

Governing Lawfully in Crisis:

COVID-19 and Public Accountability in Nepal

The COVID-19 pandemic continues to develop worldwide, causing unprecedented disruption and demanding swift and significant government action. The pandemic is requiring governments to take extraordinary measures: massively scaling up public health capabilities, pre-empting catastrophic economic consequences, and invoking emergency measures to restrict—even track¹—movement and enable control over private domains. The global crisis, which is anticipated to continue for many months, is already transforming social and economic life and altering the practice of politics and government.

Shortly after a second infected patient was detected, the COVID-19 Control and Management High-level Committee took the decision to send the country into a one-week lockdown.² As Nepal scales up its response, it is critical that lawful, publicly accountable government actions and democratic constitutionalism are not among the casualties of the COVID-19 health crisis.

Democratic states face particular challenges in dealing with emergencies such as the COVID-19 pandemic. The legally guaranteed rights and institutional checks and balances, which are associated with democratic constitutional order, do not always enable swift decision-making and may hinder effective action during a crisis. To overcome these challenges, emergency provisions—often included in democratic constitutions (in Nepal, Article 273 of the 2015 Constitution) but sometimes enumerated in normal legislation as is the case in the United States of America—can be triggered to enable governments to move speedily and respond effectively to certain crises.³

While emergency powers can be a ‘self-defence mechanism’ for democracy,⁴ ensuring that government action remains within the rule of law and is tested against other rapid-response options is essential to avoid abuse. Indeed, emergency powers are much beloved tools of autocrats and coup leaders.

Governments across the world have already begun activating special and emergency powers to enable them to confront the challenges caused by the COVID-19 pandemic. In Italy, emergency decrees approved by the Council of Ministers have been used to put the country into lockdown, constraining freedom of movement and ordering the closure of most

commercial activities.⁵ Similarly, the central government in Spain has activated a ‘state of alarm’, the first of three state-of-emergency levels included in its constitution.⁶

Not all countries, however, have seen it necessary to enter into emergency conditions in law. The Taiwanese government response, for instance, has thus far resisted resorting to presidential emergency decree; rather, legal authorisation of Taiwan’s response has been grounded in the Communicable Disease Control Act, which was enacted in 2003 to respond to the SARS epidemic.⁷

While to current knowledge COVID-19 has not yet gained community transmission in Nepal,⁸ provincial and municipal governments have followed the federal government’s lead to begin preparations for community outbreaks.⁹ In a speech to the nation on 20 March,¹⁰ Prime Minister KP Oli announced the temporary suspension of non-essential services, all flights and domestic long-haul transport; adding to restrictions placed from 18 March on limiting gatherings to less than 25 persons.¹¹ Then on the evening of 23 March, the federal government, utilising its powers under the Infectious Disease Control Act to ‘take necessary action to root out or prevent that disease’,¹² issued a directive that, among other things, banned movement outside of the house except for ‘urgent work’ from 6am the following morning.¹³ Violation of the directive is punishable by up to one-month imprisonment.

In the coming days, there may be calls to adopt more muscular approaches to limit the spread of the pandemic. If the present lockdown is unable to prevent the escalation of community transmission and outbreaks become frequent, it is likely that pressure will increase to invoke Article 273 and give the federal government added emergency powers. Whether or not this invocation is necessary must be tested and justified against the availability of other measures. Given Nepal’s recent history of political brinkmanship in the pursuit of narrow self-interest,¹⁴ such testing is imperative in the name of constitutionalism and the rule of law.

It is essential that opportunistic actors are constrained from exploiting this period for petty, parochial gain. Indeed, in Hungary observers are already concerned

that the pandemic is being weaponized for political gain by the ruling party, Fidesz, which has been undoing democracy for years. Proposed emergency legislation in Hungary could enable a state of crisis to be extended indefinitely and could be used to criminalise journalists who challenge official governmental narratives regarding the pandemic.¹⁵

Similarly, in Nepal, there is potential that, for example, the post-conflict federal bargain, which remains in a fragile condition,¹⁶ could be intentionally damaged in the name of a centralised response to the pandemic. While crises create unique coordination challenges in federal/devolved states—just look, for example, at the conflictual and piecemeal responses emerging in the United States¹⁷ and Australia¹⁸—these challenges must be overcome within the bounds of the constitution and the rule of law and not through usurpation of power. At this time, it is crucial that there be creative and transparent dialogue regarding how Nepal's cooperative federal structure can remain flexible and be empowered to respond to the present crisis without being permanently compromised.

