

# ANALYSING THE MIGRANT LABOURERS' CRISIS IN THE CONTEXT OF COVID-19: FROM CONSTITUTIONAL AND LABOUR LAWS' PERSPECTIVE

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## ABSTRACT

The unprecedented virus has caused the Indian government to lockdown for the 5<sup>th</sup> time till June 30<sup>th</sup>, 2020. Migrants in large numbers often work under informal or casual arrangements, which leave them exposed to exploitation as they are vulnerable to poverty, and often without food security and access to healthcare, social protection and government-initiated measures.<sup>i</sup> The Occupational Safety, Health and Working Conditions Code, 2019 was passed in Lok Sabha on July 23, 2019, but is still pending to be passed in Rajya Sabha<sup>ii</sup>. This Code has the authority to repeal 13 out of 44 labour laws related to safety, health and working conditions. The Inter-state Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 is also be included under the 2019 new code, which has similar provisions to that of the 1979 Act. The right to constitutional remedies and other fundamental rights are highlighted with respect to this ongoing issue. The author of this paper intends to analyse the provisions of the Constitution of India in the context of migrant welfare, and implementation of labour legislations across the highly populated sub-continent. It is pertinent to note that policy recommendations will be suggested as part of the author's conclusion to protect and ensure a reasonable quality of life towards these labourers in India as a socialist State.

**Keywords:** Indian Constitution, migrant welfare, amendments, labour reforms, COVID-19, constitutional provisions, Article 19, Occupational Safety, Health and Working Conditions Code, 2019, Orissa, Kerala, The Inter-state Migrant Workmen (Regulation of Employment And Conditions of Service) Act, 1979.

## INTRODUCTION

### *Impact of COVID-19 on Informal Sector in India:*

India has a vast informal sector, the largest in the world, employing close to 90% of its working population and contributing more than 45% to its overall GDP.<sup>iii</sup> This sector was hit by two consecutive shocks in a short span of time, from 2016 to 2019. Before COVID-19 came to India in 2020, demonetisation back in November 2016 affected the poor majorly, when 86% of the money in the economy became unusable overnight owing to a government decree, followed by the ineffective introduction of the Goods and Services Tax (GST) in 2017.<sup>iv</sup> Even though demonetisation was a monetary blunder, it did not permanently dislodge demand and supply mechanisms, but existed a temporary lack of payment methods.<sup>v</sup> Using the demonetisation situation as a precedent for COVID-19, we observed that people found work-arounds in the forms of electronic payments, informal credit, converting black money into white, using old notes etc. But unlike the previous situation, with Coronavirus, no supply or demand is created and thus, no value or revenue is generated. This harsher situation becomes much more problematic. With the Covid-19 outbreak, the already struggling informal sector will be disproportionately affected.<sup>vi</sup>

India's major job sector still lies in informal labour in total employment. The distribution or share, which includes those engaged in agricultural work, has declined at a marginal rate, from 94% in 2004-05 to 91% in 2017-18. Out of a total of 465 million workers, 422 million were informal workers in 2017-18.<sup>vii</sup> Out of the total workers, the shares of self-employed, casual and regular workers respectively were 51.3%, 23.3%, and 23.4%. The majority of the self-employed and casual employees work in an informal capacity, and consist of often unorganised labour. Daily wage labourers and other informal workers are predictably the ones who are facing the worst hit during the lockdown period and will continue to be adversely affected even when the lockdown is relaxed. With almost no economic activity particularly in urban areas, the lockdown has led to large scale losses of jobs and incomes for these workers. The population of 40 to 50 million seasonal migrant workers in India help in the construction of urban buildings, roads, factory production and participate in several service activities.

Even after the lockdown is relaxed<sup>viii</sup> (Unlock 1.0), it will take some time for the economy to pick up in the post-Covid-19 period and this will further aggravate the future uncertainty for informal workers generally, but specifically, migrant workers in particular. The formal sector is more flexible because firms do not close down and employees will mostly still have their jobs and receive their salaries, as they can work online, but this luxury is not available to those who do physical labour.

### ***Impact of COVID-19 on Migrant Workers:***

Migrants suffer an additional burden because not only they are poor, they have to migrate from place to place for work, which results in the deterioration of their health. The Working Group on Migration (2017) set up by the Ministry of Urban Housing and Poverty alleviation has examined the plight of the migrant workers in the country and submitted its report to Central Government in 2017.

