

# **Shrinking the Justice Gap: Rethinking Access to Justice for Migrants in the Global South**

Discussion Paper, March 2023

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# 1. Introduction

Access to justice is essential for the realization and assertion of an individual's human rights in both domestic and international law. Access to justice is also recognized by the United Nations as integral to delivery of the Sustainable Development Goals (SDGs), inclusive growth, and the commitment to leave no one behind. This is evidenced by the inclusion of SDG target 16.3, which commits all Member States to “promote the rule of law at the national and international levels, and ensure equal access to justice for all.”<sup>1</sup> Likewise, the Organisation for Economic Co-operation and Development (OECD) notes that the “inability to resolve legal problems diminishes access to economic opportunity, reinforces the poverty trap, and undermines human potential and inclusive growth.”<sup>2</sup>

Despite this, there remains a significant ‘global justice gap,’ which undermines access to justice for individuals and delivery of the human development agenda.<sup>3</sup> Approximately two-thirds of the world's population – roughly 5.1 billion people – lack meaningful access to justice. They either cannot obtain justice for civil, administrative or criminal problems, are excluded from the opportunities that the law provides, or live in conditions of extreme injustice.<sup>4</sup> This problem is particularly acute for migrants,<sup>5</sup> many of whom face economic, social, cultural, linguistic, structural, institutional and, at times, legal barriers to accessing justice.<sup>6</sup> Regardless of their nationality or reasons for moving, migrants enjoy the same fundamental human

rights as all human beings under international human rights law.<sup>7</sup> For some of those who decide to cross an international border, migration is a positive and empowering experience. Yet for many others, the lack of rights-based systems of migration governance – or the inability to access such systems where they exist – is creating a human rights crisis at borders and in countries of origin and destination.<sup>8</sup>

In this context, there have been growing calls to increase access to justice for migrants and their families, including in the Global South where significant international migration takes place. Two of these are of particular note. The first is the call by the UN Special Rapporteur on the Human Rights of Migrants for the development of an ‘Agenda 2035 for the facilitation of human mobility’ under the UN framework to complement the SDGs. The Special Rapporteur proposes eight goals that are, *inter alia*, aimed at promoting safe, orderly, accessible, and affordable migration, protecting the human rights of all migrants, including from discrimination and violence, ending the use of migrant detention, and providing access to justice for all migrants.<sup>9</sup> The second is the UN Global Compact for Safe, Orderly and Regular Migration (GCM), the first comprehensive agreement on migration in all its various dimensions.<sup>10</sup> In as much as it provides a roadmap for Member States to achieve its objectives, it is also a useful indicator of areas where further action is needed, and to which States have demonstrated a positive commitment. By virtue of signing up to the GCM,

1 United Nations General Assembly, “Resolution 70/1, adopted by the General Assembly at the United Nations summit for the adoption of the post-2015 development agenda,” United Nations, 25 September 2015, A/RES/70/1. Available at: <https://www.refworld.org/docid/57b6e3e44.html>. For commentary on this SDG, see, for example, Margaret L. Satterthwaite and Sukti Dhital, “Measuring Access to Justice: Transformation and Technicality in SDG 16.3,” *Global Policy* Volume 10 (2019): 96–109; Marcus Manuel and Clare Manuel, “Achieving Equal Access to Justice for All by 2030,” *Overseas Development Institute Working Paper* (London: ODI, 2018).

2 Organisation for Economic Co-operation and Development (OECD), *Towards Inclusive Growth – Access to Justice: Supporting People-Focused Justice Services*, (Paris: OECD, 2016). Available at: <https://www.oecd-ilibrary.org/sites/1e4db652-en/index.html?itemId=/content/component/1e4db652-en>.

3 The justice gap, as defined by the World Justice Project (WJP), can be “understood as the number of people who have at least one unmet justice need. These are people who are ultimately not getting the justice they need for both everyday problems and severe injustices.” For more information: World Justice Project (WJP), *Measuring the Justice Gap: A People-Centered Assessment of Unmet Justice Needs Around the World* (Washington, DC: WJP, 2019), p. 4. Available at: <https://worldjusticeproject.org/our-work/research-and-data/access-justice/measuring-justice-gap>.

4 *Ibid.*, p. 5.

5 The term ‘migrant’ as used in this Discussion Paper is inclusive of all “people who have moved from their usual place of residence, regardless of their legal status and their motivations for moving.” See <https://meaningofmigrants.org/>.

6 International Organization for Migration (IOM), *Migrants’ Access to Justice: International Standards and How the Global Compact for Safe, Orderly and Regular Migration Helps Paving the Way* (Geneva: IOM, 2022). Available at: <https://www.iom.int/resources>; United Nations, *Report of the Special Rapporteur on the human rights of migrants*, A/73/178/Rev.1 (25 September, 2018), paras. 43–57; United Nations, *Report of the Special Rapporteur on extreme poverty and human rights*, A/67/278 (9 August 2012), paras. 18, 21 and 76.

7 IOM, *International Migration Law Information Note on Access to Justice: a Migrant’s Right* (Geneva: IOM, 2019). Available at: <https://www.iom.int/resources>; United Nations, *Report of the Special Rapporteur on the human rights of migrants*, A/73/178/Rev.1, footnote 6, para. 7.

8 See for instance, United Nations, *Report of the United Nations High Commissioner for Human Rights: Principles and Practical Guidance on the Protection of the Human Rights of Migrants in Vulnerable Situations*, A/HRC/37/34 (3 January 2018), paras. 12–16.

9 United Nations, *Report of the Special Rapporteur on the Human Rights of Migrants*, A/72/173 (19 July 2017).

10 United Nations General Assembly, Resolution A/RES/73/195, adopted by the General Assembly at the 73<sup>rd</sup> session, United Nations, 19 December 2018.

and the 2022 Progress Declaration of the International Migration Review Forum, States have recognized the need to improve access to justice for migrants at the different stages of the migration process, that is, in countries of origin and destination, as well as the countries through which they move.<sup>11</sup> The GCM, in particular, recognizes that access to justice is one of the fundamental elements governing migration,<sup>12</sup> and this is reinforced in the Progress Declaration in which States commit to providing information on access to justice, and “ensuring safe and effective access to justice” for migrant victims of crime and violence.<sup>13</sup>

Drawing on evidence and data gathered by researchers in the Global South, as part of the UKRI-funded Migration for Development and Equality (MIDEQ) Hub,<sup>14</sup> this discussion paper explores the concept of access to justice for migrants in the Global South, emphasizing the importance of approaching access to justice as part and parcel of a broader agenda for social justice. We want to invite a discussion on the question of access to justice by starting with an investigation of the kinds of injustices migrants may face in their everyday lives. These injustices might be more clearly attributed to specific relations and actors, or to structural forms of oppression and inequality. We consider it important to include those instances in which the main injustices faced by international migrants might also affect marginalized citizens—a consideration that has been widely neglected within research on migration, which tends to focus on the issues of injustice and rights associated with migration only, especially in relation to employment rights for migrant workers.

We begin this paper by presenting evidence on migrants’ lived experiences of injustice and the justice challenges with which migration in the Global South is often associated. The paper further reaffirms the significance of placing migrants’ expressed justice needs and lived experiences at the centre of any access to justice analyses and interventions. We then examine the ways in which access to justice has been approached in the migration literature, unpacking the implications of dominant thinking for migrants and their families in the Global South who are often excluded from social and economic systems as well as

legal and judicial protection. While recognizing that there are significant efforts, both domestically and internationally, to improve migrants’ access to formal justice mechanisms and the rule of law, our analysis starts from an acknowledgment that the majority of access to justice and rule of law interventions in the Global South are premised on top-down and technical approaches that focus on accessing State-led justice systems and seeking to strengthen ‘justice provision’ rather than focussing on ‘justice outcomes.’ Despite increasing acknowledgment of the need to work with plural justice systems, there remains a tendency to adopt concepts, ideals, and processes that originate in the Global North, which do not necessarily reflect the priorities and opportunities available to migrants in the Global South.

The paper then moves on to propose a rethinking of the dominant approach to research, policies, and interventions which aim to increase access to justice for migrants in the Global South, and more generally. While our suggestions are by no means novel, they build upon and amplify proposals by various actors that have been advocating for a broader conception of access to justice for migrants. We also synthesize various arguments from relevant literature on justice, and access to justice generally, which contribute to shaping the specifics of our arguments for how this work might be taken forward, and indeed is being taken forward by the MIDEQ Hub.

