In Search of Advice: (re)defining meaningful access to justice in the district courts of Johannesburg.

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PREFACE

What happens when you break the law of the country and must stand trial in a South African courtroom? It usually starts with waiting. Waiting for documents, waiting for explanations, waiting for court dates for the first appearance and waiting to know what the future holds. A measure of uncertainty peppers this waiting. Is this waiting a key part to accessing justice or merely ineffective procedures? If you are new to the courts and their processes they become uncertain moments of waiting. The wait for a verdict of innocent or guilty, the wait for punishment or freedom, the wait for processes to run their course and the wait to have your future determined by your actions and the arguments made in your defence.

Courtrooms and cases are usually distilled into neat narratives and clear outcomes with a minimal emphasis on the interactions and minutiae of everyday relations that seem to have an impact on the results of a trial in court. This oversite or minutiae-blindness is what I hope to address to some extent through this ethnography. The time spent waiting is experienced by all and does not occur as a static moment, but rather becomes the space in which people discuss, reflect, offer advice, listen to advice, debate, argue, and grapple with the realities of courtrooms and the law.

These moments of waiting stretch the fabric of the legal system; exposing the grit and textures of the processes and interactions of the everyday experiences of peoples in and of the courtroom. This research is more than an organisational ethnography of the courtroom and goes a step further by offering crucial insights into the provision of legal aid to the poorer segments of South Africa. The limitations of spending only a year conducting research in this space should be noted. The idea in this thesis is to bring into consideration the possibilities of relationships, and their consequences, which find expression inside and outside the courtroom.

The courtrooms continue to play a significant role in the development of a just and constitutionally bound South Africa and warrant further research. The chapters that follow will expand theoretical discussions on the development of welfare through the expression of legal aid while emphasising the real impact of the legal processes experienced by those in the courts. It is about exploring the interactions between the people of the court from the moment of the first appearance before the magistrate, to the final judgments made and the moments of waiting in-between.

PART ONE **INTRODUCTION**

1

ACCESS TO JUSTICE: DEEP POCKETS

Since the democratic dispensation and a new constitution in South Africa access to justice has been a prominent aspect of legal reform over the past two decades. With major changes to legal aid provision at state expense being one of the main efforts in providing access to justice. However, a fair trial and the assumed access to justice it is supposed to provide, as stipulated by the state, remains unattainable to ordinary South African citizens. The archetypal depiction of dysfunctional court systems plagued by incompetency and corruption, over-worked state-funded lawyers, ineffective police service, slow administrators and lengthy delays in trials remain central to the discussions on access to justice.

The highly publicised "trial of the century" involving Oscar Pistorius following his arrest for murdering his girlfriend Reeva Steenkamp on Valentine's day in 2013 – brought to the fore a discussion on access to justice; debating privileged treatment in the courts for people who have deep pockets or rather are financially better off (Hopkins 2014). The lengthy bail hearings, deep analysis and cross analysis of evidence, extensive legal advice received and lengthy time spent with attorneys during the trial afforded to Pistorius are just some of the privileges. When juxtaposed with the treatment of ordinary South Africans on the ground level "thousands are fighting for their lives in a criminal justice system that is bent at best; or completely broken" (Hopkins 2014).

Access to justice becomes a matter of financial means; poor people are embroiled in sluggish processes, ensnared by ineffective accesses to courts and exposed to undignified treatment at the hands of the state. These issues are not new to debates around access to justice, and this thesis does not overlook these fundamental issues. However, it does attempt to move beyond the archetypal depictions by offering a nuanced discussion of access to justice as experienced by people and argues that there is a need for 'meaningful' access to justice if there is going to be 'equitable' access in South African courts. Poor people do receive access to the courts through legal aid provided by the state and civil society, but there remains a large schism between the provision of access to the courts and what I argue is meaningful access to justice. This thesis works to address what this schism is and offers insight into ways of moving towards the later.

