

# **Legal intervention to strengthen Criminal Justice System during COVID-19 in Nepal**

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# Legal intervention to strengthen Criminal Justice System during COVID-19 in Nepal

Since its inception, Advocacy Forum-Nepal (AF) has strategically used the law and litigation to improve the situation of human rights and rule of law and to promote people's access to justice in Nepal. As the country has taken several measures to enforce the lockdown to fight the spread of COVID-19, AF stands not only in the forefront by monitoring and documenting the impact of these measures on the enjoyment of basic human rights (AF's Field Monitoring Report, 2020)<sup>1</sup> but also by challenging some legal hurdles that restrict people's access to basic rights.

AF has been forging alliances with a number of human rights lawyers and organisations to minimise the risk of violations of human rights of the most vulnerable during lockdown by filing court cases, challenging measures that pose risk to the enjoyment of basic rights. This briefing highlights the efforts of AF together with other lawyers in the country and the role the Supreme Court (SC) and the High Courts have played in protecting the rights of people during the pandemic.

## The Court Directive

Responding to the country-wise lockdown imposed on 24 March 2020 to prevent the spread of Covid-19, the full bench of the Supreme Court on 20 March 2020 issued a directive<sup>2</sup> to temporarily suspend non-urgent Court proceedings, in all three tiers of the Court, by limiting their services to hearing writs of *habeas corpus*, remand hearings and hearings related to COVID-19. In the course of prioritizing the best interests of children, and also considering the probable risk of transmission, the directive specified that minors currently detained at correction facilities in different parts of the country should be handed over to their parents or guardians upon request to serve the remainder of their sentence at home. The directive also permits the release of prisoners (convicted, at the first instance, of any offence punishable by a sentence of imprisonment for a term of one year or less) after payment of the amount for the remaining jail term as stipulated in Section 155 of the National Criminal Procedure Code, 2017.<sup>3</sup> This directive of the Court helped to release 228 juveniles from different detention facilities and 216 adults from different

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<sup>1</sup> Advocacy-Forum Nepal 'Briefing Paper on Human Rights Impact of COVID-19: Advocacy Forum-Nepal's Field Monitoring Report', June 2020, Available at: <http://advocacyforum.org/downloads/pdf/publications/af-briefing-paper-covid-19-and-human-rights-june-2020.pdf>

<sup>2</sup> Press Statement of Supreme Court of Nepal of 20 March 2020, Available at: <http://www.supremecourt.gov.np/web/assets/downloads/%E0%A4%AA%E0%A5%8D%E0%A4%B0%E0%A5%87%E0%A4%B8-%E0%A4%B5%E0%A4%BF%E0%A4%9D%E0%A4%AA%E0%A5%8D%E0%A4%A4%E0%A4%BF-%E0%A5%A8%E0%A5%A6%E0%A5%AD%E0%A5%AC-%E0%A5%A7%E0%A5%A8-%E0%A5%A6%E0%A5%AD.pdf>

<sup>3</sup> Section 155 states: "*Payment of money in lieu of imprisonment: (1) If, in view of the age of the offender who is convicted, at the first instance, of any offence punishable by a sentence of imprisonment for a term of one year or less, gravity of the offence, manner of commission of the offence and his or her conduct, as well, the court does not consider it appropriate to confine the offender in prison and is of the view that there will be no threat to the public peace, law and order if he or she is released, and the court, for the reasons to be recorded, considers it appropriate to dispense with the requirement of undergoing imprisonment upon payment of a fine in lieu of imprisonment, the court may order that the offender be not liable to undergo imprisonment if he or she makes payment of money in lieu of imprisonment.*"

detention facilities. AF continues its advocacy to ensure the full implementation of the Directive of the SC and prevent the spread of COVID-19 in child correction homes, detention and prisons.<sup>4</sup>

## **Writ of *habeas corpus***

Being aware of the lockdowns and suspension of court proceedings and its potential risk to illegal and unlawful detention, lawyers have also been focusing on writs of *habeas corpus*.

