

# FAILING TO PERFORM AS A CONSTITUTIONAL COURT

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As India, along with the rest of the world, grapples with the public health crisis caused by COVID-19, it faces many unique challenges. The most acute problem is faced by migrant labourers: they have no work, no source of income, no access to basic necessities, no quality testing facilities, no protective gear, and no means to reach home. Every day, we hear of migrant labourers walking hundreds of miles, many dying in the process. The saddest is the apathy shown by the institutions meant to look out for their interests. I refer here to the Supreme Court, which has failed to satisfactorily acknowledge that the fundamental rights of migrant labourers have been violated, and ignored these workers when they most needed protection.

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Undeniably, the state must ensure that adverse consequences of this pandemic are minimised. But any duty performed by the arms of the state, even during emergency, must always be bounded by constitutional propriety, and respect fundamental rights. The judiciary becomes the all-important watchdog in this situation.

In this lockdown, enough and more evidence points to fundamental rights of citizens having been grossly violated, and especially those of vulnerable populations like migrant labourers. But instead of taking on petitions questioning the situation, the Supreme Court has remained ensconced in its ivory tower, refusing to admit these petitions or adjourning them. By effectively not granting any relief, the Court is denying citizens of the most fundamental right of access to justice, ensured under the Constitution. In doing so, it has let down millions of migrant workers, and failed to adequately perform as a constitutional court.

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In one of the strictest lockdowns in modern India, the Centre issued many directives, but designated the States as the implementing authorities. But the issue of migrant labourers is inherently an inter-State issue, and States have had to tackle it both internally as well as inter-se. Who will guarantee safe transport for the return of migrant workers? When in quarantine, who will grant them a sustenance allowance, or look after their health issues, or look after needs besides food? Who will ensure job loss compensation? Who will conduct regular and frequent testing? Only the Supreme Court can enforce accountability of the Centre in these matters.

In rejecting or adjourning these petitions, the Court has made several questionable remarks: the condition of migrant labourers is a matter of policy and thus, does not behave judicial interference; or, governments already provide labourers with two square meals a day, so what more can they possibly need (surely, 'not wages'); or, incidents like the horrific accident where migrant labourers sleeping on railway tracks were killed cannot be avoided because 'how can such things be stopped'. Equally, lawyers have been castigated for approaching the Court 'merely' on the basis of reports. But the Court has rarely insisted on such formality: its epistolary jurisdiction (where petitions were entertained via mere letters) is the stuff of legend, so its reaction here, during an emergency, seems anomalous.

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Many of the so-called excuses of the Court have been tackled by previous judgments, notably the question of policy and non-judicial interference. There are numerous judgments where it has laid out matters of policy: for instance, the Vishaka guidelines on sexual harassment in the workplace; the right to food; and various environmental protection policies. In these cases, the Court formulated policies and asked the States to implement them. Today, there is an unfortunate presumption discernible in the Court's response that the government is the best judge of the situation. In believing thus, the Court seems to have forgotten that the Constitution does not fall silent in times of crises. Similarly, nothing prevents the Court from monitoring the situation itself directly, especially regarding the state's obligations: it could easily direct bureaucrats to collect empirical data on the ground, as it has done before.

One is struck immediately by the lack of compassion or judicial sensitivity in handling this situation, and it prompts two observations. First, the Court is not merely rejecting or adjourning these petitions; it is actively dissuading petitioners from approaching the courts for redress because the Court determines that it is the executive's responsibility. Ordinarily, the Court would have at least nudged petitioners towards the High Courts, but here, even that choice is not available — the Court is practically slamming the door shut.

Second, there is the matter of how the Court is treating such public interest litigations. PILs are a specific instrument designed to ensure the protection of the rights of the poor, downtrodden and vulnerable, and "any member of the public" can seek appropriate directions on their behalf. This lies at the heart of the PIL. The concept of a PIL is to be non-adversarial, but the Court is treating these as adversarial matters against the government. PILs, in fact, ought to be a collaborative effort between the court and all the parties, where everyone comes together in seeking a resolution to the problem. Today, we find ourselves with a Supreme Court that has time for a billion-dollar cricket administration, or the grievances of a high-profile journalist, while studiously ignoring the real plight of millions of migrants, who do not have either the money or the profile to compete for precious judicial time with other litigants.

At this stage, I must acknowledge the stellar role being played by some High Courts, even though governments have tried to discourage them on grounds that since the Supreme Court is not interfering, High Courts need not do so either. At least four High Courts (Karnataka, Madras, Andhra Pradesh and Gujarat) have started asking questions about migrant rights. This is almost a replay of what happened during Emergency, where High Courts boldly stood up and recognised violations, but were overruled eventually by the Supreme Court. The Madras High Court, for example, has quashed criminal defamation cases against media houses, stating that democracy cannot be throttled this way. Contrast this with the Supreme Court's reaction to the bizarre claim of the Solicitor-General who argued that the exodus of workers was due to fake news: the Court seemed to have accepted this, and media houses were advised to report more responsibly.

In such times, High Courts come across as islands of rationality, courage and compassion. However, in truth, the subject matter of migration is inherently an inter-State issue, not an intra-State one. This is a time when the apex court must intervene and monitor the calamitous situation, instead of taking the government's word as gospel. Justice Brandeis' words quoted by Justice H.R. Khanna in *ADM Jabalpur* ring especially true in these times: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent ... [the] greatest danger to liberty lies in insidious encroachment by men of zeal, well-meaning but lacking in due deference for the rule of law."

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