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Exodus Constitutionalism

Mass Migration in Covid Lockdown Times

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Multiple disasters and mass catastrophes have been on display in the migrant crises following the Covid-19 lockdown. In its light, India's constitutionalism might be called 'Exodus Constitutionalism', a development that threatens to devalue citizenship.

Exodus, marking the liberation of the people of Israel from slavery in Egypt under the leadership of Moses, is the foundation of the Hebrew Bible. But as a meaning of dispossession or forcible mass movement of people it constitutes a universal historical experience.

1.

It is estimated that in 2019 international migrants comprised 272 million. Well over 41 million were internally displaced persons, and the United Nations High Commissioner for Refugees now uses the concept of nexus dynamics to refer to "situations where conflict and/or violence and disaster and/or adverse effects of climate change exist in a country of origin". Recently, the UN Civil and Political Rights Committee ruled that "potential human rights violations caused by climate change should be taken into account by nations considering the deportation of asylum seekers". It is estimated by the World Bank that 143 million people from South Asia, Latin America, and Sub-Sharan Africa will constitute climate-driven migrants by 2050.

A quick recitation of well-known global statistics is no substitute for a sensitive real-life understanding of the challenge that migrants face in cheating their way into existence and survival. As Hannah Arendt reminded us all on the eve of the Universal Declaration of Human Rights, the abstract figure of the human person obscures from view, almost to a vanishing point, the lived reality of the stateless and asylum-seeking refugees constituting the real horror of abject rightlessness. She stressed the basic human right to natality, a right to belong to a political community, and expected it to follow the entailments of the "right to have rights" (see Birmingham 2006, Parekh 2004, Michelman 1996).

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We are treated to abundant and elaborate televisual news and views, constitutionally enriched judicial *suo motu* phrases, elaborate rhapsodies of party political performances, social media comments, activist lawyer and citizen petitions to the courts, a forest of administrative policy and programmes, and the din of dissent, plus more. All this may not carry the authentic migrant voice. To borrow the words of Ian Anderson, the songwriter of the 1970s rock group Jethro Tull, all this is "but a whisper" which can "make us feel", while our "deafness a shout" that cannot "make us think".

And the poet says: "In the tidal destruction the moral melee/The elastic retreat rings the close of play", and "sandcastle virtues are all swept away". The migrant workers walk endless miles and miles while all "wise men don't know how it feels /To be thick as a brick" Nor ever will they know fully what it means to die on a suitcase in a railway station and have a toddler uncover the dead body of a migrant mother; or be mowed away on the tracks by a speeding train while succumbing to a fatigue-induced slumber; or be gang raped while on the move or in a state shelter.

Jethro Tull and his companions lived in an era in which no social media images went viral, but they developed a lyric and song where some unwise folks at least sensed what it was "to be as thick as a brick". The phenomenon of the Covid-19 migrant on the move was all about the senseless social suffering that thingified human beings and converted their suffering into commodities in markets of governance, justice, development, and human rights.

2.

Of necessity, this conversation mainly engages a peculiarly poignant set of contexts, conditions, and circumstances of what I call 'exodus constitutionalism'. But in order to get there a few preliminary points need to be made.

First and most crucial, no one in the world could claim recipe-knowledges that may address a sinister global pandemic. The state and society have a common agenda to fight a global pandemic. No state action can hope to succeed without intelligent cooperation of citizens and no constitutionally sincere citizen may justifiably think that the state managers and institutions are dispensable.

Indeed, the state must exercise great vigil over the situation and seek to provide conditions adequate to the security of a right to life and living with dignity and security. What is also needed besides rights-based consideration is 'resilient' politics based on empathy.

Epistemic humility is then a first virtue of the tasks and labours of governance, development, rights and justice. What matters is not the willingness to strike accompanied by the fear of being wounded, but the willingness and ability on all sides to learn from manifest and latent mistakes in law, policy, and governance accompanied by rapid course-correction.

> Epistemic humility requires us all to learn from and listen to each other, and not take recourse to antagonistic politics that divides people into the friend and the enemy.

Second, not just the social activists but the bureaucracy, security, and political elites need always to accept the accumulated constitutional wisdom of the judiciary. A subservient judiciary and a sycophantic legal profession (and media) are no friends of a democratic order. If the Supreme Court is to remain a "last resort of the bewildered and the oppressed" (in the immortal words of Justice P K Goswami), adjudicatory co-governance of the nation (the wisdom of the people speaking through courts, or demosprudence) is as essential as is legisprudence (the wisdom of the legislators) and jurisprudence (the wisdom of the jurists). Pooling these wisdoms is the need of the hour in combating Covid-19.

