

IRREGULAR MIGRANT WORKERS' ACCESS TO HOST COUNTRY'S LABOUR DISPUTE RESOLUTION MECHANISMS: EXPERIENCES FROM THE SADC

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Trends and Typologies of Labour Migration in the SADC

- ▶ Migration and labour migration deeply entrenched in history
- ▶ Colonial era migrants to mineral and plantation rich areas - contractual labour.
- ▶ Presently- about 4.5 M in 2013 (over 3M million of the working age (20 to 60 yrs))
- ▶ Predominately
 - ▶ intra-regional migration
 - ▶ Circular
 - ▶ economic-induced; only 300,000 of the 4.5 M were refugee.
- ▶ Figures exclusive of irregular migrants-
 - ▶ Dependent on smugglers
 - ▶ Non formal employment- exploitation and extortion
 - ▶ Marginally viable/semi legal sectors- not adequately covered/total excluded
 - ▶ Labour law protection - rare/absent
 - ▶ Poor working conditions

Regional Legal Framework on Labour Migration

- ▶ SADC Treaty Article 5(2)(d) -formulation of policies aimed at progressive elimination of obstacles to the free movement of labour & of pple.
- ▶ Protocol on the Facilitation of Free Movement of Persons, 2005
 - ▶ Facilitation of short term- visa free mvt across borders
 - ▶ labour migration, largely unaddressed
 - ▶ Not in force- not attained the ratification threshold
- ▶ Other
 - ✓ Charter of Fundamental Social Rights in SADC (SADC Social Charter), 2003;
 - ✓ Code on Social Security in the SADC, 2007,
 - ✓ SADC Protocol on Education and Training, 1997 (objective: promotion of labour policies, practices and measures which facilitate labour mobility)
- ▶ Notable Developments
 - SADC Labour Migration Action Plan 2013- 2015 (a roadmap to a harmonized regional labour migration)
 - ✓ SADC Protocol on Employment and Labour, 2014 (Article 19)

National Legal Framework

- ▶ Policies & legislation largely disconnected (at national and inter. level)
- ▶ Policies & Legislation administered by different ministries or institutions
- ▶ migration regarded as a security issue - attracts security control measures.
- ▶ migration rarely seen as economic opportunity for sending & host countries.
- ▶ Exclusive/Selective admission policies - reduce the number of foreign workers
- ▶ Admission only for workers with scarce/exceptional skills.
- ▶ Medium & low-skills hardly admitted= Irregular migration

The State of Labour Market institutions

- ▶ Labour Law reforms- Considerable modification of institutions (Nam, Mal., Swaz., Lesth, Zam, Tz, Bots, Zim, SA)
- ▶ New institution established - Specialized labour dispute resolution organs with specialised personnel
- **alternatives dispute resolution mechanisms (ADR)** - mediation, arbitration and conciliation mandate and
 - South Africa (the Commission for Conciliation, Mediation and Arbitration (CCMA),
 - Lesotho (the Directorate of Dispute Prevention and Resolution (DDPR));
 - Swaziland (the Conciliation and Mediation Commission ;
 - Tanzania (The Commission for Mediation and Arbitration (CMA).
 - ❖ voluntary, informal, accessible and speedy resolution of labour disputes.
- **adjudication**
 - Specialist Labour courts- High Court (South Africa, Namibia, Lesotho and Tanzania),
 - Industrial Courts (Botswana and Swaziland);
 - Industrial Relations Court (Malawi and Zambia);
 - Labour Appeal Courts also exist in South Africa and Lesotho.
 - ❖ informal - not bound by legal technicalities

Accessibility of new institutions

▶ Success:

- Improved accessibility to dispute resolution mechanisms
 - ✓ friendly pleading and referral procedures,
 - ✓ relatively speed resolution
 - ✓ low cost for filing of cases

▶ limitations

- ✓ Budget constraints
- ✓ Human resource constraints-inability to attract competent personnel (reliance on acting judges)
- ✓ Incidences of delay???????????

Accessibility new institutions- Migrants

- Not prohibited but Generally limited even in sophisticated legal systems/developed countries
- ▶ **General barriers**
 - ✓ procedural requirements,
 - ✓ legal representation;
 - ✓ Time limits to initiate court proceedings
 - ✓ Financial constraints
 - ✓ Language barriers
- ▶ **barriers inherent in immigration, residence and employment status**
 - ✓ limited relevance of labour law -traditional labour concepts/exclusion of informal sector-employment relationship/empl.contract
 - ✓ Disputed validity of employment contacts- conflicting relationships between labour law and immigration law (immigration law with an upper hand)
 - ✓ Reluctance to seek legal remedy- reticent to assert rights bse of fear of detection and possible deportation/arbitrary expulsion - mistrust of law enforcement organs
 - ✓ Anti- migration sentiments and *xenophobia*
 - ✓ Inefficiency of labour institution
 - ✓ Language Barriers

Any prospects??????

- ▶ Upholding the independence of labour law
 - ✓ *Discovery Health (SA)*
 - ✓ *Molefi V Blue Blends Investments (BOTSWANA)*
 - ✓ Inter-American Court of Human Rights in its landmark *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants*
 - ✓ ILO's Committee on Freedom of Association (CFA)
- ▶ Innovative construction of the term employee
- ▶ Implementing and enforcing regional and international migration norms
- ▶ Upholding Human rights and constitutional guarantees

“Illegal's and Criminals????”



Tribute

