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Migrant workers and discrimination: realities, threats, and remedies

Trabajadores migrantes y discriminación: realidades, amenazas y remedios

August Gächter[1] https://orcid.org/0000-0001-7061-0427

[1]*Centre for Social Innovation*, Vienna, Austria
gachter@zsi.at

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Abstract

Migrant workers perform essential work but often have to do so in substandard or even abusive conditions. Women make up nearly half the migrant workforce and are exposed to extra dangers to their health and safety. The COVID-19 pandemic and other events have heightened the visibility of their situation. The rights-based approach, developed over a period of more than 60 years, offers coherent solutions to the whole range of issues pertaining to the employment of international migrant workers. It covers recruitment, admission, employment, unemployment, training, occupational safety, health care, social security, organisation, housing, family, and others, that by minimising the differences in treatment and opportunities between migrant and national workers protect not only migrant but also national workers and minimise social and economic divisions and the risk of political divisions inherent in them. Using examples, the article outlines the risk of discriminatory treatment not only by individuals but by law and administrative practice for migrant workers and the need to control the risk, not least for the benefit of national workers. It describes the many ways and situations in which migrant workers have been found to suffer discrimination. It takes a close look at the definition of discrimination in the international Conventions adopted in response. Among their implications it highlights the issue of indirect discrimination and touches on the issue of positive discrimination. Some reasons given by states for keeping migrant workers in situations prone to discrimination are mentioned.

Keywords: migration, migrants, rights-based approach, employment, unemployment, labour inspection, domestic work.

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Resumen

Los trabajadores migrantes realizan trabajos esenciales, pero a menudo lo hacen en condiciones deficientes o incluso abusivas. Las mujeres constituyen casi la mitad de la fuerza laboral migrante y están expuestas a peligros adicionales para su salud y seguridad. La pandemia de COVID-19 y otros eventos han aumentado la visibilidad de su situación. El enfoque basado en los derechos, desarrollado a lo largo de más de 60 años, ofrece soluciones coherentes a toda la gama de cuestiones relacionadas con el empleo de los trabajadores migrantes internacionales. Abarca la contratación, la admisión, el empleo, el desempleo, la formación, la seguridad en el trabajo, la atención de la salud, la seguridad social, la organización, la vivienda, la familia y otros, que al minimizar las diferencias de trato y oportunidades entre los trabajadores migrantes y los nacionales protegen no solo a los trabajadores migrantes sino también a los nacionales y minimizan las divisiones sociales y económicas y el riesgo de divisiones políticas inherentes a ellas. Mediante ejemplos, este artículo describe el riesgo de trato discriminatorio no solo por parte de los individuos, sino también por la ley y la práctica administrativa para los trabajadores migrantes y la necesidad de controlar el riesgo, sobre todo en beneficio de los trabajadores nacionales. Describe las muchas formas y situaciones en las que se ha descubierto que los trabajadores migrantes sufren discriminación. Examina de cerca la definición de discriminación en los convenios internacionales adoptados como respuesta. Entre sus implicaciones destaca el tema de la discriminación indirecta y aborda la cuestión de la discriminación positiva. Se mencionan algunas razones dadas por los Estados para mantener a los trabajadores migrantes en situaciones propensas a la discriminación.

Palabras clave: migración, migrantes, enfoque de derechos, empleo, desempleo, inspección del trabajo, trabajo doméstico.

Introduction

Today migrant workers are ubiquitous around the world, and evidently, they are often employed in undesirable or even abusive conditions, i.e. in low-wage industries, services or plantations, in poorly regarded occupations, in jobs offering little or no opportunity for advancement, in economically unattractive or remote areas, or in enterprises offering below-standard wages and working conditions (Böhning, 1996:13). They are often underpaid, provided with inadequate or no workplace safety and health protections thus suffering injury and death, and hired and dismissed 'on a moment's notice'. Under these conditions, expression of freedom of association and collective bargaining rights may be difficult, intimidated or otherwise rendered impossible. In many places they are also more frequently unemployed than local workers. In addition, housing conditions are often poor or expensive or both (Taran and Gächter, 2005; Taran and Kadysheva, 2022).

In the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families (ICRMW), 1990, the preamble highlights the "importance and extent of the migration phenomenon, which involves millions of people and affects a large number of States in the international community," and "the impact of the flows of migrant workers on States and people concerned" (United Nations, 2005:21).

Succinctly put, "The question of migrants' rights represents a cutting edge of contention between the consequences of the economic logic of globalization vs the moral values embodied in human rights concepts and law. This contention is marked most dramatically by the conditions that many migrant workers face in host countries around the world. As the 2004 International Labour Conference observed about migrant workers: "a significant number face undue hardships and abuse in the form of low wages, poor working conditions, virtual absence of social protection, denial of freedom of association and workers' rights, discrimination and

xenophobia, as well as social exclusion. Gaps in working conditions, wages and treatment exist among migrant workers and between migrant and national workers. In a significant number of cases unemployment rates, job security and wages differ between regular migrant workers and national workers" (ILO, 2004, para 5).

"Widespread abuse and exploitation of migrant workers – often described in terms of forced labour and slavery-like situations – stand in marked contrast to the promises that economic globalization will bring better conditions and social protection to the lives of people around the world" (Taran, 2010). Against this background cooperation on migration between the UN and other agencies was intensified and became more closely aligned (ILO/IOM/UNHCR, 2001).

