



Challenges on Access to Justice for migrants

Written Contribution of Migrant Forum in Asia to the Special Rapporteur on the Human Rights of Migrants on the issue of Access to Justice and Remedies for Migrants

WHAT DOES ACCESS TO JUSTICE MEAN?

As we see changing socio-political conditions in the countries of destination, we need to place an equally keen eye to the details of those changes and how these changes affect the common migrant, upon whom the country of origin and destination depend and vice versa for the protection and enhancement of their own rights. Apart from the cases of abuse and discrimination we see on an almost regular basis whether it is through work on the field or through media, there is a need to follow up and focus on cases that have reached the stages of litigation. Legal cases by migrants against their sponsors constitute a large portion of ensuring their rights and protection by the state of occupation. The legal process, authorities involved and consequent action taken for the case indicate how well the countries of both origin and occupation are able to ensure their laws and institutions follow through.

Access to Justice means :“...
the ability of people (especially marginalized groups) to seek and obtain a remedy through formal or informal institutions of justice for grievances. Access to justice involves normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight”. – **Santosh**, Saudi Arabia¹

Through our work and the work of our partners on the ground, we found that there are several lacunae in legal and institutional channels for how migrants may secure justice for themselves. In cases that require intervention either in the form of legal aid, translation (from Arabic to English for example) or financial, migrants across the Middle East often resort to means outside the established system of complaint registration and resolution.

Throughout the migration process, migrants, particularly undocumented, face injustices of a legal nature. From recruitment to repatriation, they are faced with continued dilemmas of risking arrest. The **conditions to the access to justice** for workers are particularly affected by employment, gender, the capacity of the country of origin and their stage of the migration process.

Migration, as a complex phenomenon, renders the migrant, knowingly and otherwise, reliant on the legislative and enforcement institutions of the countries of destination and missions of the countries of origin in the former. Primarily, the question we and our members/partners on the field, seek to answer in our work is that of ensuring the self-reliance of the worker while protecting their rights. However, that becomes overwhelming when migrants have little to few rights (despite current changes) and face continued discriminatory attitudes from local authorities and the incapacity of their own missions to help them.

¹ Insights gathered during MFA consultations

THE CHALLENGES TO THE ACCESS TO JUSTICE

The challenges to the access to justice occur across the spectrum of areas and processes of seeking justice. A particular point we need to consider when looking at cases of migrant workers is that the challenges are faced regardless of their status as documented/undocumented, low-skilled or high-skilled, and man or woman. The challenges cut across the various backgrounds migrants possess. Migrants, especially those that are low-skilled and/or undocumented, have a **general lack of awareness** of legal procedures and services, including ones of their own country that concern them. They have limited information on where to seek remedy and live in fear of the police/system due to lack of social support. Government officials and the first point of contact at Labour Offices, Immigration Centres and the Police also lack the capacity to deal with complex cases of abuse or illegal treatment. Like most cases, the lack of opportunities affects domestic workers the most.

Challenges to the access of justice can be classified as challenges to enforcement, legislation, subsequent monitoring of services and ensuring accountability. These challenges are seen in the following areas : (i) **Administrative** (ii) **Financial** (iii) **Provision of services** (iv) **Awareness** and (v) **Legal**.

These areas have issues that are cross-cutting and consequent to each other. They may manifest in common practices in countries of destination like confiscation of documents essentially rendering migrants 'undocumented' in cases of visa and passport expiry, inaccessibility of legal aid and dues for the worker, inefficiency or unaccountability of the first Point of Contact at the Police Station or Labour Office, dismal communication mechanisms with embassies, and the unsatisfactory monitoring and registration of manpower agencies and recruiting agents by both countries of destination and origin.