The evidence and examples provided to illustrate the points made in this paper are drawn primarily from the six South-South migration corridors that are the focus of the MIDEQ Hub’s research, namely: Burkina Faso-Côte d’Ivoire, China-Ghana, Egypt-Jordan, Ethiopia-South Africa, Haiti-Brazil, and Nepal-Malaysia. The idea of migration ‘corridors’ is used in the MIDEQ Hub as a framing device and metaphor that allows us to look at the experiences of migrants across the migration trajectory rather than just in countries of destination, which is the case with most research on access to justice for migrants. This focus on migration corridors also allows us to examine the relationships within and between countries, countering the focus of much migration research on processes and outcomes in individual countries.<sup>15</sup>

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11 Ibid, paras. 18(b), 19(d), 26(e), and 29(d); See also United Nations General Assembly, Resolution A/RES/76/266, adopted by the General Assembly at the 76<sup>th</sup> Session, United Nations, 14 June 2022.

12 United Nations General Assembly, Resolution A/RES/73/195, footnote 10, para. 15(d).

13 United Nations General Assembly, Resolution A/RES/73/195, footnote 10, paras. 59, 61, and 63.

14 The MIDEQ Hub unpacks the complex and multi-dimensional relationships between migration and inequality in the context of the Global South. MIDEQ aims to transform understanding of the relationship between migration and inequality in the context of the Global South by decentering the production of knowledge about migration and its consequences away from the Global North towards those countries where most migration takes place. More information available at [www.mideq.org](http://www.mideq.org).

15 See “Migration corridors,” MIDEQ Hub, last accessed 1 March 2023, <https://www.mideq.org/en/migration-corridors/>.

## 2. Migration Injustices and Related Access to Justice Challenges

The Global South hosts about 45 per cent of global migrants,<sup>16</sup> a large proportion of whom are low-skilled and low-paid South-South migrant workers who fall into the ‘global justice gap.’ This justice gap arises from a number of factors, including: a lack of documentation needed to access basic rights; lack of legal status and discriminatory laws; informality; lack of access to institutional support; impermanence in a particular place; and unfamiliar cultures, systems, and languages.

The justice-related challenges that migrants face vary by region, country, migration path, reason(s) for migration, and across gender and age. Research by the MIDEQ Hub contributes to the growing body of literature on migrants’ experiences of injustice from a Global South perspective. The findings of our research underscore the fact that some of the injustices, notably regarding distributive justice and freedom of movement, normally associated with a Global South to Global North migration trajectory, are equally observable and prevalent within South-South migration.<sup>17</sup> For instance, the often stringent, complex, and highly selective admission eligibility requirements to which migrants from the Global South are subjected when travelling to Global North countries are equally pervasive in the context of South-South migration.<sup>18</sup> The only exception is among countries with operative multilateral or bilateral agreements that ease entry and residence requirements for each others’ nationals.<sup>19</sup> However, even among these regional arrangements, violations of the guaranteed freedom of movement and residence of affected nationals may still occur at border points and in host countries.<sup>20</sup>

The injustices that migrants experience may be specific to the country of origin, to the countries through which they travel *en route* to other countries, or to the country of destination. We present some of these injustices based on existing literature as well as from the data collected by the various MIDEQ country teams. While this presentation may not capture the depth of the emotional responses and overall effect of some of the injustices experienced by migrants, it provides a clearer picture of the justice landscape at various stages of an individual’s migration trajectory.

### Countries of Origin

In some countries of origin, aspiring migrants find it difficult to obtain the requisite documents, including a passport that they would need to leave the country. This is despite the universally recognized human right to leave any country, including one’s own.<sup>21</sup> For instance, MIDEQ research in Brazil among Haitian migrants<sup>22</sup> has noted the difficulty, and at times near impossibility, of obtaining a passport in Haiti. Thays, one of the Haitians interviewed by the MIDEQ team in Brazil describes the hardship of obtaining a passport in Haiti:

[M]any people have to leave their cities and use expensive public transportation to reach the capital. They need to arrive at the location as early as possible to get in line, and that is no guarantee that you will be seen that same day. You can be simply standing in line for as long as three days, and once you start the process, even if they say you will have your passport in two to three months, six months might go by before you can get that document.<sup>23</sup>

16 Jeanne Batalova, “Top Statistics on Global Migration and Migrants,” Migration Policy Institute, 21 July 2023, <https://www.migrationpolicy.org/article/top-statistics-global-migration-migrants>.

17 See, for example, Oliver Bakewell et al., “South-South Migration and Human Development: Reflections on African Experiences,” *Working Paper Series, Paper 15* (Oxford: International Migration Institute, April 2009), pp. 24–25; Jonathan Crush and Sujata Ramachandran, “Xenophobia, International Migration and Development,” *Journal of Human Development and Capabilities* Volume 11 Issue 2 (2010): 209–228, pp. 209, 210.

18 Africans, for instance, require visas to travel to 51 per cent of other African countries. See United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa: Africa’s Services Trade Liberalization & Intergration under the AfCFTA* (Addis Ababa, United Nations, 2021), p. 50.

19 There are a number of multilateral regional agreements in the Global South that provide free movement for nationals of the respective regional communities. These include the Economic Community of West African States (ECOWAS), the East African Community (EAC), the Caribbean Community and Common Market (CARICOM), and MERCOSUR in South America.

20 See, for example, Thomas Yeboah et al., “The ECOWAS Free Movement Protocol and Diversity of Experiences of Different Categories of Migrants: A Qualitative Study,” *International Migration* Volume 59 Issue 2 (2020): 1–17.

21 United Nations General Assembly, Resolution (217 [III] A), adopted by the General Assembly on 10 December 1948, article 13.2.

22 MIDEQ Brazil interviews. Information on the Brazil-Haiti MIDEQ corridor is available at <https://www.mideq.org/en/migration-corridors/haiti-brazil/>. See also The Interuniversity Institute for Research and Development (INURED), *Post-Earthquake Haitian Migration to Latin America* (Coventry: MIDEQ, 2020). Available at: <https://www.mideq.org/en/resources-index-page/post-earthquake-haitian-migration-latin-america/>.

23 MIDEQ Brazil interviews.

This in turn places a high premium on a passport, making it available to only those that can afford to make the excessive extralegal payments. This invariably affects many individuals' right to leave and return to their country. But it also renders them more vulnerable to further human rights violations if they try to procure a passport through unofficial means or they are pushed into the hands of human smugglers and traffickers.<sup>24</sup>

Poor communication or a lack of official and reliable information is another pervasive injustice, as well as an inhibitor of access to justice in various countries of origin. Interviews conducted by the various MIDEQ teams in different migration corridors reveals that many migrants, especially those who are not from metropolitan areas, obtain information from social networks rather than from official government sources.<sup>25</sup> For most, information on formal migration channels is not available in their local areas, while information from non-official sources (social networks and brokers or intermediaries) is usually more readily available and accessible.<sup>26</sup> In both Ethiopia and Haiti, many respondents opted for irregular migration based on this information. This information and communication gap, which may be regarded as a form of epistemic injustice,<sup>27</sup> is acknowledged in Objective 3 of the GCM on providing accurate and timely information at all stages of migration, and which if properly addressed by Member States, could forestall consequential migration-related injustices.

In some cases, countries of origin are associated with unjust conditions that necessitate or force people to migrate. This is usually the case where there is poor or failed governance or authoritarian regimes, leading to violations of economic, social, cultural, civil, and political rights. Migrants from Haiti, Nepal, and Ethiopia, for example, cited factors such as poor economic conditions, unemployment, and limited

prospects for personal development, among their reasons for migration. Some Ethiopian migrant respondents said that they had migrated due to political persecution and marginalization by the central government and hoped to secure international protection in South Africa.<sup>28</sup> States of origin may also fail to provide avenues of redress for potential migrants who suffer injustices at home. For instance, according to a report by the International Labour Organization (ILO),<sup>29</sup> in South-East Asia most legal complaints made by migrant workers were related to recruitment abuse in the country of origin, especially cases of delayed deployment or jobs that were not provided as promised.

