribunals for 15 days from March 22 to April 3, to prevent spread of the Coronavirus pandemic. Issuing a press statement, the topmost court of Nepal said, the non-urgent court proceedings shall stand halted during the period of outbreak.<sup>28</sup> However, the apex court allowed the hearing of some urgent court proceedings related to habeas corpus writ petition hearing, charge-sheet filing, recording of statements, trial hearings, issuing of arrest warrant and arraignment. The top court clarified that if any party elapsed statute of limitation to file or contest the case due to closure of court proceedings amid Coronavirus outbreak, their statute of limitation would not be deemed to have lapsed and they would be provided with 10 days barring travel time to file or contest their court cases.<sup>29</sup> However, the court, on different occasions, issued orders extending the period under which non-urgent court proceedings remained halted during lockdown.

Moreover, the governments of India and Nepal in their respective jurisdiction ordered for the suspension of operation of transportation, schools and colleges or mass gathering or mass participating in cultural events. Interestingly, these powers have been expressly enacted under the England's Coronavirus Act, 2020.

The Act, 2020 features a sunset clause under section 89 which says that the majority of the provisions will expire after two years. This period could be extended by six months or shortened in line with section 90. This provision is of natural import as it obliges the state to eradicate the current outbreak within a given time frame and in this way, it demonstrates the state's vow in fight against the Coronavirus. The similar legal framework could be adopted and enacted in countries like India and Nepal to set a target for eradicating a disease in stipulated timeframe. This respect, though the issue of Coronavirus may be of medical nature, its solution could be sought legally by adopting various measures, like allowing the state to

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<sup>27</sup> "SC invokes its plenary power to extend limitation period of appeals", *The Economic Times*, March 23, 2020, available at: <https://economictimes.indiatimes.com/news/politics-and-nation/sc-invokes-its-plenary-power-to-extend-limitation-period-of-appeals/articleshow/74777321.cms?from=mdr> (last visited on April 10, 2020).

<sup>28</sup> English translation of the decision of Supreme Court of Nepal, Larger Full Bench, available at: <http://www.supremecourt.gov.np/web/assets/downloads/English%20Translation%20of%20Case%20no.%20076-RE-0392%20and%20076-WO-0944.pdf> (last visited on Sept. 2, 2020).

<sup>29</sup> "Supreme Court to halt non-urgent proceedings", *The Himalayan Times*, March 21, 2020, available at: <https://thehimalayantimes.com/kathmandu/supreme-court-to-halt-non-urgent-proceedings/> (last visited on Apr. 1, 2020).



temporarily register doctors, paramedics and other healthcare professionals in case of urgencies or to bringing schemes for indemnity against clinical negligence and among other measures to march a fight against the pandemic.

If the researches are something to standby, they suggest that the likelihood of pandemic has significantly increased over the past century because of increased global travel and movement of people from one location to the other.<sup>30</sup> This movement amid an outbreak has worked as a catalyst to increase the spread of contagion. For instance, Indian soldiers who were a part of the World War-I became the potential carriers of Spanish Flu outbreak that caused wreaked havoc on people between 1918 and 1920.<sup>31</sup> So, it was imperative to impose lockdown, practice ‘social distancing’<sup>32</sup> and ensure the compliance of ‘quarantine’<sup>33</sup> procedures to curtail the transmission of Coronavirus. But, at the same time, the states of Nepal and India could have adopted measures to uphold the basic human rights—right to food, housing or healthcare-- in the midst of current lockdown and transmission of deadly Coronavirus. In Nepal, the constitution guarantees the right to health or right to food as fundamental rights but these rights are in peril because of the health emergency, observes much admired commentator of Constitutional Law Dr Bipin Adhikari.<sup>34</sup> He further said that the government of Nepal does not have crisis preparedness and if we take a pledge to work on a new legislation, probably we will get the opportunity to work on everything new including health insurance.

### III. Judicial Activism in Corona Pandemic

The judicial department, through its judicial creativity, succeeded to acknowledge the philosophy of realist school of jurisprudence. The theory argues that letters of law are made

<sup>30</sup> KE Jones, *et al*, “Global Trends in Emerging Infectious Diseases”, *available at*: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5960580/> (last visited Apr. 20, 2020).

