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The Invisible Migrant Workers: In Life , In Death

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The Invisible Migrant Workers: In Life, In Death

**Francis Adaikalam
Piya Srinivasan**

2020

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Invisibility of Deceased International Labour Migrants: The Politics of Recognition

Francis Adaikalam *

The death of international labour migrants in the Dirty, Dangerous and Difficult (3D) work is mostly accounted only for counting. The untold death stories of these wealth creators at three levels — household, country of origin and destination — are neither taken into account nor studied in-depth. The politics of recognition and subsequent invisibility are evident in the case of an emigrant worker's death. The loss of life and the associated socioeconomic impact on the families is scrutinized through this study. Challenges remain with regard to the impact of their death on the family and their ordeals, the compensation package the family has received, the response of the State (origin and destination) and corporate accountability, especially the labour contracts (the Kafala System). The present study restricts to Indian emigrants' death in the Gulf region (Persian Gulf), the cause of death and compensation. The existing volunteers' network, which facilitates the mortal remains of the emigrants, is contacted to trace the families of the emigrants in India. The study also refers to the official account of the Government of India, with regard to the number of workers' deaths in the Gulf region. It analyses the process of repatriating the mortal remains of Indian workers in the Gulf countries as well as the factors that hinder them. Through field study, this paper will capture the situation of the deceased migrant's families. The case method was adopted to interview families in Tamil Nadu, apart from friends, diaspora organizations/ interest groups and volunteers in the destination country.

International migrants, instrumental in the development of the State, are invisible both in the destination countries and in the country of origin. They are invisible and become a stateless entity except for the legal document they possess; since they are numerically insignificant, they work in varied fields and are scattered geographically both in the origin and the destination countries. Becoming a critical mass is near impossible, except in one or two states of India. Provinces like Kerala have effectively facilitated pre-departure training, established a separate Government department to deal with international migrants and have political representation from the labour returnees. Such a numerically insignificant¹ count is a key human resource in the Gulf Cooperation Countries as mentioned in Table 1 and an important contributor to the economy, both in their countries of origin and destination. In recent years, the increasing number of labour migrants under the Emigration Clearance Required Category (ECR) is from northern India. The United Nations Department of Economic and Social Affairs (UNDESA 2017) estimated that between 2015 and 2017, the Indian population in Qatar has more than tripled, rising by 250 percent. In Saudi Arabia

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and Kuwait, between 2010 and 2017, it rose to 110 percent and 78 percent, respectively. Yet, this insignificant size of Indian emigrants² is the key to the human resource and an important factor in the GCC destination country's economy as mentioned in Tables 2 and 3.

Regarding their contribution to the economy, the Reserve Bank of India (RBI) reported that inward remittances helped India finance trade deficit (43 percent in 2017–18)³ and 50 percent of the total remittances received in 2016–17 came from the Gulf Cooperation Council (GCC) countries alone. This means that mostly semi-skilled and unskilled emigrant workers contributed these deposits (ILO 2018). In 2017, RBI conducted its fourth survey on the inward remittances with its Authorised Dealers (ADs). Chart 1 reproduced from RBI shows that five countries — namely, UAE, Saudi Arabia, Qatar, Kuwait and Oman — from the Persian Gulf region account for 53.5 percent of the inward remittances. The states that received the highest percentage of inward remittance were Kerala (19.0), followed by Maharashtra (16.7), Karnataka (15.0) and Tamil Nadu (8.0).

Table 1. Emigrants going to ECR countries through RA and Direct Recruitment by FE for the Years 2007–2018 (Top Provinces in India)

Indian Provinces	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
ANDHRA PRADESH	9,65	43,613	42,023	44,193	43,612	50,359	61,213	53,103	45,301	27,005	17,725	15,528
BIHAR	16,884	59,689	50,162	60,414	72,277	83,972	96,868	98,748	107,586	76,385	69,426	59,181
KERALA	19,881	163,737	119,188	103,889	88,040	98,132	86,134	66,055	43,157	25,166	16,643	14,496
MAHARASHTRA	24,616	19,116	18,065	16,960	19,236	19,582	19,111	15,296	-	-	-	-
ORISSA	-	-	-	-	-	-	-	-	-	12,314	11,200	9,832
PUNJAB	28,195	54,254	26,969	30,858	33,010	37,539	48,697	48,450	46,574	31,860	27,607	19,777
RAJASTHAN	27,030	63,898	44,670	47,636	43,193	50,233	51,176	48,133	46,108	35,167	32,184	30,272
TAMIL NADU	9,113	93,646	77,665	84,415	69,473	78,160	83,385	83,205	73,065	42,542	38,341	31,588
TELANGANA	11,435	48,416	27,161	27,842	29,272	42,252	44,949	38,521	36,402	25,081	17,609	13,085
UTTAR PRADESH	37,126	137,298	125,548	140,501	158,315	191,143	217,849	229,496	237,254	143,741	88,450	86,273
WEST BENGAL	8,229	25,661	21,177	28,877	30,195	36,948	41,898	51,581	64,609	53,346	36,599	28,648

Source: Table prepared from the data retrieved from “eMigrate”, Overseas Employment Division of MEA, Government of India, accessed on June 1, 2019, <https://emigrate.gov.in/ext/preViewPdfGenRptAction.action>

Table 2. Number of People in Gulf Cooperation Council (GCC) and Indians in GCC

Country	Population (2012) #	Number of Indians (2012)*	Indian in Percentage
Bahrain	1,208,964	350,000	29.0
Kuwait	3,268,431	579,390	17.7
Oman	36,23,001	718,642	19.8
Qatar	1,832,903	500,000	27.2
Saudi Arabia	28,894,675	1,789,000	6.1
UAE	8,264,070	1,750,000	21.1
GCC Total	47,092,044	5,687,032	12.0