There is also the potential that invoking special powers for emergency governance will draw much-needed attention and scrutiny away from other important government actions that are being undertaken. The decision to continue towards endorsement of controversial amendments to the Special Service Act by Nepal's federal parliament is one egregious example.¹⁹ Regardless of the urgency of government business, it is necessary that those government decision-makers continue to be subjected to healthy scrutiny, which seeks to hold all actions to account without causing unnecessary hinderance to governments' ability to respond effectively to crisis. It is necessary to consider how 'normal' governance processes (e.g. the passing of important pieces of legislation, the upcoming budget, etc.) can continue despite the unfolding crisis. Let us be mindful that 'the politics of the pandemic, rather than the virus itself,'²⁰ can potentially undo the peace dividend that Nepal has just begun to realize.

Already, pandemic considerations have caused major disruptions to the functioning of governmental institutions of restraint and legal oversight. As has been done in other countries, the Supreme Court of Nepal has suspended the hearing of cases (apart from habeas corpus cases) across all courts in the country until 3 April (at the time of writing).²¹ Similarly, the National Human Rights Commission is considering how

it can appropriately scale back its activities to help prevent COVID-19 transmission. These two institutions are essential to ensure justice for citizens and, as has been commented elsewhere, their suspension or scaling back poses a significant challenge for access to justice and ensuring the rule of law.²²

Courts and human rights commissions are critical to hold government to account and protect vulnerable citizens. Their ability to do so is especially vital in times of crises and extraordinary use of special powers by government when many constitutional rights can be suspended. It is imperative that they both find ways to continue to function effectively throughout this crisis.

The COVID-19 pandemic poses huge challenges to rule-ordered society and government—in Nepal and around the world. First and foremost, this is a health crisis. The resulting strains on the country's economy and governance structures can and will only be managed by dealing first with public health issues while ensuring that the unique challenges to rule of law and constitutional government that the pandemic also poses are addressed. As noted recently by a South Asian columnist, let it not be that coronavirus has made authoritarians of us all.²³

We must be careful not to lose sight of the long-term political and governance injuries that the adoption of emergency measures may inflict on us. History may well prove that the weakening of lawful, publicly accountable government action and democratic constitutionalism is in fact the greater threat.

This was first published by the IACL-AIDC Blog on 26 March 2020²⁴ and was subsequently carried by Republica.²⁵

Set up in 2010, Niti Foundation is a Nepali non-profit organization engaged in strengthening Nepal's policy process through collaborative research, innovative policy contestation, and enhanced policy choice. Working with Nepali reform leaders, Niti Foundation supports networking and coalition building to promote an accountable, representative, and implementable public policy process.

niti
FOUNDATION

Dugar Marg, Naxal, Kathmandu, Nepal
+977-1-4423430
info@nitifoundation.org
www.nitifoundation.org

¹ Niva Elkin-Koren, 'The rule of law in the time of coronavirus outbreak' (Internet Policy Review, 18 March 2020) <<https://policyreview.info/articles/news/rule-law-time-coronavirus-outbreak/1450>>.

² 'Nepal goes into lockdown for a week', *Nepali Times* (23 March 2020) <www.nepalitimes.com/banner/nepal-goes-into-lockdown-for-a-week/>.

³ On emergency provisions generally, see Elliot W. Bulmer, 'Emergency Power' (IDEA, 30 May 2018) <www.idea.int/publications/catalogue/emergency-powers>.