To understand what meaningful access to justice entails this thesis offers an ethnographic account of the district courts in Johannesburg. These courts deal with criminal matters daily, with most of the cases involving impoverished people who rely heavily on the state-funded scheme of Legal Aid. The courtrooms of the district courts, when juxtaposed with the regional, high and constitutional courts, are smaller and deal with "petty crimes[1]" such as theft, shoplifting, and assault to name a few. The district courts remain open year-round; servicing their demarcated geographical regions. This research is the result of a year spent in a district court in Johannesburg, which I refer to as Braamfontein Court[2]. The district courts are fast paced one day and sluggish the next. Braamfontein Court caters to a geographical region of mixed levels of income, ranging from poor informal housing to suburban and gated communities. However, based on my observations and interviews Awaiting Trial Detainees (ATDs) who appear in Braamfontein Court are people who 1) live well below the minimum wage, 2) are usually family breadwinners, 3) participate in informal economies in the surrounding areas and 4) are men in most cases. Many of the ATDs were also black. While this is not the focus of my research as Bundy (2016: 13) argues "Capitalism has proceeded unevenly, and in South Africa the skewing of its costs and benefits was along a markedly racial axis". This results in increased levels of poverty and is a reason why some of the people commit crimes and end up in Braamfontein Court. This might explain why many of the poor in Braamfontein Court are black, of course this is just one possible explanation.

In Braamfontein Court, a large portion of the ATDs cannot carry the financial costs of a criminal trial and rely on the state-appointed Legal Aid South Africa (LASA) attorney. The LASA attorneys are provided for free to those who meet the criteria. Demand for LASA attorneys exists because of the demographics of the ATDs, with the majority falling into the category of impoverished. Understaffing of Braamfontein Court places pressure on the courtroom processes; on both the people working in these spaces and more importantly on the ATDs. How people cope with and experience this pressure is at the heart of this research.

In my preliminary visits to Braamfontein Court my focus shifted from a broad ethnographic description to one tailored to observing and addressing access to justice. The focus became the

[1] This category was regularly used in courtrooms to define crimes such as theft, burglary, hijacking, drug-related offences and assault. While not an official term, it does get used regularly in the courtroom.

[2] Braamfontein Court is a pseudonym used in this thesis. The names of attorneys and clients have also been changed unless otherwise stated. The anonymity is for the benefit of the professionals and the sensitive cases they work on.

interactions between LASA attorneys and their clients. The reason for narrowing my focus was threefold. Firstly, LASA attorneys play a crucial role in the functioning of the courtrooms, with the demand for Legal Aid attorneys growing as further investigation is needed. Secondly, the client-attorney[3] interactions, while legal and personal, influence the justice process and at times negate or amplify the pressures of the courtroom proceedings. How and why this happens is vital to the research and thesis. Lastly, the LASA attorneys are mainly involved in criminal matters; these were the matters that took place in the courts daily.

In a broad sense, I frame legal processes as a part of an "interactive web of social and cultural relationships" and take into consideration the "contextual roles of both micro-level legal actors and macro-level authoritative institutions [that] reinforce the constitutive role of law" (Gregware and Larry Mays 1995: 341-342). This research does not focus on individual role players that constitute the judicial process, such as the magistrates, judicial officers, state prosecutors, etc. but rather refers to them in relation to the client-attorney interaction[4].

Judicial processes are expensive in the district courts, and private representation remains unaffordable for many of those appearing in criminal matters in district courts. Thus, a heavy reliance on free legal services provided by LASA exists in the district courts (see Klaaren 2014). The LASA attorneys have become crucial role players in the district cours; their presence mandated by the Constitution and a product of history and transformation in South Africa, which I address in part two.

The significance of the research

Legal Aid South Africa's lawyers are a permanent feature of Braamfontein Court and work in close collaboration with the poorer [5] surrounding community when offering legal advice and representation. This research is significant because it offers insight into the experiences of the lawyers and their clients, allowing first-hand insight into the many issues faced in the smaller

[3] Use the term clients throughout the research paper because each client has their representation. Rather than the term "accused".