In addition to generating some of the conditions that lead people to migrate, or failing to protect people from injustices suffered domestically, some countries of origin also fail to intervene to protect their citizens who suffer injustices while abroad. Excepting refugees and asylum seekers who do not enjoy the protection of their countries, migrants often receive limited assistance from their governments, including through their diplomatic missions, when they report instances of injustice. In the case of diplomatic missions, embassy authorities are often reluctant to intervene in such cases so as not to harm diplomatic relations with the host country.<sup>30</sup> Often under-resourced and under-staffed embassies and missions are unable to respond to the cases brought to them by migrants.<sup>31</sup> Nepal, for instance, whose law provides for the appointment of labour attachés in major destination countries, has not been able to appoint attachés in some countries, or where attachés do exist, they may lack adequate training and resources to effectively carry out their role.<sup>32</sup>

One often neglected aspect of migration-related injustices is the situation of non-migrating families of migrants – in

24 INURED, *Post-Earthquake Haitian Migration*, footnote 22, pp. 31–34.

25 These dynamics are more substantively covered under MIDEQ Work Package 4 on Migrant Perceptions, Knowledge and Decision-making e.g. Jessica Hagen-Zanker and Richard Mallett, "Understanding Migrant Decision-making: Implications for Policy," *MIDEQ Working Paper* (Coventry: MIDEQ, 2020), p. 11. Available at: <https://www.mideq.org/en/resources-index-page/understanding-migrant-decision-making-implications-policy/>; Dereje Feyissa, "Beyond Economics: The Role of Socio-political Factors in Hadiya Migration to South Africa," *Zanj: The Journal of Critical Global South Studies* Volume 5 Issue 1/2 (2022): 35–58, pp. 50–54.

26 See INURED, *Post-Earthquake Haitian Migration to Latin America*, footnote 22; research data gathered by MIDEQ researchers at University of Cape Town, South Africa. See: <https://www.mideq.org/en/migration-corridors/ethiopia-south-africa/>.

27 Morten Fibieger Byskov, "What Makes Epistemic Injustice an "Injustice"?" *Journal of Social Philosophy* Volume 52 Issue 1 (2021): 114–131.

28 Feyissa, "Beyond Economics," footnote 25, pp.48–9; See also <https://www.mideq.org/en/resources-index-page/ethiopia-brief/>.

29 International Labour Organization (ILO), *Access to Justice for Migrant Workers in South-East Asia* (Geneva: ILO, 2017). Available at: [https://www.ilo.org/asia/publications/WCMS\\_565877/lang--en/index.htm](https://www.ilo.org/asia/publications/WCMS_565877/lang--en/index.htm).

30 Migrant Forum in Asia (MFA), *Challenges on Access to Justice for Migrants* (Quezon City: MFA, n.d.). Available at: <http://mfasia.org/mfanewsletter/2807>.

31 United Nations, *Report of the Special Rapporteur on the Human Rights of Migrants*, A/73/178/Rev.1, footnote 6, para. 23.

32 Anita Ghimire, 'COVID-19 has not stopped anything': Migration Practicalities Post COVID-19 and Implications for Nepal's Migration Policy? (Freiburg: Arnold-Bergstraesser-Institute, 2021). Available at: <https://www.mideq.org/en/resources-index-page/>; Government of Nepal, *Nepal Labour Migration Report 2020* (Kathmandu: Government of Nepal, 2020), pp. 91, 113.



other words, those that stay behind. These injustices are often deeply gendered and may be age specific. This is one aspect that the MIDEQ research team in Nepal explores further in their study on the impact of migration on the families of migrants.<sup>33</sup> Many of these injustices have been exacerbated by the COVID-19 pandemic.<sup>34</sup>

## Countries through which Migrants Move

In the countries through which migrants move, they may be subjected to injustices that not only violate their rights and dignity, but also seriously affect their physical, mental, psychological, and emotional well-being. Violations of migrants' rights on the move, which are often highlighted in the existing literature,<sup>35</sup> are also a prominent finding of MIDEQ's research along its various corridors. In the Ethiopia-South Africa corridor,<sup>36</sup> for example, Ethiopian respondents who had travelled to South Africa informally recounted harrowing tales of subjection to hunger and starvation, beatings, robberies and extortion, threats of violence, kidnappings, near-deaths and deaths, and sexual abuse.<sup>37</sup> Those arrested and imprisoned, for terms ranging from months to years, told of horrible prison conditions. Haitian migrants to Brazil often pay high and extortionate sums to intermediaries (*raketès*) to facilitate their journey to Brazil.<sup>38</sup>

One of the most disturbing aspects reported by some respondents was the way the justice systems in the various countries treat people that lack documentation. Undocumented migrants are often treated like hardened criminals, and are sometimes imprisoned in the same space, as was reported in some MIDEQ focus groups and interviews:

Think about it, these are people with no hope and you get arrested with them. We tell the police that he is here because he has taken a life of a human-being and it is his fault but as for us, we are here because we don't have a passport. What is our fault that you are doing this to us? We kept on asking them (MIDEQ South Africa interview).

These people, apart from trespassing into the country, they have done nothing and nor are they a threat to the safety and security of the country (MIDEQ South Africa interview).

If the worker runs away and goes to another company, that would be illegal, they would keep them in jail. They can't keep thieves, gangsters, bad people in jail and keep one labourer, a worker, in jail. This provision should be removed (MIDEQ Nepal interview).

This concern is echoed in the GCM which urges countries to use detention only as a measure of last resort, and that even where it is applied, ensure it complies with due process and human rights standards.<sup>39</sup>

## Destination/Host Countries

In countries of destination, migration justice issues relate primarily to admission and the right to access services and opportunities, with justice challenges often varying according to an individual's migration status. For instance, asylum seekers and refugees, while they may not be subject to deportation, may face challenges accessing fair and

33 Anita Ghimire, "Nepal Brief," MIDEQ, <https://www.mideq.org/en/resources-index-page/nepal-brief/>; Lorena Izaguirre et al., "South-South Migration from a Gender and Intersectional Perspective: Evidence from Three Country-Corridors," *MIDEQ Working Paper* (Coventry: MIDEQ, 2021). Available at: <https://www.mideq.org/en/resources-index-page/>.

34 These injustices are captured in a MIDEQ animation. See "COVID Chronicles: A Nepal-Malaysia Experience." Available at: <https://www.mideq.org/en/resources-index-page/covid-chronicles/>.

35 United Nations Support Mission in Libya and Office of the High Commissioner for Human Rights, *Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya* (2018). Available at: <https://www.ohchr.org/sites/default/files/Documents/Countries/LY/LibyaMigrationReport.pdf>; Christopher Horwood & Robert Forin, "Everyone's Prey: Kidnapping and Extortionate Detention in Mixed Migration," *Mixed Migration Briefing Paper* (Geneva: Mixed Migration Centre, 2019); Giulia Spagna, "Weighing the Risks: Protection Risks and Human Rights Violations faced by Migrants in and from East Africa," *RMMS Briefing Paper 5* (Geneva, Regional Mixed Migration Secretariat, 2017). Available at: <https://mixedmigration.org/resource/weighing-the-risks/>.

36 "Ethiopia - South Africa," MIDEQ Hub, <https://www.mideq.org/en/migration-corridors/ethiopia-south-africa/>.

37 Yordanos S. Estifanos and Laura Freeman, "Shifts in the Trend and Nature of Migration in the Ethiopia-South Africa Migration Corridor," *Zanj: The Journal of Critical Global South Studies* Volume 5 Issue 1/2 (2022): 59-75, pp. 67-68.

38 INURED, *Post-Earthquake Haitian Migration*, footnote 22, pp. 31-32.

39 United Nations General Assembly, Resolution A/RES/73/195, footnote 10, Objective 13, para. 29. See also United Nations, *Report of the Special Rapporteur on the human rights of migrants*, A/72/173, footnote 9, paras. 57-61, 70.

timely status determination procedures or regularizing their status in accordance with national laws.<sup>40</sup> Asylum seekers and refugees are sometimes denied freedom of movement, or detained, and may lack or have restricted access to social services and assistance, and economic or work opportunities, whilst their claims are being determined. Despite legal guarantees on non-refoulement, some asylum seekers may be returned to what are considered 'safe countries,' or they may be transferred to other countries for offshore processing. Both practices are questionable under international law.<sup>41</sup>

Migrants that lack documentation often have limited opportunities to regularize their status in the destination country, especially where they have primarily migrated in search of better life opportunities. Many Ethiopian migrants who travel irregularly to South Africa, for instance, apply for asylum upon arrival, which according to migrants is the most – if not the only – viable avenue to stay legally in the country. However, in many countries around the world, there is general hostility towards undocumented arrivals, who are prone to detention and deportation, sometimes in disregard of legal due process. The key issue here is not so much that a State should not take any action against those that violate its laws, but rather that this action should be proportionate and cognizant of international human rights law.<sup>42</sup>

Furthermore, undocumented migrants face significant legal obstacles in asserting their rights. First, the rights they are entitled to are often limited in destination countries, such as accessing basic social rights (for example health services

and education). Second, their effective ability to seek redress for rights violations is hindered in countries where there are no firewalls separating the justice system from immigration enforcement.<sup>43</sup> In these cases, the risk of detention and incarceration due to irregular status hampers judicial protection, making these migrants more vulnerable to different forms of exploitation and abuse.

