

JULY 2020 Research Paper Series Volume 1 No. 1

## *Building a Justice Mechanism for migrant workers against wage theft*

Author: Cristina Patriarca

Late or missed payments of wages of migrant workers is not a new phenomenon in the Asian region. Back in 2014, a Human Rights Watch report denounced cases of domestic workers who affirmed they had experienced late payments or wage theft at the hands of their employers.<sup>1</sup> In 2016, Engineers against Poverty published the first of a series of research outputs addressing the problem of late or absent payments of migrant construction workers' salaries, focusing particularly on the cases in Gulf Cooperation Countries.<sup>2</sup> The report evidences the extent of the issue and raises awareness on the effects of such a widespread practice. Not receiving payments on time or at all clearly has a strong impact on individuals' ability to conduct their life in dignity. It also affects their capability to transfer their wages back home to re-pay debts on time (e.g. recruitment fees)<sup>3</sup> and avoid increased interests as well as to adequately support their families. This increases the psychological stress of migrant workers and negatively impacts their well-being.

Despite their fundamental role and the huge contributions of Asian migrant workers to the economies of both origin and destination countries,<sup>4</sup> the impact of COVID-19 has resulted in a surge in violations and abuses against migrant workers and in the exacerbation of the long-standing problem of wage theft. On the one hand, migrant workers had to face a sudden loss of projected income due to pandemic-related economic downturn; on the other, they experienced a sudden disengagement from ongoing employment contracts without payment of dues and increased exposure to a risk of non-remuneration. "Like aftershocks during an earthquake, a large number of migrant workers were speedily notified that their services are no longer required. [...] To their bewilderment, not only did the workers not receive a penny as compensation for arbitrary termination, but they faced the loss of all outstanding dues as well."<sup>5</sup>

The rapid creation of a justice mechanism to address wage theft of migrant workers and to make employers accountable is now more important than ever. If wage theft, late payments and disrespect of migrant workers' rights was already unacceptable, the social and economic burden put by COVID-19 on the shoulders of migrant workers has now become intolerable: governments, institutions, civil society organisations and individuals alike have a responsibility to act and remove all obstacles to dignified, just and equal working conditions for all. Creating a justice mechanism that supports migrant workers in redressing the economic losses they suffered at the hands of their employers is a key step towards the consolidation of a different societal model, truly upholding international labour standards and human dignity. It aligns with the notion of the creation of a new social contract, one that recognises

---

<sup>1</sup> Human Rights Watch, "I Already Bought You" (2014) <<https://www.hrw.org/report/2014/10/22/i-already-bought-you/abuse-and-exploitation-female-migrant-domestic-workers>>

<sup>2</sup> Wells J., *Part One: Protecting the Wages of Migrant Construction Workers* (2016) Engineers Against Poverty <<http://engineersagainstpoverity.org/resource/protecting-the-wages-of-migrant-construction-workers/>>

<sup>3</sup> KNOMAD, KNOMAD-ILO Migration and Recruitment Costs Surveys (2020) <<https://www.knomad.org/data/recruitment-costs>>

<sup>4</sup> Including through remittances – The 2018 *Migration and Remittances for Development in Asia* report co-authored by the World Bank, Asian Development Bank and KNOMAD indicates that in 2016 remittances to the Asia-Pacific region amounted to 244 billion USD. India, the People's Republic of China and the Philippines were the top three recipient countries.

<sup>5</sup> <https://www.thedailystar.net/opinion/news/covid-19-and-migrant-workers-the-great-wage-robbery-1914953>

the fundamental role played by migrant workers across the globe (low-skilled in particular) and, beyond that, their equal stance as human beings.

A 2018 report by Co-Directors of the Migrant Workers Justice Initiative, who researched the causes behind unrecovered wage theft in Australia, shows the importance of denouncing cases of wage theft and provides evidence of the key role played by trade unions and community organisations in migrant workers' ability to recover the entirety (30% of cases) or part of (up to 67% of cases) their unpaid wages. The psychological impact and potential stress deriving from going through a claim for redress of unpaid wages alone may indeed refrain migrant workers from taking action. Fear of losing one's own employment, the immigration status enjoyed in the country of destination, procedural costs and the uncertainty of outcomes are other factors that may prevent migrant workers from denouncing wrongdoings.

