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Rethinking access to justice for migrants in the Global South

Notions and mechanisms of Access to Justice in favor of approaching of redistribution, recognition and representation

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Access to justice *for all* is indicated as one of the targets necessary to reduce inequalities as part of the global agenda on sustainable development. Access to justice is traditionally understood as seeking justice or redress mainly before a court of law. As a result, the term is predominantly conceptualised and applied in a legal and judicial sense, and formal legal processes and courts of law are viewed as playing a central role in justice delivery. Importantly however, a 2019 global report on access to justice revealed that most people do not turn to lawyers and courts to resolve disputes. This is due to a number of factors including, the fact that many people don't understand their problem to be a legal one, as well as the existence of geographical, financial, and structural obstacles to access formal justice processes, and institutional and cultural barriers, among others. Consequently, a significant proportion of the world's population lack meaningful access to justice for injustices and the wrongs that they experience.

Migrants generally are among the marginalised or disadvantaged groups that are most likely to suffer injustices or rights violations and yet are also among those least likely to be able to claim any of the protections offered by formal justice systems. The protection of migrants is considered an international concern. The United Nations (UN) General

Assembly has recognised the “situation of vulnerability in which migrants and their accompanying families can find themselves when outside their States of origin owing, inter alia, to the difficulties they encounter because of discrimination in society, differences of language, custom and culture, as well as the economic and social difficulties and obstacles to the return of migrants to their States of origin, especially those who are undocumented or in an irregular migratory situation.”

This article focuses on access to justice for migrants in the Global South. It is based on research and findings undertaken by the Migration for Development and Equality (MIDEQ) Hub, a five-year project funded by the UK Research Institute Global Challenges Research Fund (UKRI-GCRF). As part of its work, the MIDEQ Hub is interested in analysing, better understanding, and ultimately, promoting migrants’ access to justice. The analysis is based on findings of injustices that migrants face in their everyday lives.

The injustices experienced by migrants

Not all migrants experience the same injustices, just as not all migrants that suffer an injustice experience it in the same way. Migrants may experience injustices based on their migration status, employment status, education level, gender, age, race etc. Numerous reports by the UN Special Rapporteur for the Human Rights of Migrants highlight a multitude of human rights violations that migrants may experience generally, as well as specific rights violations more likely to be experienced by different groups of migrants, for example, women, unaccompanied children, migrant workers, domestic workers, and undocumented migrants.

Arbitrary detention, including the detention of children, together with worker exploitation, including non-payment of wages, lack of documentation, withholding of passports, lack of social protection, xenophobia, racism, and discrimination, are just some of the examples of common violations experienced by many migrants. Research conducted by MIDEQ has found that these and more violations and injustices are still rife in many countries including

the twelve countries, all located in the Global South, in which MIDEQ researchers are based.

Despite suffering such injustices, many migrants are not in a position to seek redress through formal justice mechanisms for diverse reasons. For instance, due to a lack of separation between immigration enforcement and the provision of other public services, undocumented migrants may fear reporting violations. Migrant workers on temporary contracts may not be able to lodge and follow up complaints about wage theft by their employers in the destination country once they leave the country. Lack of legal assistance and aid, lack of information on available mechanisms, and other structural obstacles contribute to migrants' inability to access formal justice processes. In some instances, though, migrants may choose to resolve their disputes or seek redress for injustices, not from formal legal and judicial mechanisms, but from non-formal or informal justice mechanisms.

Owing to the various obstacles migrants may face in accessing justice, and the exclusion from formal justice mechanisms that many of them experience, we argue for a more bottom-up approach to access to justice which moves away the predominant top-down conceptualisation.

Our proposed approach to access to justice

Our UN University Centre for Policy Research Discussion Paper titled "Shrinking the Justice Gap: Rethinking Access to Justice for Migrants in the Global South," lays out our argument on why we need this shift in approach, which we believe would benefit migration research and policy interventions. We produce a synopsis of the key main points here.

Firstly, we note that oftentimes research or analyses on access to justice for migrants fails to centre the experiences of migrants. Migrants are often treated as research subjects or victims rather than as justice-seeking subjects. Similarly, policy interventions meant to

improve the rule of law including access to justice fail to take into consideration the beneficiaries' customs, traditions, and laws in the countries where migrants live. Consequently, such interventions may not be effective in actually improving access to justice for the affected groups. We therefore argue that "it is only by understanding justice problems from the perspectives of migrants, including how they address injustices, and by exploring all potential justice pathways available to them, that we can begin to test and implement responses that focus on meaningful and migrant-centred justice outcomes."