[4] For a detailed explanation of courtroom proceedings in South Africa I recommend using "A Practical Guide: Court and Case flow management for regional and district courts in the South African lower court division" available as a download at http://www.justiceforum.co.za/cfm%20guidelines%202010.pdf (last Accessed 08-01-2017).

[5] The court is situated in an area of South Africa where the Living Standards Measure (LSM) index of people living in these areas is between LSM 1-3 and LSM 4-5 with the majority receiving a monthly household income of R8 000 per month. (City of Johannesburg 2015)

courtrooms of South Africa. Like many other smaller courts, Braamfontein Court is often relegated to the periphery of the legal system and receives little focus in comparison to those in the Constitutional and High courts for instance.

These courtroom proceedings rarely make it into the public eye. These smaller courts, while not regularly dealing with the making of laws *per se*, are the spaces where formal legal aid services are in high demand and are spaces where notions of access to justice, such as those enshrined in the Constitution, come to fruition, impacting the lives of the poor. The Constitution, in the Bill of Rights explicitly states that "every accused person has the right to a fair trial, which includes the right to…a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result" (1996: 15).

If this research can shed some light on the experiences of justice and the challenges faced by the courts, then it may also offer insights into what could be construed as "equitable" justice or a "fair" trial. There has also been little ethnographic research conducted into Braamfontein Court proceedings. To understand the nuances of courtroom relationships and interactions an intimate approach such as ethnography offered the opportunity to understand the expressions of accessing justice as lived out by people on the receiving end of access to justice. Insight into the smaller courts is usually written concerning cases (see for example Ritchie and Ansell's handbook for South African Journalists (2006) and the South African Law Reform Commission (2000)), focusing on the criminal acts and outcomes with little discussion on the interactions between lawyers and their clients. In the passage of writing and fieldwork, however, something became clear.

The more I came to understand the courtroom proceedings, the more I was forced to confront the fact that my assumptions and priorities were intransigently opposed to much of what is now common wisdom with legally orientated anthropologists that find their gaze shifted towards discussions of power, control and justice. As I found myself increasingly struggling to draw boundaries between official and unofficial norms of the courtrooms, I recognised that the research was spiralling into something more ambitious: in many ways, it was elaborating on the qualities of legal track, if nothing else, a reflection on advice sharing in the legal processes of the courtroom. The stories of people whose lives are affected by the happenings of these small courts warrants further research if a clear and more practical understanding of access to justice is to be understood.

2

BRAAMFONTEIN COURT HAS A LIFE OF ITS OWN: A NOTE ON METHODOLOGY

I stumbled into the foyer, through the glass door, streams of people and cigarette smoke swirling past the threshold. I found my balance and walked towards the metal detector. I wondered if it still worked, a second later the alarm was triggered, and the security personnel lazily escorted the culprit to the side, a short exchange and a gesture to a belt buckle, they seemed satisfied. I was next. Before I could even make it to the detector, I hear the booming voice of the guard "Where do you think you are going, mfana?" I nervously looked around and went into an elaborate discussion on who I was (a researcher), where I was heading (the court) and whom I had hoped to talk to (anybody willing to talk). The guard looked at me with indifference and croaked "You cannot go to court wearing shorts, go buy long pants and come back". Confused for a moment, I looked around and saw that everybody, despite the sweltering heat of summer in the Johannesburg streets, was dressed in formal attire. I returned an hour later to face the detector and more importantly to spend my first day observing the courtroom.