Farbenblum and Berg, the authors of the report, affirm that:

“there is substantial value in devoting resources to interventions that seek to encourage underpaid migrant workers to report and address underpayment and other forms of exploitation. [...] There is a need for a new specialised forum through which migrant workers can seek to recover unpaid wages. The forum must be accessible to migrant workers including well-resourced individualised assistance to calculate wage claims, along with legal advice and representation. It must be able to deliver remedies swiftly, with presumptions in the worker's favour in the absence of payslips or in the context of widespread patterns of fraudulent recording of wages or hours worked.”<sup>6</sup>

What is needed is thus a functioning and well-coordinated justice mechanism that supports migrant workers in redressing the injustices and wage thefts they have experienced.

### *Shaping a new justice mechanism*

Justice mechanisms can be either formal or informal. Formal mechanisms are created by governments (e.g. through laws), operate as part of them and are funded by them. They can also be established through treaties among states and operate under the control of international organisations. Formal mechanisms generally work through official courts (e.g. litigation), but non-court mechanisms also exist (e.g. arbitration, mediation). They can be referred to as non-justice mechanisms. Informal justice mechanisms operate outside of the formal authority of the state, instead gaining power from community structures, and may be referred to as traditional or customary mechanisms, among others. Both formal and informal justice mechanisms respond to the fundamental principle of access to justice, which enables people to exercise their rights. Access to justice is enshrined in rule of law but is also interlinked with the protection and promotion of human rights and democracy as well as an essential component for human and societal development.<sup>7</sup> Achieving justice for all is also a Sustainable Development Goal (SDG). SDG no. 16, in fact, aims at “promoting the rule of law, strengthening institutions and increasing access to justice”<sup>8</sup> in an overarching effort to challenge lack of adequate rights protection and to remove barriers to opportunities and economic development, among others. Despite increased global efforts to achieve change, however, barriers to expedited justice mechanisms and failure to redress violations are still widespread across the globe.

Access to justice is guaranteed through multiple components that include: first and foremost a legal framework and ad-hoc policies in line with international human rights standards, against which to uphold peoples' rights; secondly, the development of “accessible, affordable, timely, effective, efficient, impartial, free of corruption, that are trusted

---

<sup>6</sup> Farbenblum B. and Berg L., *Wage Theft In Silence* (2018) Migrant Workers Justice Initiative <<https://static1.squarespace.com/static/593f6d9fe4fcb5c458624206/t/5bd26f620d9297e70989b27a/1540517748798/Wage+thft+in+Silence+Report.pdf>>

<sup>7</sup> See for example: UNGA, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels* (30 November 2012) UN Doc A/RES/67/1

<sup>8</sup> UN, Sustainable Development Goal 16 (Sustainable Development Goals Knowledge Platform) <<https://sustainabledevelopment.un.org/sdg16>>

by citizens”<sup>9</sup> justice mechanisms that apply legal provisions; and lastly, mechanisms that ensure the decisions are rightfully and effectively enforced. Political will is certainly a fundamental component to realise all this. A promising example is given by Qatar that, following other Gulf Cooperation Countries, introduced a Wage Protection System in 2015, a mechanism that is specifically aimed at guaranteeing greater protection of migrant workers against wage theft or late payments. Thanks to a law amendment to support the mechanism, the Ministry of Labour and Social Affairs have now the power to impose sanctions upon non-compliant employers. A legal framework enforced concretely can thus become an effective tool to uphold the rights of those who need its protection. States’ commitment in creating a justice mechanism specifically geared to hold business and corporations accountable and to respond to specific employment-related abuses of migrant workers is essential to achieve meaningful change.