The article below intends to provide a framework for intensified research into the discrimination of migrant workers in all situations. In particular, its focus is on advancing research that wishes to combine an improved understanding of processes of discrimination with an intention to remedy injustices, inequalities, and inefficiencies. It therefore presents and discusses, at times critically, the most relevant concepts in human rights instruments as they currently stand and how they apply to migrant workers in general and to some specific kinds of migrant workers in particular. The concepts the article highlights include that of migrant worker with a special emphasis on female migrant workers, and that of discrimination with an emphasis on analysing its form, content, and functioning, and including consideration of specificities relating to migrant workers, to indirect and to positive discrimination. The article also discusses aspects of the language used in prohibitions of discrimination. To these ends it cites the relevant provisions from the human rights instruments and from accompanying commentary.

The state of debate about migrant workers and discrimination

An outline of the problem

Two events of the early 2020s brought the issues out in high relief. One was the COVID-19 pandemic that unfolded from the beginning of 2020, the other the Football World Cup 2022 in Qatar.

Firstly, in the early stages of the pandemic it became unusually evident that migrant workers are "carrying out essential jobs in health care, transport, services, construction, and agriculture and agro-food processing. Yet, most migrant workers are concentrated in sectors of the economy with high levels of temporary, informal or unprotected work, characterized by low wages and lack of social protection, including in care work which in many countries is largely carried out by women migrant workers" (ILO, 2020a:1). The disruption of supply chains and severe restrictions on labour mobility raised the spectre of food insecurity, especially in Europe. "Amidst this context, agriculture workers have been re-labelled 'essential workers' subject to lifting of travel-bans and other exceptional measures" (ILO, 2020b:2, 6).

As in the health and care sectors this situation led to calls for a revaluation of work and workers. This pandemic shows that for a long time, seasonal agricultural workers have not been fully rewarded for their contribution to society in terms of earnings, social protection, and challenging working conditions, including hours of work and occupational and health protections. This has vast implications for the design of temporary schemes and also for integration prospects of these seasonal migrant workers. Existing approaches in the law and practice of a number of countries tend to overlook the real labour market integration needs of these workers. As shown in ILO research, migrant workers in agriculture and the rural economy often experience discriminatory treatment (ILO, 2020b:5; see also ILO, 2019).

Secondly, it became no less evident that "Migrant workers are among the most vulnerable. Reports document rising levels of discrimination and xenophobia against migrants and in some cases food insecurity, layoffs, worsening working conditions including reduction or non-payment of wages, cramped or inadequate living conditions, and increased restrictions on movements or forced returns (where they may be stigmatized as carriers of the virus). Migrant workers are often first to be laid-off but last to gain access to testing or treatment in line with nationals. They are often excluded from national COVID-19 policy responses, such as wage subsidies, unemployment benefits or social security and social protection measures. Where access to COVID-19 testing or medical treatment is available, they may not come forward due to fear of detention or deportation, especially those in an irregular status. In the case of domestic workers, home-based workers, agricultural workers and others in the informal economy, exclusion in many countries stems from the fact that labour law does not regard them as workers. In some cases, travel restrictions have trapped migrants in countries of destination with few options to return home. Layoffs of migrant workers not only often lead to income losses but also the expiration of visa or work permits, putting migrants into undocumented or irregular status. Travel restrictions have also meant that many migrant workers have been prevented from taking up employment abroad for which they have contracts, and for which many may have paid high recruitment fees and costs" (ILO, 2020a:1-2; similarly, also ILO, 2020c; Baruah, 2020; IOM et al., 2020). Migrant workers are also faced with the 'work or lose your income dilemma' meaning that they might still have to work even if the COVID-19 related workplace security conditions are not put in place (ILO, 2020b:5).

In December 2010 Qatar was selected to host the World Cup 2022 finals. The ensuing building boom was heavily dependent on migrant workers from South Asia, the Philippines, Kenya and other places. In 2014, workers' groups lodged a complaint against Qatar at the ILO for non-observance of the Forced Labour Convention, 1930 (No. 29) and the Labour Inspection Convention, 1947 (No. 81) at the 103rd Session of the International Labour Conference.[1] More evidence of abuses was supplied in the following years that in their totality outlined systematic discrimination of migrant workers. In 2017, Qatar entered into a three-year (2018-2020) Technical Cooperation Programme with the ILO in which the government agreed to "align [Qatar's] laws and practices with international labour standards and fundamental principles and rights at work". Reform objectives covered five areas: improvement in the payment of wages; enhanced labour inspection and health and safety systems; replacement of the kafala sponsorship system and improvement of labour recruitment procedures; increased prevention, protection and prosecution against forced labour; and promotion of workers' voice[2] (Amnesty International, 2020:8).

Towards the end of the Technical Cooperation Programme's term the legal situation had improved but the implementation of the law's stipulations was said to lag behind: "Today, despite improvements to the legal framework, these migrants often still face delayed or unpaid wages, work excessively long hours, and struggle to access justice. The impact of the COVID-19 pandemic is also placing new stresses on employers and employees alike. For migrant workers this has only exacerbated their acute vulnerabilities, including heavy debts from high recruitment fees, restrictions on movement and obstacles to attaining effective remedies for their abuse" (Amnesty International, 2020:7). Observers called for "action to address major weaknesses in key areas including the payment of wages, access to justice and workers' voice. Qatar must also give particular attention to the situation faced by the country's domestic

[1] See the text of the complaint at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_348745.pdf

[2] See the text of the agreement at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_586479.pdf

workers, who face severe and widespread abuse away from the spotlight of the World Cup" (Amnesty International, 2020:7).