For example, Badal Mirinsingh was arrested for Cheating (*Thagi*) on 17 March 2020. Police presented him before the adjudicating authority (Kathmandu District Court) on 18 March 2020 seeking a remand order. The Kathmandu District Court initially had issued a remand order until 22 March 2020, which was extended to 29 March 2020. However, Mirinsingh was not produced before the court on 29 March 2020 or beyond. Therefore, a writ of *habeas corpus* was filed against the police for illegally detaining Mirinsingh. The Court, on 9 April 2020, issued an order to release the detainee, setting a precedent that “owing to COVID-19 concerns, investigation can be proceeded as per Section 15 of the National Criminal Procedure Code, 2017.<sup>5</sup> Besides, the writ was successful in challenging the customary practice of ‘mandatory detention of an accused’ undergoing investigation, which is a longstanding problem in Nepal’s criminal justice system.<sup>6</sup>

Furthermore, it also brought the judiciary’s attention to the needs of detainees, leading up to another Directive from the Full Bench of SC (dated 10 April 2020),<sup>7</sup> eventually resuming court proceedings such as issuing or renewal of remand orders, filing of charge sheets, recording the statement of an accused and jail-bail hearings. The Court took into consideration the right to life and right to liberty of those forced to be illegally detained in custody due to prolonged lockdowns and suspension of court’s proceedings. Following this decision, detainees were released from detention in a number of subsequent cases,<sup>8</sup> after the SC considered the detention illegal, caused by the suspension of remand hearings and other court proceedings.

## **Seeking order against security forces to prevent excessive use of force**

Since the beginning of the lockdown, AF has documented a number of incidents involving security forces resorting to excessive or unnecessary use of force, torture or ill-treatment whether on members of the public venturing out to purchase essentials or on medical personnel returning from hospital shifts

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<sup>4</sup> For the problems faced in this regard, See Advocacy-Forum Nepal ‘Briefing Paper on Human Rights Impact of COVID-19: Advocacy Forum-Nepal’s Field Monitoring Report’, June 2020, available at: <http://advocacyforum.org/downloads/pdf/publications/af-briefing-paper-covid-19-and-human-rights-june-2020.pdf>

<sup>5</sup> Section 15 states: “Power of investigating authority to release person held in detention: (1) If it does not appear necessary or appropriate to keep on detaining a person held in detention in the course of investigation under this Act, the investigating authority may, with the consent of the government attorney or by executing a memorandum, accompanied by the reasons therefor, where it is not possible to obtain such consent for the time being, remand such person on bail/bond or guarantee or personal guarantee furnished by any reliable person or on recognizance to appear on appointed days (*Tarikh*).”

<sup>6</sup> Advocacy-Forum Nepal ‘The Right to Fair Trial In Nepal: A Critical Study,2012’, Available at: [http://advocacyforum.org/\\_downloads/fair-trial.pdf](http://advocacyforum.org/_downloads/fair-trial.pdf)

<sup>7</sup> Press Statement of Supreme Court of Nepal of 10 April 2020, Available at: [http://www.supremecourt.gov.np/web/assets/downloads/Press\\_Re\\_2076-12-28.pdf](http://www.supremecourt.gov.np/web/assets/downloads/Press_Re_2076-12-28.pdf)

<sup>8</sup> AF lawyers were successful in securing release of seven detainees in Kathmandu.

(AF's Field Monitoring Report, 2020).<sup>9</sup> To prevent such excessive use of force, a writ<sup>10</sup> was filed at the SC contesting that people should not be subjected to inhuman or degrading treatment and demanding the formation of an effective monitoring mechanism to check such manhandling and high-handed behaviour. The writ also sought an order for the security forces and the Government to protect people's dignity and human rights, as well as ensure citizens' access to basic services like medicine, food, water without any obstruction during lockdowns.

Issuing a *mandamus* order (on 23 April 2020) on the application, the joint bench of the SC reiterated that it is indispensable to protect the right to life, individual integrity and dignity of people even during lockdown. And no person holding any public position of the government should treat people inhumanely. It is very important for all bodies (especially the security forces) of the government to be sensitive with regard to the protection of people's rights and refrain from inhumane behaviour towards the people. The Court further believed that the concerned bodies and government office bearers will be sensitive and serious in protecting the rights of the people.

On 14 May 2020, Parsa District Authorities' issued a directive allowing security officials to shoot COVID-19 patients attempting to flee isolation. After public outrage, the administration hoodwinked the public into thinking that it had taken back the directive by issuing another directive (dated 15 May 2020) merely altering the text of the previous one, with the same intention intact, and allowed security officials to use necessary force as per the Local Administration Act, 1971.<sup>11</sup> The Act grants the Chief District Officer to give powers to the police to open fire if they deemed necessary to maintain peace and order.<sup>12</sup> This order of the local authority was challenged in the SC, and the Court issued an interim order prohibiting the Parsa district authorities from implementing such measures pending the full decision of the Court.<sup>13</sup>

## Improving the quality of quarantine and isolation facilities

As COVID-19 is highly contagious, with some infected cases exhibiting symptoms whereas many display mild or no symptoms at all, it can still pose a risk of spreading it to others. The whole notion of social distancing aims to reduce and prevent the number of cross-infections arising from physical contacts. Hence, the Nepal Government subscribed to the idea of issuing shelter-in-place orders to those already residing inside the country while lately placing people making their way into the country in quarantine facilities and isolating the confirmed cases in isolation facilities - a simple but obvious strategy to curb the spread.

