Interstate migrant workmen act: an enquiry

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After India went into an unplanned nationwide lockdown on March 25 2020 due to the Covid-19 pandemic that an Act which had received scant attention in the judiciary and the media was catapulted centre-stage. Activists, policymakers and labour experts invoked the Inter-State Migrant Workmen act, 1979 (subsequently ISMWA) in direct relation to the unprecedented exodus of migrant workers from their places of work to their hometowns that seized the nation's imagination immediately after lockdown.What came to be known thereafter as the migrant crisis was referred to by senior Supreme Court lawyers as not a policy issue but a constitutional issue in their strongly-worded letter[1]in May to the Supreme court for its apparent indifferent to the migrant crisis and lack of cognizance of the state's inability to provide succour to migrants. In what has been called a failure of policy and legislationin safeguarding the rights of migrant workers, the dehumanizing conditions to which they were subjected during their long march home has been constituted as an act of civil disobedience and posed a formidable challenge for the law and the state.

The utility of the ISMWA can be measured in its lack of enforcement by the courts and the state during the migrant crisis, precipitated by the ill-preparedness of the move, withno time given for an estimated 4.5 croremigrant workers(according to the 2011 Census) to return to their home states, or any concerted plan by the government to transport migrant workers to their home states. A close reading of the paperwork and judgments in relation to migrant workers during lockdown provides evidence of both the ISMW's irrelevance as well as lack of will to implement this 40-year act that was instituted for the rights and welfare of migrant workers.

The jurisprudence around this Act

The ISMWA was drafted in 1979 in response to the exploitation faced by inter-state migrant workers from Orissa, otherwise known as Dadan labour, who were recruited for work at the hand of contractors for large-scale construction projects outside the state and faced extreme exploitation at the hands of the sardars or recruiting agents. A more elaborate overview of the Act's conception will be provided in the last section of this paper.This section

[1] Read: What Senior Lawyers Told the Supreme Court Before it Spoke on Migrants, The Wire, May 27, 2020. https://thewire.in/law/supreme-court-migrant-workers-lawyers-letter

examineshow the Act's provisions have been reflected in the jurisprudence on the act during a time when the conundrum of migrant labour rights arose with an urgency unparalleled in Indian history after Partition. This is based on the assumption that if the provisions of this Act had been implemented, this would have led to a comprehensive accounting of stranded migrant workers and subsequent relief and welfare measures provided by different state governments on the directives from the centre. This paper will theorize thearticulationof the gap between provision and implementation in terms of the lacuna in labour rights and welfare in relation to Constitutional provisions using what Justice Sudarshan Reddy terms as the "triadic ethical framework of the Constitution"[2] by reading some High Court and Supreme Court judgments and orders in response to petitions regarding the crisis. Article 226 of the Constitution confers upon the High Courts the broad powers to grant a writ for the enforcement of fundamental rights to any Government, authority or person. The question that emerges from this is the lack of implementation of the ISMWA that could provide relief to stranded migrants. To examine this, I turn to some significant judgments and conduct a review of the jurisprudence on the theme.

The applicability of the ISMWA most significantly happened in the Supreme Court ruling in the BandhuaMuktiMorcha[3] case. The ruling in the case states that the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 was a social welfare legislation, to be applied alongside the Contract Labour (Regulation and Abolition) Act, 1970, Bonded Labour System (Abolition) Act, 1976, Minimum Wages Act, Workmen's Compensation Act, Payment of Wages Act, Employees State Insurance Act, Maternity Benefits Act, etc, for the welfare and protection of the workers in the stone quarries who were reported to be working as bonded labour in a PIL filed by a social organization working towards the release of bonded labour in the country. The judgment discusses the obligation of the state government to adhere to Article 32 of the Constitution where its "interpretation must receive illumination from the Trinity of provisions which permeate and energies the entire Constitution namely, the Preamble, the Fundamental Rights and the Directive Principles of State Policy".[4]

The judgment upheld is one that our current judges should take cognizance of in their attempts to quash PILs filed by concerned citizens about the welfare of migrant workers. "Public Interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the

[2] See Kalpana Kannabiran (2020). Justice and Rights in Viral Contexts in India.*The India Forum*, May 1, 2020. https://www.theindiaforum.in/article/justice-and-rights-viral-contexts-india
[3] BandhuaMuktiMorcha v. Union Of India (1984 AIR 802).
[4] Ibid.

deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution.[5]"The role of the court in the "realisation of Constitutional objectives" cannot be overstated during a pandemic that disproportionatelyaffects migrants, the poor, marginalized and dispossessed. The issuing of writs for the enforcement of fundamental rights is the prerogative of constitutional court in times of emergency, crisis or exception. The provision to issue such writs "conferring on the Supreme Court power to enforce the fundamental rights in the widest possible terms shows the anxiety of the Constitution makers not to allow any procedural technicalities to stand in the way of enforcement of fundamental rights"[6]. (72)

This judgment also reiterates the relevance of a PIL as a new form of litigation in a country where poverty and illiteracy become handicaps in crores of people gaining access to justice, "in which participating sectors in the administration of justice cooperate in the creation of a system which promises legal relief without cumbersome formality and heavy expenditure"[7] (80). For Ramnath (2013), "judgments are to be read as by taking judicial observations seriously; as expressions of constitutional visions that are built up over time, in a manner reminiscent of the herculean task of common law judges writing the chain novel"[8], with reference to Dworkin's metaphor in describing common law jurisprudence. The *obiter dicta*,while not binding, sets forth a framework of judicial articulations that demonstrate "who constitutional language accommodates, but also its absences, omissions and silences"[9]. Reading judicial observations as texts helps to identify patterns of articulations over time that contributes towards an understanding of the juridical unconscious (see Felman 2002).

The BandhuaMuktiMorcha case is a productive point to begin as the judicial articulations helps us to imagine courts as sites for reinforcing the judiciary's commitment to our constitutional principles at a particular moment in history. This judgment demonstrates how constitutional provisions were interpreted to fulfil the socialist imagination of the Constitution. This becomes a fitting counterpoint to the abdication of constitutional duties that are being witnessed in the jurisprudence of the present moment, in the judiciary's handling of the migrant crisis. Through this framework, we can trace the attitudes of the law through High Court and Supreme court judgments and observations.

[5]Ibid, Para 6.
[6]Ibid., Para 72.
[7]Ibid., Para 80.
[8] See KalyaniRamnath. The Runaway Judgment: Law as Literature, Courtcraft and Constitutional Visions. Journal of Indian Law and Society, 3 (2011-12).
[9]Ibid, p. 28.

An early instance of adjudication on ISMWA was *Damodar Panda v. State Of Orissa*[10]where the Supreme Court stated that as per the provisions contained in Section 20 of the ISMWA, an "officer of the Originating State can make enquiries within the Recipient State provided the Recipient State agrees to such Officers of the Originating State operating within that State.."[11]. Importantly, the order says: "This is a beneficial legislation for satisfying the provisions of the Constitution and the obligation in international agreements to which India is a party." The reinforcement of the act enforces not only Constitutional obligations but the upholding of India's status as signatory to the ILO conventions as already stated above in the BandhuaMuktiMorcha case. The judgment also stated: "We would, therefore, make a direction that to implement the provisions of the Act of 1979 referred to above every State and Union Territory in India would be obliged to permit Officers of originating States of migrant labour for holding appropriate inquiries within the limits of the Recipient States for enforcement of the statute and no Recipient State shall place any embargo or hindrance in such process."[12]

These early judgments are important because they set the stage for adjudication on(or lack thereof)the constitutional rights of migrant workers and the obligations of states to implement the legal measures in place for the welfare and protection of inter-state migrant workers. I will return to this in the last part of my analysis where I look at the statutory obligations that the ISMWA's provisions impel within the framework of the DPSP and Fundamental Rights framework laid out by the Indian Constitution and how this was addressed by the courts.

The jurisprudence of the Present

The imposition of lockdown measures under Section 10(2)(1) of the Disaster Management Act (DMA) by the central government on 24.03.2020 and the directions to implement these measures to contain the spread of Covid-19 in the country had two outcomes. It coincided with the mass exodus of migrant workers to reach their hometowns. Despite directions being issued for "adequate arrangements for temporary shelters, and provision of food etc. for the poor and needy people, including migrant labourers, stranded due to lockdown measures in their respective areas"[13], the decision of the migrants to walk reflects their lack of faith in the judicial, welfare and administrative mechanisms in place to deal with migrant workers in general, a conundrum that would culminate in the exodus. I will reflect on the strategy of

[10]1990 AIR 1901.
[11]Ibid.
[12] Ibid.
[13]No. 40-3/2020-DM-I(A). Government of India, Ministry of Home Affairs, March 29, 2020/https://www.livelaw.in/pdf_upload/pdf_upload-371867.pdf

"walking" as a political act and how different high courts have variously defined this strategy of migrants to view how the judgments perceive migrants.