The court buildings are stark and beige. Their hallways weave into the nearby police station. The connection seems obvious from the inside. From the outside, the signs separate the two. Braamfontein Court is the research site in Johannesburg – nestled in the boundary of suburbia and city. Braamfontein Court is not the name of the real court but rather a pseudonym[6], drawn from the location of the headquarters of Legal Aid South Africa. Researching organisations and institutions such as Braamfontein Court need to start with an understanding that the spaces and processes that contribute to their functioning, as much as rules and regulations govern them, are likewise subjected to the everyday lives of people. Methodologically, this research relies on the premise that studying the everyday organisational life of spaces, such as Braamfontein Court, requires an understanding of the people that occupy them. As Ybema et al. (2009:1) noted, "organisations are

[6] I use Braamfontein Court throughout this report to ensure anonymity of the participants.

inhabited and embodied by individuals who go to work". Here is where organisational ethnography becomes necessary for understanding the court.

What became central to research in the courtroom and its surrounding corridors was a focus on the seemingly mundane. A clearer understanding of proceedings was revealed by the intrigue of organisational life that "is hidden in the ordinary exchanges of ordinary people on an ordinary sort of day" (ibid.). From this premise, the intricacies of the everyday organisational life in the courts could be better understood "not through questionnaires developed and analysed while sitting in an office," but by going out into the organisational 'field' – in this instance sitting in the courtroom gallery talking to people during free time; sitting for hours in the administrative office of the court manager; having tea with the admin staff, engaging with magistrates during lunch breaks and "hanging out" with warrant officers in hallways (Ybema et al., 2009). With this premise and approach to understanding Braamfontein Court, various problematics arose in doing and writing this organisational ethnography. This chapter outlines the challenges associated with methodology, (re)presentation, analysis, ethics and social challenges faced during the period of research.

The first three parts in this chapter explore an ethnographic approach to studying processes in Braamfontein Court through engaging methodological issues and benefits particular to i) observing (with varying degrees of participation), ii) conversing (ranging from formal to informal interviewing), and iii) a close reading of archival and documentary sources. The methods employed in this research rested upon action (talking, waiting, laughing, and wondering) and proactive perception (observing, reading, and listening). These methods for accessing, representing and assessing data (elaborated on by Bernard and Gravlee, 2015) distinguish ethnography from alternative approaches to researching organisation (see Alvesson and Deetz, 2000). This methodology allows for a juxtaposition between access to justice as conception (its definition and ideal; developed politically and historically) and access to justice as experienced by people. This insight could not be gained effectively with quantitative methods.

The thesis unpacks an interpretive ethnographic approach essential for working through formal design and informal wheeling and dealing, front regions and back regions (Goffman, 1959). I then turn to the ethical considerations, positionality and reflexivity that need to be discussed critically to ensure a clearer understanding of the relationship between myself and the people I came to know professionally and personally. The use of these methods makes it possible in understanding

Braamfontein Court as coming to life through the work and daily processes of the people in the courts.

Part I: Observing

The courtrooms are public spaces during the proceedings of cases. Witnesses, reporters, police officers, attorneys, accused, family and friends find seating in the hallways waiting to participate the process. The courtrooms may be public, but for this research, anonymity seemed the most useful means of protecting workers in the courts and those that agreed to interview session[7] The principal methodology of observation worked as a primary means of gaining access to people in the courts. With no gatekeeper to rely on or a familiar contact, the time spent observing worked to create familiarity. I started my observing in the gallery of the court.

After passing through the metal detector and inspection by security on my first day, I would make my way to the administrative offices to introduce myself and find out which courts were open for the day. Certain courts would be closed to the public due to the nature of the case, serious crimes such as rape and murder would usually not be open to the public unless permission was granted. After receiving authorisation to be in the court for the day from the state prosecutor, an officer of the court and the magistrate I walked into the courtroom and took a seat in the gallery. The earlier days of observation worked twofold, they firstly offered me an overview of proceedings in the courtroom and secondly made participants more comfortable speaking to me, and it created familiarity.

The preliminary observations informed my academic position and the interest in processes. The earlier observations where spread across two courts, but due to constraints of time and location I chose a local setting as the principal field site and traced the connections between Braamfontein Court and other locations as far as it was feasible and to the "extent that these connections were relevant to the research project" (Ybema et al., 2009: 27).