Problems faced by these migrant workers<sup>ix</sup> were about lack of access to basic needs, eg. food, shelter, cutting of wages by employer now that work has been halted, fear of getting infected and anxiety about the security of their job. As a result, thousands of them started fleeing from various cities to their home towns. Many migrants died due to a number of reasons- gruelling tiredness from walking thousands of kilometres to their native place, hunger, accidents or suicide. A telephonic survey<sup>x</sup> of more than 3000 migrants from North Central India shows that majority of the workers were the daily wage earners and at the time of lockdown, 42% had been cut off from ration, 33% were stuck at their destination with no access to food, water and money, and 94% were without a worker's ID.

Those who reached their native villages, were seen as potential carriers of the infection just because of their poverty level and were subjected to societal condemnation and police brutality. Recently, it was reported that a group of migrants who were on their journey to go back home were sprayed with chemicals to disinfect them for which the local administration apologized.<sup>xi</sup> Migrant workers are one of the biggest streams of mass return migration in the country, but they are still being taken advantage of. The very effort to stave off the pandemic turned into one of greatest human tragedy in India's recent history, and still hasn't been resolved.

## ISSUES RAISED

There is a huge uncertainty about how long this crisis will last and what damage it would do to the economy, livelihood of people and availability of basic healthcare services. Due to the virus' size and ability to spread, the management of migrants under lockdown represents a massive logistic challenge, from a public policy and legal point of view. The author seeks to examine the constitutionality and legality of the issues.

- Whether Article 19 of the Indian Constitution is applicable to migrants in the COVID-19 lockdown? Whether physical and social distancing will be considered as reasonable restriction to Article 19?
- Whether COVID-19 lockdown be considered as an emergency declared by the President? Can Fundamental Rights be taken away at this time?
- Whether the Directive Principles of State Policy can be taken as a guideline to lift up the position of the vulnerable migrants?
- What are the labour welfare legislations can they seek relief from? Whether implementing these Acts will be time-consuming or ineffective?
- Whether the Supreme Court planning to resolve this crisis by providing informed and systematic/detailed directives?

## RECOURSE AVAILABLE WITHIN THE AMBIT OF THE INDIAN CONSTITUTION

### *Definition of “Migrant” in the Constitutional Context*

It is apposite to note that the usage of the term “migrant workers” has been trending in the international sphere with “The International Convention<sup>xii</sup> on the Protection of the Rights of All Migrant Workers and Members of Their Families” since 1990. The Convention accurately differentiates between the origin State and the employment State in the political sphere depending upon the migration in different countries, the nature of work and the generation of employment for the workers.<sup>xiii</sup>

The Convention defines migrant workers as a person who has involvement- in past, present or future tense in activities with the provision of reimbursement where they don't possess the nationality of the State/place of work. It is unfortunate to highlight the fact that the Convention guarantees equality of treatment in the employment State whereas the same is apparently refused to migrant workers working within India. The Central Government enacted "the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979"<sup>xiv</sup> aimed at preventing the exploitative tendency of the contractors to outsource the work-hire people from out-of-state to work in another state. Migrants are an asset from a political, legal and economic perspective.

### ***Fundamental Rights and Fundamental Duties:***

There is a significance placed on the definition of 'migrant' in the exercise of the right to freedom. The combined reading of the rights to freedom under Articles 19(1)(d)(e) and (g) are not only the affirmation of the charter of liberties but also the catalyst to build a new nation ideally comprising of unity and no divide amongst the citizens. It appears that the word "migrant" adds another ground of the restriction, other than Clauses (5) and (6), where the decision to stay or to leave the migrated State is not voluntarily taken by the citizens, to the exercise of the right assured to every citizen in a situation.

The Directive Principles of State Policy intend to create principles and conditions of an economic and social nature under which the citizens can lead a good life and follow their duties.<sup>xv</sup> The "minimum wage law" coupled with the provision on "living wage" under the directives was validated by the Indian Supreme Court, and it also justified the limitations on the right to carry on trade under Article 19(1)(g) in the case of *Chandra Bhavan Boarding and Lodging, Bangalore v. State of Mysore*<sup>xvi</sup>.