Second, I will explore the lack of enforcement of the welfare and protection mechanisms in place to uphold the rights of migrant workers in the apex court judgments that instead used the language of benevolence and care and indulged in what AnujBhuwania (2020) illustrates as the "remedies without rights phenomenon"[14]. While the central government order of 24.03. 2020 also contained instructions for the payment of workers' wages without any deduction "for the period their establishments were closed during the lockdown"[15],this order would be revoked by the Supreme Court from May 18 after a writ petition filed by many small and medium enterprises and associations[16] whereupon the court ruled that "No coercive action shall be taken in the meanwhile" (against any employer for the non-payment of wages to workers). The court demanded a mutual resolution to the problem between employers and labourers, issuing elaborate instructions to state labour departments to facilitate the process of settlement.[17]Despite this, the case was argued using the constitutional rights of the employers as I will explore both these points through my reading of the language of court judgments and government circulars regarding the Covid-19 crisisand their role in exemplifying the progressive dilution of rights of migrant workers, with the centrality of the ISMWA in mind.

In stark contrast to the old cases mentioned above, the PILs[18] filed in the Supreme Courtby concerned citizens, including activists, were summarily dismissed. It was a petition filed by a practicing Supreme Court lawyer[19] exhibiting concern over the plight of migrant workers that finally got the Supreme Court to take cognizance of the matter. In response to this petition, the central government filed a status report before the Supreme Court on steps taken to counter the Covid-19 crisis and towards the protection of citizens. It declared that "the Central Government was fully conscious that during the period of an inevitable lockdown, no citizen should be deprived of basic amenities of food, drinking water, medication, etc."[20] To this end, it provided a financial package under the Pradhan MantriGaribKalyanYojana and

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[14]AnujBhuwania. "The Curious Absence of Law in Migrant Workers' Cases."*Article 14*, June 16, 2020. https://www.article-14.com/post/the-curious-absence-of-law-in-india-s-migrant-workers-cases

[15]See Footnote 13.

[16]*Hand Tools Manufacturers Association v. Union of India* (WP 11193/ 2020)

[17] While a discussion on the problems of this judgment and its dilution of labour rights is outside the scope of this paper, see Saurabh Prakash. 'A Supreme Error', *The Statesman*, May 28, 2020.https://www.thestatesman.com/supplements/law/a-supreme-error-1502893349.html

[18]Mahua Moitra v. Union of India; Harsh Mander&Anr. v. Union of India &Anr; Swami Agnivesh&Anr. v. Union of India &Ors; Aruna Roy &Anr. v. Union of India &Anr.; AlakhAlokSrivastava v. Union of India; Jagdeep S Chhokar&Anr. v. Union of India; Sagheer Ahmed Khan v. Union of India

[19]AlakhAlokSrivastava v. Union of India (WP(s) (Civil) No(s).468/2020)

[20] Status report on AlakhAlokSrivastava v. Union of India (Diary no. 10789 of 2020)

separate financial support for low-wage earners in organized sectors.It was further held that "construction workers (most of whom are migrant labourers) will be provided financial assistance through 'Welfare Fund for Building and other Construction Workers'." This directive by the Ministry of Labour & Employment to State Welfare Boards to implement under the Building and Other Construction Workers (BOCW) Act, 1996 on March 24, 2020, involved a Direct Fund Transfer to approximately 2 crore registered construction workers across the country.[21]While this law was invoked by the state to protect the interest of construction workers, it is important to note that there was no mention of the welfare measures taken under the ISMWA.Further, the government stated that the movement of migrant workers would pose a "serious health hazard" and ordered "complete prohibition of inter-district and inter-state migration of any population including the migrant workers who are en route"[22].

What stands out in the *AlakhAlokSrivastava v. Union of India*judgment is that the only two acts invoked are Section 54 of the DMA (2005) and Section 188 of the Indian Penal Code with a punitive intent as opposed to the intent of legal enforcement of the rights of migrant workers. This stands in contrast to any form of rights-based jurisprudence on part of the courts that would enforce a statutory obligation on part of the states towards the migrant workers. Section 188 punishes disobedience to any orders promulgated by a public servant and Section 54 of DMA "provides for punishment to a person who makes or circulates a false alarm or warning as to disaster or its severity or magnitude, leading to panic". The provisions of the Interstate Migrant Workmen Act, 1979, are blatant in their omission.