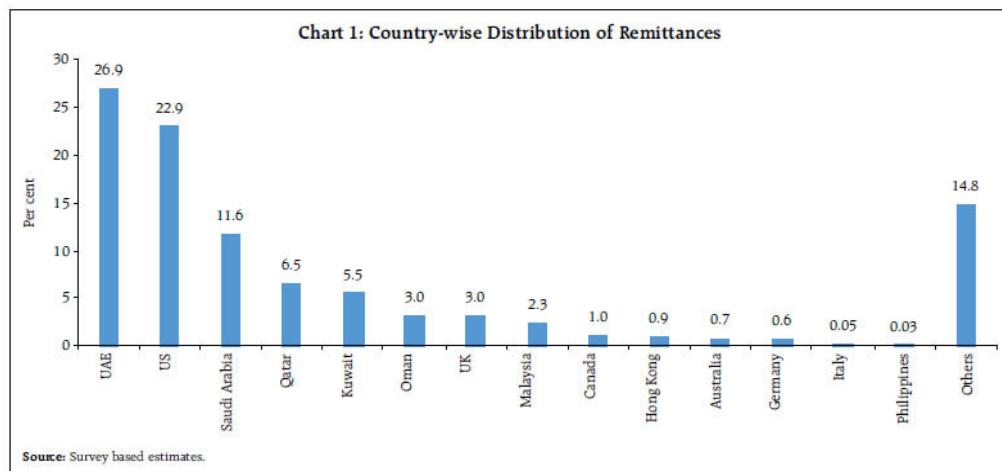
Source: #GCC-estimated population data obtained from Gulf Cooperation Council Statistical Centre, accessed on May 30, 2019, <http://dp.gccstat.org/en/DataAnalysis?BLusCmXUaW2gz3lqQNA>

*Indian population presented to the Lok Sabha, August 12, 2012 by MoIA in response to Question No. 1351 regarding the estimated country-wise total number of Indians residing/working in various countries. (Kohli 2014: 117).

Table 3. Indian Emigrants in Gulf Cooperation Council (GCC) Countries 2014–2018

Country	2018	2017	2014	% Change 2018/2014
UAE	103,720	149,780	224,037	-53.7
Saudi Arabia	65,542	78,557	329,882	-80.13
Kuwait	52,245	56,380	80,419	-35.03
Qatar	32,492	24,759	75,983	-57.24
Oman	32,316	53,332	51,317	-37.03
Bahrain	8,522	11,516	14,207	-40.00
Total	294,837	374,324	775,845	-62.00

Source: Response by the Ministry of External Affairs in Parliament.
Numbers counted up to November 30, 2018.



Source: Reserve Bank of India.“Globalizing People: India’s Inward Remittance.”RBI Bulletin, November 2018.

These inward remittances benefitting India have come with a cost: abysmal working and living conditions, complex contractual chains, sub-contract arrangement to major companies, and appalling safety standards adopted by the companies. An Amnesty report termed this as “The Dark Side of Migration,” pointing out a high number of hospital admissions due to falling from heights and resulting in death. The ILO, in its Forced Labour Convention no. 29, terms such practices as the “menace of penalty”. The penalties include compelling someone to perform work or service, penal sanctions, various forms of direct or indirect coercion, such as physical violence, psychological threats or the non-payment of wages, a loss of rights or privileges such as a promotion, transfer, or access to new employment.⁴ ‘Menace of penalty’ is optimally operationalized if one dies because the denial of benefits affects the family and the loved ones severely.

For instance, the ill-fated, labour- and gender-oppressive Kafala Sponsorship System was introduced by the UAE in 1971 and expanded to other parts of the Persian Gulf to recruit temporary guest workers. It allowed the employer to privately sponsor and recruit a worker from any part of the

world. The employer would, many times, using the recruitment agent, hire a worker by signing the contract in Arabic. Subsequently, the sponsor would have total control over the worker, including their movement, wages and passport. There are reports of abusive working conditions and even deaths. Since the Kafala Sponsorship System comes under the jurisdiction of interior ministries rather than the labour ministry, complaints of any kind against the sponsor who is a native of that country are not taken seriously. Within the Gulf Cooperation Council (GCC),⁵ the sponsor or the employer has to bear the cost of repatriation for its workers. But the social security benefits such as medical and insurance provisions are not uniform in GCC countries. In UAE, the previous mandatory deposit of AED 3,000 has been replaced with an annual deposit of AED 60 per worker for the insurance coverage. This would cover end-service benefits, vacation allowance, overtime allowance, unpaid wages and the worker's return ticket in case of injury. Similarly, the Labour Market Regulatory Authority (LMRA) under the Ministry of Labour and Social Development (MOLSD), Bahrain, established a migrant labour service centre and shelter in 2015 to address their physical and mental health needs. But in most GCC countries there are no clear domestic worker laws, fixed minimum wages and places where the complaints against the sponsor are to be lodged.

The Indian Insurance scheme called Pravasi Bharatiya Bima Yojana (PBBY) was launched in 2003 for those going for work abroad and was made mandatory under the ECR category.⁶ Under this scheme, labour migrants travelling for work abroad have to subscribe to a policy offered by an insurance company registered under the Insurance Regulatory and Development Authority of India (IRDAI). A premium of INR 275 (for two years) and INR 375 (for three years) must be paid. It covers the accidental death and permanent disability up to Rs 10 lakhs; it covers the cost to transport the mortal remains of Indian emigrants, repatriation expenses of Indian emigrants, medical coverage (hospitalization up to Rs 1,00,000) for family members and also maternity expenses for women emigrants and the legal expenses incurred by emigrants. This government-backed scheme was the only emergency stopover for the migrant going under the ECR category and did not cover other costs. The worker, who goes by a legal channel, is briefed about the dos and don'ts at the time of medical emergency neither in the country of origin nor in the destination country. In the event of a foreign labourer's death, the responsibility falls on the employer (sponsor); still, his companion, his new acquaintances and his relatives help the whole process.

The Politics of Recognition

This insignificant position of international migrants, even though they are very significant in economic terms, can be understood from the theory of recognition. International labour migrants, especially if they are undocumented, come into this precarious position since they are not under any contract and they neither have membership or citizenship. Thus, equal dignity and promotion of equalization of rights and entitlements become null and void (McQueen 2015: 25). The fact is that rights are based on one's legal and social status and the velocity of their operation depends on the uniqueness of one's social group and their political standing. It is negotiated based on one's identity, social role, practices and beliefs. Axel Honneth (1995) has proposed "spheres of interaction" such as love (physical needs and emotions), rights (belief in equal rights) and esteem (recognition of traits). These traits depend on their interaction with the social situation and the political institutions they operate. According to Honneth (1995), recognition must be centred on social justice and he argues that a sense of disrespect leads to social injustice. But on the other hand, if there was no self-respect provided in the first place, how would they know that they are being ill-treated and exercise their autonomy? McQueen (2015) argues that recognition brings us a number of questions. First, the

object of recognition is based on one's individual identity, cultural identity, social role, legal rights, equal status, religious and ethical beliefs, social practices and so on. Second, who recognizes/legitimizes the recognition? They are friends, family, community, the government, social institutions, etc. Third, what is the purpose of recognition? Is it to promote one's own interest, to establish a set of legal and cultural rights (Kymlicka 1995; Tully 2004), to foster social equality (Fraser 1997), to secure the value of cultural identities (Taylor 1994) or to promote social solidarity (Honneth 1995)?