In a paper on *New Mechanisms of Accountability for Corporate Violations of Human Rights*, Khoury and Whyte look into the “feasibility of developing mechanisms capable of holding corporations accountable for violations of human rights.”<sup>10</sup> Business accountability, in fact, is key for the prevention against employment-related violations and human rights abuses. The authors set up interviews and focus groups with legal practitioners to explore the topic. What emerged from their discussions is a strong agreement among practitioners on the need for the creation of “a new, specialised body to address the issue of corporate harms”,<sup>11</sup> remedying the failures of existing systems in protecting workers. In practical terms, this new mechanism could be created as an ad-hoc forum within already existing courts. Alternatively, harmonised regional fora could be created, i.e. permanent tribunals that are specifically geared to handle cases belonging to regional specificities. According to the suggestions put forward in the paper, the judges working in these regional fora could be ad-hoc or could be seconded from existing courts. The figure of a regional commissioner could also be instituted, with a specific responsibility to oversee the practical implementation of targeted legislation aimed at protecting individuals against abuses and the concrete enforcement of law through adequate and well-functioning justice mechanisms. The creation of a targeted justice mechanism that can hold employers accountable and protect workers against wage theft or a systematic delay in salaries’ payments would mean effective protection against the risk of mounting debts and against the insecurity of not being able to support oneself and one’s own family in dignity.

In a 2010 paper by the Corporate Responsibility Coalition, the idea of resorting to non-judicial justice mechanisms to resolve business-related rights disputes, particularly where there is a power imbalance between the parties, is also discussed:

“Many states around the world have already developed new institutions to provide alternative means of dispute resolution and, specifically, to make it easier and cheaper for individuals (especially less well-off people) to enforce their rights. The last few decades have seen a steady growth in state-based [non-judicial mechanisms], used in a variety of different regulatory areas, through which people can air their complaints, reconcile their differences, resolve their disputes and receive some form of satisfaction without the need to resort to expensive and uncertain court action.”<sup>12</sup>

These systems would be complementary to legislative frameworks, existing judicial mechanisms and international justice bodies, for example. They would be free and offer advice and support to claimants, whether individuals, unions, or any other representatives. Besides being more flexible, these mechanisms, the paper argues, would also favour a systematic change in sectors where needed. This is because, in addressing complaints, competent bodies may elaborate ad-hoc instruments to more comprehensively address the underlying problem. These mechanisms would

---

<sup>9</sup> Marchiori T., *A Framework for Measuring Access to Justice Including Specific Challenges Facing Women* (2015) Council of Europe, <<https://rm.coe.int/1680593e83>>

<sup>10</sup> Khoury S. and Whyte D., *New Mechanisms of Accountability for Corporate Violations of Human Rights*, University of Liverpool <<https://www.business-humanrights.org/sites/default/files/documents/New%20Mechanisms%20for%20Accountability.pdf>>

<sup>11</sup> As above.

<sup>12</sup> Corporate Responsibility Coalition, *Protecting rights, repairing harm: How state-based non-judicial mechanisms can help fill gaps in existing frameworks for the protection of human rights of people affected by corporate activities* (2010) <<https://www.business-humanrights.org/sites/default/files/media/documents/ruggie/core-submission-to-ruggie-nov-2010.pdf>>

thus be set up with a narrow mandate, with clearly defined admissible complaints, and would have an “advisory, educational and standard-setting role”,<sup>13</sup> in addition to dispute resolution. Importantly, final remedies should be legally enforceable, go beyond financial compensation to include public apologies and bind commitments to change current practices.

In line with an overall recent effort by the international community to improve and expedite access to justice,<sup>14</sup> the European Union and the Council of Europe have increasingly been working on the enhancement of already existing justice systems. With this in mind, since 2005 an annual competition, the Crystal Scale of Justice, has also been organised to bring to the fore positive and innovative examples of practice in European Courts. Among these cases is the successful example of the creation of Accelerated Family Proceedings in Berlin and in other parts of Germany, a new procedural approach created to address lengthy processes and to expedite judicial proceedings regarding family cases. Among others, the approach relies on interdisciplinary working teams, who are assigned to specific geographical areas, as well as on an effective collaboration among all parties involved (including judges, lawyers, social workers).<sup>15</sup> According to the 2016 Fundamental Rights Agency’s Handbook on European law relating to access to justice, in the municipality of Espoo (Finland) judicial courts have instead established the so called “Jouko-days”, days where priority is given to the processing of children’s cases to reduce proceedings’ times. Given the existence of a mechanism, quick access to justice, timely proceedings and swift decisions are, in fact, equally important. A new justice mechanism created to tackle countless migrant workers’ claims against wage theft should thus respond to these fundamental elements as well.