Directive Principles include a set of provisions on welfare of the workers. "Workers" are used in three directives. Article 39(e) states that the State has a binding authority to make a non-abusive policy on health and strength of workers, regardless of sex. Article 43 guarantees living wages to all the industrial or agriculture workers through legislative measures. Article 43-A, the directive added in 1976, suggested the participation of workers in any industry's



management and equal treatment between the workers of the migrated States and the migrant State.

Article 41 laid down directives for the right to social security and opens up a new charter of life to the exploited and underprivileged with the commitment to attain not only socio-economic democracy but also economic democracy. The scheme of Part IV does not suggest the entitlement based upon the profession/field chosen by the worker.

## **LABOUR LAWS**

### ***Existing Legislations***

#### **1. The Unorganised Workers' Social Security Act, 2008**

The Unorganised Workers' Social Security Act, 2008 was enacted on 30<sup>th</sup> December, 2008 with an aim to ensure social security and welfare of unorganised workers and to implement the national Security Social Scheme. Section 3 of the Act mandates the Central Government to formulate schemes for the unorganised workers on matters relating to old age protection, maternity benefits, life and disability cover, health and any other benefit as fixed by the discretion of the Centre.<sup>xvii</sup>

The 2008 Act makes the registration of the unorganised workers compulsory in order to enjoy the benefits of these schemes by the Central Government. According to Section 10 of the Act, the District Administration issues an identity card by which the worker will be assigned a unique identification number (UIN).<sup>xviii</sup> after an unorganised worker submits an application.

The welfare schemes for the unorganised sector is enumerated in Schedule I of the Act. One such scheme is Rashtriya Swasthya Bima Yojana<sup>xix</sup> that aims to provide appropriate health insurance coverage to unorganised workers. The Scheme provides insurance that is cashless to people coming under Below Poverty Line via a smart card through which they are entitled to get hospitalised in private as well as public hospitals.

## **2. The Contract Labour (Regulation and Abolition) Act, 1970**

The objective of this Act was two-fold: 1. prevent exploitation of contract labour and also to 2. introduce better conditions of work.<sup>xx</sup> Contract workmen are indirect employees deemed to be employed as contract labour, when he is hired in connection with the work of an establishment by or through a Contractor. The Act applies to establishments wherein 20 or more workmen are employed or were employed even for one day during preceding 12 months as contract labour by the principal employer of an establishment or the contractor, and does not apply to the establishments where work performed is of intermittent or seasonal nature.

The rule laid down in *Steel Authority of India Ltd. vs. National Union of Waterfront Workers & Ors.*<sup>xxi</sup> was that the contract workers would have no right to automatic absorption upon abolition. The Bench further added that when issue is notified by the concerned government under Section 10(1) which prohibits employment of contract labour in a given establishment, the contractor needs to offer work to his labourers in establishments where the contract labour system is permitted.

Section 9 of the Act provides that if the principal employer fails to get registered under the Act, then he/she cannot employ contract labour. If there is any derogation from this penal provision, the punishment is imprisonment for a maximum term upto 3 months and a fine upto a maximum of Rs.1000/-. This act was created at a time when workers began migrating from less developed states eg. UP, Bihar to industrial states eg. Gujarat, West Bengal, Orissa<sup>xxii</sup> and other cities, post-independence. This Act failed because it couldn't prevent malpractices and was replaced by the 1979 Act.

## **3. The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979**

According to the Central Information Commissioner, this Act is intended to monitor the employment of inter-state migrant workmen and to provide for their conditions of service One common misconception is that inter-state migrant workmen are an addition to other workmen, but instead they are to be included in the definition of workmen. It is applicable to all institutions and contractors who hire 5 or more of passbook to every inter-state migrant

workman with relevant information. The provisions of the Act are meant to provide for their service conditions and for matters connected to it.

According to this law, terms and conditions of the recruitment should be provided to the migrant workers by the contractors who are deploying the migrant workers, eg. the remuneration to be paid, working hours, determination/calculation of wages and other essential amenities. The rates at which wages are fixed, number of holidays, working hours and other conditions of recruitment of a migrant worker must be same as those extended to other local workmen in the same field, as long as the nature of their work is similar.