In 2021, the debate about Qatar's treatment of migrant workers increasingly focused on the number of deaths among construction workers and on whether the causes given for them were correct (Amnesty International 2021a, 2021b; The Guardian 2021). It should be noted that Qatar's unreformed system had similarities with that in other Gulf States and elsewhere in Asia (Baruah 2020).

Both the pandemic and the Qatar experience prompted renewed emphasis on the need for adequate labour inspection: "Some abuses can only be detected through labour inspection, showing how vital these services have become during the pandemic" (ILO 2020b:5). The important role of adequate labour inspection was also re-emphasized in the European Union (EU FRA, 2021).

If having part of the population in deplorable conditions is undesirable, not only for the afflicted themselves but for everybody because everybody is suffering in some way from the social division, then it will be important to understand the conceivable causes of the situation and to remedy them.

Human rights bodies have been observing, monitoring, and analysing the situation of migrant workers since 1919. They have also been developing constructive ways of dealing with the challenges through legal regulation and governance under the rule of law as well as policy and practice. The framework they developed is known as the 'rights-based approach' to the movement, employment, and settlement of migrant workers. Below its provisions regarding discrimination and how they can help come to terms with the challenges will be discussed.

The core international legal instruments referred to are far from new. They were in the main negotiated and adopted between 1930 and 1990, i.e., over a period of 60 years that ended more than 30 years ago. Directly involved were not only governments but also employer organisations and trade unions. Civic organisations provided important inputs. Since 1990, little had to be added which speaks to their completeness and factual adequacy. The discussion below draws substantially on seminal commentary on the human rights instruments written soon after their provisional completion in 1990.

The ICRMW, adopted in 1990, came into force in 2003 when 20 Member States had ratified it. At the end of 2021 ratifications stood at 56, mostly in Latin America, West and North Africa, with several in Asia and the Caribbean.

Migrant workers

Although used in many different ways, the term migrant worker has a precise meaning.

As defined in Article 11 of ILO Convention No. 143 (1975) "the term migrant worker means a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker." It thus does not include persons not regularly admitted.

Similarly, the ICRMW Article 2 says, "The term 'migrant worker' refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national." The ICRMW further explicitly includes self-employed workers, as well as other specified categories of: frontier worker; seasonal worker; seafarer

including fisherman; project-tied worker; worker on an offshore installation; itinerant worker; and specified-employment worker ('posted worker').

The ICRMW excepts employees of international/ intergovernmental organizations, of States (governments) posted abroad, investors, students, refugees and stateless persons, and seafarers not admitted for residence in the State where their employment is based.

The ICRMW definition is considerably wider than the ILO Convention's. It neither requires the person to have migrated nor to have been "regularly admitted". It thus includes persons in an irregular situation/unauthorized status and persons born in the country not possessing the country's citizenship provided they ever entered the country's labour force or hope to do so in the future. In practice, given that the UN statistical definition for measurement of *international migrant* counts *foreign-born* persons, international migrant workers are usually counted as and among foreign-born, even as some may have acquired 'naturalized' citizenship of the country of residence. It can be noted that many naturalized immigrants will have also maintained citizenship of their country of origin given the increasing recognition of dual citizenship by States.

Several of the problems and challenges mentioned apply to internal migrants, too, as do the solutions offered by the rights-based approach, but the article below will only deal with international migrant workers.

Discrimination

In the UN's analysis, discrimination is certainly not the only but clearly the main contributor to the migrant workers' disadvantaged situation. "It can be said that discrimination is unjustified differential treatment" (Taran and Gächter, 2015). The precise UN definition of discrimination will be looked at in the next chapter. The current section presents in outline the manifestations of discrimination and the instances of its operation that were taken into consideration when the ICRMW was drawn up and adopted.

"Discrimination against migrant workers in the field of employment takes many forms. These include exclusions or preferences as regards the types of jobs which are open to migrants, and difficulty of access to vocational training. Different standards are often applied to nationals, on the one hand, and migrants, on the other, as regards job tenure, and contracts may deprive migrants of certain advantages" (United Nations, 1996:5). "A widespread tendency is to regard migrants as a complementary labour force, and to assign them to the jobs which have the least attraction for nationals" (United Nations, 1996:6).

"Cases are cited of legal and administrative rules which force migrants to remain in certain occupations and specific regions, as well as of inequalities in pay and grading for identical jobs. Migrant workers are known to have been excluded from the scope of regulations covering working conditions, and to have been denied the right to take part in trade union activities" (United Nations, 1996:6).

"Although migrant workers contribute to social security schemes, they and their families do not always enjoy the same benefits and access to social services as nationals of the host State" (United Nations, 1996:6).

"Living conditions for migrant workers are often unsatisfactory. Low incomes, high rents, housing shortages, the size of migrants' families, and local prejudice against foreign

elements in the community are the main factors which combine to cause a serious accommodation problem" (United Nations, 1996:6).

"Migrant workers face the gravest risks to their human rights and fundamental freedoms when they are recruited, transported and employed in defiance of the law." … They are "a natural target of exploitation … at the mercy of employers and may be obliged to accept any kind of job, and any working conditions. In the worst cases, the situation of migrant workers is akin to slavery or forced labour." They "rarely seek justice for fear of exposure and expulsion, and in many States have no right of appeal against administrative decisions which affect them" (United Nations, 1996:6-7).

All these formulations carefully avoid laying the blame for discrimination on anybody in particular. Evidently, though, they envisage discrimination to arise from the interplay of private agency, practices of authorities, and state regulations with the weights and roles between the three components being distributed differently in different countries and at different times. Given that human rights instruments are in the first instance addressed to lawmakers the legislative and administrative practices of states get particular attention. This also includes the states of which migrant workers are citizens (Abella, 1997).