Third, this pandemic renders political oneupmanship or hyperpartisanship entirely superfluous and downright dangerous. Epistemic humility requires us all to learn from and listen to each other, and not take recourse to antagonistic politics that divides people into the friend and the enemy. If nothing else, Covid-19 should teach us to care for each other and co-learn from fellow-citizens, rather than use the arsenal of law to silence or punish free and responsible acts of speech and expression, howsoever inconvenient or irritating these may prove to those who hold power. To accuse each other of defamation, hurting religious or cultural sensitivities, sedition or even treason is an undemocratic vice not to be celebrated.

3.

All policy formulations must rely on the postulate that constitutional and core human rights are not an adversary but an ally in the fight against Covid-19 and related evils. An infected body is not just a source of contagion but also a human citizen, a being with basic rights. A recent report in the *Lancet* (Gostin, Monahan, Kaldor et al 2019) stresses that the capacity of the law to act as "a social determinant" of health has been "underutilized" and stresses "evidence-based legal interventions," which should "build the research case for legal action". It appeals to the "global health community" to "oppose laws that undermine the right to health and to equity", especially those laws that "stigmatize or discriminate against marginalised populations" as these are "especially harmful and exacerbate health disparities".

We also need to attend to the views that tend to place migrants into homogenous and heterogenous categories for different purposes. For example, as the UN International Organization for Migration (IOM) for whom a migrant is broadly "any person who is moving or has moved across an international border or within a state away from his/her habitual place of residence, regardless of (1) the person's legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is".

> There is, also, no such thing as 'migrants' but only persons and groups with distinctively (and often disturbingly) different needs and abilities…

This agency-specific wide definition is useful to map out cross-border and within-nation voluntary and forced migration. On the other hand, there is another view that accentuates differentiation between voluntary and involuntary, free or forced, migration. In this sense, we preserve distinct categories such as immigrants, asylum-seekers, other necessitous migrants, internally displaced persons (IDPs), stateless peoples, persecuted religious minorities, and ecological exiles. Further, 'migrants' form a heterogeneous mass who have not merely the same basic material needs (food, clothing, shelter, health. literacy and numeracy) and non-material needs (dignity, privacy, freedoms, participation, information, and access), but also such vertical needs. There is, also, no such thing as 'migrants' but only persons and groups with distinctively (and often disturbingly) different needs and abilities: divided by age (from infants to senior

citizens), sex and gender, health (the coexistence of earlier morbidity), disability, and ways of belonging to religious, cultural, spiritual, and civilizational communities.

We concern ourselves here with forced migration of IDPs. Indeed, every time we use the general appellation 'migrants' or 'internally displaced persons', we must fully know the existential horror reflected in their social biographies: the economic, social and political conditions and contexts which make people move from the domicile of birth to the domicile (of their necessitous and precarious) 'choice'.

4.

How do the anti-Covid-19 strategies and contexts in India cope with both individual human and social suffering? Some imposition of this suffering has been considered as a necessary evil and bearing it gracefully is considered as a badge of national unity and patriotism. Some suffering must be classified as 'surplus' or unnecessary suffering.

> To point out to some structural limits of the anti-Covid-19 programmes is surely not to indulge in any anti-national, seditious or treasonable conduct.

Such suffering occurs when every individual person is regarded as a potential carrier of disease and exposed to state and social management. Epidemiology regards each person as a unit of contagion and the law becomes the instrument for management of contagion, followed by testing, treatment, isolation, distancing and therapy. Law emerges as an adjunct of intense public health management, in turn morphed into a public culture of self-care (frequently washing hands, wearing masks in public places, and 'social' distancing). Is sheer survival of individuals and society as a whole to be considered as paramount to the management of a global pandemic in which all constitutional values remain secondary? Or, should it also be the case that anti-Covid-19 performances must not violate basic human rights? For example, the human right to health may not be held incompatible with the human right to live with dignity, or the new penal laws and action should also bear in view social stigma as a mechanism of instant control.