The wages of the migrant workers should be equal to or higher than the wages mentioned in the Minimum Wages Act. If all the States had implemented the ISMW Act 1979 (arguably considered as a “dead letter”<sup>xxiii</sup> nowadays) faithfully, they would have had full data on immigrant workers in regard to their home State and other particulars.

#### **4. Limited Legislations**

The Industrial Disputes Act functions as a blanket legislation<sup>xxiv</sup> which facilitates definitions which overlap in other Acts and serves as an adjudicatory guide for settling disputes/ grievances between employers and employees. The scope of the act is limited for 2 reasons: 1. only applicable to organised sector and 2. restricted interpretation of “industry” [Section 2(j)]. The Supreme Court has tried to expand the definition to give relief to a wider section of workers however the position has remained unchanged since the case of *Bangalore Water Supply and Sewerage Board v. A Rajappa*.<sup>xxv</sup>

Between the cases of *Chief Conservator of Forest v. Jagannath Maruti Kondhare*<sup>xxvi</sup> and *State of Gujarat v. Pratamsingh Narshinh Parma*<sup>xxvii</sup>, there have been conflicting opinions by the courts on this issue. Section 21 of the IDA states that an inter-state migrant workman is said to be employed when he has actually worked with the establishment or the establishment in connection with the work of which he is employed on and from the date of his recruitment.

Migrant workers can seek relief from the provisions of the Employees’ State Insurance Act, 1948. To the contrary, in *Calcutta Electric Supply Corporation Ltd. v. Subhash Chandra*



*Bose*<sup>xxviii</sup>, a Supreme Court case, has left the ambit of “employee” uncertain against contract labour. Even if we apply this Act, it comes with its own set of conditions including, but not limited to, contribution from the employee side monthly wage cap (an employee earning more than Rs. 3000 will not be covered under the Act), like the Employees’ Provident Funds and (Miscellaneous Provisions) Act, 1952.

### **5. Occupational Safety, Health and Working Conditions Code, 2019**

This 2019 code, introduced in the Lok Sabha, has the objective of dissolving 13 labour codes in the country in order to strengthen protection for labourers. The code states that all labourers contracted by him/her are directly employed by the principal employer, if a contractor is yet to obtain a licence. The code also emphasises the significance of the displacement allowance equal to 50% of the wage to facilitate any emergency that arises. In February 2020, the bill was subject to review by a committee, where they agreed to provide a chapter solely on the protection of migrant labourers and unanimously agreed to implement the provisions of the bill.

#### ***Amendment of Labour Laws/Labour Reforms in Various States***

The International Labour Organization (ILO) has declared that to manage labour migration, 1. all countries have the sovereign right to develop their own policies and 2. opportunities and risks may differ across different nations and across migration borders, so it is necessary to develop tailored and effective policy responses.<sup>xxix</sup> Using these international guidelines, India has applied this to its domestic territory.

There were notable contributions to change in law made in different Indian States. The Uttar Pradesh Temporarily Exempted Certain Labour Laws Ordinance, 2020<sup>xxx</sup> suspended the activity of all work laws in the state for the following three years, except for the Bonded Labour System (Abolition) Act 1976, Section 5 of the Payment<sup>xxxi</sup> of Wages Act 1936 (which identifies with the convenient instalment of wages) and the Employees Compensation Act 1923. Provisions of the Factories Act and the Building and Other Construction Workers Act 1996, ascertaining the wellbeing and security of laborers have been reserved.

Kerala has a long history of several thousands of its citizens working abroad. Kerala has introduced pioneering schemes such as Kerala Migrant Workers Welfare Scheme, 2010 that offers financial support for treatment of illness of migrants, education grants for their children and benefits of retirement policy given to those who have worked under the scheme for a period of 5 years. Kerala set into motion another health insurance scheme called “Awaaz” which was set up in 2017 with 2 objectives: 1. to provide health insurance coverage to migrants and 2. prepare an extensive and thorough database of migrant labourers’ state-wise.