<sup>31</sup> “COVID-19: History of Epidemics in India Since the 1900s”, *Jagaran Josh*, March 23, 2020, *available at*: <https://www.jagranjosh.com/general-knowledge/history-of-epidemics-in-india-since-the-1900s-1584627562-1> (last visited on Jun. 1, 2020).

<sup>32</sup> The Public Health (prevention, control and management of epidemics, bio-terrorism and disasters) Bill, 2017 defines “social distancing” as a public health practice designed to limit the spread of infection by ensuring sufficient physical distance between individuals.

Similarly, Hopkins University in its research papers defines social distancing as deliberately increasing the physical space between people to avoid spreading illness, *available at*: <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-social-distancing-and-self-quarantine> (last visited on Jun. 1, 2020).

<sup>33</sup> India’s the Public Health (prevention, control and management of epidemics, bio-terrorism and disasters) Bill, 2017 defines “quarantine” as the restriction of activities and/or separation from others of suspect persons who are not ill or of suspect baggage, containers, conveyances or goods in such a manner as to prevent the possible spread of infection or contamination.

<sup>34</sup> *Supra* note 24.

by parliament but the spirit is filled in it by the judiciary. Acknowledging this theory, almost every Constitution of the world incorporates judicial precedent clause in order to ensure the full faith and credit to the judicial pronouncements.

Justice Holmes was of the view that judges should recognize their inevitable duty to weigh considerations of social advantage in stating the law. “They [judges] do not explain how community expectations or public policy filter into the law through the judicial sieve. If the judges legislate, they do so in a very special way. They cannot decide what is good for the community on the basis of their personal convictions. The court receives the signals of community good from the community’s own practices and expectations. The arguments of litigants before the court, in the end, are not about policy but the legitimacy or reasonableness of their expectations. The court decides what expectations are reasonably held according to the practice of the community. Expectations change as the condition of social life change. Holmes was right to observe that in some areas of law, the community expectations may be unclear so that judges are left with legislative discretion.”<sup>35</sup>

This way, the concept of judicial review is a sacrosanct principle embodied under the constitutions which gives a spacious room for the judicial department to act freely for maintaining constitutionalism in the state. It has been hailed as the basic structure<sup>36</sup> of the constitution. The doctrine becomes the most potent weapon in the hands of the judiciary for quickening the pulse of rule of law.

In this context, on April 13, 2020, the Pennsylvania Supreme Court (while invoking its Kings Bench jurisdiction) in the case of *DeVito v. Wolf*<sup>37</sup> held the COVID-19 pandemic as a “natural disaster”. The court reasoned that: The specific disasters in the definition of ‘natural disaster’ themselves lack commonality, as while some are weather related (e.g., hurricane, tornado, storm), several others are not (tidal wave, earthquake, fire, explosion). . . . the only commonality among the disparate types of specific disasters referenced is that they all involve “substantial damage to property, hardship, suffering or possible loss of life.” In this respect, the COVID-19 pandemic is of the ‘same general nature or class as those specifically enumerated,’ and thus is included, rather than excluded, as a type of “natural disaster.”

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<sup>35</sup> Suri Ratnapala, *Jurisprudence* 110-111 (Cambridge University Press, Delhi, 2<sup>nd</sup> edn., 2013).

<sup>36</sup> *L. Chandra Kumar v. Union of India*, AIR 1997 SC 1125.

<sup>37</sup> “Pennsylvania Supreme Court Affirms Governor’s Power to Issue COVID-19 Executive Order”, *Crowell*, April 20, 2020, available at: <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/Pennsylvania-Supreme-Court-Affirms-Governors-Power-to-Issue-COVID-19-Executive-Order> (last visited on Apr. 20, 2020).

Still, has the court relied on any scientific study to reach to that conclusion? At a time when the multiple kinds of research, and leaders of various states, including Donald Trump, Angela Merkel and Vladimir Putin, accuse China of its (alleged) role in the spread of a global pandemic, it would be unwise to declare that the outbreak was not a manmade disaster. Neither there is any research to support the court's judgment, nor do studies rule out the role of China in the spread of COVID-19.