Difficult questions are raised concerning the imposition of the lockdown or its partial lifting. Epidemiologists and health experts continue to differ on different models of scientific uncertainty. But no education in the obvious is necessary to say that even the simple rules of hygiene are not observable in conditions of extreme impoverishment or migrants on the move. Governments have done well to launch a campaign for civic education and in suppling masks, soaps, and even water. But these can do very little in reducing physical distancing in slums or slum-like conditions which manifest the malaise of unconstitutional mass impoverishment. To point out to some structural limits of the anti-Covid-19 programmes is surely not to indulge in any anti-national, seditious or treasonable conduct. Rather, it highlights the importance of more intense implementation of the Directive Principles of State policy and the performance of fundamental duties as provided by Part IV-A of the Constitution of India.

> [W]hatever one may say about its design and detail, the principle of federalism as an essential aspect of the basic structure of the Constitution remains necessary to sustain social diversity and human dignity.

Second the pressing need to put an anti-Covid-19 framework in place makes unusually difficult a fresh legal start for managing the nation. Drastic measures like lockdowns and zoning require taking the toxic dust off from the four-section colonial Epidemic Diseases Act, 1897, and naming the happening as a 'disaster' within the meaning of the Disaster Management Act, 2005 (DMA). This did help governments acquire an arsenal of discretionary police powers, enforce social discipline, introduce many new measures of epidemiological surveillance, and resort to volatile forms of biopower and biopolitics. However, it is good to come across normative constitutional and statutory limits. For example, section 61 of the DMA prohibits "discrimination on the ground of sex, caste, community, descent or religion" in the administration of compensation and relief to the victims of disaster, but this should not remain a prescription more honoured in breach rather than compliance.

In a deep constitutional irony, a command and control planned national economy - the Essential Commodities Act, 1955 - now helps neoliberal India combat Covid-19. It enabled the central government on 13 March 2020 to declare masks and hand sanitizers as essential commodities until 30 June. This law's vast potential to control production, supply, distribution and to secure their equitable distribution and availability at fair prices, is once again writ large on the economy and the nation. So remains its potential for use in life after Covid-19.

Third, whatever one may say about its design and detail, the principle of federalism as an essential aspect of the basic structure of the Constitution remains necessary to sustain social diversity and human dignity. Asymmetric federalism is not always irredentist or secessionist; it also promotes "the conditions of an enlarged democratic setting'… by leveraging group 'equality, inclusive participation and justice' which 'deepen the legitimacy and strengthen the functionality of multinational states" (Hausing 2014, 89). Unsurprising is the fact that "extensive empirical case studies […] conclusively show that all durable multinational states also happen to be federal democratic states" (*Ibid*).

5.

An endemic feature of Indian politics, and probably all party-political systems everywhere is the processes of politicisation of catastrophe. The term 'catastrophizing' has been long used by social psychologists to characterise a social disposition, but Adi Ophir (an Israeli political philosopher, whose work should be better known in India), explicitly links it with the distribution of evils, including (if I may use my words) radical suffering of the constitutional have nots. Ophir describes this political process of "the sudden or gradual rise in evils", its "quantity, quality, frequency, span of distribution, and durability" - in short, a rise in "the volume of evils" and the "accompanying decline in the availability and effectiveness of means of protection, healing, and restoration". Indeed, such internal processes where natural and man-made disasters often work conjointly to "create devastating effects on a large population" and represent the "very avalanche of evils that injure entire populations" (Ophir 2010). Cognate insights are offered by the Nigerian thinker Clade Ake (1994) in speaking about the "democratization of disempowerment" and the Cameroonian philosopher Achilles Mbembe (2019) who has accentuated the "necrophiliac" nature of power.

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This combination of multiple disasters and mass catastrophe is on abundant display in the migrant crises. First, the policy inadvertence which lasted till 29 April, and second the difficulties since then in making transport and related facilities available to migrants on the move. We all know of the costs to be borne by the originary states of migrant workers, the so-called 'bus politics' or 'train politics', and the repatriation of some migrant workers to the host states. If the spread of a global pandemic was an act of misfortune, its catastrophization has to be located in the injustices of social structure and policy. On the other side, the spectacular emergence of new communities of belonging (social groups trying to meet the many needs of migrants on the move), which counter the politics of creating communities of danger, hopefully will become a post-Covid-19 future, ending forever the production of social indifference.

6.