Migrant workers that are covered by labour agreements or arrangements between Member States are often denied family unification rights, have limited access to social protection, and their rights to occupational and geographic mobility are generally restricted.<sup>44</sup> Many, including domestic workers, may work in exploitative work conditions, where they are overworked yet underpaid or not paid at all (wage theft).<sup>45</sup> Those that are on employer-sponsored visas risk losing their immigration status should they leave exploitative work conditions. These workers also face hurdles in obtaining access to justice in cases of abuse.<sup>46</sup> Additionally, their stipulated return makes it temporally difficult to claim rights and obtain redress while abroad. Given these limitations, temporary migrant workers who are subject to rights violations tend to either seek undocumented work or return to their country of origin, rather than seek legal remedies in the destination country.<sup>47</sup>

In addition to status-related injustices, there are also more systemic problems migrants may face in countries other than their own. These include racism, especially in deeply racialized societies, discrimination based on nationality, gender, and class, as well as xenophobia manifested on

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40 In South Africa, for instance, it emerged from the MIDEQ research that some of the respondents had been awaiting a decision on their asylum claim for more than a decade. See also Didier Fassin, "Asylum as a Form of Life: The Politics and Experience of Indeterminacy in South Africa," *Current Anthropology* Volume 58 Issue 2 (2017): 160–187; Rebecca Sutton et al., "Waiting in Liminal Space: Migrants' Queuing for Home Affairs in South Africa," *Anthropology Southern Africa* Volume 34 Issue 1/2 (2011): 30–37.

41 Sergio Carrera and Elseph Guild, "Offshore Processing of Asylum Applications," *CEPS Policy Brief* (Brussels: CEPS, 2017). Available at: <https://www.ceps.eu/ceps-publications/offshore-processing-asylum-applications-out-sight-out-mind/>; Sarah Leonard and Christian Kaunert, "The Extra-territorial Processing of Asylum Claims," *Forced Migration Review* Volume 51 (2016): 48–50.

42 United Nations, *Report of the Special Rapporteur on the Human Rights of Migrants*, A/72/173, footnote 9, paras. 57–59; United Nations, Resolution A/RES/73/195, footnote 10, para. 29.

43 IOM, *International Migration Law Information Note on Access to Justice*, footnote 7; MFA, *Challenges on Access to Justice*, footnote 30; United Nations, *Report of the Special Rapporteur on the Human Rights of Migrants*, A/73/178/Rev.1, footnote 6, paras. 33–37.

44 United Nations, *Report of the Special Rapporteur on the Human Rights of Migrants*, A/HRC/26/35 (3 April 2014), para. 4. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/129/15/PDF/G1412915.pdf?OpenElement>.

45 For more information on access to justice for wage theft, visit <https://www.migrantjustice.org/wagethefta2j>; Bassina Farbenblum and Laurie Berg, *Migrant Workers' Access to Justice for Wage Theft: A Global Study of Promising Initiatives* (Sydney: Migrant Justice Institute, 2021).

46 Bethany Hastie, "The Inaccessibility of Justice For Migrant Workers: A Capabilities-Based Perspective," *Windsor Yearbook of Access to Justice* Volume 34 Issue 2 (2017): 20–39; United Nations, *Report of the Special Rapporteur on the Human Rights of Migrants*, A/HRC/26/35 (3 April 2014), footnote 44, paras. 49, 52.

47 This is the case of many migrant workers under the kafala system in Qatar who face labour exploitation and wage theft—the few who do bring their cases to the justice system, which is of difficult access and navigation by migrants, often abandon their cases after some time. See Andrew Gardner et al, *Labour Migrants and Access to Justice in Contemporary Qatar* (London: LSE Middle East Centre, 2014), p. 33. Available at: <https://core.ac.uk/download/pdf/216860031.pdf>; United Nations, *Report of the Special Rapporteur on the Human Rights of Migrants*, A/HRC/26/35, footnote 44, para. 60.

variable scales.<sup>48</sup> For example, in Brazil, where racism is seen as a ‘defining element’ of society, migrants from Latin America and Africa are often viewed with contempt.<sup>49</sup> For Haitians, discrimination is worsened “by the stigmatization of Haiti as a country marked by poverty, political instability, and natural disasters.”<sup>50</sup> The systemic discrimination of migrants was more pronounced during the COVID-19 pandemic, when a number of States announced social, economic, and some health interventions that effectively excluded migrants.<sup>51</sup>

It is important to acknowledge that the ‘justice gap’ that exists in the countries of the Global South often affects both nationals and migrants alike, sometimes in much the same way with regards to the accessibility and availability of justice mechanisms.<sup>52</sup> This is particularly the case for nationals belonging to marginalized or disadvantaged groups. Nonetheless, migrants are often especially disadvantaged due to their lack of knowledge about environmental, linguistic, and cultural differences, as well as their unfamiliarity with the laws and justice structures of their new place of residence. Furthermore, although legislation in some destination countries requires that complaints related to recruitment and labour rights be filed in labour courts, this exposes migrants to generally lengthy and costly processes for settlement, which they are unable to pursue due to time-bound contracts and visas. Undocumented migrants may also want to stay under the

radar and so are unable to access justice mechanisms when they experience rights violations. In the absence of adequate consular support, migrants tend to turn to non-governmental organizations (NGOs) and civil society organizations in cases of abuse.<sup>53</sup> However, a lack of access to, or information on, organizations providing support to migrants can constitute an additional obstacle to accessing justice for many migrants, regardless of status. Consequently, both the initial injustice that a migrant may suffer owing to their status, together with the lack of access to justice or redress mechanisms in the host country, constitute what we describe as a *continuum of injustice*.

Access to justice is often overlooked in predominant debates on justice in migration. The discourse on justice in migration has tended to focus on which migrants should be accepted in a given society, and on what terms and conditions. The discourse and predominant approach to justice in migration is often top-down and shaped mainly by views from the Global North. In many cases, the voices or experiences of migrants are neglected. Consequently, any ensuing analyses and interventions on access to justice for migrants may not be entirely responsive to and reflective of their justice needs. This leads us to question the predominant understanding of access to justice and to argue that its application may be inadequate for influencing laws, policies, and practices that address the justice needs of migrants.

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48 United Nations, Resolution A/RES/71/1, adopted by the UN General Assembly at the 71st session, United Nations, 19 September 2016, paras. 13–14; See also United Nations, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, A/HRC/38/52 (25 April 2018), paras. 39–48. The racism and xenophobia against migrants was particularly pronounced during the COVID-19 pandemic as illustrated in Marie McAuliffe and Anna Triandafyllidou (eds.), *World Migration Report 2022* (Geneva: IOM, 2021), pp. 165–6.

49 Jailson De Souza, “From Affirmative Action to Collective Action: Confronting Legacies of Racism in Brazil,” *Crises of Inequality: Shifting Power for a New Eco-Social Contract* (Geneva: UNRISD, 2022), p. 2. Available at: <https://www.mideq.org/en/resources-index-page/from-affirmative-action-to-collective-action-confronting-legacies-of-racism-in-brazil/>; Heaven Crawley, “From Despair to Hope? Securing Rights for Haitian Migrants in the New Brazil,” UNU-CPR, 10 January 2023, <https://cpr.unu.edu/publications/articles/securing-rights-for-haitian-migrants-new-brazil.html#info>.

50 Ibid.

51 See, for example, Ncumisa Willie and Faisal Garba, “Covid-19 in South Africa: Whither Migrants?” *African Arguments*, 17 June 2020, <https://africanarguments.org/2020/06/covid-19-in-south-africa-whither-migrants/>; Heaven Crawley, “The Great Amplifier: COVID-19, Migration and Inequality,” 8 April 2020, <https://www.mideq.org/en/blog/great-amplifier-covid-19-migration-and-inequality/>.

52 United Nations, *Report of the Special Rapporteur on Extreme Poverty and Human Rights on Access to Justice for People Living in Poverty*, A/67/278, (9 August 2012), paras. 24–27, 75–76.