Interestingly, Professor Luc Montagnier, 2008 Nobel Prize winner for Medicine, claims that SARS-CoV-2 is a manipulated virus that was accidentally released from a laboratory in Wuhan, China. Chinese researchers are said to have used coronaviruses in their work to develop an AIDS vaccine. HIV RNA fragments are believed to have been found in the SARS-CoV-2 genome. The SARS-CoV-2 is a virus that was manipulated and accidentally released from a laboratory in Wuhan, China, in the last quarter of 2019.<sup>38</sup>

In Nepal, the full court meeting of the Supreme Court (SC) on March 20 decided to halt non-urgent court proceedings of all the courts and tribunals for 15 days from March 22 to April 3, to prevent spread of the Coronavirus pandemic.<sup>39</sup> Stating that children kept in juvenile correction centres were at high risk of COVID-19 infection, the SC urged the body concerned to hand over those children to their parents on the condition that the parents, when asked, would bring back their children to the correction centres.<sup>40</sup> Issuing a notice on April 17, the highest court said that the previous (full-court) decision shall remain in continuance till further announcement.

However, the top court on May 28 in a writ petition held that if any case party elapsed statute of time limitation to file or contest case due to closure of the court proceedings, their statute of limitation would not be deemed to have elapsed and they would be given 30 days barring travel time to file or contest their cases.

Previously, the top court on March 2 issued an interim order directing the government to halt flight from and to the countries that pose a high risk of Coronavirus infection, including China, South Korea, Japan, Iran and Bahrain, till the pandemic is brought under control.

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<sup>38</sup> "The Coronavirus Is Man Made According to Luc Montagnier the Man Who Discovered HIV", *Gilmore Health*, April 16, 2020, available at: <https://www.gilmorehealth.com/chinese-coronavirus-is-a-man-made-virus-according-to-luc-montagnier-the-man-who-discoveredhiv/?fbclid=IwAR2fbEtUFq3sZIC4SU83t8QXYC3XAP12r0vOADCrExddrFq7hElWb0r0kfQ> (last visited on Apr. 20, 2020).

<sup>39</sup> *Supra* note 31.

<sup>40</sup> *Ibid.*

Meanwhile, the apex court on March 25 refused to issue interim order sought by advocate Madhav Kumar Basnet to allow the stranded Nepalis in foreign countries, including India, to return home. However, the Supreme Court on April 16 issued an interim order to the government asking it to take care of the health needs of Nepali migrant workers living in foreign countries and to repatriate vulnerable Nepali workers from foreign countries to Nepal. A single bench of Justice Sapana Pradhan Malla issued the order in response to a writ petition filed by Advocate Som Prasad Luitel and others against the Office of the Prime Minister and Council of Ministers and others seeking relief for Nepali workers stranded in foreign countries.<sup>41</sup>

While responding to a writ petition filed by senior advocate Prakash Mani Sharma, the Supreme Court of Nepal on April 17 directed the government to ensure free transportation facility to stranded migrant workers who have hit the roads on foot to reach their homes miles away. The apex court also asked the government to conduct a rapid diagnostic test for Coronavirus on all those stranded persons. In doing so, the court directed the state to stand by the cause of society. The ‘judges should equip themselves with the necessary tools required to write qualitative and thought provoking judgments’, held the Supreme Court of India in case of *Hindustan Times Ltd. v Union of India*.<sup>42</sup>

The Supreme Court of Nepal on March 31 directed private hospitals to attend novel Coronavirus patients unconditionally. Issuing an interim order, the SC said all the private hospitals should make necessary arrangements to treat COVID-19 patients. It said the hospitals could not shrug off their responsibility on any pretext. “Private hospitals shall make necessary arrangements of beds, ICUs and ventilators, and ensure the safety of medical staff involved in the treatment of COVID-19 patients,” states the SC order.<sup>43</sup>

The Apex Court on April 23, in a writ petition filed by advocate Ajay Shankar Jha and others, directed the state to ensure special care and protection to citizens during the Coronavirus pandemic. The court wrote, “No government officials or persons holding public office shall endeavour to harm the rights, interests and dignity of the persons.”

Conversely, the Supreme Court of India on April 8 pronounced, the tests relating to COVID-19, whether done in approved government or private lab, shall be free of cost. Responding to

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<sup>41</sup> Ram Kumar Kamat, “SC asks govt to bring back migrant Nepalis stranded in foreign lands”, *The Himalayan Times*, April 18, 2020.

<sup>42</sup> (1998) 2 SCC 242.