Hence, the larger structures and 'spheres of interaction' are an essential part of recognition as it is negotiated based on one's identity, social role, practices, and beliefs. Such recognition helps us to form, to determine, to shape and to think who we are, and how we have to understand and exercise freedom and justice. It negotiates power and the regulation of identity to establish a condition for a particular community and the situation in which they are living. Such negotiations cross through struggles with the baggage of uncertain outcomes and limitations. The instabilities are inherent within the identities as much as we gain positives depending on the social context (McQueen 2015: 4). Hence, it is imperative that the recognition, as part of social justice, be contextualized for labour emigrants as they have experienced difficult living and working conditions, leaving behind family members. For instance, the politics of recognition emphasized strongly by rationalist E. V. Periyar in Tamil Nadu through his active engagement with everyday reality would benefit this analogy. His postulations on the self-respect movement through practical, rational talk, his writings and, most importantly, through his actions, pitched justice for the unspoken and the most deprived communities in Tamil Nadu. He argued that some individuals, by virtue of belonging to a particular race, culture, caste, gender are esteemed/privileged or less privileged than others. As the work is divided based on purity and pollution and is reinforced through the caste to which they belong, the power to coexist operates unequally. Hence, recognition can't be formulated independently of the structures they inhabit. In a similar vein, Weiner (1982) argued: "Migrants are incorporated into the economic structure but are excluded from the social structure. Separation and not integration or assimilation is the goal."

For the international labour migrant workers, the instability in the destination countries is complex due to the political position of the country, labour conditions, commercial activities in the destination place, the economic situation of the destination country, new social and cultural environments, the hostile community situation in the destination place and the condition of the family. History vividly informs us how the imperial governments objectified people as 'commodities' rather than as people with agency. One such example is the practice of slave trade, which later turned into the *Kangani* system in Tamil Nadu.⁷ Migrants with no knowledge of contractual content set themselves up for an exploitative trap. Such situations create instabilities among international labour migrants as the dignity of labour is compromised and human right is not in sight.

Methodology

Considering the feasibility, Tamil Nadu was proposed as a case study by only focusing on death cases reported from the Gulf region in the last three years (2016–2019). The narratives of family members, friends and welfare associations who facilitated in transporting the remains of the migrants are taken into consideration for the study. COVID-19 made it difficult to meet the respondents in person to do an in-depth interview. Hence, a limited field visit was undertaken in the month of December 2020. Some contacts and references given by the organizations working for migrants were utilized. But it was of little help as the respondents refuse to answer over the phone, given the sensitivity of the situation, or such contacts have changed their phone numbers. Interviews were conducted with

the family members of the deceased persons and Panchayat representatives by following the COVID-19 protocols to understand the cause of death, the role played by the State, diaspora network, family and friends with regard to the transportation of the mortal remains. These were reviewed on deaths, working conditions, the volume of the labour migration and other regulations using secondary literature, newspaper articles and reports of multilateral agencies and the government.

Death Count of an International Migrant Worker

The death of a migrant worker, whether in India or other parts of the world, has been contested on multiple counts. The complexities associated with death are an under-researched theme in international migration studies. Similarly, only on certain occasions, if the number of deaths is higher or if the migrants' inhuman treatment is flared up in the media is it seriously discussed in the corridors of power. The number of deaths reported (if they are undocumented), the type of death, cause of death, whether the death is work-related or not, the repatriation process of the mortal remains and associated hurdles, the role of the State and the family situation of the deceased are some of the issues that require detailed analysis. Similarly, the analysis of the cause of death and compensation claim is close to nil. In this section, some of the points raised are discussed. As shown in Table 2, Tamil Nadu is one of the leading states in sending labourers abroad and the State administration has an office named Non-Resident Tamils division in the Public Department; the government of Tamil Nadu, in coordination with Indian missions abroad, look after the Tamils living abroad. Their main role so far is to bring back the Tamils in distress abroad and also to facilitate the transportation of the mortal remains of the Non-resident Tamils. In each district, an officer is designated as the District Welfare officer (Non-Resident Tamils) with an establishment of District Welfare Centre (Non-Resident Tamils). As per the policy note, 2019–20, the Government of Tamil Nadu Revolving Fund was created to support NRT and the department conducted pre-departure training for potential migrants.⁸

According to the data published by the NRTs, nearly 621 death cases of NRTs were reported between 2014 and 2018. In the same period, the TN government also paid death compensation for 388 cases, rescue/repatriation of NRTs (2,341) and general grievances from NRTs (926). The data also indicates that every year (2014 to 2018), nearly 155 NRTs died abroad. The data provided by Government of India is based on a RTI filed in September 2020 as shown in Table 4 indicates only the number of mortal remains of Indian Nationals transported to India from other countries. Cause of death, disaggregated country-wise data, the state and district domicile of the deceased person and their demographic details are not available. The absence of pan-national and state-level disaggregated data on the deceased Indians abroad, number of workers, type of visa they possessed, nature of death and compensation claims are yet to be mapped. More importantly, there is no Standard Operating Procedure (SOP) with the State and Central Governments.

Table 4. Number of Reported Deaths of Indians in Kuwait, Saudi Arabia, Bahrain, Qatar, Oman and UAE since 2014

S. No	Country	2014	2015	2016	2017	2018	2019 (till Oct)	Total
1	Bahrain	175	223	186	237	234	180	1235
2	Kuwait	559	611	576	591	659	584	3580
3	Oman	519	520	547	495	526	402	3009
4	Qatar	279	198	281	282	285	286	1611
5	Saudi Arabia	2427	2694	2766	2664	2551	1920	15,022
6	United Arab Emirates	1429	1540	1657	1637	1759	1451	9,473
Total		5388	5786	6013	5906	6014	4823	33,930

Source: Indian Parliament (Lok Sabha), Unstarred Question No637 answered on November 20, 2019,
<https://mea.gov.in/loksabha.htm?dtl/32058/QUESTION+NO637+DEATH+OF+INDIAN+WORKERS+ABROAD>

Table 5. Table Mortal Remains of Indian Nationals

Year	Data presented by Indian Govt to Parliament on number of Indian Migrant Workers Death in Persian Gulf (as cited in Table 4)	Data obtained from Right to Information, October 2020
2014		—
2015		—
2016		—
2017	33,930	4222
2018		4205
2019		5291
2020	—	3160 (till 15th August 2020)