Efforts to deny discrimination or to belittle its importance sometimes focus on the migrants' cultural rooting and attribute poorer housing standards and poorer working conditions to it. This appears to follow the common pattern of attributing blame to the victim. At the UN it was noted that "In most cases financially poor, they share the handicaps – economic, social, and cultural – of the least-favoured groups in the society of the host State" (United Nations, 1996:5). Thus, the treatment received by migrant workers sometimes is a more intense symptom of wider patterns of discrimination in a society.

Women migrant workers: multiple discrimination

Women make up nearly half the migrant workers (ILO, 2021) but their work is often less publicly visible. They provide essential services in private households, in health and in care, but also in manufacturing, in hospitality, and food services among others. For instance, in Italy, "women migrant agriculture workers perform key activities for certain crops and in packaging houses. … [and] are usually overrepresented in unpaid and seasonal work. Women migrant farm workers often labour under the same harsh conditions as men: 10 or 12-hour days in unsafe and inadequate conditions for a daily wage of EUR 15 to 25. They face an additional risk, because agricultural workers usually live on the farms, in contexts of isolation and poorly maintained housing. These conditions are often accompanied by sexual harassment and abuse" (ILO, 2020b:5; see also ILO, 2019).

The United Nations Committee on the Elimination of Discrimination against Women issued a General Recommendation in 2008 on the situation and issues facing migrant women (CEDAW, 2009). The following passages from it highlight risks of women migrants to multiple discrimination (Taran and Gächter, 2005):

"(13) Once they reach their destinations, women migrant workers may encounter multiple forms of de jure and de facto discrimination. There are countries whose governments sometimes impose restrictions or bans on women's employment in particular sectors. Whatever the situation, women migrant workers face additional hazards compared to men because of gender-insensitive environments that do not allow mobility for women, and that give them little access to relevant information about their rights and entitlements. Gendered notions of appropriate work for women result in job opportunities that reflect familial and service

functions ascribed to women or that are in the informal sector. Under such circumstances, occupations in which women dominate are, in particular, domestic work or certain forms of entertainment."

"(15) Because of discrimination on the basis of sex and gender, women migrant workers may receive lower wages than do men, or experience non-payment of wages, payments that are delayed until departure, or transfer of wages into accounts that are inaccessible to them."

In the COVID-19 pandemic, too, over and above the issues mentioned earlier women migrant workers bore extra burdens: "The impacts on women migrant workers appear to be compounded as they are over-represented in the informal economy and among undocumented workers in many countries. Women migrant workers employed as front-line health and care workers are in a particularly high-risk group for COVID-19. Further, those who experience increased levels of violence or harassment – in accommodation, at work, in quarantine facilities, or upon retrenchment and return home – now have fewer options for support services. Globally, many support services for migrant workers and particularly addressing violence against women have been forced to downscale, close, or are online/phone-only models" (ILO, 2020a:2; see also Spotlight Initiative, 2020).

Multiple discrimination may result in cumulative effects (Sheppard, 2011; Taran and Kadysheva, 2022) and may make anti-discrimination activity ineffective unless it takes a broad approach, i.e. to discrimination in general rather than any specific kinds or bases of discrimination.

The effects of discrimination on the non- or less discriminated

Migrant workers were sometimes viewed as instruments in the hands of employers to undermine or thwart efforts by local workers for better conditions. This can only come about when migrant workers are in a legally or otherwise disadvantageous situation that makes them accept lower wages or in other ways poorer conditions or even forces them to do so.

Human rights instruments have been alerting to such dangers, although they tended to highlight them particularly with respect to workers lacking the right to be in the country or to be in employment or in this particular employment. In its preamble the ICRMW contains the consideration "that workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition," and "also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned" (United Nations, 2005:22).

Subsequent commentary emphasized that "Discriminating against ordinary migrant workers or, worse, having foreigners work in illegal conditions … runs counter to fundamental beliefs concerning equity and human rights in the economic and social field, and it is bound to have a boomerang effect on national workers whose remuneration and working conditions will sooner or later be undermined by unlawfully employed migrants" (Böhning, 1996:57). "Discrimination creates inequality, and inequality is a danger to the standards protecting native workers" (Abella et al., 2014).

One step on in the process migrant workers may themselves become dissatisfied with their situation. Böhning expressed the "conviction that workers who are badly or unfairly treated will become frustrated, may contract psychosomatic and other illnesses and, as a result, will be less productive than satisfied workers" (Böhning, 1996:57). Then employers may want to replace them with even more pliable workers. A downward spiral is set in motion that ultimately benefits no one.

Definitions of Discrimination and Factss

Three components: content, effect, and criteria

Discrimination is defined in the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) as "(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies. (2) Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination" (Art. 1(1) and (2)).

In 1965 the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted by the UN Assembly. In its Article 1 'racial discrimination' is defined as "any distinction, exclusion or preference based on race, colour, descent or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." One notes the parallels to ILO C111.

ILO Convention No. 111, while referring specifically to employment and occupation, was the first major international instrument specifically on discrimination. All other international instruments on discrimination are consistent with its approach (Taran and Gächter, 2005).

The definition combines three components, namely a kind of behaviour ("distinction, exclusion, or preference"), an effect on victims ("nullifying or impairing equality of opportunity or treatment in employment or occupation"), and a list of seven "bases" ("race, colour, sex, religion, political opinion, national extraction or social origin") that can be added to individually by Member States.