Access to Justice means : "...
when government offices freely
entertain/settle disputes between
migrant workers and their employer

mostly involving contract violations; when the Ministry of Labor and Social Affairs implement Labor Laws and amicably settle disputes but it endorse or recommend filling charges to the Labor Court when employer does not response or show up during the scheduled appointment officially arranged; and when the National Human Rights Committee (NHRC) does the mediation and recommend measures to refer complains of injustice to Police Department, Ministry of Labor and Social Affairs and finally to the Supreme Judicial Council for filling of charges." – **Pastor Kawi, Qatar**

There are several issues within the mechanisms constituted for issues of labour and migrants within countries of occupation/destination. Commonly seen issues are **lack of inter-agency / ministerial coordination and collaboration for case management**. The ministries or departments concerned would be the Ministry of Labor, Ministry of Interior, Police Stations, Central Intelligence Division, Immigration Department, Passport and Identification Verification Department, Grievances Department, National Human Rights Institutions, Deportation Department, Government Shelters, Ministry of Justice and the Ministry of Health.

Recruitment is an entire industry affected by this institutional gap. **Lack of effective firewalls between the immigration and law enforcement officials** (e.g. weak labour inspection) are a specific yet imperative cause to the discrimination and institutionalised abuse of migrant workers. Countries of destination and their ministries of labour claim that they allow for legal migration through manpower or recruiting agent companies that approved at the country of origin. Countries like UAE, Oman and Kuwait and have pre-specified lists according to job designation. Recruiting agents are blacklisted at the countries of origin and only companies that have been physically raided by labour authorities, get shut down. Monitoring and registration process of the manpower agencies need to be thoroughly vetted, considering the prevalence of corruption at the countries of origin. From our work on the ground, we have discovered several cases registered as labour complaints at different

times against one particular recruiting company in the UAE. The lack of coordination between departments may explain why the same company was allowed to recruit by the same agents at different times, despite the pending cases against it.

Another indication of lack of coordination between departments are that migrants are forced to produce (and consequently pay exorbitant administrative fees for) similar documents for the complaint they want to register or any help they need. For example, the Assessment of Disability certificate (in UAE) has been requested multiple times, across departments, to register the case for each one. This means, at AED 150 or so per certificate, it is a cruel expense inflicted on the migrant that only wants the case resolved and compensation for damages incurred. In legal cases related to confiscation of documents, migrants and their legal aides are asked to visit the Police or the Labour Office alternately and in both places, they are not allowed by the **first person of contact** to register written complaints, although it is required by law; instead asked to call the sponsor to the office and discuss it amicably.

Currently, destination countries are overhauling their current system of labour by providing institutionalised laws and rules on recruitment and abuse. However ineffective implementation of existing laws/policies by enforcement authorities results in perpetrators not being punished. There have been mass deportations due to visa raids carried out in Kuwait, Oman, UAE and Saudi Arabia in particular, who carried out a campaign with sloganeering against illegal residents. However, the **conditions that rendered these migrants illegal**, or the reasons as to why they did not/ could not approach relevant authorities to assist their status is not yet determined or considered by state authorities. In many cases, migrant workers are unaware they have an absconding notice against them. There has been less of an effort to hold sponsors accountable for the problems of their workers, whether they are conglomerates² or single sponsors. In matters of litigation, **weak enforcement of court decisions** in favour of

workers means the possibility of delayed, if not denied, justice.

The **state of domestic workers** is even more telling of **the lack of gender-sensitive mechanisms** that exist in countries of destination. Domestic workers (more specifically, in-house maids) have less rights than the common migrant worker, due to their gender and nature of job that does not allow them freedom of movement. The overarching challenges and barriers in countries below and Asia as a region mainly dwells on the **prejudice and stigma** of migrant workers—especially migrant domestic workers—from communities both in countries of origin and destination. From what we have seen on the field, women migrant workers who come home are shunned by their families and communities for acquiring sexually transmitted diseases and/or are impregnated, even if it was forced upon them. It is also the xenophobia and racism in countries of destination that result into migrant workers being marginalized and stereotyped as low-skilled. Such stigma and stereotypes would often affect a migrant worker's perspective on pursuing justice.