The apex court's response demonstrates how the law was used both as a punitive and a palliative measure. The obiter dicta of the judgment states: "Later, on 29.03.2020 the Ministry of Home Affairs has issued a Circular prohibiting movement as transportation of migrant labourers in overcrowded buses would cause more damage than help to the migrant labourers… In such view, the movement of migrant labourers was prohibited and a direction was given to the State Governments to stop the migrant labourers wherever they were and shift them to nearby shelter homes/relief camps."[23] The Supreme Court order also impressed that migrants were to be treated in a "humane" manner and with "kindness". The shepherding of migrant workers walking home into relief camps and temporary shelters offers a paternalistic view of the court couched in the language of benevolence and

[21]https://pib.gov.in/PressReleasePage.aspx?PRID=1633546#:~:text=Under%20the%20Act%2C%20the%20State,remitted%20to%20the%20Welfare%20Fund.
[22]See Footnote 10.
[23]AlakhAlokSrivastava v. Union of India (WP(s) (Civil) No(s).468/2020).

philanthropy as opposed to invoking any laws that have a direct bearing on the implementation of migrant worker rights.

This lack of statutory enforcement of the laws already in existence to provide rights and relief to the migrant workers, of which the ISMWA is a central legislation, is telling in its absence. It fails to take into account the structural and systemic inequality that has disproportionately affected the populace, most notably migrant workers. In its place, at least in the initial phase of the lockdown, there is an overbearing reliance on the provisions of the DMA and a demonstration of the iron hand of the state in its anxiety to suppress the movement of the workers. Laws such as Section 51 of the Disaster Management Act 2005 have been used against migrant workers who have been found to be "in violation" of these codes.

This is evidenced in a directive from the Haryana DGP[24] under the NDMA act 2005 which stated that the Union Cabinet and Home Secretaries were alarmed at the large-scale movement of migrant labour on roads by foot followed by accumulation of large number of people especially at the Anand Vihar Bus Terminal. His circular stated, among other points:

1. The inter-state borders have to be sealed and no persons whether travelling in a bus/ truck/ tractor trolley or on foot/ bicycles should be allowed to cross interstate boundaries. They should be turned back *without exception*.
2. The persons who are travelling on foot within the districts on highways/ roads should be picked up., placed in buses and left in localities from where they started.
3. Directions are being issued by State Home Department to declare big indoor stadiums and other similar facilities as *Temporary jails, so that people who refuse to obey the lawful directions of district administration can be arrested and placed in custody for the offence committed by them under the Disaster Management Act.*

What stands out in contrast is the many suomotu applications by different High Courts[25] laying out orders or taking state governments to task for not sufficiently alleviating the suffering of migrant workers on humanitarian grounds. In its May 15 order[26], the Madras High Court's suomotu cognizance of the miserable plight of migrant workers following the national lockdown calls it a "human tragedy"."One cannot control his/her tears after seeing

[24] No. 5264-5304/L&0-3, March 29, 2020.

[25] *K. Ramakrishna v. UOI and ors* (WP (PIL) No: 101 of 2020); *SuoMotu v. State of Gujarat*(PIL) NO. 42 of 2020; *RiteshSrivastava and anr vs. State of UP* (PIL No. 583 of 2020); *A.P. Suryaprakasham v. Superintendent of Police Maharashtra*, HCP No. 738 of 2020); *Re Inhuman Condition at Quarantine Centres and for Providing Better Treatment to Corona Positive v. State of U.P.*(PIL No. 574/2020).

[26] A.P.Suryaprakasamvs Superintendent Of Police (H.C.P.No.738 of 2020)

the pathetic condition of migrant labourers shown in the media for the past one month."[27] The judgment accords this responsibility to "no coordinated efforts between the States".The crucial point in the judgment is its demand for accountability regarding the collection of relevant data on migrant workers in all states. Of the questions asked by the court to the respondents, Union of India and Government of Tamil Nadu, two are pertinent to this paper.

1. Whether any data is being maintained by the Government of India regarding the details of migrant workers working in each State/Union Territories in India?

2. If so, what is the number of migrant workers in each State/Union Territories in India and the details regarding their nativity?