As mentioned in Table 4, the Ministry of External Affairs, Government of India, informed the Indian Parliament on November 2019 that 33,930 Indian migrant workers have died in the (Persian) Gulf between 2014 and 2019.⁹ Among these deaths, nearly half occurred in Saudi Arabia alone.¹⁰ Indian newspapers calculated this to be 117 deaths per \$1 billion remittance.¹¹ The data provided by Government of India based on a RTI filed in September 2020 shows only the number of mortal remains of Indian Nationals that have been transported to India from abroad. There have been no data on the cause of death and on undocumented migrant deaths given the fact that there are a large number of undocumented migrants in the destination countries.¹² N. McGeehan and D. Keane (2008) have brought out conflicting reports on the number of deaths by different Government departments. For the year 2009, Dubai city's ambulance records reported 40 Indian deaths whereas Dubai Municipality officials claimed 31 deaths. One may wonder which data to accept with no complete statistics with regards to migrant labour with the Department of Health and

Medical Services.¹³ Similarly, Amnesty International's report, "The Dark Side of Migration: Spotlight on Qatar's Construction Sector Ahead of the World Cup" shows that the Indian Embassy reported the deaths of 237 Indian nationals in Qatar in 2012.¹⁴ On the other hand, *The Guardian*, using information through the Right to Information Act, stated that close to 450 Indian nationals had died in Qatar in 2012 and 2013.

The process of bringing the mortal remains varies across countries. In general, the countries in the Persian Gulf region follow certain procedures to bring the mortal remains. Elected Panchayat Presidents, current and former, who have worked in many Gulf regions, said: "Options vary for the families of labour migrants depending on the labour contractor, labour contract agreement and also based on the destination country and cause of death (suicide, prolonged illness, accident and sudden death)". Once the death is reported, the local sponsor is informed who, in turn, communicate the news to the family members or his or her relatives or his cohabitant in the room where he has been living. Mostly, the process of transporting back the mortal remains rest with his relatives, friends or a volunteer who would take the pain of organizing the papers from the family and also mobilize funds. The utmost importance is given to transporting the mortal remains immediately with or without the insurance claim from the employers due to the urgency of the family members. In the event of the remains being transported immediately after death, the loved ones must give an undertaking stating that they won't claim any financial compensation for his death. If the family wants to claim compensation, there would be delay in sending the mortal remains due to administrative formalities and impending enquiry based on the work-permit conditions. If someone dies while on duty, compensation is provided at the mercy of the sponsor. Some sponsors bear the cost of transporting the body, paying for the return ticket of those who accompany the mortal remains and even send support for the final rites. One of the key concerns of the family members has been that the personal belongings of the deceased persons are not transported back.

"My husband's death [which] happened a decade back still haunts my memory," said the wife of a migrant worker who died in Saudi Arabia. Relatives and friends from the village working in Saudi Arabia informed the family, and it took three months for the mortal remains to be transported citing the *Ramadan* season. She echoed the heaviness of her husband's death by stating, "Not even his personal belongings, materials he had used were transported back to the family. The body was not properly packed, it's a disgrace and these things should never happen to anyone who had gone abroad for work. No compensation was paid."

I. Unreported and Underreported Deaths

In the Persian Gulf region, the death of a migrant labourer is disputed due to its undervalued nature. McGeehan, and Keane (2008) reported that deaths and suicides among migrant workers are not recorded properly, both by private companies and the Government in UAE. As per the federal law, the employers are legally required to report work-related incidents to the Ministry of Labour, meet the medical cost and to provide sick leave.¹⁵ But hardly any report is filed and even if it is reported, such reports are not available in the public domain. Further, the employers are required under the law to pay for the treatment cost of work-related injuries¹⁶ and, if a work-related death is reported, the family members of the deceased are entitled for compensation.¹⁷ The officials in the Ministry of Labour admitted non-cooperation from the companies in reporting injury and deaths. More specifically, for the Indian workers, the Economist Intelligence Unit has reported on the link between suicides, work and accommodation in UAE. To quote, "An Indian worker killed himself after his employer refused to give him Dh50 to visit a doctor.... The case highlighted the plight of

many unskilled foreign labourers in Dubai and the UAE, many of whom go unpaid for months and are forced to live in cramped, poor-quality accommodation.”¹⁸

How would one then count the death and most importantly cause of death? Should we count it as a mere suicide or a denial of the entitlement, which resulted in stress and death? Field visits to the deceased families whose dear ones mostly work in a highly stressful, labour-intensive environment with long hours of work and perusal of the death certificates show that almost all the deaths are due to cardiac arrest (Cardiogenic Shock), a safe reason to state in order to absolve of the compensation and epidemiologically to show that industrial-related deaths are minimal. The sub-human working conditions have been highlighted by a number of human rights organizations and newspapers. *The Guardian* reported on the increase in the number of cardiac-related deaths during summer. The opportunity for post-mortem examination is permitted only for criminal cases and death due to illness, only if family members permit and if there is a bilateral agreement between countries. Most of the time, the pain of losing a key family member or the only source of income would devastate the families and the family only wanted the mortal remains to be transported immediately for last rites. The returnees and their family members narrated how stressful the labour-intensive construction work has been. For the returnees, it is their choice to toil for their family. Hence, they choose to work in the most non-hospitable conditions, brushing aside all odds. Any death due to work-related pressures is difficult to prove even though some died while at work and there were many who died by suicide.

II. Cause of Death

The high suicides among the Indian migrant workers are attributed to personal problems and not to work-related conditions. With no up-to-date statistics forthcoming, the Indian consulate reported that the deaths in 2004 portrays the condition of Indian workers in the Gulf region. The Indian ambassador to UAE said that there were 67 suicides in the year 2004¹⁹ and, between August 2005 and August 2006, the number of reported suicides by Indian nationals was one hundred.²⁰ A number of other factors such as schizophrenia, alcoholism, homosexuality and AIDS were also attributed for suicide incidence.²¹ In response to the deaths in Qatar in 2012, *The Guardian* reported on the increase in the number of cardiac-related deaths during summer, which are work-related. On the contrary, the Indian embassy in Qatar stated that “most of the deaths are due to natural causes and are quite normal given the size of the Indian community in Qatar”.²²

Invisibility & Politics of Recognition of Migrant Death

Article 6 of UDHR states that everyone has must be recognized as a person before the law. This was also reiterated through 16.9 of SDG which said “legal identity for all” by 2030” with a caution that the process must not make an individual stateless; rather, it must prevent statelessness (United Nations Executive Committee Decision, January 17, 2018). In fact, to ensure these requirements, the UN has established the UN Legal Identity Expert Group to ensure civil registration for all the member countries and to have legal identities for all. But it remains to be seen how this is going to be played out given the track record of each State and their xenophobic practices in their countries. For example, the international migrant worker in a foreign land becomes anonymous and verge of becoming stateless if they become undocumented or die. The family must negotiate multiple legal documents that have been hitherto unheard of. The mortal remains sometimes take six months or, if the workers are undocumented, never reach their family for the last rites.

