

## What do we mean by Access to Justice (A2J)?

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In order to explain what we mean by access to justice in the context of the MIDEQ Hub's research (Work Package 8), we first need to consider how access to justice has been defined, both in general terms and specifically in relation to the circumstances of international migrants. This concept note sets out our current thinking in this regard.

### Dominant understandings of A2J

Access to justice (A2J) is traditionally understood 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” (Francioni 2007: 3). In short, A2J has generally been understood as synonymous with judicial protection. Since the 1948 Universal Declaration of Human Rights, A2J has been included in virtually every regional and international human rights instrument.<sup>1</sup>

According to Garth and Cappelletti (1978), A2J came to be seen as an effective right (rather than simply a formal right) in the post-Second World War years, when welfare state reforms were under way in many countries of the Global North. 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” (1978: 185). A2J thus came to be approached as citizens' actual ability to seek remedy before a court of law when their rights are unfulfilled or violated. In order for A2J to be an effective right, governments are required to put in place policies to guarantee that even the most disenfranchised members of society are able to access the legal system. Such policies include, for example, the provision of legal aid and the promotion of legal empowerment.<sup>2</sup>

It is important to recognize that this understanding of A2J positions state courts as the only way through which people can access justice. This understanding is also premised on the concept of the rule of law, on the existence of impartial legal

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<sup>1</sup> The right to access justice is included in, for example, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, the European Convention on Human Rights, and the Arab Charter on Human Rights.

<sup>2</sup> Legal empowerment is generally understood as “the ability of people to understand and use the law for themselves” (OECD and Open Society Foundations 2016: 5).

procedures, and on the constitutional separation of powers, with courts being independent from the executive. These presumptions are a reflection of the fact that the literature on A2J has been overwhelmingly developed with the legal standards, concepts, ideals, processes and outcomes of the Global North in mind. Arguably, national courts are not the primary mechanism through which individuals, especially those who are marginalized and/or do not have citizenship status, are able to settle disputes or secure access to their rights, even in the Global North. Moreover, structural inequalities undermine access to information about the existence of legal remedies and mean that certain groups lack the economic, social, and linguistic resources needed to access judicial protection. Also, in most of the world, people are often faced with judicial systems that are labyrinthine, prohibitively onerous and lengthy, biased against the least powerful, and so on.

### **A2J beyond the state and for migrants**

Given these limitations, more recent and broader understandings of A2J go beyond the judicial system and recognize other mechanisms through which people might “get justice.” The UNDP (2005: 5), for example, defines A2J 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.” 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” (Bedner and Vel 2010: 8). This expanded definition makes it hard to pin down what differentiates A2J from initiatives of grassroots organizations and forms of activism that seek to advance certain groups’ rights. Nevertheless, this broad approach to A2J takes into account the fact that many people, especially the least advantaged, have more likely to have their grievances addressed through non-state institutions.

The UNDP quote above refers to “the ability of people” to access justice, and not just the ability of citizens. This is another important aspect of broader definitions of A2J which recognize that, following international and regional human rights instruments, all human beings are entitled to their right to access to justice, even when they are located in a country other than the one in which they hold citizenship. OHCHR’s (n.d.: 9) guidelines emphasize states’ duty to “[t]ake measures that will enable migrants, including migrants at particular risk of marginalization and exclusion, to enjoy effective and equal access to justice, without discrimination on any basis.” Reports and studies on international migrants’ access to justice tend to focus on whether disenfranchised migrants of different statuses (generally low-skilled and temporary migrant workers, asylum-seekers, and refugees) encounter a fair, non-discriminatory, and impartial justice system, and whether they can effectively obtain redress in cases of rights violations and appeal via legal processes in the “host”

country.<sup>3</sup> Particular attention has been paid to the violations of the rights of migrant workers, who, according to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 25), are entitled to the same rights as nationals in remuneration and conditions of work, even those who are undocumented.