Similarly, the Andhra Pradesh High Court[28] also issued a PIL demanding that the state offer food material, financial aid and safe accommodation and the appointment of a Nodal Officer in each district to supervise the shelters where the migrants may be accommodated, along with a Tehsildar and DSP. The judgment adds: "These interim measures are being suggested till all the migrant labour, who are walking through are picked up and transported by the State… "Efforts should be made to convince the migrant labour to stop walking and to take the transportation being provided by the State Government."[29] This innocuous statement illuminates the migrant's relationship with the state and the law. Hitherto left to navigate the perils of working in another city with no right to housing, food, medical treatment or social security, the figure of the migrant worker emerges in its bareness during the mass migrant exodus from the cities. This paper would like to reflect on three aspects: the language of care used by the courts, the symbolic significance of the act of walking and the data deficit which is one of the primary reasons for the lack of implementation of the ISMWA.

The Supreme Court finally took suomotu cognizance of the migrant crisis in courts and issued a notice to the Union of Indian and all States and UTs to look into the matter on May 28. In its order dated June 9 2020, the SC responded to an application by the National Human Rights Commission's suggestion for taking "certain short-term and long-term measures to ameliorate the conditions of the migrant workers, with specific reference to statutory protections such as those of the Inter-State Migrant Workmen (Regulations of Employment and Conditions of Service) Act, 1979 as well as Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996. The apex court responded that with respect to registration of migrant workers they would consider the response of the states on the issues. It also invokes the High Courts' cognizance of the "violation of the

[27] Ibid.
[28] WP (PIL) NO: 101 OF 2020
[29] Ibid.

fundamental rights of migrant workers" and in a tepid, non-committalresponse, states "we have no doubt that those proceedings shall proceed after considering all aspects including the response of concerned authorities"[30].

It is significant to note that the language used in some instances in the court order is one of subjecthood. Strikingly, while addressing the various applications by different parties on remedial measures relating to migrant workers and the government's response, the court says in one instance: "Counselling centres be set up by the concerned State at block level and the district level to provide all information regarding Government schemes and other avenues of employment to these workers and where possible to expand the avenues of employment to these workers so that they may not sit idle and they may be utilised as a *resource* by the State."[31]The abnegation of the state's responsibility towards the migrant worker has caused the structural fissure of which the migrant crisis is the cumulative outcome.

The Act of Walking as a Right to Life

As much as the Covid-19 crisis is a public health crisis, the migrants' long march reveals it to be the culmination of a long-standing crisis of labour rights. What Chowdhory and Poyil (2020) defineas the state's **"**carefully calibrated protection regime towards migrant labour which oscillates between coercion and care"[32] is reflected strongly in the judgments where the disruptive action of the migrants by moving out of their designated spaces and asserting their agency -- no longer passive recipients of state beneficence -- evokes the iron hand on the state. I read act of walking as a staking of right to life under Article 21 of the Indian Constitution that sets the stage for the biggest enactment of upholding their fundamental right to life.As migrant workers exercise their right to life as a social group, even as their long march is a consequence of state apathy and neglect and leads to intense suffering, it is the ultimate agentive actas they defy government dictates and are pitted in a unique challenge to state power.

The objectification of the figure of the migrant worker to a reduction of their biological bodies as carriers of disease was exemplified in the actions of the fire and safety officials spraying chemical disinfectant containing sodium hypochlorite on the crouched bodies of migrant

[30]Re Problems and Miseries of Migrant Labourersvs Union Of India, WP (CIVIL) NO.6 OF 2020
[31] Ibid.
[32]Nasreen Chowdhory and ShamnaThachamPoyil."The long march home", *The Hindu*, May 27, 2020.https://www.telegraphindia.com/opinion/the-long-march-home-migrant-workers-and-their-conditions-in-india-amid-the-coronavirus-lockdown/cid/1776343

workers who had reached their hometown in Bareilly, Uttar Pradesh, from Delhi.[33]Under the auspices of care and protection, the general tenor of government directives to find and load migrants onto buses and shuntthem off to temporary shelters – exclusion and segregation being the key measures of survival and treatment in an epidemic –belies state anxiety at the migrants' visibility.

The government's response to the worker exodus was two-pronged. In the SC's June court order, Solicitor General Tushar Mehtasaid on behalf of the state that "the Central Government, with the support of National Highway Authority of India is facilitating the shifting of migrant workers, who were found walking on the roads, by providing them with the requisite transport to the nearest railway stations"[34]. This is in keeping with government-authorized protocol regarding social distancing and lockdown measures to prevent the spread of the virus.