Like everything else, the management and arrangements of quarantine and isolation facilities raise many questions. In many places, poorly maintained public buildings or makeshift tents on open ground have been designated as quarantine facilities holding hundreds of people (including women and children). The inhabitants are forced to live in compact space under tarpaulins, sleep on benches for lack of beds, feed

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<sup>9</sup> Advocacy-Forum Nepal 'Briefing Paper on Human Rights Impact of COVID-19: Advocacy Forum-Nepal's Field Monitoring Report', June 2020, Available at: <http://advocacyforum.org/downloads/pdf/publications/af-briefing-paper-covid-19-and-human-rights-june-2020.pdf>

<sup>10</sup> *Writ Petition (076-WO-0941) filed by Advocate Shailendra Prasad Harijan and others v. Office of Prime Minister and Council of Ministers et al.*

<sup>11</sup> Bhusan Yadav & Shuvam Dhungana, 'Parsa authorities' decision to allow police to fire upon COVID-19 patients fleeing isolation is "utterly wrong", say rights activists', The Kathmandu Post, 15 May 2020, Available at: <https://kathmandupost.com/province-no-2/2020/05/15/security-personnel-authorized-to-open-fire-at-COVID-19-patients-if-they-flee-isolation-wards>

<sup>12</sup> Local Administration Act, 1971, Section 6 (1) (a)

<sup>13</sup> *Writ Petition (076-WO-0956) jointly filed by Advocacy Forum-Nepal, Terai Human Right Defenders Alliance (THRDA), and Public Defenders Society Nepal et al. against Office of Prime Minister and Council of Ministers and others.*

on food lacking nutrition, and share common washrooms lacking sanitary products as opposed to the guideline<sup>14</sup> adopted by the Government. Patients in some isolation facilities narrate similar experiences.<sup>15</sup>

The central government claims to have allocated six billion for control and management of COVID-19,<sup>16</sup> and funds being transferred to local and provincial authorities in accordance with the response plan by Ministry of Health and Population.<sup>17</sup> However, the provincial and local authorities have been blaming central government for lack of money and human resources for their inability to manage quarantine and isolation facilities as per the guidelines.

As this blame game continues, the Court had to intervene to notify the government of its lapses. In response to a writ filed in the High Court Tulsipur, Nepalgunj bench, the Court issued a *mandamus* order against thirty seven (37) local units to maintain quarantine and isolation facilities as per the Guidelines introduced by the Ministry of Health and Population,<sup>18</sup> to fulfil at least minimum standards of quarantine and isolation facilities as per World Health Organizations' (WHO) recommendations, and to immediately form committees responsible for monitoring, management and prevention of the spread,<sup>19</sup> complying with the demands of the applicants. Earlier, the Court had propounded that the "*right to life guaranteed by the Constitution shall not be infringed at any cost, one should strictly adhere to the letters of the law*", on responding to a writ with similar demands.<sup>20</sup>

## Improving the quality of prison and detention

Since rates of infectious diseases generally hit confinement facilities at high transmission rates, it is likely that the proliferation of the pandemic in such compact settings may result in severe implications. With facilities already undergoing issues of overcrowding, sanitation, inadequate health care and lack of nutritious food, the outbreak of infection is unavoidable. This further calls for the reduction of the population, to the extent possible, in prisons and detention facilities.

Amid the looming COVID-19 fears, lawyers helped detainees file writs in the SC demanding their release as per the directive issued by the court. Detainees claimed that maintaining physical distancing is almost unmanageable, and that the number of inmates residing in the facilities is much higher than the actual

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<sup>14</sup> Guidelines for the Operation and Management of Quarantines, 2020, Ministry of Health and Population Nepal, Available at: <https://mohp.gov.np/attachments/article/584/%E0%A4%95%E0%A5%8D%E0%A4%B5%E0%A4%BE%E0%A4%B0%E0%A4%BE%E0%A4%A8%E0%A5%8D%E0%A4%9F%E0%A4%BE%E0%A4%87%E0%A4%A8%20%E0%A4%B8%E0%A4%82%E0%A4%9A%E0%A4%BE%E0%A4%B2%E0%A4%A8%20%E0%A4%A4%E0%A4%A5%E0%A4%BE%20%E0%A4%B5%E0%A5%8D%E0%A4%AF%E0%A4%B5%E0%A4%B8%E0%A5%8D%E0%A4%A5%E0%A4%BE%E0%A4%AA%E0%A4%A8%20%E0%A4%AE%E0%A4%BE%E0%A4%AA%E0%A4%A6%E0%A4%A3%E0%A5%8D%E0%A4%A1%202076.pdf>