<sup>43</sup> “Attending corona patients a must for private hospitals: SC”, *The Himalayan Times*, April 1, 2020.

a writ petition filed by advocate Shashank Deo Sodhi, the highest court pronounced that "Private hospitals including laboratories have an important role to play in containing the scale of the pandemic by extending philanthropic services in the hour of national crisis."

A wise and creative judge, unfettered by paragraphs in the code and precedents, will find justice through clear and cool perception and valuation of social issues at stake,' says eminent jurist Frank. Edwin N Garland of the realist school observes in his *Legal Realism and Justice*: "The attempt to determine what the law is involves a simultaneous attempt to determine what is desirable."

Likewise, Mr. Justice Cardozo in his popular work *The Nature of Judicial Process* has rightly observed that "judicial process" will have no rational backing unless it embodies forces like logic, history, custom and sociology. "Judicial process is the name given to the intellectual procedure by which judges decide cases."

The recent judicial construction which aims to secure the rights and interests of the people rests on the rocky foundation of natural justice, rationale, logic and necessity. And, it is a judicial process.

#### **IV. Constitutional Perspective**

The Constitution of Nepal shoulders responsibility on all tiers of government to control or abate disaster risks. This way, disaster risk management is a shared responsibility of the governments (i.e., central, provincial and local). Of 22 entries enumerated under the List of Local Power/Jurisdiction for the local level, entry 20 (Disaster Management) of Schedule-VIII obliges the local bodies to adopt possible measures to fight against disaster.

Entry 17 (Natural and man-made disaster preparedness, rescue, relief and rehabilitation) of List of Concurrent (federal and provincial) Powers/Jurisdiction (Schedule-VII) casts an obligation on central and provincial governments to adopt laws to battle the disaster. Also, Entry 9 (Disaster management) of Schedule-IX, which is the list of concurrent powers of federal, provincial and local level, is put in place which again clarifies that disaster risk management is the shared responsibility of governance.

Despite this, the republic is in want of an epidemic law that would cast a bundle of responsibilities on the second and third tiers of government during the outbreak. Under the existing legal regime, the central government has a complete say and the subordinate

governments are required to shape their activities in line with the Centre. It means the provincial and local governments are not entitled to act independently in their respective jurisdiction. They have to dance on the tune of the central government, meaning thereby, the state is yet to dethrone the legacies of unitary character, that is, strong centralizing tendencies, even after the arrival of federalism.

Likewise, article 51 stipulates the policies to be pursued by the state. The sub-article (g) that relates to “policies relating to protection, promotion and use of natural resources,” envisages that the state shall formulate policies on the development of sustainable and reliable irrigation by controlling water-induced disasters and expediting river management. Article 51(g) (9) of the Constitution states that the state shall pursue policies relating to, among several other issues, protection, promotion and use of natural resources. Article 51(g)(9)<sup>44</sup> of the Constitution of Nepal also allows the government to make policies related to “advance warning, preparedness, rescue, relief and rehabilitation in order to mitigate risks from natural disasters.” Yet, these provisions are part and parcel of Directive Principles of State Policies (DPSP), which is not enforceable by law. The directive principles of state policies are merely the guiding principles for the states. It's expected that the states would pay heed to the provisions of the directive principles while enacting policies or law for the people of their province. Scholars argue that the directive principles and fundamental rights are the conscience of the Constitution.

“There is a subtle jurisprudential distinction between the two in that the provisions of Part-IV [Directive Principles] are positive in content whereas the provisions of Part-III [Fundamental Rights] are virtually negative and it is by force of their negative content that they represent the limits of state action.”<sup>45</sup> Nevertheless, the directive principles have their own importance.

Justice Chandrachud in the case of *Minerva Mills v. Union of India*<sup>46</sup> argued that the fundamental rights and DPSP constitute the conscience of the Constitution. “To give absolute primacy to one over the other is to disturb the harmony of the constitution. This harmony and balance between fundamental rights and DPSP is an essential feature of the basic structure of constitution.”<sup>47</sup> Similarly, in *Dalmia Cement Ltd v. Union of India*<sup>48</sup>, the Apex Court opined

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<sup>44</sup> The Constitution of Nepal, art. 51(g)(9): The state shall formulate and pursue a policy of designing a pre-warning system, disaster preparedness, rescue, relief works and rehabilitation in order to minimize the risk of natural disasters.