At the same time, the language of the judgments presents a more insidious narrative between care and coercion. The power of theheightened visibility of the migrant worker and the anxiety this generated is reflected in the Supreme Court'ssuomotu cognizance of June 9. Among the directions issued by the court to the Central Government, States and Union Territories was the order for "All concerned States/UTs to consider withdrawal of prosecution/complaints under Section 51 of Disaster Management Act and other related offences lodged against the migrant labourers who alleged to have violated measures of Lockdown by moving on roads during the period of Lockdown enforced under Disaster Management Act, 2005."[35]The court also acknowledges that migrant movement was "by force of circumstances" (33).

Baxi points out that that the state did not apprehend the enactment of what, in a Foucauldian phrase, are "mass illegalities" and "did not anticipate legal ways to solicit compliance" (Baxi 2020). While the judgments provide the consolation of a benevolent and caring judiciary, the question that remains to be asked is what the role of the law is in circumstances of the blatant violation of constitutional rights of such a significant segment of the population and whether that has been fulfilled in adjudicating the cases emerging before the judiciary. These ways, while they uphold the restrictions in place to prevent the spread of Covid-19, also contain the measure of a biopolitical state in its monitoring and surveillance of bodies and the attempt at the removal of any agency of the actors who were walking to assert their right

[33]Sanjay Pandey. "Migrant workers sprayed with 'disinfectant' in Uttar Pradesh; many suffer burning sensation."*Deccan Herald*, March 30, 2020 https://www.deccanherald.com/national/north-and-central/migrant-workers-sprayed-with-disinfectant-in-uttar-pradesh-many-suffer-burning-sensation-819298.html

[34]Re Problems and Miseries of Migrant Labourersvs Union Of India, WP (CIVIL) NO.6 OF 2020

[35]Ibid.

to life in the face of the failure of the mechanisms, legislations and policies designed for their welfare and protection, of which ISMWA is the principal one.

Bereft of belonging to a political community or availing of any mechanisms which may grant them relief and social security, the migrant exodus is a witnessing of what Baxi refers to as "exodus constitutionalism, acting as the other of ordinary democratic constitutionalism"[36] (Baxi 2020), a term that is exemplified by the genesis of the Constitutional text itself. Much like the story of Toba Tek Singh and the Indian Partition of 1947, the lockdown epitomized the state of statelessness that migrants occupy, pushing violently to the forefront the lack of redressal mechanisms that maintained them as but became the aggregate of their miseries after the announcement of the lockdown, also allowing for a moment of collective conscience-making.

Even without the dramatization of their plight in the media that reflected in totality the complete apathy of the state and polity towards the plight of migrant workers – rotis on the railway track as the only evidence remaining of 16 migrant bodies mown down by a train, an infant uncovering of the shroud of his dead mother as a form of play on the railway station, amidst countless other examples -- the visibility of the migrants in this form of heightened despair is a wound on the Constitutional fabric of the nation. Repeatedly producing their bodies on display as evidence of neglect, rightlessness and statelessness, they stake their claim to life. This throws up the opportunity to question the legal borders created around both migrant identity and migrant welfare. A starting point is the failure of the ISMWA to provide any succour to migrants. In the next section, I will highlight the provisions of the Act that could have been employed to help migrants.

An overview of provisions of the ISMWA and its faultlines

The ISMWA is applicable to every establishment that employs five or more migrant workers and the contractors who employ or have employed five or more migrant workers over the preceding 12 months fall under the Act. Every such he establishment which must be registered with the registration officers sanctioned by State Government.Contractors require a license from the concerned authority of the workman's home state as well as the host state. Contractors are to issue pass books to each workman containing: details of his employment, name of establishment and period of employment, wages payable and mode of wages, displacement allowance payable, hours of work, and other such amenities.

[36]UpendraBaxi. "Exodus Constitutionalism: Mass Migration in Covid Lockdown Times."*The India Forum*, June 29, 2020.https://www.theindiaforum.in/article/exodus-constitutionalism

It is worthwhile to note at this point that in the years preceding the enactment of the Inter-State Migrant Workmen Act,1979, some significant constitutional amendments were introduced by the Indian National Congress, including the addition of the words “socialist” and “secular” to the preamble of the Indian Constitution. The first party to defeat the ruling Congress in independent India in the wake of the excesses of the Emergency, the Janata Party, came into power with the aim of righting the wrongs of the Indira era and restoring democracy in the country. The concern of the party’s socialist leaders over the exploitation of migrant labour in Orissa and Bihar, known as Dadan labour, by sardars or middlemen who employed them outside the state for large construction projects but made the labourers work under exploitative conditions, with no wage security, fixed working hours or habitable working conditions, led to the formation of a committee for the protection of the rights of these inter-state migrant workers. This took place aftera consultation with the labour ministers of all states, the Labour Ministers Conference in New Delhi, 1977, that resulted in the introduction of the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Bill, 1979, in Parliament. The Bill became an Act in 1980.

