

THE INDIAN TRAVEL BAN IS OVERBROAD

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The COVID-19 pandemic has left the world more apart than ever. International travel is close to a standstill. Some countries such as the United Kingdom have limited international travel. Some others like India, however, have prohibited all incoming and outgoing flights altogether. I want to focus on a particular constitutional right that the pandemic brings tension for – the right to movement. I will focus especially on the right of citizens stranded abroad to return to their native country.

Since 25 March 2020, India has been on a nationwide lockdown. The lockdown was [severe](#) in terms of restrictions. All public transport systems remained shut, schools and universities closed and most public and private institutions except essential services ceased work. It imposed considerable costs on the country's poor and other vulnerable sections. The lockdown also prohibited travel to and from the country, imposing serious constraints on the right to return of Indians.

In this paper, I will argue that the indiscriminate travel ban imposed by the Indian government is overbroad. To begin, consider the nature of the rights involved. There are various groups of people who left the country for different purposes such as education, medical treatment, employment or short visits. The lockdown which was announced only some hours before its implementation left the people stranded abroad in tremendous misery. No efforts were made to secure their return before the lockdown. Several of them are already unemployed, and universities were accused of forcing international students to vacate their residence halls. Pregnant women and people with ailments are stranded without adequate medical treatment. Several people are forced to continue to live in dreadful living conditions, such as labour camps, with a high likelihood of catching the pandemic. Many have their families in India and are compelled to stay apart, with an uncertain hope for reunification. This is also in the context of an unfamiliar, exclusionary rights regime abroad where the enforcement of rights is highly precarious and access to justice, limited.

The travel ban cuts at the root of exercise of their fundamental rights. [Article 21](#) of the Indian Constitution guarantees a right to life and liberty. [Article 19](#) guarantees the right to freedom of speech and expression, the right to assembly, the right to move throughout the country, the right to reside and settle at any part and so on. The right to family life and unification, arguably part of the right to life is also directly altered by the ban. The prohibition of entry made the exercise of these rights practically impossible. This is a *different* kind of rights infringement, from the conventional modes of right violation by states and a far more dangerous one. All the ideas about rights become redundant when there is no possible means of enforcement. By prohibiting access to the country altogether, a whole bundle of rights is foreclosed unilaterally.

Now, the most prominent response from the state is this: we are in a public health emergency. Rights can be overridden when there are supervening state interests at stake. The argument specifically is that domestic containment has priority at this stage. But it cannot be that we must give disproportionate weight to the rights of people within India against those outside. The factum of being away, which in many cases is involuntary, cannot be the sole basis of a reasonable classification between two sets of Indian nationals. Here, the risks the stranded Indians face, such as lack of medical treatment or food, must be weighed against the risk that returning Indians import coronavirus and thus create health risks to people within the country.

Here, the 'risk' argument becomes significant. If reasonable precautions cannot be taken to contain immigration, individuals within the country face a real threat of the spread of the epidemic, and even death. But even if it is true that the country is economically and infrastructurally incapable of making sufficient arrangements for the return of all Indian nationals, there are certain states capable of doing so. The ability to make arrangements depends in part on the prevalence of COVID-19. States or regions with fewer cases will find it easier to make arrangements than states or regions overwhelmed with the pandemic. The problem with the travel ban is that it made no selective assessment among states or regions. Even those Indians who want to return to these selected states are disabled from doing so, in spite of the fact that there are no reasons justifying the prohibition of their return. Kerala is a good illustration since the state has an ever-ready public health infrastructure at its disposal and expressly welcomed Keralites back home. The action of the central government has therefore been indiscriminate among all citizens, without being sensitive to the customised and selective response that was called for. It unjustly affects citizens from those states capable of containing their return.

The second argument is that selective evacuation, that is, evacuation for those Indians belonging to states with low risk alone, by excluding the others, is not possible since that would amount to discrimination. States cannot be treated differently in the context of a pandemic, it is said. In other words, why should it be that a person from Bombay is disallowed to return when a Keralite is, when what distinguishes them is an accident of birth?

But places with low and high risks – be it in cases of contagious diseases or law order problems – are always treated differently, for good reasons. States do not find a problem with imposing more travel and movement restrictions in areas which saw communal riots than those which had none. For instance, one would not doubt the necessity of imposing additional restrictions in regions threatened by insurgency (if the reasons were true). A complaint that such an imposition is discriminatory since places with no such threats do not have restrictions would be unsound. A law and order assessment is always made considering the threats involved. Similarly, those from low risk regions must be treated differently from those in high risk regions and form distinct and separate classes. It cannot give rise to a discrimination claim.

Further, rights conversation must be individualised. Restrictions on rights must be *justifiable to each*. This means that the state must justify the overriding restriction on a particular right, in this case, right to return to each individual. The prohibition on return is justifiable to someone from Bombay and not to someone from Kerala, since the latter state both has fewer COVID cases and is more equipped to deal with a public health crisis than the former. The reason for this differential treatment is justifiable. This approach to rights resonates with T.M. Scanlon's moral theory of contractualism as laid out in *What We Owe to Each Other*.

Hence, the ban which had a direct impact on the right of people to return, was insensitive to the disparities among Indian states and adopted a 'one size fits all approach.' It made no reasonable classification between states, districts or regions, which had stable and effective public health systems such as Kerala, and those such as Uttar Pradesh which have notorious public health standards. The reasons which might apply to prevent the return of persons to certain states might not apply in the case of others. Some states are both willing and capable of containing their natives whereas some others are not. The degree of risk also differs thoroughly from one state to the other since the number of infected cases range from less than 5 in states like Arunachal Pradesh and more than 15,000 in Maharashtra. Therefore, the travel ban is *overbroad*.

An important lesson of the travel ban is that unilateral centralisation of power can have dangerous consequences not only for principles of federalism, but for rights as well. Decentralisation of power, at the time of a pandemic can often lead to better safeguard for individual rights for countries like India.

Now, as I write this article, Indian government has begun to allow citizens to return in a phased manner from May 7. The return plan is certainly underinclusive, since very few flights are scheduled to contain the enormous population of Indians abroad. It is also unfortunate that this decision was made belatedly, after around 6 weeks of the lockdown already inflicting a vast amount of needless suffering.

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