Secondly, the predominant understanding of access to justice is both Eurocentric and statecentric in its emphasis on formal judicial mechanisms, excluding many of people that cannot access these processes and mechanisms. As it is, many of the world's poor, marginalised, and disadvantaged peoples do not rely on formal justice systems, but rather on informal dispute resolution mechanisms or non-formal structures. Such informal mechanisms may include customary or traditional legal systems constituted of community elders, or families. Other informal justice actors could be local NGOs, women's groups and social organisations. We therefore advocate for an approach to access to justice that considers not only the traditional and formal justice institutions and mechanisms.

Moreover, the understanding and general application of the term "access to justice" needs to go beyond mere procedural justice to involve broader aspects of social justice. In this sense, justice can be seen as a function of other public service providers and administrative units such as schools, hospitals, immigration authorities, labour departments, etc, whose express mandate is not particularly judicial. Such institutions ought to provide services equally to all persons and without unlawful discrimination. Access to justice should include access, not only to alternative dispute resolution mechanisms, but also to other justice-delivery structures whose role it is to ensure justice is done for all.

Thirdly, still with reference to its judicial connotations, access to justice is largely discussed in terms of procedural justice. As a result, most interventions aimed at improving access to justice focus on making courts and formal legal processes more accessible for poor and marginalised citizens. Such interventions might involve, for example, increasing the number of the police and paralegals as well as associated infrastructure, improving the provision of legal aid, building more courts, making courts more efficient, and promoting legal education

and awareness, among others.

Whilst such interventions may be needed, the emphasis on these technical aspects of access to justice diverts focus from the core issues of structural inequalities and substantive injustices, (most notably, patriarchy, racism and capitalism) thus having a depoliticizing effect. For instance, having good, or any, legal representation will not necessarily address what could be widespread societal issues of racism, discrimination, or class and other structural inequalities. Whilst strategic litigation can help to draw attention to such issues and put the executive and legislative arms of government to task, this only goes to show the limits of judicial redress. Addressing some of these issues necessarily requires political, social, economic, or other action that goes beyond the reach of the judiciary to redress (see, for instance, the call for collective action in confronting the legacies of racism in Brazil).

We argue that any notion of and approach to access to justice should as such aim to address issues of substantive justice. We agree with the approach that conceives of justice in three dimensions of redistribution, recognition, and representation. The redistribution dimension refers to the economic structure of society and aims to tackle class inequalities, the recognition dimension refers to the status order of society and aims to tackle socio-cultural hierarchies such as racial and related discrimination, and the representation dimension refers to political participation and aims to tackle exclusions from political processes or political voicelessness. Conceiving of access to justice from this perspective opens up ways of improving access to justice for the various disadvantaged groups, including migrants. This approach recognises that while access to justice may still require judicial intervention and formal legal processes to redress some individual or collective injustices, it will also necessitate more of the political action to ensure justice for all.

Fourthly and finally, most research and interventions on access to justice have tended to focus on injustices suffered by migrants *as migrants*. This is particularly so in relation to the rights of migrant workers. While some injustices are suffered specifically by migrants due to their status and therefore ensuing interventions need only target migrants, we should also be attentive to the extent to which these injustices are also faced by similarly disadvantaged or disenfranchised citizens. Likewise, while migrants will face specific obstacles in accessing justice, some obstacles will be similarly experienced by citizens. Isolating

migrants' experiences of injustice from those experienced by citizens, where the injustice experiences are in fact intersecting, could obscure structural forms of oppression and prevent building solidarity among similarly affected groups.

In conducting analyses or research in migration, or in thinking of possible interventions that may improve migrants' access to justice, migration status might not be the most important criterion determining the injustices that people face. Categories of difference such as gender, age, race, and income status may be the more relevant for understanding the nature of the injustice, whom it affects and how it may be redressed. It is important then that both research and other access to justice interventions be mindful of intersecting injustices and obstacles to access to justice and come up with meaningful solutions that cross the migrant-citizen divide.

We hope that this broad and bottom-up approach to access to justice that encompasses but also goes beyond judicial protection and which is attuned to structural inequalities might allow for the promotion of interventions that are more meaningful and sustainable. We also hope that this approach can help link up the experiences of injustice faced by migrants (and citizens) in different contexts. Finally, we hope this approach may help move discussions on migrants' access to justice beyond the strictly legal realm, thereby making it less tied to the formal understandings of justice that have dominated political and policy debates in the Global North.