This context is important to remember in keeping in mind the intention of the framers to understand the dimensions of the Constitutional obligations evoked by the Act. Alongside, the BandhuaMuktiMorcha judgment the relatively new introduction of the PILs in the Indian judicial system and its towards the implementation of social justice for the socially disadvantaged. The ISMW Act itself can be considered the brainchild of the post-Emergency era where Directive Principles of State Policy were given precedence by the Indira Gandhi government in the 42nd Constitutional amendment.Under the Act, and in keeping with Directive Principles of State Policy, namely Articles 38(2), 39(a)(d), 42, 43,contractors are duty-bound to ensure the welfare of the workers by ensuring the regular payment of wages, equal pay for equal work irrespective of sex, ensure suitable conditions of work to such workmen having regard to the fact that they are required to work in a State different from their own State; to provide and maintain suitable residential accommodation to such workmen during the period of their employment; to provide the prescribed medical facilities to the workmen, free of charge; to provide such protective clothing to the workmen as may be prescribed; and in case of fatal accident or serious bodily injury to any such workman, to report to the specified authorities of both the States and also the next of kin of the workman.

Wages are to be paid from the date of recruitment and it is the duty of the contractor to pay wages to the inter-state migrants recruited by him. If the migrant workman performs the same or similar kind of work as is being performed by a local workman in that establishment, be the wages will be the same as those applicable to such other workman, and be paid no less than the wages fixed by the Minimum Wages Act, 1948. The workman is eligible for a

displacement allowance amounting to 50 percent of monthly wages payable to such migrant workmen, or Rs 75, whichever is higher. In addition to their wages, migrant workmen are also entitled to a journey allowance no less than the fare from the place of residence of the migrant workman in his State to the place of work in the other State payable by the contractor for onward and return journeys and importantly, such workman shall be entitled to payment of wages during the period of such journeys as if he were on duty.

The registration process for establishments under the relevant state authority was to facilitate a process of accountability and a way to enumerate and keep track of the workers employed from different states allows their services to fall under some form of legal regulation. The onus falls on the state labour departments of both the home state and the host state to maintain the registration of migrant workers and ensure implementation of the provisions, including regular inspections by inspectors appointed by the state governments under the Act. The glaring fact of the complete failure of this process and lack of any form of data on migrant workers during the worker exodus goes back to the post-liberalization era and the increase in the flow of migrant workers, with the lack of state monitoring of migrant workers by states due to a deregulated labour market. Migration is also voluntary and most often not pursued through a contractor but a more informal kinship network, providing little scope for documentation or registration of workers and consequently, scant application of the welfare and rights-based provisions of the Act. To also be taken into consideration is the fact that most migrant workers are informal workers unregistered by contractors and invisible in the eyes of the state.

The data conundrum

The repeated inability of the state governments to furnish data regarding the number of migrants departing from home states and those residing in destination states, which could have helped in providing a structured and systematic intervention at various stages of the lockdown, is exemplified in the following instance. On April 8, a circularwas issued by the CLC for regional heads to urgently provide comprehensive data about stranded migrant workers in their state under three categories: those placed in temporary shelters/ relief camps by State Government authorities; from employers whose labourers were in-situ at the workplace; places where migrants are clustered. The data was sought under the following heads: State-wise names of districts from which data about the stranded migrant workers has been received; district wise numbers of male and female migrant workers belonging to

each of the three categories mentioned above as reported from each state; and other related information.[37]

On April 21, RTI activist Venkatesh Nayak requested information from the Central Public Information Officer (CPIO) about the URL of the webpage where this data was posted on an official website, as required by the CLC's directive requiring urgent compliance on part of the regional heads as well as the Respondent Public Authority. The CPIO's reply that no such statistical data was available would be echoed in the monsoon session of the Parliament when the government was questioned about data on the migrant workers. Nayaksubsequently filed a complaint for not furnishing thisinformation in the public domain. During the hearing and decision on the complaint May 27, 2020, the Information Commissioner on came down heavily on the CPIO for his callousness. "The Commission records its severe admonition against the CPIO for such negligent handling of the RTI application concerning an issue of such wide implications."[38] The decision states further: "Undoubtedly, the need of the hour is to get concrete data regarding the number of stranded migrant workers across the country so that necessary measures may be taken by the concerned State Governments/ UTs to provide some relief to them."[39]