Their access to justice is challenged by the very fact that in most destination countries, they are **not considered under the labour law** or are only included as a casual reference. **Lack of evidence** (eg documentary, statements) in support of Domestic Workers case hinders cases being filed in court or compensation being paid to them. Evidence is gathered only in cases of extreme abuse with clear physical signs. Cultural notions prevent labour inspectors from assessing the working and living conditions of domestic workers and hence **no monitoring mechanism** exists to ensure the protection of their rights inside the sponsors house. Despite legal immigration, domestic workers may work up to 16 hours a day, face verbal and physical abuse and restriction of movement, leisure or holidays. Their access to justice is again hindered by **lack of formal redressal mechanisms** specifically aimed at their job designation; mechanisms that are gender-sensitive in terms of arbitration, mediation and litigation. On all sides, their protection of their rights and their opportunity to ensure them face sufficient roadblocks.

The process of litigation is a harrowing experience for the common migrant worker. The costs involved and the lack of assured and enforced justice are what constitute the

²"Should we commit suicide? 3000 Indian workers stuck in Kuwait without food, money". 5 January 2018. NewsMinute. Source : <https://www.thenewsminute.com/article/should-we-commit-suicide-3000-indian-workers-stuck-kuwait-without-food-money-74248>

financial and service provisory challenges for migrants in the fight for access and opportunity for justice and rights. The costs associated with the legal process, including time spent, constitute a major challenge to most migrants, who prefer to avoid the entire process completely and repatriate without pursuing the case further. The need for the migrant worker to be at the country of destination and earn/save for his family and life at the country of origin is not prioritised enough to the extent of it being a reason for lowered fees/dues. Hence, migrant workers are asked to settle for a few months wages as a settlement instead of the compensation they deserve. The **lack of financial resources** to pay for legal representation in the country of destination is where the migrant worker loses his opportunity to ensure justice.

Legal aid (especially that is which pro bono) in the country of destination are sometimes not applicable to foreign nationals, especially domestic workers for whom the added restrictions of movement and association are stressful. Their ability to express their needs are further affected by **the language barriers** that exist in documents, testifying and conciliation and the state and their own missions are additionally unable to find a reliable interpreter for them. Typesetting services provided by private companies have differing rates of charge, only some of which the migrant can afford. There is no regulation to the prices of legal aid, translation and typing services which are essential for the registration and eventual resolving of their case.

Bureaucracy and the issues associated with it means that for migrant workers, payment for settlements take a long time and cases continue even after they have been repatriated. If the worker has registered a complaint against their sponsor, the sponsor may suspend their work visa or fire them from the job during the processing of the case or during the trial. There are currently no provisions to prevent this from happening or connecting the two issues (indicative of a lack of coordination within the concerned departments). Without the job they possess, they lack the means to sustain themselves throughout the litigation process. Male migrant workers particularly face a difficult situation due to a lack of shelters for them to stay during the process. Embassies are not equipped and lack the capacity required to

perform legal services for the large number of expatriates they are meant to support.

CHALLENGES OF COUNTRY OF ORIGIN

Access to Justice

means : “... securing vested rights through the use of courts, missions and tribunals. In another words, right to access to complaints, redress and legal system when a migrant falls in a difficult or distress situation can be called access to justice for migrants.” - Jabir, Oman

As an institution that is meant to be the foremost line of defence, migrants are heavily reliant on their missions to **inform, represent and aid them legally** in their country of destination. Despite bilateral agreements being chalked out between countries of origin and destination specifically on migrant issues, the agreements themselves lack in substantial content to ensure all-round protection of migrants and may even affect their rights. Despite efficient and swift working of the government of the country of destination, the **capacities of embassies** and consulates of countries of origin are particularly telling. In certain cases, the countries of origin are late in their response to cases where the migrant worker has had a favourable and just verdict pronounced. The missions fail to capitalise on the momentum of the case, and fail to ensure adequate help to the migrant at the right time.

Countries of origin, except in certain cases that gain media attention, hesitate to change the delicate balance in the relationships they keep with countries of destination. They additionally fail to hold the country of destination accountable for the conditions of their bilateral agreements or to the ratification of conventions in this regard. Hence, undocumented workers are not sufficiently protected by their own embassies (primarily because they are of an illegal status in the destination country). Undocumented migrants are particularly vulnerable in countries of destination and their awareness of their legal status or the rules of immigration are lacking. Missions were also found to be insufficient in **ensuring free legal aid**

and assistance to their own nationals and did not involve themselves in cases of imprisonment. When communicating to embassies about certain issues, the embassies respond that they are unable to intervene with matters of local law.