<sup>15</sup> See Advocacy-Forum Nepal 'Briefing Paper on Human Rights Impact of COVID-19: Advocacy Forum-Nepal's Field Monitoring Report', June 2020, Available at: <http://advocacyforum.org/downloads/pdf/publications/af-briefing-paper-covid-19-and-human-rights-june-2020.pdf>

<sup>16</sup> Nepali Times, 'Nepal unveils COVID-19 Budget', 28 May 2020, Available at: <https://www.nepalitimes.com/latest/nepal-unveils-covid-19-budget/>; Budget Speech (2020-20201) of 28 May 2020, p. 9, Available at [https://mof.gov.np/uploads/document/file/%E0%A4%AC%E0%A4%9C%E0%A5%87%E0%A4%9F\\_%E0%A4%B5%E0%A4%95%E0%A5%8D%E0%A4%A4%E0%A4%B5%E0%A5%8D%E0%A4%AF\\_%E0%A5%A8%E0%A5%A6%E0%A5%AD%E0%A5%AD\\_website.pdf](https://mof.gov.np/uploads/document/file/%E0%A4%AC%E0%A4%9C%E0%A5%87%E0%A4%9F_%E0%A4%B5%E0%A4%95%E0%A5%8D%E0%A4%A4%E0%A4%B5%E0%A5%8D%E0%A4%AF_%E0%A5%A8%E0%A5%A6%E0%A5%AD%E0%A5%AD_website.pdf)

<sup>17</sup> Health Sector Emergency Response Plan COVID-19 Pandemic, Ministry of Health and Population Nepal, Published on May 2020 Available at: [https://www.who.int/docs/default-source/nepal-documents/novel-coronavirus/health-sector-emergency-response-plan-covid-19-endorsed-may-2020.pdf?sfvrsn=ef831f44\\_2](https://www.who.int/docs/default-source/nepal-documents/novel-coronavirus/health-sector-emergency-response-plan-covid-19-endorsed-may-2020.pdf?sfvrsn=ef831f44_2)

<sup>18</sup> *Writ Petition (076-WH-0124) filed by Advocate Sunil Kumar Shrestha and others v. District Administration Office, Banke et al*

<sup>19</sup> *Writ Petition (076-WH-0123) filed by Advocate Sunil Kumar Shrestha and others v. District Administration Office, Banke et al*

<sup>20</sup> *Writ Petition (076-WH-0122) filed by Advocate Sunil Kumar Shrestha and others v. District Administration Office, Banke et al*

capacity. The SC issued a show cause order seeking the authorities' clarification over its delay to release detainees.<sup>21</sup> The hearing of the case is pending and lawyers are continuing to monitor the situation closely.

The implementation of SC directives has been a subject of legal discourse in recent weeks. Even though the directive permits release of prisoners (convicted, at the first instance, of any offence punishable by a sentence of imprisonment for a term of one year or less after paying the amount for the jail term that they were yet to serve - see above), but pinpointing the gravity of offense, the district court judges have been denying release of prisoners' who filed an application for release as per the directive. In *Prajun Giri v. Banke District Court et al.*, the Banke District Court refused to release 9 out of 11 prisoners from Nepalgunj Prison who had apparently filed for release. A writ of *habeas corpus* was filed in the High Court, Tulsipur against the decision of Banke district court. The Court ordered to "release the applicants after they pay the monetary fine as per the law for their remaining jail term".<sup>22</sup> This resulted in the release of Nine (9) applicants. This precedent played a vital role in securing the subsequent release of six (6) other detainees.

## Seeking order to regulate relief distribution

As AF's previous briefing exposed how the measures taken to respond to the COVID-19 pandemic impacted people's lives, especially those who survive on daily wages, minimum wages or work in the informal sector. The relief packages promised to them have hardly reached them, and the ones reaching them are of poor quality. The local authorities have been criticised for distributing sub-standard food (grains, rice, oil etc.), consumption of which in some cases has caused people to have to seek medical help. Besides, reports of the authorities stockpiling relief materials, speak a lot about their intentions.

The structural problems in relief policies were challenged by lawyers, leading to an interim order by the SC directing the government to distribute relief materials to the economically marginalised and helpless people without requiring them to present citizenship certificate or identity cards, and also pointed out that the government had an obligation to provide relief without any discrimination and ensure people's right to food.<sup>23</sup> Addressing the anomalies in relief distribution, Court<sup>24</sup> issued a *mandamus* order against the government units to ensure transparency in relief distribution and to ensure relief is distributed in accordance with the guidelines issued by the federal and provincial governments.