Matters relating to the emigrants' experiences, personal loss including death, socio-economic and the psychological status of the family, the situation in the destination and the country of origin are not taken up by the State except for the management of migration from the lens of Indian Emigrants Act, 1983. One would never know the pattern of death due to absence of either a pan-national or state-level disaggregated data on deceased Indians abroad, number of workers, the type of visa the migrant possessed, nature of death, demographic details and compensation claims. More importantly, the family's status is yet to be understood and there is no standard operating procedure both with the state and Central Governments. The State's non-recognition could be due to the invisibility of the subject matter on multiple counts such as non-reporting, less research, sparse and meagre number of workers compared to migrant workers within India.

On the other side, the complexities associated with death are an under-researched theme in international migration studies. The cause of death, the repatriation process of the mortal remains, the role of the State, and the family situation of the deceased worker need to be studied in detail. The term 'invisibility' was used in this paper because the death of an international migrant worker is not studied or researched in depth except for the demographic count (Gaikwad et al: 2018). Hence, the politics of recognition becomes a very pertinent analogy to understand the whole dynamics associated with the emigrant's death in a foreign land, as the families have no agency to raise their voice to avail legal remedies within and outside the country.²³

Notes

¹ UNDESA (2017) estimated that between 2015-2017, the Indian population in Qatar more than tripled, rising by 250 per cent. In Saudi Arabia and Kuwait between 2010-2017 it rose to 110 per cent and 78 per cent respectively.

² UNDESA (2017) estimated that between 2015-2017, the Indian population in Qatar more than tripled, rising by 250 per cent. In Saudi Arabia and Kuwait between 2010-2017 it rose to 110 per cent and 78 per cent respectively.

³ "Globalising People: India's Inward Remittances", *RBI Bulletin* (14 November 2018), accessed on 10 June 2020, https://www.rbi.org.in/scripts/BS_ViewBulletin.aspx?Id=17882 \l "F2.

⁴ "The New Protocol and Recommendation at a Glance", *ILO Standards on Forced Labour*, Geneva: ILO, 2016, https://www.ilo.org/wcmsp5/groups/public/-/-ed_norm/-/declaration/documents/publication/wcms_508317.pdf.

⁵ The GCC, which comprises of the United Arab Emirates, Kingdom of Bahrain, Kingdom of Saudi Arabia, Sultanate of Oman, State of Qatar and State of Kuwait, was formed in the year 1981 to coordinate economic, social, political, defence and security fields among its members.

⁶ Scheme named as Pravasi Bharatiya Bima Yojana, 2017, was notified from Overseas Indian Affairs, Division-I, Ministry of External Affairs, New Delhi on July 10, 2017. Check for a detail order <http://www.egazette.nic.in/WriteReadData/2017/177373.pdf>.

⁷ An overseer of labourers was called as *Kangani* in Tamil (means one who monitors after). He was a person from the same geographical location, usually from a dominant caste group or from the same caste group. As a middleman or an agent he would hire labourers, monitor their movement and ensure that workers are bound by the contract in British colonies. Migrants sign in the contracts with no knowledge on its content, the place and type of work.

⁸ https://cms.tn.gov.in/sites/default/files/documents/public_e_pn_2019_20.pdf, pp. 23-27.

⁹ "India: 34,000 migrant workers have died in the Gulf since 2014; activists criticise lack of protections", *Business & Human Rights Resource Centre* (27 November 2019), <https://www.business-humanrights.org/en/india-34000-migrant-workers-have-died-in-the-gulf-since-2014-activists-criticise-lack-of-protections>.

¹⁰ “RTI Reveal: More than 10 Workers Died Every Day in Gulf Countries in the Last Six Years; 117 Deaths for Every US\$117 Remitted”, *Commonwealth Human Rights Initiative*,
<https://www.humanrightsinitiative.org/blog/rti-reveal-more-than-10-indian-workers-died-every-day-in-gulf-countries-in-the-last-six-years-117-deaths-for-every-us-117-remitted->.

¹¹ Ramananda Sengupta, “Every day, 10 Indian workers die in the Gulf”, *New Indian Express* (5 November 2018), <http://www.newindianexpress.com/world/2018/nov/05/every-day-10-indian-workers-die-in-the-gulf-1894681.html>, accessed on 12 May 2019.

¹² A person who is termed as undocumented are persons who legally crossed the borders. But become undocumented in the destination countries due to following accounts (i) When the person does not possess a legal passport, (ii) When the person travels in another person’s passport (iii) When the person does not have the right VISA (iv) When the person over stays in a country even after the expiry of the VISA.

¹³ *Gulf News* (21 November 2009).

¹⁴ “Amnesty International Report”, 137.

¹⁵ Article 142, Chapter 8, Federal Law No. 8 for 1980 on Regulation of Labour Relations and Article 144, Chapter 8, Federal Law No. 8 for 1980 on Regulation of Labour Relations, UAE.

¹⁶ Article 144, Chapter 8, Federal Law No. 8 for 1980 on Regulation of Labour Relations, UAE

¹⁷ Article 149, Chapter 8, Federal Law No. 8 for 1980 on Regulation of Labour Relation, UAE.

¹⁸ *Economist Intelligence Unit, Country Report: UAE, Main Report* (1 February 2005).

¹⁹ *Gulf News* (22 October 2005).

²⁰ Ambassador Nada S. Mussallam (19 August 2006) as quoted in N. McGeehan and D. Keane, 2008.

²¹ *Gulf News* (22 November 2005).

²² Amnesty International, “India: More transparency needed over migrant deaths in Gulf” (21 February 2014), accessed on 21 December 2020, <https://www.amnesty.org/en/latest/news/2014/02/india-more-transparency-needed-over-migrant-deaths-gulf>.

²³ Charles Taylor, “The Politics of Recognition”,
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Acts of Omission: A Socio-legal Enquiry into the Failure of the Interstate Migrant Workmen Act, 1979

Piya Srinivasan *

After India went into an unplanned nationwide lockdown on March 25 2020 due to the Covid-19 pandemic, adormant legislation¹ was catapulted centre-stage. Activists, policymakers and labour experts invoked the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 (subsequently ISMWA) in relation to the unprecedented exodus of lakhs of migrant workers on foot from their places of work to their hometowns in the first weeks of lockdown that seized the nation's attention. What came to be known 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 letter² in May to the Supreme court for its apparent indifference to the migrant crisis and inability to provide adequate relief to migrants despite both legal and constitutional provisions to secure them, resulting in migrant suffering and death. In what has been called a failure of policy and legislation in safeguarding their rights, the migrant workers' long march home was constituted as an act of civil disobedience and exposed the fault-lines in the legislative framework regarding labour in India.