53 United Nations, *Report of the Special Rapporteur on the the Human Rights of Migrants*, A/73/178/Rev.1, footnote 6, para. 23.

### 3. The Problem with Dominant Understandings of Access to Justice

Access to justice is commonly – and predominantly – associated with litigation and access to judicial mechanisms for redress. For instance, it is defined as “the right to seek a remedy before a court of law or a tribunal which is constituted by law and which can guarantee independence and impartiality in the application of the law,”<sup>54</sup> as “a procedural ideal ... to enforce one’s rights by suitable legal means,”<sup>55</sup> as “the right to litigate on terms of equality with others,”<sup>56</sup> and as “the right to defend and assert all one’s rights on terms of equality with others and by due process of law.”<sup>57</sup> In short, access to justice has generally been understood as synonymous with judicial protection. The full cycle of access to justice begins when an individual with a grievance occasioned by the actions or omissions of others takes the matter to the justice system. The cycle ends when the dispute is solved, and the grievance is redressed. Redress might take different forms, and normally includes compensation, restitution, or punishment.

We find this dominant understanding and application of access to justice problematic in relation to the justice needs of migrants in the Global South for reasons presented below.

#### **Eurocentrism and State-centricity in Concepts of Access to Justice**

Narratives on the evolution of access to justice confirm that it is an essentially Eurocentric and State-centric concept. In the late eighteenth and nineteenth centuries, access to justice was mostly understood as individuals’ *formal* right

to resort to the justice system to litigate or defend a claim.<sup>58</sup> As a formal right, access to justice was *not* understood at that time as requiring the State to take measures to guarantee its fulfilment. This right only came to be seen as a central and *effective* right during the post-Second World War period, when welfare state reforms were under way in many countries of the Global North, and when social rights and the duties of governments in relation to these rights were recognized by different States.<sup>59</sup> In this context, citizens’ access to justice came to be understood as individuals’ most essential human right, “since the possession of rights is meaningless without mechanisms for their effective vindication.”<sup>60</sup> Access to justice thus came to be approached as citizens’ actual ability to litigate and seek remedy before a court of law when their rights are unfulfilled or violated.

With the post-Second World War development of international law, and in particular human rights law, access to justice became crystalized as a duty of the State towards not only its citizens, but to all persons in its territory without discrimination. The entire international human rights canon is indeed about justice for all persons without discrimination. However, references and commentaries on access to justice under the various international and regional instruments or even national bills of rights, largely maintain the understanding of access to justice in a mostly juridical sense.<sup>61</sup> For instance, when referring to provisions on access to justice in international law, commentators tend to confine themselves to provisions on the right to an effective remedy,<sup>62</sup> the right to a fair and public hearing by an

54 Francesco Francioni, “The Rights of Access to Justice under Customary International Law,” *Access to Justice as a Human Right* ed. Francesco Francioni (Oxford: Oxford University Press, 2007), p. 3.

55 Stefan Wrška, “European Consumer Protection Law: Quo Vadis?” *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* eds. Stefan Wrška, et al. (Cambridge: Cambridge University Press, 2012), p. 27.

56 Peter Sanderson and Hilary Sommerlad, “Colonising Law for the Poor: Access to Justice in the New Regulatory State,” *Redefining Social Justice: New Labour, Rhetoric and Reality* eds. Valerie Bryson and Pamela Fisher (Manchester: Manchester University Press, 2011), p. 179.

57 Thomas H. Marshall, “Citizenship and Social Class,” *Citizenship and Social Class* eds. Thomas H. Marshall and Tom Bottomore (London: Pluto Press, 1992/1950), pp. 10–11.

58 Bryant Garth and Mauro Cappelletti, “Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective,” *Buffalo Law Review* Volume 27 (1978): 181–292, p. 183.

59 Ibid, pp. 184–185; Marjorie Mayo, et al, *Access to Justice for Disadvantaged Communities* (Bristol: Bristol University Press, 2014), pp. 9–18.

60 Bryant Garth and Mauro Cappelletti, “Access to Justice,” footnote 58 p. 185; See also Mayo et al, *ibid*, p. 2.

61 See for instance, Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2015); Pierre Schmitt, *Access to Justice and International Organizations: The Case of Individual Victims of Human Rights Violations* (Cheltenham: Edward Elgar Publishing, 2017); Martin Scheinin, “Access to Justice before International Human Rights Bodies: Reflections on the Practice of the UN Human Rights Committee and the European Court of Human Rights,” *Access to Justice as a Human Right: Collected Courses of the Academy of European Law* ed. Francesco Francioni (Oxford: Oxford University Press, 2007).

62 For example, Universal Declaration for Human Rights, article 8; International Covenant on Civil and Political Rights, article 2(3); European Convention on Human Rights, article 13; American Convention on Human Rights, article 25.

independent and impartial tribunal, and fair trial rights.<sup>63</sup> Accordingly, access to justice within international governance has in some cases been taken to mean that “individuals have access to and can make effective use of existing judicial or quasi-judicial mechanisms to protect their rights and obtain redress in response to violations.”<sup>64</sup> This leaves no doubt as to a predominantly juridical conceptualization of access to justice in dominant legal and policy discourse.

Courts, doubtless, are a central element to the administration of justice in a democracy. But, our understanding of access to justice as mainly access to courts and litigation undercuts the meaning of justice, broadly understood. Philosophers have variously conceived of justice as an individual’s due or deserts, as fairness, as utilitarian, as contractarian, as equality, among others.<sup>65</sup> Even though the concept of justice has typically been rooted in the law,<sup>66</sup> it is now predominantly spoken about across various academic disciplines in terms of, for instance, distributive justice, economic and social justice, and global justice. Importantly, this means that some matters of justice are beyond the reach of the courts and the legal system. In other words, while justice may be the business of courts, justice is not only done or seen in the courtroom. This point is well-articulated and illustrated in a submission by the Global Alliance Against Traffic in Women to the UN Special Rapporteur on the human rights of migrants:

In many cases ‘justice’ is not associated with the legal system but with the ability to receive assistance, move on, find a good employer or be understood and accepted by the family and community. Asked what they consider ‘justice,’ some trafficked women assisted by our members said: ‘Just wanted them [people in her community] to know that I’m not guilty,’ ‘I think if the people in society would talk to me nicely, with kind words, I might feel I got justice,’ ‘Society does not treat me well, so I do not feel I have got justice.’<sup>67</sup>

In another study that sought to assess the public’s understanding of access to justice, one respondent stated, “[w]e’re not even talking access to justice ... we’re talking access to food, to shelter, to security, to opportunities for ourselves and our kids and until we deal with that, the other stuff doesn’t make sense.” Another was of the view that the “biggest thing is taking care of the disenfranchised ... because what’s enfranchisement other than accessibility...?”<sup>68</sup>

Understood from this viewpoint, justice is not only a matter for the State which has the primary obligation under international law to ensure that justice is provided and met; it is also the function of the wider society. Accordingly, “any account of access to justice must be able to encompass the enormous variety of social settings, political atmospheres, ideological frameworks, and cultural contexts.”<sup>69</sup> A broader understanding of the concept of access to justice becomes almost imperative if the process of justice is to deliver substantive justice outcomes.

### **Emphasis on Procedural and Formal Justice Mechanisms**

The focus on access to justice as access to litigation or courts leads to a focus on procedural justice.<sup>70</sup> While this is appropriate for court-centred or formal justice approaches, many of these formal legal mechanisms are simply out of reach for many communities regardless of citizenship status. This is true for countries in both the Global South and the Global North where people are faced with judicial systems that are labyrinthine, prohibitively onerous, costly, complex, lengthy, and generally biased against the least powerful (be it in terms of social and economic status, race, age, gender, or nationality). Courts also face internal administrative deficiencies leading to overwhelming backlogs, and in some cases miscarriages of justice, meaning that “those who receive their ‘day in court’ do not always feel that ‘justice has been done.’”<sup>71</sup> As a result, many people are, or feel, alienated from the court system and as such hardly ever turn to formal courts to have their justice

63 For example, Universal Declaration for Human Rights, articles 10 and 11; International Covenant for Civil and Political Rights, articles 14 and 16; European Convention on Human Rights, article 6; African Charter on Human and Peoples Rights, article 7; American Convention on Human Rights, article 8.