Effective access to justice also includes the ability to receive adequate redress in case a wrongdoing is committed: “[a]ccess to justice refers to the process of hearing and deciding claims of [...] rights violation, while substantive redress concerns the result of that process: the actual relief granted to the victim.”<sup>16</sup> One form through which this can be achieved is compensation, which means offsetting the damage suffered as a result of a breach of one’s rights. Recognising the existence of multiple barriers to effective compensation, the European Commission (EC) has recently looked at solutions for the creation of more effective justice mechanisms that ensure a greater protection of people’s rights against violations and abuses from this perspective as well. In 2019, a new report<sup>17</sup> drafted by a Special Adviser was, in fact, delivered to the former EC President Jean-Claude Juncker, specifically aimed at informing a new EU strategy on how to improve access to compensation for victims of crime, particularly in cross-border situations. Even though not specifically aimed at tackling wage theft or, in broader terms, not tailored to the injustices experienced by migrant workers in the Asian region, this report represents a useful resource to further expand one’s understanding of key components for the creation of functioning justice mechanisms that serve their purpose effectively. The report calls upon structural shifts that, in the first place, require states’ determination in upholding human rights and taking responsibility for their violations, for example by compensating victims upfront and only subsequently reclaiming the amount from the offender. Importantly, the report suggests that inability to access adequate compensation may result in secondary victimisation. On the contrary, just redress contributes to formal recognition of the violation and, in turn, reinforces the recognition of the individual as right bearer, with actual access to their rights. It also works as a potential deterrent from future abuses of the same kind.

---

<sup>13</sup> As above.

<sup>14</sup> As above; and see for example, OECD and World Justice Project, *Building a Business Case for Access to Justice* <<https://www.oecd.org/gov/building-a-business-case-for-access-to-justice.pdf>>

<sup>15</sup> European Union Agency for Fundamental Rights et al., *Handbook on European law relating to access to justice FRA handbook access to justice* (2016) <<https://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice>>; *The Accelerated Family Proceeding* (2014) <<https://rm.coe.int/the-accelerated-family-proceeding-aveiro-october-16th-sixteenth-2014/168078af77>>; Council of Europe, “*The Crystal Scales of Justice*” Prize, *The European prize for innovative practice contributing to the efficiency and quality of civil justice* (2014) <<https://rm.coe.int/-the-crystal-scales-of-justice-prize-the-european-prize-for-innovative/168078d0c4>>

<sup>16</sup> As quoted in Wewerinke-Singh M., *Remedies for Human Rights Violations Caused by Climate Change* (2019) *Climate Law* 9, Brill Nijhoff, doi: 10.1163/18786561-00903005

<sup>17</sup> Milquet J., *Strengthening Victims’ Rights: From Compensation To Reparation*, (2019) European Commission