The Covid-19 styles of law and administration all over the globe enhance the powers of the administrative biopolitical state. But from its inception, India's apex court has acquiesced in the constitutional fact of vast powers to make law and policy. The presumption of the constitutionality of state laws and policies still stands. The judicial doctrine of harmonious construction in the sphere of conflicting rights in Parts III and IV of the Constitution still prevails. Administrative mala fides remain difficult to prove; and the courts in interpreting the constitution still hold that the mere possibility of abuse of power is not a ground for not conferring it. Further, several draconian security and anti-terror and related economic offences have been held constitutionally valid. And let us recall that as late as in the *Kesavananda Bharati* case (1973), six Supreme Court justices ruled in favour of Parliament's absolute power to change the basic structural constitutional identity and many justices even today believe in judicial self-restraint.

> [I]t must be reiterated that the conflict between the legislative/executive combine and adjudicative constitutional interpretation stands ingrained in the Constitution itself as a vital aspect of republican democracy.

Yet the indictment of judicial overreach survives and grows, as an example of successful political (and even academic) propaganda since the dawn of the Constitution! But (without exploring here my writings), it must be reiterated that the conflict between the legislative/executive combine and adjudicative constitutional interpretation stands ingrained in the Constitution itself as a vital aspect of republican democracy. We may learn from it but cannot eliminate it.

And the differences between competitive power politics and the constitutional politics of courts needs to be always re-explored. The latter may be occasionally jurispathic (rulings that are coercive) but is never self-interested. Justices do not decide disputes or contentions on considerations of personal benefit, even when the quality of justice they produce may be contested.

The heightened use of suo motu proceedings by the Supreme Court and the high courts has been quite remarkable in times of Covid-19. Aggressive monitoring by as many as 19 high courts of administrative schemes and local institutional management procedures is an aid, rather than an obstacle, to more effective anti-Covid-19 action (as, for example, in situations of domestic violence, inadequate nutrition, and release of undertrial prisoners on bail).

How to make the invisible socially visible is another name for social action litigation (SAL), still conflated with the so-called public interest litigation (PIL). Even if considered identical twins, each has a different constitutional visage. SAL is dialogical, not adversarial. The protracted 'hope and trust' jurisdiction is inherent to SAL and not an aberration, even though in PIL we may prefer certain instantly desired outcomes.

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Still the SAL power and process may be criticised when dismissal of well-reasoned petitions amounts to judicial abdication. Whether such abdication occurred or not in relation to the migrant labour exodus is a hotly contested issue, both inside and outside the Court. A Supreme Court bench has referred to the central government the detailed SWAN report on stranded migrant workers, and articulated the 'hope and trust' SAL jurisdiction to trigger appropriate policy and on-the-ground action. Sometime later, a different bench took urgent *suo motu* action and issued some interim directions. Welcome though this step is, on a better-late-than never principle, it is too soon to make even informed guesses on how these directions will work in the daily life of those on the move. We may also ask whether the adversarial litigation is more to be preferred compared with *suo motu* action.

The vast executive and administrative structures claim, and rightly so, to be sensitive to people's misery in a global pandemic. But does that necessarily mean that courts and justices may not speak *at all*? Is not there a difference between a rights-based solicitude and the more routine policymaking tasks? Judicializing the issue of mass public health, monitoring of the supply of essential medicines and testing, conditions in public hospitals and costs in private ones, for example, mark judicial itineraries of normative cooperative action to sensitise and redirect the local executive regarding specific issues otherwise solely left to health and other experts.

There is lots to be learnt on all sides from those who decided to walk across the length and breadth of India that is Bharat; this mass civil disobedience met with some law and order type preventive or punitive response.But undeterred, they marched on very long distances on foot, gambling with exhaustion, hunger, disease, fatigue and even death. Neither policy, nor political, actors thought that such "mass illegalities" (to use a striking phrase of Michel Foucault) were ever possible and therefore did not anticipate legal ways to solicit compliance. We should also accept that the migrant labourers acted as individual moral actors, rather than as an inert mass of moral patients.

7.

While not offering any fully-fledged theory of this form here, I suggest in that our constitutionalism may truly be called *exodus constitutionalism*, acting as the other of ordinary democratic constitutionalism. In a sense, border control is the insignia of the sovereignty of a modern state and marks the beginning of geopolitics. The good side of this is what Hannah Arendt was to call natality: a political community to which one may belong. The flip side is the terrible reality of statelessness: a being without any national identity and having the status of a global pariah as a refugee or asylum-seeker, a quintessentially a rightless human being.