The criteria

The ICRMW in its Article 7 contains a more extensive list of bases than ILO C111 does. The rights provided for in the Convention are to be ensured by states "without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status."

Closing the list on "or other status" makes it open-ended. Contrary to ILO C111 it does not leave it up to Member States to extend the list but makes it compulsory on them to consider the specifically named bases as merely illustrative and not exhaustive. Naming them, however, does make them inescapable priority concerns as was also true of the seven bases named in C111. Left open to interpretation is the exact meaning of 'status' but, of course, also the

meanings of the words used to designate the specifically named items in the list. Would, for instance, a difference in accent be covered by 'language'? Why is 'origin' appended to 'social' – does this make discrimination on current social status less culpable than on social origin? How is 'position' in 'economic position' to be understood? What is covered by 'birth'? These among many other questions can all be answered but it is left open to legislators and judges in Member States to do so and the results may vary a great deal between places, over time and according to context.

When the 1990 UN Convention was not yet in force it was stressed that "… discrimination on the grounds of nationality, a type of discrimination to which migrants by definition are extremely vulnerable, is not outlawed by [ICERD]" (ILO, 1999:26). Given that the lack of the country's citizenship they reside in is a distinguishing feature of migrant workers and because in advertisements firms or landlords may state citizenship as a selection criterion the inclusion of 'nationality' in the listing seemed an urgent matter. There are countries that have taken it on board without becoming a party to the UN Convention. How much effect it has had is hard to gauge as is always true of preventive measures when they are taken without embedding the legal change in a carefully planned and executed evaluation.

Baring individuals and enterprises from discriminating on the basis of citizenship has the effect of transferring the exclusive right to exclude or to disadvantage non-citizens to state authorities and to legally defined, suitably transparent processes. States are extremely hesitant to give up legislation disadvantaging citizens of other countries. They have done so exceptionally on a mutual basis within regional economic groupings, but generally left backdoors open allowing them to curtail the rights of non-citizens at critical moments.

Outside the UN human rights context, the "bases" are sometimes called "grounds" of discrimination. The use of the word 'grounds', however, may to some falsely suggest causation, i.e. that characteristics of the discriminated are the causes of the discrimination. This is of course not so. The cause of any discrimination always lies in the characteristics of the discriminators, in the circumstances of their existence, or in the norms they adhere to. The word 'basis' is also not entirely free of ambivalence on this matter. Other words might be more serviceable, such as perhaps 'criteria' or 'categories'.

Restricting legislation and action against discrimination to the items explicitly mentioned in any of the listings would miss the point, even if, as in Belgium, the list is extended to 19 "grounds": nationality, national or ethnic origin, 'race', skin colour and cultural background (e.g. Jewish origin), disability, religious or ideological beliefs, sexual orientation, age, wealth, civil status, political beliefs, trade union beliefs, health status, physical or genetic characteristics, birth, social background and language. In addition, there are 13 "grounds" related to gender (gender, pregnancy, childbirth, breastfeeding, motherhood, adoption, assisted reproduction, gender identity, gender expression, so-called 'sex change', sex characteristics, fatherhood, co-motherhood) (UNIA, n.d.).

Because everybody wants to be treated fairly and is entitled to equal treatment the list would ultimately have to include every particularity of everybody who ever lived. This is being acknowledged by making the lists open-ended. Conceivably, listings will eventually be abandoned in favour of a more prominent focus on the behaviour that is to be prohibited and particularly the impacts that are to be averted.

Behavioural content

The behaviour in question – "distinction, exclusion, or preference" – in itself is a commonplace activity humans cannot but to engage in incessantly in regard of other humans. Thus, it is not the behaviour as such that poses a problem or that needs to be prohibited. Only if the behaviour leads to certain effects is it to be abstained from no matter whether the behaviour and its effects are intended or not, conscious or not, on one's own accord or not. The definition does not state who or what is making the "distinction, exclusion, or preference" and who is executing it. It could be an algorithm making it that has learned it from analysing millions of previous decisions so that no particular person was involved in bringing it about. The algorithm's decision would reflect the rules, regulations, practices, traditions, habits, social norms etc. that were being adhered to during the time the decisions were made that it learned from. The decisions may have been made in an office, an organisation, a society. In other words, whether the behaviour emanates from named individuals, from anonymous individuals, from organisations, social structures or other such entities is of no concern.

Behaviour is shaped by structure and there may thus be no choice about it. Outlawing certain behaviours, if they have certain effects, implicitly required the recognition of such structures, and implicitly outlaws them. Outside the UN this has come to be recognized legally by including indirect discrimination among the explicit prohibitions. Within the UN-defined rights-based approach it could be left implicit as agency is left open and the actual focus is on the effect that is to be averted.

Effect on victims

The key component of a definition of discrimination is its description of the prohibited impact on victims. It is the injustice that matters rather more than the kind of behaviour that inflicted it or the basis on which it was inflicted.

In ILO C111 the prohibited impact is "nullifying or impairing equality of opportunity or treatment in employment or occupation". Both, treatment and opportunity are to be equal. Treatment is in the here and now, but opportunity projects into the future. It seems that in general this future was understood to have to take place in the country the migrant workers are not citizens of but actually the definition does not require this.

If a definition of discrimination emphasized the behavioural aspect too much, i.e. the perpetrator's choice to discriminate or not, it would invite a certain risk of being interpreted narrowly to only include intentional discrimination. By deemphasizing behaviour and focusing on the effect definitions become more explicitly inclusive of unintentional behaviour, of regulations, conditions and circumstances that could result in the same effects without anybody intending them knowingly or consciously.