<sup>45</sup> R.G. Chaturvedi, *Law of Fundamental Rights* 9 (Delhi Law House, Delhi, 4<sup>th</sup> edn., 2003).

<sup>46</sup> (1980)2 SCC 591.

<sup>47</sup> *Ibid.*

that fundamental rights and DPSP—the trinity—are the conscience of the constitution. It means the provisions ordained under DPSP are subject to enforcement at the sweet will of state or its economic capability. So, the state cannot achieve its goals unless it gives effect to directive principles.

The Constitution of Nepal in its article 267 provisions, 'the Government of Nepal may also mobilize the Nepal Army in, among other things, the disaster management works, as provided for in the Federal law.' Article 273 (2) says, "if there arises a grave emergency in a State because of a natural calamity or epidemic, the concerned state government may request the Government of Nepal to declare a state of emergency in respect of the whole of the State or of any specified part thereof." This way, the constitution allows the state to deploy the army to control and abate the extraordinary situations during a crisis.

Despite the fact that India is more prone to calamities, the disaster management law does not figure in the scheme of the 1949 Constitution of India. At the time of the making of the Constitution, disaster management law was not much in limelight. Maybe due to this reason, the drafters of the Indian Constitution failed to take cognizance of crisis management provisions.

However, there is something called the doctrine of residuary power which fills the gap. Entry 97 of Union List (read with article 248 of Indian Constitution) provides that whichever subject of legislative competence have not been allocated to any level of government through the constitutional scheme of division of powers, such subjects would automatically fall in the domain of Union. This way, though the highest law of the land does not feature disaster management, it's the subject of the Union and the Centre has the legislative competence on it by virtue of doctrine of residuary powers. The parliament has an exclusive power to make any law with respect to any matter not enumerated under Concurrent List or State List (Entry 97, Union List and article 248). Therefore, article 248 extends to the jurisdiction of disaster management.

Above all this, the state is under an obligation to enforce the fundamental rights guaranteed to every citizen, for a vibrant democracy deserves to cherish the fundamentals of human rights in every given time.

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<sup>48</sup> (1996) 10 SCC 104.

## V. Conclusion

There is a desperate need of holding a discourse at the international level to interpret and analyze the success or failure of our concept of the social contract that says that a state alone is capable enough to resolve its outstanding issues. After all, the old and tried tactics have failed to address the people's expectation.

A global welfare state seems to be the best choice in hand when it comes to marching a fight against the pandemics. It's high time we realized that the states should collectively devise a worldwide social contract called "Vasudhaiva Kutumbakam" (i.e., the world is one family) to fight the diseases and to win a war against the pandemic situations in future.

The authors humbly submit that the epidemic law regime of both India and Nepal does not oblige the government at the centre or provincial level to establish a common forum consisting of bacteriologists, virologists, biomedical scientists and among other healthcare professionals to conduct research on antibodies of pandemics. Nor do the laws in the two friendly open-border states direct the state to set up a common forum comprising of healthcare professionals, lawyers, economists, political scientist or sociologists to develop a robust mechanism against vulnerability reduction. In fact, it would be an uphill task for the state to combat outbreaks unless there is a robust mechanism to study the causes, symptoms, prevention and cure/treatment of the diseases and to undertake activities for vulnerability reduction.

Nevertheless, the epidemic Acts in both states fail to define what the infectious or contagious disease is. The legislations explain that the government has an inherent right to adopt measures to contain the spread of infectious diseases but they do not explain duties of the state towards its vulnerable citizens during health emergency-like situations. Nor do the epidemic laws explicitly and authoritatively recognize the rights of citizens during the outburst of any disease. Also, the epidemic law regime of India and Nepal falls short on prescribing welfare functions. The legislations do not necessarily oblige the governments of the states concerned to ensure arrangement of food or compensation or financial assistance to the daily wage labourers or vulnerable citizens. Ultimately, our democracies—India and Nepal--failed to act as guardian of the underprivileged people and in this respect, the celebrated common law doctrine of *Parens Patriae* stands violated in the time of outbreak.