In a separate writ, the SC spoke about the protection of consumers' rights and issued a *certiorari* order urging the government to arrange an environment where local produces reach the local market, alongside the produces imported from neighboring countries. The court also asked the authorities to check the produces imported from India and only let them enter Nepal if there is no risk of virus transmission.<sup>25</sup>

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<sup>21</sup> *Writ Petition (076-WO-0939) filed by Gopal Siwakoti (Chintan) and others v. Office of Prime Minister and Council of Ministers et al.*

<sup>22</sup> *Writ Petition (076-WO-0007) filed by Advocate Sunil Kumar Shrestha on behalf of applicant Prajun Giri v. Banke District Court et al.*

<sup>23</sup> *Writ Petition (076-WH-0948) filed by Advocate Shailendra Prasad Harijan and others v. Office of Prime Minister and Council of Ministers et al.*

<sup>24</sup> *Writ Petition (076-WH-0124) filed by Advocate Sunil Kumar Shrestha and others v. District Administration Office, Banke et al; See also, Writ Petition (076-WO-0411) filed by Advocate Bhogendra Kumar Yadav v. Office of the Chief Minister and Council of Minister et al. (Province 2)*

<sup>25</sup> *Writ Petition (076-WO-0945) filed by Advocate Maniram Upadhyay and others v. Office of Prime Minister and Council of Ministers et al.*



## Seeking order to ensure safety of migrant workers, returnees and people remaining abroad

The images of mass exodus on foot, walking miles, sleeping on sidewalks, swimming across rivers, or eagerly awaiting to cross the border from India to Nepal under a scorching sun in a bid to reach their 'homes', have fanned national and international concerns. The authorities at the border, not prepared to handle the situation, kept hundreds of them stranded with minimal or complete absence of basic means to survival.

The Government's dillydallying over the concerns of migrant workers propelled lawyers to seek legal relief. In *Prakash Mani Sharma and others v Office of Prime Minister and Council of Ministers et al.*,<sup>26</sup> petitioners demanded that the Government should arrange to transport workers who had been stranded in Kathmandu or other places across the country due to lockdown and were forced to make their way to home on foot, to their respective districts. The Court issued an interim order on 17 April 2020 against the Government to first test the workers for the virus and if they test negative, then to arrange transportation facilities for them free of cost, and ensure that they reach their destinations safely; with priority to be given to women, children, elderly citizens, and those differently abled. However, if the test results are suspicious then to place people immediately in quarantine or isolation facilities as per necessity. After this decision, local governments arranged vehicles for migrant workers heading home on foot.

Moreover, in *Mina Khadka Basnet and others v Office of Prime Minister and Council of Ministers et al.*,<sup>27</sup> petitioners demanded for an interim order with claims that no law permits the government to refrain a Nepali citizen willing to enter Nepal from entering the country, therefore, Nepali migrant workers stranded on the borders should be allowed to enter the country and in any case, if the person cannot enter the country irrespective of his/her willingness, then the Government to immediately rescue him/her. In its order of 7 April 2020, the SC proactively stated that safeguarding the rights of the citizen is a matter of national interest as per Article 5 of the Constitution<sup>28</sup> and it is the responsibility of the State to protect its citizens and that State cannot escape from fulfilling its obligation in any situation. Besides, the court urged the authorities to identify Nepali citizens experiencing lack of food, living space and health treatment or crisis and arrange for the repatriation of such citizens through diplomatic channels. Also to make arrangements for providing food, living space and health treatment in their respective locations, if repatriation is not possible immediately. Furthermore, the SC ordered the authorities to bring back the Nepali citizens stranded at the Nepal-India border and quarantine them for the mandatory period. If it is not possible to do so, then to immediately make arrangements for food, living space and medical treatment in coordination with the Government of India.

Likewise, in *Shom Prasad Luitel and others v. Office of Prime Minister and Council of Ministers et al.*,<sup>29</sup> the petitioners demanded for an interim order contending that the government should rescue all the migrant workers stranded abroad and allow those workers stuck at the borders to enter Nepal, without hindrance and place them in a quarantine facilities for a mandatory period. The Court issued an interim order 16 April 2020 asking the government to immediately prepare a report on the health status of Nepali migrant workers in the countries affected by COVID-19 and ensure they receive WHO standard health service

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<sup>26</sup> *Writ Petition (076-WO-0938) filed by Advocate Prakash Mani Sharma (on behalf of Forum for Protection of Public Interest) and others v. Office of Prime Minister and Council of Ministers et al.*

<sup>27</sup> *Writ Petition (076-WO-0932) filed by Advocate Meera Khadka Basnet and others v. Office of Prime Minister and Council of Ministers et al.*

<sup>28</sup> Constitution of Nepal, 2015, Article 5

<sup>29</sup> *Writ Petition (076-WO-0940) filed by Advocate Shom Prasad Luitel and others v. Office of Prime Minister and Council of Ministers et al.*

without discrimination and rescue through diplomatic channels those who are at high risk, ensuring the individual rights of citizens and taking the interest of the larger population into consideration.