Also having ratified Article 8 of Part II of the Labour Statistics Convention, 1985[40], the Commission was also under international obligation to publish data on basic labour statistics as per its ratification with the ILO. The IC's decision CIC under section 25(5) of the RTI Act was for the CPIO to "immediately place the data regarding migrant workers on the website of the Respondent Authority"[41], adding that this data should be updated from time to time.

The disturbing relationship of the migrant crisis with the dearth of data has its antecedents in the non-implementation of the Inter-State Migrant Workmen Act, 1979. For instance, the SC's judicial order on June 9 2020 states "There can be no exception to the policies and intentions of the State but what is important is that those on whom implementation of circulars, policies and schemes are entrusted are efficiently and correctly implementing those schemes. Lapses and short-comings in implementing the schemes and policies have been highlighted by various intervenors in their applications and affidavits."[42]It further adds: "The responsibility of the States/Union Territories is not only to referring their policy,

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[37]Venkatesh Nayak v. Central Information Commission.Decision no.: CIC/OTCLC/C/2020/669711/03585https://www.humanrightsinitiative.org/download/CLC%20Circular%202020.pdf

[38] Ibid.

[39]Ibid.

[40]https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C160

[41]https://www.humanrightsinitiative.org/download/CLC%20Circular%202020.pdf

[42] See Footnote 1.

measures contemplated, funds allocated but there has to be strict vigilance and supervision as to whether those measures, schemes, benefits reaches to those to whom they are meant." [43]

In their order of July 31,the court noted thatthe states hadnot complied with the orders of the court in furnishing the registration details of the migrant workers. "None of the States/Union Territories have filed any affidavit giving details of the compliance of the aforesaid direction. The States are required to bring on record the mode and manner in which records of migrant labourers who have reached their native places are being maintained with their skill, nature of employment and other details."[44]The lack of compliance of the state authorities and the state labour commissions in fulfilling the legal mandate of the ISMWA is reflected in the overwriting of advisories without enforcing the implementation of existing schemes and laws. Data becomes the most insidious indicator of the callousness surrounding the migrant worker rights, maintaining them at the periphery of meaningful intervention.

Conclusion

As noted earlier, the very act of walking during the pandemic reveals the deep structural flaws and fissures in the legal and policy frameworks designed for the welfare and protection of migrant workers. Walking is manifested as a form of dissent and if dissent is the heart of a democracy, the migrant exodus is a protest against their lack of rights, an unplanned, mass protest, a sea of bodies moving against state injunction, in defence of both their lives and their right to life. Walking becomes the ultimate agentive act, a staking of claim to the body politic, a demand for visibility that unfolds during a crisis of the magnitude of a pandemic. The migrant body, leathered and hardy with the ravages of time, becomes the metaphor for the staking of rights and fighting, through the act of wearing down, the elementary and fundamental character of the Constitution.

The worker exodus thus can be read as two-pronged: it upholds the migrants' assertion of the right to life under Article 21 of the Indian Constitution, a Fundamental Right and at the same time, the most visible symptom of the abnegation of responsibility of all the states and Union Territories in implementing the provisions of the ISMWA 1979. A socio-legal reading of the workers' exodus through the lens of 'walking' being cast as a political act, and secondly, the nature of court judgments becoming reflective of remedies without rights in light of the ISMWA and becomes a call for the assertion of the trinity of provisions in our Constitution that can serve as a reminder to the judiciary of their statutory obligations in

[43] Ibid.

[44] Re Problems And Miseries Of Migrant Labourersvs Union Of India, WRIT PETITION (CIVIL) NO.6 OF 2020

adjudicating social justice. Alongside, with Labour being a subject in the Concurrent List, different states have made amendments to the ISMWA 1979, and which some states are more migrant-friendly than others, the nation lacks a cohesive policy framework that is implementable as a statutory legal provision. What needs to be taken into consideration is the enhancement of the architecture of social protection for migrant workers consisting of a transferrable PDS system, housing rights, health insurance and a prioritization of education for the children of migrant workers.

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