Taking from the above, this paper reviews the failure of the ISMWA during the migrant crisis by examining the high court and apex court judgments during this period alongside government notifications that illustrate how the crisis was handled by the union government. The redundancy of this law will be read alongside the strategy of “walking” as a political act and how different courts variously addressed this strategy to unearth how migrants have not been perceived by the state as political actors and rights-bearing citizens. Second, by reading the laws that were invoked during the pandemic and juridical decisions taken to address the migrant crisis, I will show how the apex court used the language of benevolence and care and indulged in the “remedies without rights phenomenon”³(Anuj Bhuwania, 2020). This coincided with the depiction of media narratives of the walking migrants as charity-seeking supplicants through a hypervisibility of their suffering, a process that lends itself to an easy desensitization and consequent pathologizing of experience while removing any agency from the migrant worker.

Instead, law and order became the model of government rule to combat the public health crisis through the invocation of the National Disaster Management Act, 2005, and the casualty became the poor and disenfranchised. The coalescence of the migrant worker with the image of the

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virus becomes an outcome of the government's epidemiological approach in addressing the Covid-19 crisis using "the governmental forms of a much deeper reasoning as to how to shape society" (Samaddar 2020, 41). The migrant worker becomes collateral in a governmental paradigm of self-correction through elimination. I will eke out these distinctions in court statements, decisions and omissions to highlight the emergence of the migrant worker as a political and politicized entity. This paper will reflect on the language of care used by the courts, the withdrawal of the law from the migrant worker crisis and the symbolic significance of the migrant workers' long march home and its implications for rights.

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 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.

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 these inter-state migrant workers. This took place after a consultation with the labour ministers of all states, the Labour Ministers Conference⁴ 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, keeping in mind the intention of its framers to understand the Constitutional obligations evoked by the Act. Alongside this, the *Bandhua Mukti Morcha* judgment, the relatively new introduction of Public Interest Litigation (PILs) in the Indian judicial system and its will 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 Act's provisions. To also be consideration is the fact that most migrant workers are informal workers unregistered by contractors and invisible in the eyes of the state.

The applicability of the ISMWA most significantly happened in the Supreme Court ruling in the *Bandhua Mukti Morcha*⁵ 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 energises the entire Constitution namely, the Preamble, the Fundamental Rights and the Directive Principles of State Policy".⁶

The judgment and its deliberations on the PIL upholds the latter as a certain form of legal intervention that was absent in this recent crisis. The judgment states: "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 deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution."⁷ The role of the court in the "realisation of Constitutional objectives" cannot be overstated during a pandemic that disproportionately affects 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”⁸. (72)

Another early instance of adjudication on ISMWA was *Damodar Panda v. State Of Orissa*⁹ 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.”¹⁰ 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 *Bandhua Mukti Morcha* 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.”¹¹ These early judgments 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 to secure the same through the invocation of the ISMWA within the framework of the DPSP and Fundamental Rights framework. These judicial articulations also help to imagine courts as sites for reinforcing the judiciary’s commitment to our constitutional principles at a particular moment in history.

The *Bandhua Mukti Morcha* judgment also evokes the historical relevance of a PIL as a form of litigation in a country where poverty and illiteracy become social handicaps in 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”¹² (80). However, Bhuwania points to the dangers of solely reading the PIL as an alleviator of social suffering and as the ultimate course of judicial relief such as in the case of the migrant workers. While it was envisioned as a tool to spearhead public causes, the rise of the PIL directly owing to the judiciary trying to salvage its damaged image post the Emergency, especially in the wake of a judgment like ADM Jabalpur, its increasing dilution of *locus standiover* the decades and circumventing the judicial process makes it controversial.¹³ “The lack of interest in translating a socio-economic issue of public concern into a legal issue is at the heart of the problem with the legal culture that PIL has engendered”¹⁴, a process that he suggests erases the relationship between rights and remedies, where the latter is upheld without invoking the former, leading to a gradual dilution of the rights narrative within the Indian legal system.

The Absence of the ISMWA in Adjudicating the Present

The imposition of lockdown measures under Section 10(2)(1) of the Disaster Management Act (DMA) 2005 by the central government on 24.03.2020¹⁵ and the directions to implement these measures to contain the spread of Covid-19 in the country was followed by the mass exodus of migrant workers to reach their hometowns. Directions were 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”, 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 “walking” as a form of political resistance and how different high courts have variously addressed this to view how migrants have been perceived by the law. Second, I will explore the lack of enforcement of welfare and protection mechanisms to uphold the rights of migrant workers in the apex court judgments that instead used the language of benevolence and care to illustrate the “remedies without rights” recourse as a malady of the judiciary.

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”, this order would be revoked by the Supreme Court from May 18 after a writ petition filed by many small and medium enterprises and associations¹⁶ where manufacturers’ associations sought a waiver on payment of wages due to losses suffered during lockdown 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 The MHA order to pay full wages to employees also ceased to have effect from May 17. The arbitrary application of the DMA 2005 to direct private establishments to pay bills was also challenged in the one of petitions made by the manufacturers’ associations.

The petitions were argued using the fundamental rights of the employers to trade and business and the inability to pay wages due to the complete lockdown. In contrast, the apex court’s treatment of the PILs filed by lawyers and activists regarding the migrant workers’ crisis lacks the legal force of invocation of the constitutional rights of the migrant workers or the acts in place to protect their rights. I will explore both these points through my reading of the language of court judgments and government circulars during the first phases of the Covid-19 crisis and their role in exemplifying the progressive dilution of rights of migrant workers, with the centrality of the ISMWA in mind.

The PILs¹⁸ filed in the Supreme Court by concerned citizens, including activists, were summarily dismissed. It was a petition filed by a practicing Supreme Court lawyer¹⁹ exhibiting concern over the plight of migrant workers that 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 Mantri Garib Kalyan Yojana and 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 was one of the main concessions made for migrant workers that was repeatedly highlighted by the union government. 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 However, while a significant number of migrant workers are construction workers, especially in the southern states, it is important to remember that many of them are not registered and could not avail of the government scheme.

While this law was invoked by the state to protect the interest of construction workers, there was no mention of the welfare measures taken under the ISMWA. Access to government food distribution schemes like free ration was also impossible because of ration cards being registered in the migrants’ home states, preventing them from availing of benefits in destination states and leaving them helpless and adrift during the lockdown, compelling their visibility on the roads. The

portability of the PDS, which has long been a demand of labour activists and policymakers, remains elusive.²² 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”.²³ The application of the DMA 2005 aided the process of subduing and surveillance and pathologization of the migrant body and exposes the vulnerability of labour in a neoliberal regime. The pandemic has also been used by the state “as an opportunity to strengthen the control of capital over labour” (Sood and Nath, 2020).