Following the Court's intervention, the Cabinet meeting held on 25 May 2020,<sup>30</sup> decided to evacuate Nepalese stranded in foreign lands, including migrant workers. Yet the authorities are reluctant to bear the cost of rescue and repatriation. This issue has also been challenged in the Court,<sup>31</sup> arguing that those stranded abroad whose return costs are not paid by the employer or destination country and for those eligible under Foreign Employment Act, 2007 must get assistance from the government through the Welfare Employment Fund. The SC issued a show cause order against the government on 7 June 2020. The case remains under the consideration of the Court.

## **Seeking order to make Private Hospital treat COVID-19 patients / RDT test accessible**

In the wake of the crisis, many private hospitals suspended their outpatient department and avoided taking patients with fever or flu. The wave of self-referring patients to state-run hospitals was gradually seen throughout the country. This incompetent behaviour by private hospitals was neither controlled nor regulated by the government. Before the malpractice could spread further, lawyers sought the Court's intervention to protect the rights of the people.

A writ application was filed contesting that private hospitals have an equal responsibility to provide medical facilities and treatments to save lives in this time of a global pandemic. It was argued that private hospitals cannot escape from their duty to provide treatment for COVID-19 patients and have no right to sit out in such pressing times. The court issued an interim order on 31 March 2020 asking respondent to arrange the use of beds in Intensive Care Units (ICU), ventilators and other medical essentials available at private hospitals to treat patients infected by COVID-19. The Court further ordered that *"as per the nature of service, employers to provide personal protection equipment and safety measures to the frontline workers, to prevent them from getting infected from the virus. The frontline workers include medical professionals, nurses, ambulance driver, cleaners, those involved in production and distribution of medicines, security personnel and workers producing and delivering essential daily consumable items."*<sup>32</sup>

The fact that WHO constantly urges countries to 'test, test, test' for COVID-19, is for a reason. Testing allows the experts to trace the scale of the pandemic and the way it is impacting the demography of a country. The main rationale behind testing is that when experts and authorities are provided a sense of the impact of the pandemic on the population, they can decide on a future course of action. The Rapid Diagnostic Test (RDT) and Polymerase Chain Reaction (PCR) tests are two commonly used test in Nepal for detection of the virus. RDT kits are used to detect mature cases whereas PCR testing is mainly used to detect active cases. The SC has issued an interim order<sup>33</sup> to increase the testing range of PCR tests.

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<sup>30</sup> The Order of the Government, 2020, available at: <https://drive.google.com/file/d/1ltgut4gpGkUZi-N5DYsejCG6W23y1T19/view>

<sup>31</sup> *Writ Petition (076-WO-0967) filed by Advocate Barun Ghimire and others v. Office of Prime Minister and Council of Ministers et al.*

<sup>32</sup> *A Writ (076-WO-0934) filed by Advocate Pushpa Raj Paudel and others v. Office of Prime Minister and Council of Ministers et al.*

<sup>33</sup> *A Writ (076-WO-0950) filed by Advocate Kamal Bahadur Khatri and others v. Office of Prime Minister and Council of Ministers et al.*



The Government has allowed for paid testing for both local and foreign nationals, thereby discriminating against those economically disadvantaged. Inclusion is the best response to a pandemic, especially when the most vulnerable are exposed to a high risk of transmission. A writ was filed challenging the government's move of allowing paid testing (where health facilities could add up only up to 20 percent to the imported price of the kits, and charge the general public for the tests accordingly) by contesting that it is against the principle of social justice and discriminatory against those belonging to the weaker sections of society. In response to the petition, the Court on 26 May 2020 issued an order to not charge any fee for RDT or PCR tests for minimum wage workers.<sup>34</sup>

Similarly, in another case,<sup>35</sup> the Court urged the concerned authorities to manage the tests for free (if possible) or at a minimum cost, without any discrimination. The SC proactively upheld the rights of the most vulnerable, ensuring their access to tests.