Areas or fields in which discrimination can occur

The ICERD definition contains an extra component not present in those of the ILO or the UN Convention of 1990, namely the – open ended – listing of "fields of public life." As the list is open-ended naming any fields at all is a matter merely of prioritising them. The other conventions do not contain a reference to fields as part of the definition because they define the areas of their applicability elsewhere or do so implicitly by referring to ICERD or other statutes.

The danger of too narrow a delineation of the fields or areas of applicability would be to miss the side-effects discrimination in one area can have in another, as for instance discrimination by school principals or teachers could affect subsequent employment outcomes

of the students, and so could discrimination by landlords or neighbours (Wrench 2007). Protecting workers against discrimination by employers and by other workers cannot achieve its full intended effect as long as discrimination in other fields is not also kept in check. The necessary holistic approach to the rights of migrant workers is the added value of the 1990 UN Convention mentioned before.

International legal norms

Fundamentals

Non-discrimination is one of the most fundamental rights, reiterated in all core International Human Rights Conventions, and generally in International Labour Standards.

Non-discrimination provisions are at the start and the heart of all international human rights instruments, many of these widely ratified. These include the:

- Universal Declaration of Human Rights, Article 2
- International Covenant on Civil and Political Rights, Article 2
- International Covenant on Economic, Social and Cultural Rights, Article 7
- International Convention on the Elimination of All Forms of Racial Discrimination
- International Convention on the Elimination of All Forms of Discrimination Against Women.
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (that incorporated nationality to the list of prohibited grounds)
- Convention on the Rights of Persons with Disabilities.

The legal framework for non-discrimination regarding migrant workers[3]

A coherent and comprehensive legal framework for non-discrimination and equality of treatment under the rule of law has been elaborated over the last century. Application of its universal principles to migrant workers and their families has been progressively recognized. The international instruments and policy recommendations have been elaborated by States parties at global and regional levels. Together, they provide the foundations – and relevant legal texts – for national law, policy and practice applicable in all countries.

The CERD and ILO Convention No. 111 lay out anti-discrimination and equality of treatment norms, particularly as they apply to the world of work. Additionally, three specific instruments address equality of treatment and non-discrimination for migrants: ILO Conventions No. 97 and No. 143 and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. It is said that these instruments comprise an international charter on migration by providing a broad normative framework covering both treatment of migrants – including non-discrimination – and inter-state cooperation on regulating migration. They provide definitions and legal text for national law. They also articulate an agenda for national policy and for consultation and cooperation among States on labour migration policy formulation, exchange of information, integration, and orderly return.

Special concern for the protection of workers outside their countries of citizenship was recognized in the Treaty of Versailles of 1919 and the ILO Constitution. The application of universal principles of non-discrimination to migrant workers was subsequently spelled out in

[3] This whole section draws extensively on Taran/Gächter (2005) and on Taran/Kadysheva (2022).

the ILO Migration for Employment Convention (Revised), 1949 (No. 97), the ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and the 1990 International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families, as well as in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

Further provisions directly of relevance to the protection of the rights of migrant workers are contained in the ILO Equality of Treatment (Social Security) Convention, 1962 (No. 118), the ILO Maintenance of Social Security Rights Convention, 1982 (No. 152) (Böhning 1996:4f), and the ILO Convention on Decent Work for Domestic Workers, 2011 (No. 189), as well as in the accompanying ILO Recommendations. The Forced Labour Convention, 1930 (No. 29) and the Labour Inspection Convention, 1947 (No. 81) along with others are of continued relevance.

Open-ended non-discrimination clauses in international and regional human rights instruments have been interpreted to outlaw unjustifiable distinctions between persons based on nationality. These include:

- Article 2 of the Universal Declaration of Human Rights,
- Articles 2 and 26 of the International Covenant on Civil and Political Rights,
- Articles 1 and 24 of the American Convention on Human Rights and
- Article 2 of the African Charter on Human and Peoples' Rights.
- Article 14 of the European Convention on Human Rights (ECHR), while not explicitly referring to nationality, has been interpreted by the European Court of Human Rights as prohibiting discrimination based on nationality.
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families formally recognized nationality as a prohibited base, explicitly listed in Articles 1 and 7 regarding applicability and non-discrimination.

Non-discrimination in application of labour standards

International law stipulates that, once established in a country with authorization for employment, there should be no difference in treatment between migrant workers and national workers, either in general or in terms and conditions of employment such as wages, benefits, opportunities for advancement, occupational safety and health, etc.

While this is evident regarding migrants with authorized entry, residence, and employment, the ILO Committee of Experts and international courts have reinforced the notion that application of International Labour Standards in the workplace is universal to all workers who are in an employment relationship, regardless of immigration status.

"An important development in this respect is the advisory opinion that the Inter-American Court of Human Rights issued at the request of Mexico on the legal status and rights of undocumented migrants.[4] In its opinion, the Court states that the fundamental principle of equality and non-discrimination is of a peremptory nature and binds all States regardless of any circumstance or consideration such as the migratory status of a person. The Court concludes that the State thus has the obligation to respect and guarantee the labour human rights of all

[4] Corte Interamericana de Derechos Humanos. Condición Jurídica y Derechos de los Migrantes Indocumentados Opinion Consultativa OC-18/03 de 17 de Septiembre de 2003, solicitada por los Estados Unidos de Mexico; Inter-American Court of Human Rights, Advisory Opinion OC-18/03 on the juridical condition and rights of undocumented migrants, 17 September 2003.

workers, including those of undocumented migrant workers. The Court clarifies that 'the migratory status of a person cannot constitute a justification to deprive [her or] him of the enjoyment and exercise of human rights, including those of a labour-related nature' and that 'States may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals, whatever these may be, including those of a migratory character'" (United Nations, 2005:13).