64 IOM, “Migrants’ Access to Justice,” footnote 6, p. 3.

65 Louis P. Pojman, *Justice: An Anthology* (London/New York: Routledge, 2006).

66 John Stuart Mill, *Utilitarianism* (1863) cited in Pojman, *ibid*, p. 53.

67 Global Alliance Against Traffic in Women, *Submission to the UN Special Rapporteur on the Human Rights of Migrants* (2018), p. 2. Available at: [http://gaatw.org/advocacy/Access\\_to\\_justice\\_for\\_migrants-Submission\\_to\\_UN\\_SR.pdf](http://gaatw.org/advocacy/Access_to_justice_for_migrants-Submission_to_UN_SR.pdf).

68 Trevor C. W. Farrow, “What is Access to Justice?” *Osgoode Hall Law Journal* Volume 51 Issue 3 (2014): 957–988, p. 971.

69 Sahar Maranlou, *Access to Justice in Iran: Women, Perceptions, and Reality* (Cambridge: Cambridge University Press, 2014) 15.

70 Deborah L. Rhode, “Access to Justice,” *Fordham Law Review* Volume 69 (2001), p. 1786; Farrow, “What is Access to Justice?” footnote 68, p. 970.

71 *Ibid*.

needs met. According to the available data, people rarely use the justice services that governments provide: only seven per cent use a court or some other form of tribunal, and only eight per cent receive the advice of a lawyer or another law professional.<sup>72</sup>

These problems are exacerbated for many countries of the Global South, where “state courts and other state institutions are not as important in dealing with disputes as they are in countries where the access to justice literature originates,” that is, in countries of the Global North.<sup>73</sup> For example, in Sierra Leone, Tanzania, and Zambia, the rural population rarely relies on the formal justice system, which is costly, concentrated in urban areas, and virtually inaccessible to the illiterate.<sup>74</sup> Instead, a significant proportion of the population of these countries relies on informal justice systems constituted by customary law and traditional court systems that include a role for chiefs. Research conducted in Indonesia similarly reveals that most Indonesians resolve disputes through informal mechanisms “involving local leaders or government officials,” as such mechanisms are “considered to be cheaper, faster and more satisfactory.”<sup>75</sup> In Ethiopia, it has been observed that,

the customary norms are more strong, relevant, and accessible than imposed and top-down legal norms. Moreover, experiences in different regions of Ethiopia show that people, even after passing through the procedures and penalties in the formal criminal court, tend to use the customary dispute resolution mechanisms for reconciliation and in order to control acts of revenge.<sup>76</sup>

While the inaccessibility of the courts and problems associated with formal justice mechanisms will equally adversely impact on disadvantaged and marginalized citizens, for many migrants the problem is likely to be pronounced. As noted earlier, migrant communities are often excluded or fearful of addressing injustices through State-led justice or administrative pathways. Lack of legal status may inhibit migrants from approaching domestic legal and court processes, even when their rights have been or continue to be violated. Some continue to suffer in silence, others move back to their home countries or move on to other locations. Others still may resort to alternative informal dispute resolution mechanisms. For instance, MIDEQ research in South Africa among Ethiopian migrants found that many of them resort to a system of elders to resolve both business and personal disputes. As one key informant explained:

When disputing parties fail to resolve the conflict by themselves, the arbitration effort commences ... led by elders ... all conflicting parties are expected to present their side of the story. After analysing the stories and testimonies presented by both parties, the council of elders comes with final resolutions and the disputing parties are informed about the ultimate decision... accordingly the guilty party is required to pay up the designated compensation to his contender, even people engaged in murderous conflicts accept the final resolution made by the council of elders.<sup>77</sup>

While there could be some legitimate concerns regarding the operation of alternative informal institutions, such as the marginalization of women, children, and other

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72 HiiL, “Delivering People-Centred Justice, Rigorously,” HiiL Policy Brief (The Hague: HiiL, 2021). Available at: <https://www.hiil.org/projects/delivering-justice-rigorously-sdg-16-3-trend-report/>.

73 Adriaan Bedner and Jacqueline A. C. Vel, “An Analytical Framework for Empirical Research on Access to Justice,” *Law, Social Justice & Global Development* (2011), p. 4. Available at: [https://warwick.ac.uk/fac/soc/law/elj/lgd/2010\\_1/bedner\\_vel](https://warwick.ac.uk/fac/soc/law/elj/lgd/2010_1/bedner_vel). A similar point is made in a report by the OECD and the Open Society Foundations: “Although courts in formal justice systems are critical for access to justice and the rule of law, relatively few legal problems are resolved through the court system or even through formal alternative dispute resolution processes. When faced with legal problems, people often turn to non-court-based processes, and even non-legal services.” See OECD and Open Society Foundations, *Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All* (2016). Available at: <https://namati.org/resources/leveraging-the-sdgs-for-inclusive-growth-delivering-access-to-justice-for-all/>.

74 Richard Bowd, “Access to Justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia,” *Policy Brief* (Pretoria: Institute for Security Studies, 2009). Available at: <https://www.africaportal.org/documents/3032/NO13OCT09.pdf>.

75 Ward Berenschot et al., “Access to Justice: an Introduction to Indonesia’s Struggle to Make the Law Work for Everyone,” *Akses terhadap keadilan: Perjuangan masyarakat miskin dan kurang beruntung untuk menuntut hak di Indonesia* [Access to Justice: the Struggle of Indonesia’s Poor to claim their Rights] (Jakarta: Huma Jakarta/KITLV Jakarta/Epistema Institute; Leiden: Van Vollenhoven Institute, Leiden University, 2011), pp. 3, 9. Available at: <https://hdl.handle.net/1887/19132>.

76 Endalew Lijalem Enyew, “Ethiopian customary dispute resolution mechanisms,” ACCORD, 27 February 2014, <https://www.accord.org.za/ajcr-issues/ethiopian-customary-dispute-resolution-mechanisms/#>.

77 MIDEQ South Africa interviews.

minorities,<sup>78</sup> access to these informal justice mechanisms needs to be considered if we want to understand how the most marginalized effectively access justice. As noted by the UN Special Rapporteur on the Right to Adequate Housing, for example, access to justice should not focus solely on courts, but should include “administrative procedures and accessible, community-based, informal mechanisms.”<sup>79</sup> Reflecting this, the United Nations Development Programme (UNDP) defines access to justice as “the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.”<sup>80</sup> Informal institutions of justice can include, for instance, trade unions, NGOs, and community or religious leaders. These institutions “may function as both dispute resolvers themselves and as intermediaries to other forums, including those belonging to the state.”<sup>81</sup> The discourse and interventions on access to justice in migration therefore ought to extend to all such possible mechanisms through which migrants can and do seek to assert their rights.

## The Risks of Depoliticization

Access to justice in its predominantly procedural sense can be said to stand for “access to legal assistance and legal processes that can address law-related concerns.”<sup>82</sup> Accordingly, most interventions aimed at improving access to justice have been geared towards making courts more accessible to users through, for instance, advocacy or provision of legal aid, improving efficiency, and increasing the number of police, courts, and lawyers or paralegals.

These include interventions by international development agencies carried out under the rubric of the rule of law.<sup>83</sup> While relevant, a procedural approach does not discuss justice in a substantive sense.<sup>84</sup> As such, this approach not only often fails to capture the ways that many people perceive of and obtain justice, it also runs the risk of having a depoliticizing effect. For example, many development programmes aimed at improving access to justice for the poor focus primarily – or even exclusively – on promoting legal assistance, resulting in the provision of technical and targeted solutions to address what are often structural and political problems. While the intervention may assist the targeted population to take cases to court, it would not address, for instance, “how the poor might change the structures of inequality that surround them.”<sup>85</sup> With specific reference to migrants and their rights, legal empowerment interventions could well equip them with the skills and knowledge to seek justice through formal justice mechanisms. However, they may also not address structural issues, effectively distracting from core injustices faced by migrants and the broader structures that make these injustices possible (including structural racism and immigration laws that curtail their rights).<sup>86</sup>

## Migrants as ‘Marginal Subjects’

As noted earlier, most access to justice research, and even some interventions, fail to centre the experiences of those that they aim to study or assist. Researchers, for instance, have a tendency to “summarise and rephrase justice seekers’ real life problems into legal categories, whereas

78 Erica Harper, “Engaging with Customary Justice Systems,” *Traditional Justice: Practitioners’ Perspectives, Working Paper No. 7* (Rome: International Development Law Organization, 2011). Available at: <https://www.semanticscholar.org/author/Traditional-Justice/2077614232>; Marcus Manuel and Clare Manuel, “Achieving Equal Access to Justice for all by 2030: Lessons from Global Funds,” *ODI Working Paper 537* (London: Overseas Development Institute, 2018).