## **Seeking order for measures against domestic violence and special care to expecting, new mothers and new-borns**

Domestic violence raging behind closed doors has targeted the most vulnerable group, mainly women and children. Reports reveal a disturbing statistic where 61% of women report having faced domestic violence<sup>36</sup> during the lockdown period, and the numbers keep rising per day. The widespread tragedy remains unaddressed as police authorities are reluctant to lodge complaints, citing coronavirus fears (AF's Field Monitoring Report, 2020).<sup>37</sup> Moreover, the latest data shed light on 200 percent increase in maternal mortality since the start of the lockdown (i.e. at least 24 women have died of birth-related complications in the last two months, compared to 80 in the whole of last year).<sup>38</sup>

A writ application<sup>39</sup> was filed in the SC where petitioners demanded for the representation of women in a high-level coordination committee to ensure the right to safe motherhood along with measures to prevent the rising domestic violence against women and children as well as to prioritize the best interest of women and children and ensure their security in quarantine facilities. Responding to the application, the SC issued an interim order on 9 June 2020 urging the authorities to provide special care to vulnerable groups in quarantine or isolation facilities, to promptly respond to the complaints lodged via helplines, not to deny registration of complaints on domestic violence and urging all the district courts to strictly adhere to Section 5 of the Domestic Violence (Offence and Punishment) Act, 2009<sup>40</sup> and proceed accordingly. Likewise, to make special arrangements for pregnant women and their new born babies by making provisions for regular check-ups and vaccinations during the lockdown, and to only publish information

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<sup>34</sup> *Writ Petition (076-WH-0957) filed by Advocate Santosh Bhandari and others v. Ministry of Health and Population et al*

<sup>35</sup> *Writ Petition (076-WH-0124) filed by Advocate Sunil Kumar Shrestha and others v. District Administration Office, Banke et al*

<sup>36</sup> Women's Rehabilitation Centre (WOREC), Press Release of 9 June 2020, '624 cases of violence against women and children during lockdown, 61% cases of domestic violence', Available at: <https://www.worecnepal.org/resource/30/2020-06-09>

<sup>37</sup> Advocacy-Forum Nepal 'Briefing Paper on Human Rights Impact of COVID-19: Advocacy Forum-Nepal's Field Monitoring Report', June 2020, p. 8 Available at: <http://advocacyforum.org/downloads/pdf/publications/af-briefing-paper-covid-19-and-human-rights-june-2020.pdf>

<sup>38</sup> *Ibid.* p. 7

<sup>39</sup> *Writ Petition (076-WH-0962) filed by Advocate Roshani Paudel and others v. Office of Prime Minister and Council of Ministers et al.*

<sup>40</sup> Section 5 of Domestic Violence (Offence and Punishment) Act, 2009 states: "Action to be taken by the Court: (1) Upon receiving a complaint pursuant to Sub-section (11) of Section 4, the Court shall proceed the case as per this Act, on the basis of such complaint. (2) Notwithstanding anything contained in Section 4, the **Victim may directly file his/her complaint to the Court**"

relating to him/her after obtaining consent. The judicial activism portrayed by SC has notably upheld the rights of the most vulnerable, ensuring their right to safe motherhood, and right to live with dignity.

## Working to improve implementation of SC's decisions

As discussed earlier, SC issued a directive order on 20 March 2020 that upon a request to serve the remainder of their sentence at home, minors currently detained at correction facilities could be handed over into parental or guardian custody. However, the directive doesn't stipulate particular eligibility criteria for release. Due to the directive's ambiguous nature, many minors continue to live in fear at correction facilities.

In *Pushpa Raj Paudel on behalf of Narcotics Control Bureau KA and Narcotics Control Bureau KHA (name changed) v. Kathmandu District Court et al.*,<sup>41</sup> a group of minors arrested on suspicion of substance abuse who had been unlawfully detained in custody for 31 days (i.e. beyond the permissible timeframe) filed a writ of *habeas corpus* at SC seeking release on 9 April 2020.<sup>42</sup> The investigating authority had not filed a charge-sheet or initiate any legal proceedings against them during the period. Before the SC could intervene, citing the decision of SC of 10 April 2020, the Kathmandu District Court released the juveniles on parental custody on 14 April 2020. The ruling paved the way for other cases of similar nature.

Likewise, in *Ajay Shankar Jha on behalf of 71 Dhangadhi 61 (name changed) v. Kailali District Court*, the Court exercised its judicial powers to preserve the rights of minors deprived of liberty, enduring unlawful detention as a consequence. A juvenile who had to serve a 14 months' sentence had applied for release as per the SC directive, but the application for release was overruled by Kailali District Court.<sup>43</sup> The decision of district court was challenged in the SC, which, on 26 April 2020, overruled the decision of the district court stating that "...the officials of every organization and institution that carries out activities related to children shall adopt necessary child-friendly process by giving priority to the best interests of children, while doing every activity and it shall be the responsibility of everyone to instantly help children whose life is in risk".