However, the England government makes a principled distance with the prevailing epidemic law regime of both India and Nepal in a sense that their Coronavirus Act, 2020 casts an obligation on the government to provide compensation to the victims of COVID-19. In doing so, Act, 2020 succeeds to strike a balance between the rights and duties of the state during an outbreak. Also, the Act, 2020 hosts provisions regarding temporary registration of healthcare professionals, volunteers and among other staffers required to control the pandemic. In this respect, this law obliges the state to ensure sufficient staffs in hospitals to fight against the pandemic. This provision is of natural significance as it aims to frustrate the crunch of medical doctors and among other healthcare professionals. Unfortunately, we lack such welcome provisions in our part of the world. Similarly, the Act, 2020 enacts a sunset clause under Section 89 which says the majority of the provisions of the Act would expire after two years. This provision, in itself, exhibits the commitment of the state in fight against the pandemic as the state is directed to close the account of COVID-19 within a stipulated timeframe. Nepal and India could borrow these provisions while enacting a (comprehensive) pandemic/disaster law.

Moreover, under the current epidemic law regime of India and Nepal, the states could not punish an outlier, who commits theft of swabs/samples so collected to test COVID-19. The states have to resort to criminal legislation to punish a person so convicted for the offence of theft of swabs.

Its understandable that the daily wagers, unorganized sectors and among other underprivileged people suffer the most in an unprecedented situation that see the shutdown of market and movement. The migrant workers, daily wagers and people working in unorganized sectors walked home to escape hunger and insecurity. In India and Nepal, millions of migrant workers were reportedly seen heading to villages on foot in absence of public transport. The epidemic law regime of India and Nepal does not host any provision as to obliging the states to endorse mechanisms for addressing the concerns of vulnerable people. Our democracy deserves to recognize the rights and concerns of the people engaged in informal sectors and among others who suffer the loss due to health emergency or disaster. In a welfare state, there should portability of benefits, such as the arrangement of food and relief materials to the needy ones through public distribution system.

Moreover, India and Nepal could adopt long-term strategy to attract larger chunk of informal sector workforce into formal sector which would ultimately provide them the benefits of

social security. In our part of the world, as there is no any mechanism to bring workforce of informal sector under safety nets, a drop in their income due to unprecedented situations like pandemic, lockdown, shutdown, or disaster-like situations can drive them into poverty.

On the other hand, the emergence of many new kinds of pandemics or disasters cannot be overruled unless the world devises a strong mechanism to upright sustainable development and endeavour to curb deforestation and climate change. The pandemics could stalk the humanity in coming days too until and unless we devise and implement a long-term strategy against environmental degradation. Its understandable that the pandemics can bring about both biological and social outcomes. It could be terrible to overlook one at the cost of other.

There should be comprehensive pandemic code to deal with the issues connected with the contagion. Also, there should be a healthy research in the field of homeopathy, Ayurveda and traditional knowledge to leave room for the development of non-allopathic medicines as well. Such an approach will pave the ways for the parallel development of Ayurveda, allopath or homeopath or traditional knowledge. Together, the three can prepare us against the pandemics that may wreak havoc on livelihood in future.

The authors humbly submit that the Nepali government could give a tough battle to health emergency-like situations if it succeeds to ensure the equal growth of Allopath, Ayurvedic medicines and devises a strong mechanism for vulnerability reduction. Of late, the strong reliance on Ayurvedic herbs, like 'Giloy' (*Tinospora Cordifolia*), 'Aloe vera' or 'Kadha' to increase immunity so as to fight against the Coronavirus has given a message to the world community that Ayurvedic medicines have a vital role to play in enhancing immunity. In fact, we cannot turn a deaf ear to the crucial role of Ayurvedic medicines in improving immunity.

Its imperative for the Federal Democratic Republic of Nepal to adopt and enact a comprehensive pandemic code to augment medical research, compensate the loss caused to private enterprises as well as underprivileged people, or to allow the second and third tiers of governments, i.e., provincial and local governments, to adopt plans and policies at their pleasure, not at the sweet will of the centre. After all, 'health service' (entry 9, Schedule-VI of the Constitution of Nepal) is a subject matter enumerated under state list. In fact, moving ahead with a unitary law in a federal democracy is to move towards quasi-federalism or federalism with strong centralizing tendency. There is a dire need of repealing the Infectious Disease Act, 1964, for the Himalayan republic deserves to fight the pandemics with a federal

law, not with a unitary law enacted to serve the mandates of erstwhile constitutional monarchy.

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