The earlier observations also offered me gatekeepers to other sites such as the Legal Aid Board of South Africa, archival material and administrators in the surrounding courtrooms. While observing processes, it became crucial to understand my physical space and the flow of people. Below is a small excerpt from my field notes, with a small drawing so that I could make sense of

[7] For this report, pseudonyms are uses for people and places. Unless stated otherwise. I use the original names when archival resources and documents in the public domain are referred to.

the physical setting. This later serves as a means of interpreting other interaction and the different channels of advice flows in the courtroom. The illustration of the physical layout of the court shows the different roles in the courtroom setup.

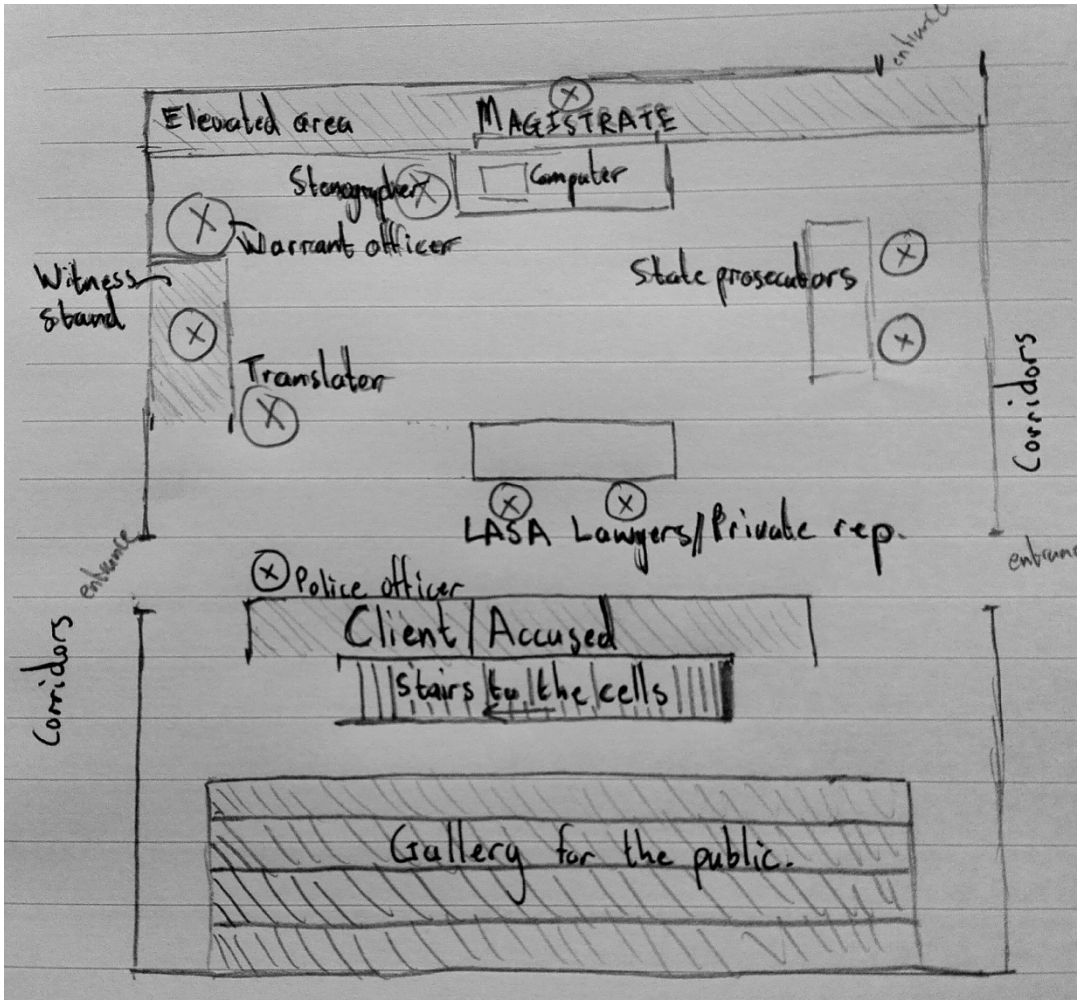

Figure 1: An illustration of the physical layout of Braamfontein Court.