It is appalling, but nonetheless true, that innocent in the past have suffered due to procedural failures. It is pivotal for the judiciary to maintain its sanctity to prevent miscarriages of justice and reaffirm people's faith in the judicial system of the country. These cases hold a significant relevance in reaffirming the role of an independent judiciary, and that under no circumstances, the justice system should be jeopardized, compromised and undermined.

Securing constructive and far-reaching rulings from the SC is one step but the effectiveness of the court rulings lies in their implementation. Thus, AF is also monitoring the implementation of Court rulings, documenting lacunae in implementation to draw constant attention of relevant authorities.

For example, prior to the lockdown, the SC issued a directive to release minors from correction homes and prisoners from confinement facilities (who fit the criteria stipulated by the law), with the sole intention to reduce the density of population of inmates in confinements as such facilities were highly

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<sup>41</sup> *Writ Petition (076-WH-0329) filed by Advocate Pushpa Raj Paudel on behalf of Narcotics Control Bureau KA and Narcotics Control Bureau KHA (name changed) v. Kathmandu District Court et al.*

<sup>42</sup> The Act relating to children, 2018, Section 21 (7) states that "The child taken under control pursuant to sub-section (1) may be kept in an observation chamber with the permission of the Juvenile Court for a maximum twenty-one days, not exceeding five days at a time."

<sup>43</sup> *Writ Petition (076-WH-0329) filed by Advocate Ajay Shankar Jha on behalf of 71 Dhangadhi 61 (Name Changed) v. Kailali District Court*

likely to be an incubation ground for COVID-19. However, the decision to release were largely based on the discretion of judges of district court, therefore, many applicants were denied release. Owing to the gravity of offense, district court judges denied the application for release even though the applicant had fulfilled the criteria as per the SC directive. AF convened dialogues with stakeholders to draw their attention to the issue<sup>44</sup> and suggested to maintain uniformity while issuing the orders to release prisoners and juveniles, upholding the very essence of rule of law.

AF has also documented situations where parents have not been able to come to Court with an application of release, on behalf of minors due to travel restrictions during lockdowns. AF is bringing these cases to the notice of the authorities to find ways to facilitate the juveniles' release.

The judiciary has encountered a multitude of unforeseen problems in recent days. The current situation has interrupted many hearings and trials on civil and criminal matters (with particular statute of limitations), and almost all non-urgent court proceedings. Through notable efforts from lawyers, the grand full bench of SC on 28 May 2020 ruled that the lockdown period would be counted as a 'zero period' and all court dates could be furnished within 30 days after the lockdown period is over.<sup>45</sup> The decision was extraordinary in terms of easing the judicial deadlock, and unlocking justice locked during the lockdown.

A total of 113 writs (from 22 March 2020 to 10 June 2020)<sup>46</sup> have been filed in SC since the start of lockdown. The SC has issued remarkable decisions in most public interest litigations and writs of *habeas corpus* filed during this period. Some decisions like the one allowing the release of detainees to stop the spread of COVID-19, promote local produces, provide free testing services to minimum wage workers, to ease access to basic services during lockdowns, non-discrimination on relief distribution, stop inhuman treatment in the name of lockdowns, make special arrangements for pregnant women and their newborn babies by assuring regular check-ups and vaccinations during lockdowns, returnees stranded at the borders and international territories to be brought back to the country are noteworthy. Irrespective of the binding nature of these decisions, not all have so far been implemented. Non-implementation of the Court orders is a longstanding problem in Nepal. Thus, AF is now forging alliances with other organizations to monitor and help different agencies to implement the Court orders, not only to uphold the rule of law but also protect the basic rights of the citizen impacted by the COVID-19 pandemic.



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<sup>44</sup> Advocacy Forum-Nepal, 'AF Convened Meeting with Stakeholders of Criminal Justice System for the Release of Prisoners and Juveniles', Published on 9 April 2020, Available at: <http://advocacyforum.org/news/2020/04/af-convened-meeting-with-stakeholders-of-criminal-justice-system.php>

<sup>45</sup> A grand full bench of 19 presiding Justices decided on a Writ (076-RE-0392) filed by Advocate Tikaram Bhattarai , Available at: <http://www.supremecourt.gov.np/web/assets/downloads/fullCourtAadesh.pdf>

<sup>46</sup> Bhadrakali Pokharel, Spokesperson, Supreme Court of Nepal