Migrant domestic workers

Migrant domestic workers have long been recognized as particularly at risk of discrimination, abuse and exploitative working and living conditions (Böhning, 1996:63-64) and pose a well-documented instance of the cumulative discrimination referred to earlier. "Most domestic workers are women and suffer discrimination on the grounds of their sex and associated gender roles. This is reflected in pay levels where the work remains undervalued and poorly regulated. Traditional attitudes and prejudices about women as subordinates also contribute to wide-spread practices of coercion and violence" (ILO, 2016:3). This is believed to be particularly acute if the migrant domestic workers are in an irregular situation. In connection with forced labour "domestic work is one of the most frequently cited economic sectors" (ILO, 2016:4).

In June 2011, the ILO adopted the first international standard specifically on domestic workers, Convention No. 189 on Decent Work for Domestic Workers. It includes a number of provisions intended to improve protection and ensure equality of treatment for many domestic workers who are foreigners (migrant workers) in their place of employment, although it does not cover undocumented migrant domestic workers nor those under an au-pair programme or in diplomatic households. In particular, where this has not been the case the country's labour laws should be extended to domestic workers. For migrant workers this would entail access to other employers and occupations. The Convention has found relatively rapid approval by Member States and by the end of 2021 was ratified by 35 of them.

Inferior rights, insufficient protection

If States have not ratified international human rights instruments or labour standards, they may be less immediately bound by specific provisions. However, customary international law and *jus cogens* impose normative obligations on all States for human rights and labour standards, including non-discrimination, regardless of ratification of particular instruments. Applicability remains debated as to the extent of non-discrimination obligations for non-citizens on the territory of the country – notably depending on immigration status – but international court and treaty body rulings generally regard non-discrimination as in effect s*ina qua non* for all persons, including migrants and regardless of status for labour, economic, social, and cultural rights protection.

In any case, if national legislation and administrative practices conform to what in the instruments is defined as discrimination, it will be discrimination in the light of these instruments.

There are at least three ways in which a state can allow or facilitate discrimination:

a) The state does not outlaw or, if outlawed, it tolerates private discrimination,
b) the state itself discriminates in its laws and regulations or in its administrative practice,
c) the state puts an obligation on individuals and organisations to discriminate.

Any combination of (a), (b) and (c) can and does occur in reality but while there is reasonable knowledge of the legal regulations in a large number of countries there is little or no information on actual practices (ILO, 1999).

States offer a variety of reasons for not ratifying the Conventions. The contents of the Articles do not appear to be the main obstacle, although states engaged in strict rotation of temporary, posted or seasonal migrant workers do of course view any provisions establishing equality between migrant and national workers, equality of opportunity and treatment, the right to change jobs, and any rights in the case of loss of employment or incapacity to work as anathema (ILO, 1999:239). Rather they cite (unspecified) specificities of their labour market, the lack of infrastructure, of personnel capacity, of funds, untoward economic or political conditions, uncertainties about how much their laws and practices conform with the norms set in the Conventions, and while they may agree with equal treatment equal opportunities are held to be asking too much (ILO, 1999:236-240, 242-243). The point they mean to make is not always exactly clear.

There were and are instances where employers or landlords are obliged by law to treat non-citizens differently from citizens and in fact to discriminate against them, although 'discrimination' will not be the term used in the relevant legal language.

Forms, remedies, and proof of discrimination

While there is no need for the definitions in the Conventions to do so, there are many different categorisations, classifications or typologies of discrimination in the academic literature. The definitions and names chosen for the categories, types, forms etc. do not matter as much as the awareness that discrimination comes in many guises and does not depend on intention. Helpful is also the awareness that good intentions are no guarantee at all against discriminating.

Much discrimination arises from an unwillingness to accommodate the needs of others as long as there is neither obligation nor other need or pressure to do so. In addition, behaviour can be chosen opportunistically to accommodate third parties. Finally, there is the whole area of behaviour that follows social norms, regulations, rules, traditions, or habits regardless of whether they may be deemed discriminatory or not.

In the Conventions and Covenants that define the rights-based approach to migrant workers no distinctions between different kinds of discrimination are drawn. This has the beneficial effect of avoiding any sense of hierarchy or priority among them and bears the risk of overlooking discrimination that is indirect. The risk arises less in cases of complaints and perhaps least when equality of opportunity is considered because it is almost self-evident that opportunities lie in structures rather than in individual behaviour but may be relevant when thinking about preventive measures.

Direct and indirect

These concerns were in the main dealt with above when discussing the behavioural content of the definition of discrimination in ILO C111. Nonetheless it may serve well to establish an understanding of the now widely accepted distinction between direct and indirect discrimination that at the start of the century still posed considerable problems for law makers and judges. The European Union, in 2000, drew the distinction thus:

(a) "direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular [characteristic] at a particular disadvantage compared with other persons unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary, or (ii) …"[5]

Here indirect discrimination is not distinguished by any particular effects but by the effects arising out of a, for instance, selection behaviour following rules that would not be discriminatory, if people did not differ on characteristics they can either not give up or have a right to possess. In other words, rules of any kind have to be adapted sufficiently to accommodate the limitations set by, in the EU's specific case, disability, age, sexual orientation, political conviction, and faith.

In the framework of the rights-based approach to migrant workers such accommodation is not explicitly provided for.