79 United Nations, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, A/HRC/40/61 (March 2019).

80 UNDP, *Programming for Justice: Access for All* (Bangkok: UNDP, 2005), p. 5. Available at: <https://www.un.org/ruleoflaw/blog/document/programming-for-justice-access-for-all-a-practitioners-guide-to-a-human-rights-based-approach-to-access-to-justice/>.

81 Bedner and Vel, “An Analytical Framework,” footnote 73, p. 8.

82 Deborah L. Rhode, “Access to Justice: An Agenda for Legal Education and Research,” *Journal of Legal Education* Volume 62 Issue 4 (2013), p. 532.

83 The World Bank has tackled the issue of access to justice by promoting six main lines of work: court reforms, legal aid and other legal services, legal education, alternative dispute resolution, public sector accountability, and research on access to justice and development. See Viveke Maru, “Access to Justice and Legal Empowerment: A Review of World Bank Practice,” *Justice & Development Working Paper Series* (Washington, DC: World Bank, 2009). Available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/18102/518430NWPOAcce10Box342050B01PUBLIC1.pdf?sequence=1&isAllowed=y>.

84 As noted by David Johnston, *A Brief History of Justice* (West Sussex: Wiley-Blackwell, 2011), p. 4. Limiting a discussion of justice to a strictly legal, State-based understanding of the term is much like limiting a discussion on music to the realm of military music.

85 This illustration is based on the assessment of the World Bank’s social development programme in Indonesia, the Kecamatan Development Program which, among other actions, created a pilot programme of legal assistance supporting villagers to take corruption cases to court. See Tania Murray Li, “Neo-Liberal Strategies of Government through Community: The Social Development Programme of the World Bank in Indonesia,” *International Law and Justice Working Papers* (New York: Institute for International Law and Justice, 2006), p. 23. Available at: <https://www.iilj.org/publications/neo-liberal-strategies-of-government-through-community-the-social-development-program-of-the-world-bank-in-indonesia/>.

86 Hastie, “The Inaccessibility of Justice for Migrant Workers,” footnote 46, p. 29.

the people involved are likely to have other ways of understanding them.”<sup>87</sup> This then affects the nature of proposed interventions to solve the problem, which in some cases may not address the justice-seeker’s concern. Some development interventions aimed at improving the rule of law, of which access to justice is a component, have also been criticized for being ineffective because they were “based on a misreading of the trajectory of economic and political development in the West,”<sup>88</sup> and exhibited an “unwillingness to try to understand local laws, traditions, customary laws, etc.”<sup>89</sup>

In order to make access to justice research and interventions more meaningful for migrants, we agree with the view that migrants should be accorded a more central position, not as “marginal subjects, but as justice-seeking subjects.”<sup>90</sup> This view “takes the personal histories of migrants into account, caring for their vulnerabilities, but also recognising their agency.”<sup>91</sup> It is only by understanding justice problems from the perspective of migrants, including how they address injustices, and by exploring all potential justice

pathways available to them (for example State-led, community-based, civil society-led, religious and traditional justice systems), that we can begin to test and implement responses that focus on meaningful and migrant-centred justice outcomes.

In our work within the MIDEQ Hub, we want to both incorporate and also go beyond the procedural and technical understanding of justice adopted in the access to justice agenda, and to engage in a discussion about the more substantive and inherently political issues of justice and injustice that are relevant to the migrants and communities with whom we are working. Our intention is not to suggest that efforts to increase migrants’ access to formal justice mechanisms are unimportant or that such strategies are not needed. However, we do not want to limit our analysis to these issues.

How then do we envision approaching substantive questions of justice when discussing, researching, and mobilizing resources for interventions on access to justice in migration?

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87 Bedner & Jacqueline A. C. Vel, “An Analytical Framework,” footnote 73, p. 11.

88 Thomas Carothers, “The Problem of Knowledge,” *Promoting the Rule of Law Abroad: In Search of Knowledge* ed. Thomas Carothers (Washington, DC: Carnegie Endowment for International Peace, 2006), pp. 15–28; Thomas F. McInerney, “Law and Development as Democratic Practice,” *Vanderbilt Journal of Transnational Law* Volume 38 (2005): 109–144, p. 110.

89 Yash Ghai and Jill Cottrell, “The Rule of Law and Access to Justice,” *Marginalised Communities and Access to Justice* eds. Yash Ghai and Jill Cottrell (London: Routledge-Cavendish, 2009), p. 4.

90 Silvia D’Amato and Sonia Lucarelli, “Talking Migration: Narratives of Migration and Justice Claims in the European Migration System of Governance,” *The International Spectator* Volume 54 Issue 3 (2019): 1–17, p. 7.

91 Ibid.



## 4. Rethinking Access to Justice for Migrants in the Global South

When we talk of rethinking access to justice for migrants in the Global South, and indeed more generally, it is not our ambition to contribute to the development of a new conception or typology of justice. Rather, our aim is to offer some clarity on how, in researching and proposing interventions on access to justice, we can engage with questions of justice in a substantive sense. Our proposals contribute to existing literature that advocates for a new approach centring on the following aspects:

- The need for a bottom-up approach in migration research and policy interventions that centres migrant perspectives and experiences;
- The need to understand justice beyond formal legal and judicial State structures;
- The need to address structural inequalities in access to justice;
- The need to build solidarity among migrants and citizens by paying attention to intersectionalities in their justice and access to justice experiences.

### Centring Migrant Perspectives and Experiences

If it is to be effective in narrowing the ‘justice gap,’ the analysis of issues of justice related to migration needs to adopt a bottom-up approach which centres migrants’ own experiences of injustice. Any analysis or research that overwrites or fails to take seriously the experiences of migrants in proposing justice solutions may in itself be perpetuating an epistemic injustice, that is “when a society lacks the interpretive resources to make sense of important features of a speaker’s experience, because she or members of her social group have been prejudicially marginalized.”<sup>92</sup> We once more reiterate that it is important to analyse injustice by first of all taking seriously what the subjects of analysis themselves perceive as unjust, that is “the special kind of anger we feel when we are denied promised benefits and when we do not get what we believe to be our due.”<sup>93</sup>

A bottom-up approach to migration justice is necessary for any resulting recommendations or solutions to have legitimacy. It would also serve as a crucial compass for

appropriate interventions by various actors in their attempts to improve the justice landscape for marginalized and disadvantaged migrants in the societies in which they live and/or work.

### Understanding Justice beyond Formal Legal and Judicial State Structures

International law and relations accord primacy to the State in ensuring justice delivery, and the State does this mainly through formal justice mechanisms. The efforts by States to ensure access to justice for all notwithstanding, the justice gap is still significantly wide. A bottom-up approach from the side of justice delivery requires that we recognize justice as something that happens well beyond formal legal and judicial structures. It has been aptly observed that, “[g]ood laws, rules, judges, educators, lawyers and courtrooms are all important. However, [they] are not ends in [themselves], but rather steps along the path to justice and access to it.”<sup>94</sup> In some ways, at both the international and national levels, there has been a move away from traditional court-administered justice mechanisms, with a growing recognition, and establishment of, alternative dispute resolution mechanisms.

In the context of migration, and particularly that which takes place within and between the countries of the Global South, we need to broaden our lens and understanding of the various justice mechanisms available in societies. This understanding should include both non-judicial administrative mechanisms and non-formal structures that migrants and others similarly excluded or unable to access formal justice mechanisms may necessarily or occasionally resort to. This might involve expanding our perception of what could be considered a forum for justice to include administrative units that have some authority to plan and enforce rules for “securing our lofty justice ambitions.”<sup>95</sup> Reflecting this broader understanding, institutions such as schools or hospitals, for example, could be seen as administrative structures for purposes of justice delivery where it is in their power to decide whether to extend services to a migrant regardless of immigration status. The

92 Elizabeth Anderson, “Epistemic Justice as a Virtue of Social Institutions,” *Social Epistemology* Volume 26 Issue 2 (2012): 163–173, p. 166; Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (New York: Oxford University Press, 2007), pp. 158–9.

93 Judith N. Shklar, *The Faces of Injustice* (New Haven: Yale University Press, 1990), p. 83.

94 Farrow, “What is Access to Justice?” footnote 68, p. 983.

95 Gillian Brock, *Justice for People on the Move: Migration in Challenging Times* (Cambridge: Cambridge University Press, 2020), p. 29.

thrust of our argument is not to absolve the State of its justice obligations, but rather to ensure that the role of all justice-delivery structures is recognized and considered in access to justice studies and interventions.