As a final point, for the purposes of understanding modalities to better address injustices experienced by migrant workers, it is also relevant to look at the legislation adopted to discipline working conditions of posted workers in European Member States, as, to an extent, parallels may be drawn in the necessity to create an overarching harmonised system that ensures migrant workers' protection across borders. Posted workers are individuals who are "sent by his [or her] employer to carry out a service in another EU Member State on a temporary basis, in the context of a contract of services, an intra-group posting or a hiring out through a temporary agency."<sup>18</sup> In 1996 the European Union adopted a first Directive (96/71/EC), aimed at protecting the rights and working conditions of posted workers across all Member States as well as avoiding companies' use of cheaper labour to increase their profits.<sup>19</sup> According to Directive 2014/67/EU on the enforcement of the Posted Workers Directive, host states have a particular responsibility in ensuring workers' rights protection and the existence of health and safety compliant conditions. All states, however, are responsible for the creation of effective justice mechanisms that enable posted workers to file claims against their employers in case they suffered wrongdoings, regardless of whether the employment relationship has ended or not. In particular, states have a duty to ensure that posted workers receive any outstanding net remuneration as well as "back-payments or refund taxes or social security contributions [or any other cost] unduly withheld from their salaries."<sup>20</sup> Failure to comply with the rules on posted workers will result in the cross-border application of penalties on the employer. This means that borders will not prevent employers from being accountable and collaboration among states is key to this end too.<sup>21</sup> When movement across borders is granted to workers for employment purposes, states have a responsibility to ensure the respect of individual rights, access to justice and enforcement of decisions. In other words, with the creation of a justice mechanism, regardless of whether in the form of a department in a states' court, a regional forum or an independent mechanism, borders should be taken down to ensure the effective protection of peoples' rights.

---

<sup>18</sup> European Commission, Posted Workers <<https://ec.europa.eu/social/main.jsp?catId=471>>

<sup>19</sup> The original Directive 96/71/EC was amended to expand the protection of posted workers' rights and working conditions by Directive 2018/957 in 2018, which Member States must transpose in their national legislation by July 2020.

<sup>20</sup> Directive (EP and EU Council) 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') OJ L159/11, art. 11(6)

<sup>21</sup> The current system is not flawless when it comes to cross-border enforcement, particularly in the case of sub-contracting. More needs to be done to ensure full chain liability.

## *Moving forward*

This paper has addressed the relevance of access to justice and the need for an effective justice mechanism to respond to the specific issue of wage theft among migrant workers. Access to justice importantly relates to the enforcement of rights and is fundamentally linked with development too. Governments have a responsibility and a key role to play in the creation of justice mechanisms that enable people to reclaim the upholding of their rights. To this end, targeted legislation should be put in place as well as decisional and enforcement mechanisms to ensure legislation is concretely applied.

The idea of ad-hoc justice mechanisms created for the violation of business-related rights is presented, alongside with the idea of them being instituted as either within existing courts or external fora that respond to regional specificities of business violations. The possibility of setting up non judicial mechanisms is also presented, the idea of more flexible and rapid justice mechanisms that could complement existing tools. Resorting to standard judicial mechanisms may, in fact, result in complex and lengthy processes for claimants, which may ultimately lead to people desisting denouncing cases of violation of rights. Recognising its impact, attempts to reduce proceedings time, backlogs and inefficiencies have indeed already taken place within national judicial systems in Europe, as part of a broader regional and international effort to improve and expedite access to justice.

Another fundamental element discussed in the paper is the possibility of implementing structural change in compensation for victims of abuses. One of the main ideas presented is an increased responsibility of the state in ensuring quick and effective redress of victims. Taking the work of the European Union as an example, the relevance of guaranteeing not only access to justice but also substantive redress is considered a key component of an effective justice mechanism. Still looking at the European Union, through the example of posted workers, the paper stresses the importance of bearing in mind cross-border enforcement and the essentiality of cooperation among states in ensuring people's rights are effectively upheld. Wage theft is widespread and systematically practiced against migrant workers from Asian countries, and particularly among those performing low-skilled jobs.

In moving forwards, a last point needs to also be highlighted regarding the relevance of the creation of a justice mechanism from a perspective of inclusion: “[l]ow-income earners and other disadvantaged groups often have a greater need of justice [...] at the same time as a lower ability to navigate the legal system [...] and obtain assistance [...]. In turn, because of their vulnerability to adverse events, they suffer more from the consequences of inadequate access to justice.”<sup>22</sup> The creation of an easily accessible justice mechanism that takes into account gender, disabilities and specific barriers, that offers support and legal representation to claimants, and that ensures swift redress is a long needed solution to an exploitative practice of wage theft and the undermining of migrant workers' rights.

---

<sup>22</sup> OECD and World Justice Project, *Building a Business Case for Access to Justice* <<https://www.oecd.org/gov/building-a-business-case-for-access-to-justice.pdf>>