Affirmative Action and "Positive discrimination"

Discrimination against one kind of persons is tantamount to discrimination in favour of other kinds of persons. For this reason, so called 'positive discrimination' is usually outlawed along with its counterpart. A case can be made, though, for permitting or even requiring affirmative action (see, for instance, Faundez 1994) as justified differential treatment until a certain goal has been achieved when a category of persons is shown or believed to have suffered extensive discrimination in the past. Moderate and widely practised forms of positive action/affirmative action consist in an obligation to prefer one kind of candidate if there are several equally qualified ones until a certain balance is achieved or in setting quotas for certain categories of persons.

Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted on 18 December 1979 by UN General Assembly Resolution 34/180, for instance, authorises "temporary special measures aimed at accelerating de facto equality between men and women" and exempts them from being considered discriminatory provided that they are "discontinued when the objectives of equality of opportunity and treatment have been achieved." This, of course, applies to migrant women, too, and could be an example to follow in regard to other criteria of discrimination.

Outlawing positive discrimination may not also prohibit 'positive action', meaning the targeting of particular kinds of persons for the improvement of professional qualifications, for anti-discrimination training including training in how to react to being discriminated, or for building resilience to discriminatory behaviour by others.

The line between positive action and discrimination is a fine one, though. Excluding somebody from participation in positive action courses on grounds of not belonging to a designated group could result in a discrimination charge. Admission to positive action has to be as free of discrimination as any other kind of admissions policy, i.e. it has to be based on objective, verifiable criteria of individual need for positive action.

[5] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 2 (2); likewise, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 2 (2).

As discussed earlier, expectations and claims of employer discrimination in favour of migrant workers are one reason why workers or trade unions and other actors have at times advocated against the admission of foreigners to the labour market, to employment, to integration and settlement, or to the country.

Proving the existence of discrimination against migrant workers

Individual cases illustrate the existence of discrimination in society and its widely varying appearances but provide no measure of its extent. This is particularly true of court cases but almost equally of complaints to designated organisations or offices.

If necessary, there are ways of obtaining data on the extent of discrimination, chiefly situation testing and surveys of perceptions of discrimination. The challenge is to carry them out judiciously and with up-to-date methodology and to actually cover the situation of migrant workers, including recently arrived ones, or to reach them with a questionnaire.

However, far more data and research is needed to establish where and how discrimination is taking place, and thus to enhance the political and social will to fight against discrimination and promote equality of treatment around the world.

The issue of measurement is a complex one with a substantial specialist literature that cannot be gone into here (but see, for instance, OECD 2008). Suffice it to mention that, for a period, the ILO itself offered Member States testing of hiring processes for discrimination and that between the mid-1990s and the mid-2000s seven European countries used the opportunity and in two more the methodology was copied. The results were remarkably similar showing that labour market entrants whose parents were migrant workers had to try between two and four times more often in order to get a job interview than others (Zegers de Beijl, 1999; ILO, 2007).

Conclusions

The rights-based approach calls for and, where applied, strengthens the protection of rights. It includes legislation, policy and practice to protect migrant workers and their families from discrimination. In its results, the rights-based approach contributes to a situation in which migrant workers, national workers, and employers can derive the most benefit from the admission and employment of migrant workers. This may not always be immediately evident in the very short run but arises as an incontrovertible conclusion from observing the evolution of national labour policies over the past 200 years, where the replacement of largely repressive with more rights-based regimes has been benefitting employers, shareholders, workers, government finances, and social cohesion, even if the transition remains incomplete. The same conclusion arises from the success of policies in regional groupings such as the European Union, ASEAN or Mercosur since the middle of the 20th century. Nationally and in regional groupings this path should therefore be continued and the temptation to turn the clock back should be resisted by workers, business, and all of society alike.

Changing laws is the easy part of the transition from a repressive and divisive to a rights-based approach. Getting practices on the ground to conform to the law however takes a sustained effort. This is true both in regard of practices of the public administration and the courts and of employers whether private or public (Abella et al., 2014; Taran and Gächter, 2004; Gächter, 2017). Laws set rules, and rules take time to learn, but absent implementation they will not be learnt even in the long run. There need to be serious efforts to make the rules known, accessible opportunities to learn them, and incentives or, if need be, pressure and sanctions. A particularly effective way of propelling learning on the job for administrators,

managers and household proprietors may be to give workers, including all migrant workers, the freedom to react to changes and to decisions by either seeking other employment, organising, demonstrating or at least for fielding complaints anonymously.

Laws also provide or withhold rights. “The benefits of migration cannot be maximised unless the migrating workers are made fully aware of their rights and conditions of employment” (Abella et al., 2014). The onus for providing such information on rights and responsibilities has often been placed on the states the migrants are citizens of but, as became evident once again during the COVID-19 pandemic, and as emphasized here and elsewhere, it would benefit the states where they work to disseminate impartial and accurate information and to encourage trade unions and other bodies such as civil society groups and community associations to do so (EU FRA, 2021). In addition, the need for adequately staffed, trained, and empowered labour inspection cannot be emphasized enough, but crucially needs to be complemented by facilitation of workers’ self-organisation and easily accessible, effective complaints bodies and recourse to justice by individual workers for there are large numbers of workplaces inaccessible to or hidden from labour inspection.

In closing it may be noted that this bare-bones outline of the conceptual framework international legal instruments provide for research on and action against discrimination, especially of migrant workers, largely leaves open the content of such research. While much of will necessarily have to be local, regional, or national in focus, attention may also have to be paid to international and global structures of inequality and the processes of their perpetuation.

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