In what is a particularly disturbing trend, embassies and missions are not informed of the **arrests and detainment** of their nationals from the police or Labour office. The migrant is prosecuted while relying on the legal aid that they have arranged or is offered to them pro bono. The embassies are late in addressing these issues and hence migrants are encouraged to also use the **services of non-governmental societies** sympathetic to their cause to repatriate and settle cases with their sponsor out of court. During cases of amnesty (Kuwait and Saudi Arabia as recent examples), migrant workers were encouraged enthusiastically by their embassies to leave during the period to prevent further arrest or fines and dues. However, the missions were inefficient in deal with the question of compensation of these workers. Few origin countries have the infrastructure or institutional capabilities to ensure a smooth **rehabilitation and reintegration** process. Embassies provided with the power of attorney for cases of compensation are slow and the bureaucratic run-around for migrants and their families back in the home country is time-consuming.

For litigation, certain missions do offer legal advice and awareness but the practice is not common nor engaging and comprehensive enough to be a substantial resource to the worker. Missions also lack **financial capacity** and resources to deal with workers issues, with (in some cases) 1 Labour attaché or Legal consultant for all cases. Migrants hence rely on NGO's run by migrants or other civil society bodies that include **faith based, cultural and charity based organisations** to fund the repatriation of workers in their asylum or the deportation centres. These organisations enable translation of documents, jail visitation, escort during hearings, liaison with the policy and the sponsor, as a non-governmental figure. This puts those helping the distressed migrants into further danger considering that migrant activists and charity workers help these migrants at their own risk.

RECOMMENDATIONS FOR CHANGE

- **FOR COUNTRIES OF DESTINATION**

- 1) **Administration**

- a) **Language barriers**

- i) For labour offices to hire migrants in their departments who could communicate with workers lodging grievances - or hire labour offices who speak English.
 - ii) Provide quality interpreters during court hearings, processing, verdict and documentation

- b) **Prioritise, Shorten and simplify litigation process**

- i) Establish Cross border mechanism for cross border claims
 - ii) Promote power of attorney and cross-cultural litigation / recognition of foreign judgment

- c) **Develop capacity of related departments and authorities**

- i) Provide trainings and conduct consultations with police, embassies and legal officials with regards to available services for access to justice
 - ii) Inter-departmental coordination of all services, complaints registration, detainment and deportation, and resolution of legal cases as an urgent and immediate requirement.
 - iii) Allocate budget for the training of the government officials and the training to be audited
 - iv) Prioritise the role of the first Person of Contact at ministries and departments and develop their capacities to deal with migrants
 - (1) With the minimum capacity of speaking English
 - (2) In cases of trouble/difficulty/ refusal registering a case at the first Person of Contact, a higher authority must be available to register complaints
 - (3) In cases of refusal to accept written complaints by the first Person of Contact, audio/video evidence must be acceptable and allowed for case registration, documentation and evidence

- 2) **Legal concerns**

- a) In cases of **confiscation of documents**, e-Locker must be provided to all migrants with an approved visa, regardless of professional or visit visa. E-Locker must be updated with the scans of passport, labour card, UID, sponsor-provided ATM card, and other visa documents where applicable. It can be a time bound system where the sponsor must put up the documents within 48 hours of the approval of visa. For the country of destination, this helps solve cases of delay in producing ID and may also act as a system for embassies to access for legal cases as well as holding them accountable to act in case of illegal migrants.

- b) Qualify / sensitize interpreters in cases of **sexual and physical harassment** of domestic workers

- c) Worker must be allowed to register the case at related departments without the intervention of the **embassy**

- i) In cases of prosecution, the embassy must be informed and there should be access to view the information that was passed to the Embassy.