What stands out in the *Alakh Alok Srivastava 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 upholding of rights 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 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.”²⁴ 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 philanthropy as opposed to the invoking laws in place to uphold the enforcement of right to life and livelihood.²⁵ The apex court’s response demonstrates how the law was used both as a punitive and a palliative measure to address its ‘unruly’ population whose act of walking can be seen as a form of political mobilization that needed to be quashed using the law while promising succour. Sircar (2012) refers to this idea of the law being simultaneously poison and remedy as embodied in the term *Pharmakon*, where the deferred promise of constitutional or other forms of justice is a strategy of statecraft.

The 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. 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 DGP²⁶ under the DMA 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.*

The invocation of the Disaster Management Act 2005 as a means to manage unruly populations during the pandemic ties together the declaration of the pandemic as a public health crisis and a crisis of the right to life. “The National Disaster Management Act (2005) has also followed the same model of centralisation, massive surveillance, punishment, and dispossession of the poorer classes of resources of life. The Act calls for “compliance” of lower levels (state onwards) to the central - “national”- directives” (Samaddar 2020). The centralization of the management of the epidemic is reflected in the different visions of the high courts that evoked the migrants’ fundamental right to life and the apex court that practised a language of care and benevolence, aided by powerful and dramatic visuals of the misery of the migrant labourers’ walk home, in the heat, perishing for want of food, water, shelter. Senior advocate Kapil Sibal, the guidelines for the minimum standard of relief accorded by Section 12 of the DMA 2005 had not been adhered to. The selective utilization of the NDMA 2005 Act allowed the union government to impose surveillance and policing but did not attend to the humanitarian relief to be granted to the walking migrant workers.

What stands out in contrast is the many suo motu applications by different High Courts²⁷ 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 order²⁸, the Madras High Court’s suo motu 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 the pathetic condition of migrant labourers shown in the media for the past one month.”²⁹ 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 Court³⁰ 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.”³¹ 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.

The Supreme Court finally took suo motu 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 fundamental rights of migrant workers" and in a tepid, non-committal response, states "we have no doubt that those proceedings shall proceed after considering all aspects including the response of concerned authorities"³². It is significant to note that the language used in some instances in the court order imposes a kind of homogeneous subjectivity on the migrant subject, performing a kind of flattening that depicts them as hapless victims, inert and incapable of agency, at odds with the unprecedented upheaval by the migrants, which will be read as a form of political resistance. 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. What Chowdhury and Poyil (2020) define as the state's "carefully calibrated protection regime towards migrant labour which oscillates between coercion and care"³³, an old tactic of statecraft directed at despised and diseased bodies, for instance, in the way the Indian state controlled and continues to control sex workers, establishing a precedent there to show how labour, health, and state anxieties have historically coalesced.³⁴ This 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 act as 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 workers who had reached their hometown in Bareilly, Uttar Pradesh, from Delhi.³⁵ Under the auspices of care and protection, the general tenor of government directives to find and load migrants onto buses and shunt them 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 Mehta said 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"³⁶. 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 the heightened visibility of the migrant worker and the anxiety this generated is reflected in the Supreme Court's suo motu 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.”³⁷The court also acknowledges that migrant movement was “by force of circumstances” (33).

Baxi points out 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 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.

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 becomes illustrative of the asymmetrical relationship between the hyper visibility of suffering and the abrogation of rights. Arthur and Joan Kleinman (1999) talk about the commodification of experience and the appropriation and consumption of social suffering. “Images of trauma are part of our political economy” (Kleinman and Kleinman 1999, 8). They examine how these images circulate as a part of what they call trauma stories and “become the currency, the symbolic capital, with which they enter exchanges for physical resources” (*ibid*) or other, similar ends. The re-imaging of the migrant worker is a process of pathologization where their vital contribution to the economy is submerged under this new trope of helpless victim and charity seeker, erasing any agency or claim-making on their part as citizens and rights-bearing subjects. Adrift, unmoored, homeless, they become symbolically representative of a social scourge, a burden, a pathogen.

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”³⁸ (Baxi 2020). The images of the migrants’ long march, as some mainstream newspapers have shown, evokes the image of an earlier trauma, the Partition of 1947, that created a nation born of migration. Trauma writes the constitutional text and in the process, the other nation. The covid-19 migrant crisis, Baxi suggests, is a vivid reminder of the million displacements that have occurred since Partition. The hallmarks of exodus constitutionalism are the progressive devaluing of citizenship, the enhanced vulnerability of affected populations, the creation of the constitutional “other” and the production of exiled bodies. The Constitution hence embodies within it the contradiction of exile and is illustrative of the notion of the pharmakon, of pain and palliative, poison and remedy, reflecting the pharmacological dimensions of law.

The lockdown epitomized the 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. Their hypervisibility during the pandemic as evidence of neglect, rightlessness and statelessness draws attention to the exilic state they occupy as they stake their claim to life. This throws up the opportunity to question the legal borders created around both migrant identity and migrant welfare.

Conclusion

Why did the Act fail the migrants when its application could have meant saving the lives and livelihoods of thousands of migrant workers in systematic, informed manner? The restructuring of labour laws and the dilution of about 40 labour laws into four codes under the garb of simplification and making them more applicable to the present industrial and economic context shows a growing disregard for the rights of migrant workers and their right to social security benefits. The pandemic laid bare the redundancy of the ISMWA as legal instrument to confer rights and offer protection, highlighting the need for the emergence of the migrant worker as a political subject with transferable rights and entitlements as an Indian citizen. This also brings to the fore the need for lack of voting rights that migrant workers face due to an electoral system that doesn't recognize the migrant worker's right to vote and treats them as disenfranchised subjects. "The system is biased in this way towards settled population groups, and not migrant workers' communities, effectively disenfranchising in the process the migrant and the peripatetic populations" (Samaddar 2020, 32). This paper has hoped to show the interconnectedness of the withdrawal of law and its absence alongside the redundancy of the ISMWA and the reduction to the figure of the migrant worker to its mute biological condition speaks of the operation of a government rationality that finds itself unaccountable to the rights question. The process of the law withdrawing from the life of the migrant worker not only rendered the ISMWA null and void but also showed the apathy of the state towards its marginalized constituents and stands in direct contrast to the changes in labour law over the recent years and during the pandemic in states like Madhya Pradesh and Uttar Pradesh³⁹. Sood and Nath (2020) point to an intentional conflation of the categories of formal/ informal workers to be subsumed under the category of working class, a distinction flattened by the treatment of the pandemic and the absence of a rights-oriented discourse. This allows for "a new logic of differentiation" to be applied to the condition of workers, reshaping the labour-capital dynamic in the country and the restructuring of the economy.