The reference to ‘governance structures’ when considering the subject of justice offers yet another expansive understanding of justice structures. Recommending an ‘all-subjected’ principle when considering who should be a subject of justice, Fraser proposes that “all those who are subject to a given governance structure have moral standing as subjects of justice in relation to it.”<sup>96</sup> The governance structure at stake might be the nation State, but it might also be local, regional, or global structures, as long as they generate “enforceable rules that structure important swaths of social interaction.”<sup>97</sup> This reference to a ‘governance structure’ could thus extend to include both informal or non-formal structures, State and non-State actors (be it at State, interstate or sub-State levels), as well as State-aided mechanisms, all of which have the capacity to redress real or perceived injustices, be they of legal or non-legal (non-justiciable) substance.

## Addressing Structural Inequalities in Access to Justice

The shift from thinking of access to justice in a predominantly procedural sense to engaging with more substantive issues of justice requires that we reconsider what the substance of justice might involve. In discussing what should be considered as the ‘what’ of justice, Fraser proposes three dimensions of approaching justice:<sup>98</sup>

- **Redistribution:** The redistribution dimension refers to the economic structure of society, and it tackles class inequalities (such as labour exploitation and economic marginalization).
- **Recognition:** The recognition dimension of justice refers to the status order of society, and it tackles sociocultural hierarchies which position certain groups as superior to others (resulting in injustices such as prejudice and cultural domination).
- **Representation:** The representation dimension refers to the question of political participation, tackling exclusions from political processes or political voicelessness (when certain individuals are denied the ability to make justice claims in a political community or to participate in its political decisions, for example).

This tridimensional framework and non-State conception of social justice can help us situate our analysis of migrants’ access to justice. It helps us to map out substantive issues of justice, whether they affect migrants as migrants or as part of a wider community that is equally disadvantaged or marginalized. These three dimensions are not mutually exclusive; to the contrary, they often intersect when we analyse cases of subordination and injustice. Many of the injustices experienced by migrants, discussed in section two above, can be analysed under any one or more of the three dimensions, regardless of whether they occur in countries of origin, countries through which migrants travel, or in destination countries.

Take the injustices associated with racism in the migration trajectory, for example. Racism is perhaps most clearly a breach of the recognition dimension of justice (a harm of misrecognition), for it results from a pattern of cultural values that privileges one race over another, constructing the latter group as deficient and preventing them from being treated as full members of society. At the same time, racism is also an injustice of maldistribution, since it shapes a structural division of labour which renders those racialized as exploitable labour power assigned to low-paying menial jobs. Finally, racism is also a misrepresentation injustice, for in many societies those racialized have been denied equal political participation, have experienced political marginalization and underrepresentation, and/or have been denied equal rights and protections. For migrants, the injustice of misrepresentation is more pronounced due to their lack of political belonging that often renders them politically voiceless.

Approaching justice for migrants in terms of maldistribution, misrecognition, and misrepresentation may have both an individual or collective dimension. Redressing the individual injustice may require access to the formal or informal justice mechanisms that provide more traditional remedies. If the injustice is collective, however, redressing it may require political action. For instance, interventions might involve the support of political networking and mobilization by migrants, groups of citizens, and those acting in solidarity with them. Interventions might also involve the promotion of a narrative shift in public discussions associated with migration, and public campaigns for new regulations and policies that better promote migrants’ (and citizens’) dignity. Or they might also rely on the judicial system if the court option be deemed the more effective means of

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96 Nancy Fraser, “Abnormal Justice,” *Critical Inquiry* Volume 34 Issue 3 (2008), p. 411.

97 *Ibid.*, p. 412.

98 *Ibid.*

providing redress, for example, through the promotion of strategic litigation, legal empowerment campaigns, or provision of legal aid.

## **Building Solidarity to Address Intersectional Injustices**

In building a new approach to research and policy intervention identified by migrants and their families, we should also be attentive to the extent to which such injustices might also be faced by disenfranchised citizens. The isolation of the injustices migrants face from those suffered by citizens creates a simplified picture of the forms of oppression at stake, as well as undermining the potential for coalition building around injustices that cross the citizenship divide. This does not mean neglecting the specific obstacles migrants face in different contexts due to their legal status, cultural traits, racialization, and so on. Rather, it means approaching the category of migrants and the sub-categories of different immigration statuses (such as migrant workers and asylum-seekers) for what they are: governmental categories of the nation State rather than analytical concepts. These categories are highly consequential—in terms of people’s entitlement to and enjoyment of rights, people’s sense of belonging, the discrimination they face, and policies implemented.<sup>99</sup> However, we make an epistemological mistake when we take these categories for granted and assume they are the most empirically relevant characteristic shaping a certain question (such as the injustices people face).<sup>100</sup>

In migration research and policy intervention, it might be that in some of the contexts in which we are intervening, migration status is not the only or most important criteria determining the injustices people face, or the justice pathways available to them. It might be that migration status is only empirically relevant when intersecting other categories of difference (such as gender, class, sexuality, and age). Hence, we need to be careful not to naturalize governmental categories and produce analyses that artificially isolate migrants from other social groups and the broader societies in which they live. In this context, the ‘all-subjected’ principle becomes especially relevant since it does not position issues of justice as applying exclusively to those who have political membership in a given nation State (i.e. citizens). Thus, “what turns a collection of people into

fellow subjects of justice is neither shared citizenship or nationality, nor common possession of abstract personhood, nor the sheer fact of causal interdependence, but rather their joint subjection to a structure of governance, which sets the ground rules that govern their interaction.”<sup>101</sup>

In conclusion we argue that the starting point for our work on access to justice for migrants in the Global South should be an empirical consideration of what our research participants identify as unjust in their experiences. It might be that the injustices identified are endured exclusively by migrants or that they are also endured by marginalized citizens. The injustices identified might be codified as crimes in the laws of the countries where they take place or not. The injustices might be more clearly attributed to specific relations and actors or to structural forms of oppression and inequality. The injustices may be experienced individually or collectively. For justice to be done in some cases, it may require that the administrative structures overlook some legal or formalistic infractions on the part of the justice seeker (hence the importance of some firewalling between immigration and justice systems). The point is that migration research and interventions on access to justice should be open to all these options if they are to be meaningful to the targeted communities.

Such a bottom-up approach would also take into account the justice mechanisms that are more practical and relevant for the community. These may not be formal justice institutions, which have underlain the predominant conception of access to justice, but would include all the administrative, informal, and customary avenues and intermediaries through which migrants and the communities in which they live seek justice or settle their disputes.

We recognize that the procedural dimensions of access to justice are important, especially for many migrants and other disadvantaged community members that may not be able to navigate complex and often inaccessible justice systems. However, such interventions should neither obfuscate nor leave untouched questions of structural inequality, powerlessness, and social injustice that underlie most of the injustices. It is also crucial that we consider the broader dimensions of social justice that are at stake in each case, hence dealing with the more substantive issues of justice. One way this could be done is by questioning how

99 Heaven Crawley and Dimitris Skleparis, “Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe’s ‘Migration Crisis,’” *Journal of Ethnic and Migration Studies* Volume 44 Issue 1 (2018): 48–64, pp. 48, 50–52.

100 Janine Dahinden, “A Plea for the ‘De-migranticization’ of Research on Migration and Integration,” *Ethnic and Racial Studies* Volume 39 Issue 13 (2016): 2207–2225, pp. 2213–4.

101 Fraser, “Abnormal Justice,” footnote 96, p. 411.

the various injustices speak to the often intersecting dimensions of redistribution, recognition, and representation. Do these injustices go beyond these dimensions and refer to another aspect of social justice that has been largely invisible so far? For instance, the lack of access to information on migration and for migrants appeared quite prominently along most of MIDEQ's research corridors.<sup>102</sup>

Finally, inasmuch as our apparent focus is on migrants, we also recognize that some of the injustices migrants

experience are shared with marginalized citizens, and can be community experiences irrespective of migration status. In this context, isolating migrants' injustices not only provides a simplified picture of the forms of oppression at stake, but also undermines the potential for coalition building around injustices that cross the citizenship divide. Hence, any access to justice research and interventions for migrants should explore intersectional injustices as a way of building solidarity among different or similarly affected groups if we are to effectively contribute to the SDGs and promote access to justice for all.

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102 Likewise, United Nations General Assembly, Resolution A/RES/73/195, footnote 10, para. 59, reaffirms the importance of and need for States to provide migrants with “access to information pertaining to their rights and obligations during all stages of migration, including information on ... access to justice...”



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