- ⁴ Ibid 6.
- ⁵ Diletta Tega, Michele Massa, 'Fighting COVID 19 – Legal Powers and Risks: Italy' (Verfassungblog, 23 March 2020) <<https://verfassungsblog.de/fighting-covid-19-legal-powers-and-risks-italy/>>.
- ⁶ Osborn Clarke, 'Main measures established by Royal Decree 463/2020, of 14 March, declaring the state of alarm for the management of the health crisis situation caused by COVID-19' (16 March 2020) <www.osborneclarke.com/insights/main-measures-established-royal-decree-4632020-14-march-declaring-state-alarm-management-health-crisis-situation-caused-covid-19/>.
- ⁷ Wen-Chen Chang, 'Taiwan's Fight against COVID-19: Constitutionalism, Laws, and the Global Pandemic' (Verfassungblog, 21 March 2020) <<https://verfassungsblog.de/taiwans-fight-against-covid-19-constitutionalism-laws-and-the-global-pandemic/>>.
- ⁸ 'The Covid-19 outbreak so far and how Nepal can prepare for the worst', *The Kathmandu Post* (21 March 2020) <<https://kathmandupost.com/national/2020/03/21/the-covid-19-outbreak-so-far-and-how-nepal-can-prepare-for-the-worst>>.
- ⁹ 'Province 1 government to construct 50-bed hospital', *The Himalayan Times* (22 March 2020) <<https://thehimalayantimes.com/nepal/province-1-government-to-construct-50-bed-hospital/>>.
- ¹⁰ Tika R Pradhan, 'Oli announces suspension of all flights, all long-haul transport and all non-essential services', *The Kathmandu Post* (20 March 2020) <<https://kathmandupost.com/national/2020/03/20/oli-announces-suspension-of-all-flights-all-long-haul-transport-and-all-non-essential-services>>.
- ¹¹ Ajit Tiwari, 'Province 2 tightens border with India as Covid-19 precaution', *The Kathmandu Post* (22 March 2020) <<https://kathmandupost.com/province-no-2/2020/03/22/province-2-tightens-border-with-india-as-covid-19-precautions>>.
- ¹² The Infectious Disease Control Act 1964 (in Nepali) is available at: <www.lawcommission.gov.np/wp-content/uploads/2019/04/2-%E0%A4%B8%E0%A4%82%E0%A4%95%E0%A5%8D%E0%A4%B0%E0%A4%BE%E0%A4%AE%E0%A4%95%E0%A4%B0%E0%A5%8B%E0%A4%97%E0%A4%90%E0%A4%A8%E0%A5%A8%E0%A5%A6%E0%A5%A8%E0%A5%A6.pdf>.
- ¹³ 'Lockdown guidelines', *Nepali Times* (24 March 2020) <www.nepalitimes.com/latest/lockdown-guidelines/>.
- ¹⁴ Ramesh Kumar, 'The business of politics undermines Nepal's democracy', *Nepali Times* (5 July 2019) <www.nepalitimes.com/here-now/the-business-of-politics-undermines-nepals-democracy/>.
- ¹⁵ Hungarian Spectrum, 'Kim Lane Scheppele: Orbán's Emergency' (21 March 2020) <<https://hungarianspectrum.org/2020/03/21/kim-lane-scheppele-orbans-emergency/?fbclid=IwAR1g3HyHZ9Wj4pf0prPfQadPNtid4e6KnZzepluwKuteuTe8TdpAlqnKcz4>>.
- ¹⁶ Prakash Bhattarai, 'The New Federal Structure in Nepal: Challenges and Opportunities for Quality Governance' (Research Network External Democracy Promotion, 23 April 2019) <www.external-democracy-promotion.eu/the-new-federal-structure-in-nepal-challenges-and-opportunities-for-quality-governance/>.
- ¹⁷ John Authers, 'Feeling Adrift? Here's a Crisis Map for Investors', *The Bloomberg* (23 March 2020) <www.bloomberg.com/opinion/articles/2020-03-23/coronavirus-sell-off-has-investors-navigating-without-maps>.
- ¹⁸ David Crowe, 'National cabinet needs to work better after shambolic Sunday', *The Sunday Morning Herald* (23 March 2020) <www.smh.com.au/politics/federal/national-cabinet-needs-to-work-better-after-shambolic-sunday-20200323-p54cvg.html>.
- ¹⁹ Binod Ghimire, 'House panel endorses bill allowing intelligence agency to listen in on conversations', *The Kathmandu Post* (19 March 2020) <<https://kathmandupost.com/national/2020/03/19/house-panel-endorses-bill-allowing-intelligence-agency-to-listen-in-on-conversations>>.
- ²⁰ Harve Lemahieu, 'West must face its viral demons' (Lowy Institute, 21 March 2020) <www.lowyinstitute.org/publications/west-must-face-its-viral-demons>.
- ²¹ 'All courts across Nepal suspend hearing for two weeks, except on habeas corpus cases', *Online Khabar* (20 March 2020) <<https://english.onlinekhabar.com/all-courts-across-nepal-suspend-hearing-for-two-weeks-except-on-habeas-corpus-cases.html>>.
- ²² 'Complete chaos': How the coronavirus pandemic is upending the criminal justice system', *USA Today* (19 March 2020) <www.usatoday.com/story/news/politics/2020/03/19/coronavirus-upends-courts-jails-prisons-criminal-justice-system/5064174002/>.
- ²³ Huma Yusuf, 'Corona crackdown' *Dawn* (23 March 2020) <www.dawn.com/news/1543049/corona-crackdown>.
- ²⁴ See: 'Governing Lawfully in Crisis: COVID-19 and Public Accountability in Nepal', *IACL-AIDC Blog* (26 March 2020) <<https://blog-iacl-aidc.org/2020-posts/2020/3/26/governing-lawfully-in-crisis-covid-19-and-public-accountability-in-nepal>>.
- ²⁵ See: 'Governing lawfully in crisis', *Repubblica* (26 March 2020) <<https://myrepubblica.nagariknetwork.com/news/governing-lawfully-in-crisis/>>.