Analyses of international migrants' access to justice have highlighted the particular barriers these people face when accessing justice, barriers which are not generally faced by citizens. These can include, for example, migrants' lack of identity documents necessary to launch a legal proceeding, and the host country's lack of institutional support (when legal aid including translation services might not be available to non-citizens) and lack of non-discriminatory legislation against migrants. Importantly, when countries do not have "firewalls" between the judiciary and immigration law enforcement, undocumented migrants tend to avoid seeking redress for rights violations out of fear of detention and deportation. Migrant workers with temporary visas dependent on the continued sponsorship of their employer also face particular hurdles in obtaining justice in cases of abuse. Their stipulated return makes it temporally difficult to claim rights and obtain redress while abroad, and fear of retaliation by the employer resulting in loss of status similarly decreases their chances of vindicating their rights.

## Our approach to A2J

In our work as part of the MIDEQ Hub, we are interested in analysing, better understanding and, ultimately, promoting migrants' access to justice within these parameters set out by the literature on A2J. We recognize that institutions of justice (both formal and informal) and the legal repertoire can be powerful tools in addressing rights violations and resolving disputes affecting international migrants across the Global South. However, we also believe that it is important to go beyond the dominant, often Global North-orientated understanding of A2J, not least because limiting an investigation on justice to the legal realm and legal mechanisms can have a depoliticizing effect and hide from view structural inequalities impinging on the dignity and effective rights of disenfranchised migrants. This dominant understanding can also serve to define rights and access to justice in ways that do not have meaning or resonance for those whose situations we are interested in improving through our interventions.

We thus *do not* assume that promoting migrants' access to justice must necessarily focus exclusive or even primarily on access to state mechanisms for legal redress, such as through the provision of legal aid, strategic litigation or legal empowerment

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<sup>3</sup> For works along those lines, see, for example, ILO (2017), Hastie (2017), Burrige and Gill (2017) and IOM (2019).

campaigns. These may, of course, be valuable and effective strategies, especially in contexts where a robust legal system and the rule of law are in place. However, we are aware that, in many contexts, such “development interventions” might constitute an imposition of a technical solution to broader issues of structural inequality, powerlessness, and injustice. A focus exclusively on legal interventions can inadvertently leave untouched and out of the picture the role of structural inequalities and injustices (such as patriarchy, racism, and capitalism itself).<sup>4</sup> In the name of producing targeted interventions that can be evaluated as successful in the short term, this approach might work as an “anti-politics machine” (Ferguson 1994), obfuscating deeper political questions of inequality and resource allocation.

Reflecting this, in our work on A2J across the different MIDEQ Hub migration corridors, *we see access to justice as part and parcel of a broader agenda for social justice*. We want to invite a discussion within the Hub on the question of 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.<sup>5</sup> We would also like the Hub’s discussion on issues of justice 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 migration studies, which tends to focus on the issues of injustice and rights associated with migration only, especially in relation to employment rights for migrant workers.

Having identified the injustices at stake, we want to investigate the different possible responses to them. These responses can involve the promotion of judicial protection for migrants, but they can also involve other, non-judicial pathways and approaches. For instance, responses might involve the promotion of a broader narrative shift in public discussions about migration, and the support of political networking and mobilization by migrants and those acting in solidarity with them. In this regard, we anticipate that our work in WP8 will sometimes converge with the work of colleagues in WP7 (political mobilization and transnational solidarity) in certain contexts. We believe that our work *does not* need to be limited either by strictly judicial understandings of A2J or by our research silos.

We hope that a broad approach to access to justice within the MIDEQ Hub’s research, one that encompasses but also goes beyond judicial protection and which

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<sup>4</sup> Tania Murray Li (2006) makes this point in her analysis of a social development program undertaken by the World Bank in Indonesia. She argues that the Bank’s team deployed neoliberal development strategies which were de-politicizing, focused on the agency of villagers (rather than trying to improve the conduct of government officials, investors, the military, etc.), and did not address deeper issues that capitalism’s advancement provoked in Indonesia (increasing conflicts, dispossessing and displacing villagers, etc.).

<sup>5</sup> When identified injustices are associated with gender oppressions, childhood inequalities, or poverty, our work will inevitably overlap with the work of Work Packages 1, 2, and 3 respectively.

is attuned to structural inequalities, can support the analysis of the data emerging from our different contexts. We hope that this broad approach might be more respectful of the particularities of the different contexts at stake, and consequently 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' A2J 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.

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