**Orissa** took timely and proactive steps to address the issues of its own migrant workers who were stranded in other states.<sup>xxxii</sup> The State Government created helplines and appointed nodal officers for key migrant destination states, and is currently attempting to help around 50,000 migrant labourers stranded in the state’s approximately 1,800 relief camps. Chief Minister Naveen Patnaik took efforts of writing letters to his contemporaries to offer a helping hand to Odisha’s citizens stranded in the respective states and also offered compensation towards donations for the stranded migrant workers.

The Madhya Pradesh government has declared that “the legitimacy of license will be for the period as applied for” under the 1973 Contract Labour Act. At this moment, contractual workers, who assist organizations with getting contract laborers, need to acquire numerous licenses for various firms inside a state. The Madhya Pradesh government has hindered the relevance of a maximum part of provisions of the Industrial Disputes Act, 1947 for new assembling units that will come up in the following 1,000 days.

Such companies will never again be required to look for consent of the administration to lay-off laborers, yet will at present be required to do as such for conservation and giving conservation pay to laborers, failure which will draw in punishment. In *PUDR vs. Union of India*<sup>xxxiii</sup>, the Supreme Court held that laws securing provisional work and between state vagrant laborers were expected to guarantee essential human nobility<sup>xxxiv</sup>; damaging these laws would disregard the privilege to life under Article 21. Further, the Court held that “constrained work”, precluded by Article 23, included physical power as well as the danger of detainment or fine.

The basic identification of the tenets of being a “labourer” is still undefined in India, with over 250 state and central overlapping legislations that can be called labour laws, and hopefully the

2019 Code repeals the rest.<sup>xxxv</sup> The 7<sup>th</sup> Schedule Union List along with Article 217 states that the Central Government alone is empowered to deal with Item 81 in general, where inter-state migrant workers are to be protected in virtue of their responsibility. The list of states' powers and responsibilities do not expressly mention inter-state migrants, but that does not excuse them from total responsibility, as they receive labour and exporters as well.<sup>xxxvi</sup>

## CONCLUSION AND POLICY RECOMMENDATIONS

The declaration made by the ILO on the Fundamental Principles and Rights at Work was welcomed by India in 1998. As of 5<sup>th</sup> June, 2020, Supreme Court of India has taken up suo-moto<sup>xxxvii</sup> cognizance hearing to assuage the situation of the migrants, and interim<sup>xxxviii</sup> decisions are to be issued on 12<sup>th</sup> June, 2020.<sup>xxxix</sup> In this paper, the author intended to highlight the situation of migrants from not only a constitutional and labour law perspective, but also socially and economically.

The employees that work in the formal tier, which comprise of less than 10% of the workforce, enjoy considerable protections, while those in the informal tier get almost no protections. 50% of migrant workers had either no rations left or only sufficient for less than a day, according to a survey.<sup>xl</sup> The Supreme Court is set to pass an order for the migrant worker crisis on 9<sup>th</sup> June, 2020.<sup>xli</sup> Those companies that have maintained labour camps must be advised to continue with all facilities (food<sup>xlii</sup>, water, sanitation, hygiene, etc.) during lockdown.

The ISMW Act should discourage a mandate for formalisation<sup>xliii</sup> as it adversely affects migrants, who work in the unorganised sector. The Delhi High Court on June 3<sup>rd</sup>, 2020<sup>xliv</sup> addressed a petition pertaining to seeking implementation of the ISMW Act. The Court opined that the first and the foremost significant measure would be the collection of the actual information or data and the integration and incorporation between the Central and the State Governments to ensure unambiguity and uniformity, in order to have a proper streamlined regulation of migrant workmen and their conditions of service.

On 5<sup>th</sup> June, 2020, Ministry of Labour & Employment extended validity of licenses granted under Contract Labour Act, 1970 and ISMW Act, 1979.<sup>xlv</sup> The author also condemns the Solicitor General Tushar Mehta's elitist and insensitive views<sup>xlvi</sup>, who disapproves of

citizens filing PILs<sup>xlvii</sup> to ensure various court's accountability towards the plight of migrants. Hopefully, this pressing issue finds a solution before COVID-19 is over. Even post-COVID, migrants should not be ignored, and more structured amendments must be made to prevent crisis in the time of such disasters- whether natural or not, like done in Kerala. The author's suggestion is to use the pandemic as a lesson for states across the sub-continent to follow Kerala and Orissa's behaviour as model states in ensuring safety to migrants.

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