The migrants' visibility became a wound on the fabric of the epidemiological narrative woven by the state in its guise of care. 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, amass protest, a sea of bodies moving against state injunction, in defence of both their lives and their right to life. Walking becomes an 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 stereotype of the migrant body, created in the media leathered and hardy with the ravages of time, becomes the metaphor for the staking of rights and fighting for the 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 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 delivering social justice. With Labour being a subject in the Concurrent List, different states have made amendments to the ISMWA 1979, and some states are more migrant-friendly than others, the nation lacks a cohesive policy framework towards migrant workers that is implementable as a statutory legal provision and that is simplified and less onerous. There should be a focus on the enhancement of the social protection architecture for migrant workers consisting of a transferrable PDS system and transferable voting rights, a right to housing, and the digitization of the migrant databases by the state governments that are migrant-friendly and accessible. The system of registration should be transparent and web portals containing information about registered employers in destination states should be available and accessible to migrants and the general public. Non-compliance of uploading the relevant data should be punishable, penal provisions that has been removed in the OSHWCC 2020. Data should also be gathered in a decentralized manner as the centralization of data may be used to target vulnerable citizens and minorities gives rise to a separate set of problems and marginalizations, which can be the subject of another paper. The public and institutional memory of the failure of the Interstate Migrant Workmen Act should be instrumental in establishing future law and policy frameworks for the protection of migrant workers' rights as well as access to social protection.

Notes

¹ The genesis of the ISMWA was a response to exploitative practices in the working conditions of migrant workers hired for large-scale construction projects in the states of Orissa and Bihar after the 1977 Emergency and the need for labourers in cities to enhance economic development. The Act mandated timely payment of wages by the hiring contractor or middle-man who was required to obtain a licence from the state that would contain employment details, maintain a database of migrant workers with the relevant authority in both origin and destination states, regular inspections of the workplace, a journey and displacement allowance, and suitable living conditions. Failure to comply was accompanied by strict punishment. The failure of the Act, as noted by various scholars and activists, has been the lack of will to implement the Act by the states, lack of databases and registration of migrants and the lack of enforcement by contractors for providing all relevant details to the relevant state authority. The act has now been replaced with the Occupational Safety, Health and Working Conditions Code (OSHWCC), 2020, which conflates many labour laws and does not provide a penalty for non-compliance.

² 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>

³ Anuj Bhuwania. "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>

⁴ The deliberations of the 1976 Labour Ministers Conference and the recommendations of the Compact Committee constituted in 1977 to suggest the enactment of another legislation to regulate the terms of employment of inter-state migrant workers could not be accessed due to institutional archives being closed during the lockdown period. This will be followed up when the archives are accessible again.

⁵ *Bandhua Mukti Morcha v. Union of India* (1984 AIR 802).

⁶ Ibid.

⁷ Ibid, Para 6.

⁸ Ibid., Para 72.

⁹ 1990 AIR 1901.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid., Para 80.

¹³ For a comprehensive history of the PIL, see Anuj Bhawania. *Courting the People: Public Interest Litigation in Post-Emergency India*. Cambridge University Press (2017).

¹⁴ See supra note 3.

¹⁵ 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

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.; Alakh Alok Srivastava v. Union of India; Jagdeep S Chhokar & Anr. v. Union of India; Sagheer Ahmed Khan v. Union of India*

¹⁹ *Alakh Alok Srivastava v. Union of India* (WP(s) (Civil) No(s).468/2020)

²⁰ Status report on Alakh Alok Srivastava v. Union of India (Diary no. 10789 of 2020)

²¹ <https://pib.gov.in/PressReleasePage.aspx?PRID=1633546#:~:text=Under%20the%20Act%2C%20the%20State,remitted%20to%20the%20Welfare%20Fund>.

²² Part II of the new Occupational Safety, Health and Working Conditions Code 2020 only alludes to the transferability of the benefits and access to PDS at the destination state where the worker is employed without any roadmap on its implementation, becoming nothing more than lip-service.

²³ See Footnote 10.

²⁴ *Alakh Alok Srivastava v. Union of India* (WP(s) (Civil) No(s).468/2020).

²⁵ It can be argued that the rights discourse comes embedded with its own structural problems. I refer specifically thinking of rights based on the idea of a basic inequality that through its attempt to foster an equal universality, engenders conditions of dependence whose basis is marked by an unequal exchange. All unequal exchanges are marked by violence which is cloaked by sweeping gestures of “humanitarianism” seeking induction into a liberal order that always already contains within it the specter of the illiberal. The liberal significance of rights is that it gave a language to outsiders and the ‘rights-less’. But within the same understanding “the universal seems now to lack a widely accepted language in which the return of the particular or of the local could be demanded”. See Peter Fitzpatrick. ‘Globalisation and the Humanity of Rights’, *Law, Social Justice and Global Development*, 2000. The embeddedness of human rights in a certain neoliberal idea of rights is accompanied by a structural violence that the inclusiveness of human rights perpetrates through the production and categorization of exclusion.

²⁶ No. 5264-5304/L&0-3, March 29, 2020.

²⁷ *K. Ramakrishna v. UOI and ors* (WP (PIL) No: 101 of 2020); *Suo Motu v. State of Gujarat*(PIL) NO. 42 of 2020; *Ritesh Srivastava 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).

²⁸ *A.P.Suryaprakasam vs Superintendent Of Police* (H.C.P.No.738 of 2020)

²⁹ Ibid.

³⁰ WP (PIL) NO: 101 OF 2020

³¹ Ibid.

³² *Re Problems and Miseries of Migrant Labourers vs Union Of India*, WP (CIVIL) NO.6 OF 2020

³³ Nasreen Chowdhury and Shamna ThachamPoyil. “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>

³⁴ See Ashwini Tambe. *Codes of Misconduct: Regulating Prostitution in Late Colonial Bombay*. University of Minnesota Press: Minneapolis, London (2009).

³⁵Sanjay 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>

³⁶Re Problems and Miseries of Migrant Labourers vs Union Of India, WP (CIVIL) NO.6 OF 2020

³⁷ Ibid.

³⁸Upendra Baxi. "Exodus Constitutionalism: Mass Migration in Covid Lockdown Times." *The India Forum*, June 29, 2020. <https://www.theindiaforum.in/article/exodus-constitutionalism>

³⁹<https://www.bloombergquint.com/coronavirus-outbreak/labour-reforms-in-the-age-of-covid-19-whats-the-right-balance>

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