Exodus constitutionalism is born and thus always at work with ordinary constitutionalism but it also stands often at the crossroads of political and judicial power. One may here usefully borrow from life sciences the imagery of the host and parasite, to learn how the latter begins the dance of its own destruction while populating the host. I know that the analogy is stressful in Covid-19 days, but as the great French philosopher Jacques Derrida once described it, this relation constitutes a viral trajectory: "an inert code that replicates itself by using a host," by making "an unsuspecting host ingest it; to force the host's internal machinery to make new copies of the virus; and to spread as many of these copies as possible, in order to maximize the possibility of infecting new hosts". The virus "requires a more complex host to invade and destroy but cannot live by itself." The "virus being many things […] in part a parasite that destroys, that introduces disorder into communication […] it derails a mechanism of the communicational type, its coding and decoding [... it] is neither alive nor dead." (quoted in Barnett and Wills 1994, Salingaros 2015).

Extended to the constitutional text, Covid-19 and the epic tragedy of mass migration, we find the same disease of a "combinational type" that introduces "disorder" and death "in communication".

The Constitution of India may well be said to provide a leading contemporary text of exodus constitutionalism. Composed in the poignant times of the Partition of India, the Constitution itself was written with blood. It bears many birthmarks of its foundational violence - 20 million people - Hindus, Sikhs, and Muslims constituted the largest mass migration in human history. Since then many exoduses have happened, marked with considerable violence. The Planning Commission of India in 2012 stated that since Independence in 1947, about 60 million people had been displaced by development projects. And the 2017 India Migration Report acknowledges that apart "from conflicts and disasters, over the years, development projects, including urban redevelopment and beautification, have displaced large numbers of people from different parts of the country".

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The constitutional development has been thus haunted by many an involuntary mass migration, from the mass exodus of the Kashmiri Pandits to now Covid-19 threatened mass migrants often walking to their distant homes from many populous Indian states they had once made their own. It is estimated that in the first phase of the lockdown about 5 million (see the complex analysis by Nomaan Majid 2020), although the statistical scenarios fluctuate widely and are as diasporic as the migrants on the move (Seema Chishti 2020).

Exodus constitutionalism crystallises the dilemma of dates. Our citizenship provisions stipulated in Articles 3-5 of the Constitution expose this. So do the recent memories of the conjoint working of the Citizenship Act of 1955 and its amendments, the 1946 Foreigners Act, the 1964 Foreigners (Tribunal) Order, and the adjudicatory leadership of the Supreme Court resulting in some forcible detentions and migrations in Assam.

What may one say are the main characteristics of an exodus constitutionalism? First, at the heart of every constitution there pulsates a distinction between 'us' and 'them', the constitutional self and the constitutional others. In this sense, even when the other may not always be regarded as an enemy, constitutional identity depends a great deal on the distinction (rendered famous by Carl Schmitt) between the 'friend' and the 'enemy'. The USA is often cited as an example of restricted citizenship because no foreign born naturalized citizen can run for the office of president, but restrictions based on citizenship for contesting or voting at elections and occupying public offices are common to most societies.

Second, the status of citizenship is available through Articles 5-9 of Part II of the Constitution, and Parliament may make further law (which it has through the Citizenship Act or Foreigners Act). But citizenship is a sovereign decision of the state and not a fundamental right. Parliament by simple majority may decide who may count as citizen and the supreme judiciary seems in no constitutional hurry to decide thorny constitutional issues thus arising and now raised by a few states and social action petitioners.

Third, exodus constitutionalism enhances the vulnerabilities of the populations affected. Even the term 'Covid-19 migrant workers' does not fully disclose various vulnerabilities specific to the very young as well as very old, women at work (notably sex-work and domestic labour), and married women. According to the 2011 Census, about 205.8 million women in India migrated for marriage; an extraordinary fact illustrating how marriage is related to migration. The demography of migration also varies strikingly, as we all know.

Fourth, a devaluation of citizenship is typical of exodus constitutionalism. IDPs (whether victims of natural disasters or of conflict and violence, or certain practices of development *as* governance) are often treated as *objects* rather than *subjects* of governance. This distinction has been affirmed by the UN Declaration on the Right to Development (Baxi 2007). IDPs signify kaleidoscopically changing situations in which constitutional othering always takes place, often making the culmination of the process of 'thingification'.

Many other variations exist. But it is high time that we recognize ways in which we continue to repudiate the foundational postulate of the Declaration of Philadelphia in 1919 that birthed the International Labour Organization. It enunciated a century ago that "labour is not a commodity" and that "all human beings, irrespective of race, creed or sex, have a right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity." These are also the solemn pledges of the Constitution of India. Shall we allow forms of exodus constitutionalism to further override it?

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