3) Financial concerns

- a) Provide **paralegal** services and **pro bono** services for migrants
- b) Lower **legal fees and dues** of processing and registration for low-income and domestic workers
- c) Regulate **typesetting and documentation** fees for low income workers

• FOCUS ON DOMESTIC WORKERS (FOR BOTH COUNTRIES)

4) Gender sensitization of all key stakeholders

- a) Raise awareness of domestic workers on all legal and judicial services upon arrival and pre-employment
- b) Increased presence of women in legal process
- c) Allow the domestic worker to present their case with adequate interpretative facilities
- d) Provide government budget to CSOs and relevant stakeholders for domestic workers advocacy
- e) Educate the domestic workers on the use of internet, cell phone, gadgets, hotline to document evidence and taking care of personal documents
- f) Set up domestic workers desk in all related department and ministry buildings ; local government units in countries of origin

5) Protecting mechanisms

- a) Increased vigilance of sponsors and agencies on granting visit visas to women
- b) Improve labour inspection by recognizing the employers' home as a work place
- c) Increase provision of psycho-social support during case processing
- d) Provide easy and accessible educational materials
- e) Simplify the system for case financing and availability of mission staff

6) Free legal aid and representation of domestic workers

- 7) **The access to lawful work** until case finalizes and to follow up on the case, cross border, if they are sent back.

• FOR COUNTRIES OF ORIGIN AND RELATED MISSIONS

8) Capacity Building

- a) Establishment of Legal Clinics (Separate for Domestic Workers/Skilled/Criminal) free of cost for migrant workers.
- b) Establishment of Legal Assistance Fund where both countries of origin and destination provide financial support throughout the entire process.
 - i) State funding of lawyers: The Indian government has made provisions in the Community Welfare fund for initial legal expenses. But this is very much insufficient. The Philippine government also provides some financial help as legal expenses. But as a general rule none of the sending countries meet the full litigation expenses of their citizens in an alien nation. Since the litigation expenses are unaffordable to the worker the states (both sending and receiving) should provide funds to meet the entire process.
- c) Widening the scope of support provided by diplomatic missions to migrant domestic workers facing exploitation or abuse.

- d) Ensure effective training and orientation for migrant domestic workers prior to departure.
- e) Provide space for CSOs and NGO to conduct capacity building exercises and legal awareness campaigns among the expat community instead of criminalizing them for aiding and protecting the migrants.

9) Legal Concerns

- a) Developing a simplified procedure in accessing justice that is easy, quick and efficient with guaranteed interpreter and admission of bona fide defence advocates.
 - i) Embassies need to hire one-time Legal Consultant to draft possible defence for the common cases that are usually encountered and faced so it facilitates the process prior to court hearing.
- b) Ensure speedy execution of court judgements
- c) Provide shelters for embattled migrant workers awhile awaiting their cases.
 - i) Monitoring and Evaluation Reports by MFA partners and members showed that women in shelters do not use the time available in the shelter productively to learn new skills or plan their new life when back home. Turning the “caring & waiting center” into a “learning center” for women staying in shelters is essential for their future. In fact, women reported needs for vocational trainings that would improve their professional opportunities in their origin country, and let them take advantage of the time spent at the shelter waiting for the end of the trial procedure, that can sometimes last many years. While staying in the shelters, time should be used helping women design their personal Reintegration Project.
- d) Ease the formalities of repatriation of mortal remains.

• FOR CIVIL SOCIETY ORGANISATIONS OF BOTH COUNTRIES

10) Collaborative efforts

- a) Members of diaspora as ‘honorary counsels’ to sign documents and work in limited official capacity and support
 - i) This is especially helpful in cases of civil war or strife in the country of destination. Embassies could also provide special status/recognition in certain countries to enable migrants to assist other migrants at legal cases as a trustworthy ally to governments and a representative of civil society.
- b) Raising awareness and funds with high skilled and better off migrants for welfare of those facing unfair criminal charges
- c) Raising awareness on on domestic workers’ rights, international conventions, national laws and policies with key stakeholders (employers, police, foreign embassies and consulates, parliamentarians, media, domestic workers and migrant workers’ groups)