Relationships were developed, and observation grew into participant-observation (as I began to sit-in on consultations between clients and attorneys). Relationships usually came about through small talk; around the vending machines, outside the court and when borrowing pens, and paper to others in the courtrooms. With these relationships came significant ethical implications. Many of the courtroom processes deal with sensitive information and with court cases that are still pending. As a researcher, it was crucial to avoid getting in the way and assuming a knowledge of the system and laws beyond my plebeian understanding. I was there as a researcher, not as a contributor to the

legal processes inside and outside the courtroom. In my first week, the state prosecutor, in a threatening tone and with a wagging finger said, "you could be called to the stand if you get in the way of the law". The idea that I was privy to sensitive information and that I could be causing unneeded stress to courtroom process was clearly a concern for the workers of the court. Ethnographic writing can cause harm to those studied, particularly with the publication of participants' lives (Kaiser, 2009). In cases of observation, I relied on coding my field notes and using pseudonyms throughout the observation and writing parts of fieldwork. Therefore, relying on guidelines such as those set out by Anthropology Southern Africa (2005) which emphasise the protection of research participants' interests was necessary for my ethnographic endeavour. It is also crucial to understand that informed consent was not always possible due to the full social context of the courtrooms. The challenge of informed consent is elaborated on later in the ethical considerations.

Concerning methodology, participant observation cannot stand on its own. Isolated from conversations and interviews, participant observation "would result in strange and unnatural behaviour were the observer not to talk to his or her host" (Atkinson *et al*., 2007: 5). The next part details the approach of 'conversing' and 'interviewing' as a method in the field and particularly looks at how at times these are indistinguishable from other forms of dialogue and engagements in field research settings.

Part II: Conversing

As I became familiar with my research setting and the people became familiar with me, scheduling an interview time was the only way to engage with certain people. Attorneys preferred scheduled times, carved into their busy workload. The admin personnel allowed me to sit in the offices and ask questions as the day moved on. The translators, stenographers and warrant officers had little patience for formal interview sessions but valued discussions in the brief pauses between cases when the magistrate and attorneys were preoccupied. Some conversations where organic and took place spontaneously while others required advanced planning on my part. Conversing during recesses usually involved me asking procedural questions and only later in the research did these expand into discussions about the courts and specific cases that kept appearing. These informal conversations were born from familiarity and 'hanging-out' in corridors, courtrooms and lunch areas. My involvement in Braamfontein Court comprised on average one day a week over eight

months, interviewing, observing court proceedings, sitting in admin offices, sharing the occasional cup of tea and hanging around talking and getting to know people and their work.

Interviews are a different kind of conversation. Semi-structured interviews were employed during this research. Semi-structured interviews allowed for an understanding of organisations (Braamfontein Court) from the inside perspective (Chapman, 2001). As Ybema *et al*. (2009: 35) explain, material gathered from interviews or recorded during public events "will be in the form of 'official' narrative that can strengthen and reproduce and identity, or that can structure experience". However, a large part of Braamfontein Court's processes, cases and interactions amongst people are less structured and informal, requiring that I be perceptive to all kinds of unofficial knowledge.

A setback in interviewing individuals involved in cases (friends and family members of the victim or accused and witnesses sitting in the gallery, for example) and temporary employees (translators that moved from one court to another, for instance) was a lack of follow-up interviews. This ensured that I was thorough in my time with participants. Tracing the same people to review answers was not always an option. One approach to dealing with this was to follow certain cases. If a case were postponed or the date changed, I would return on latter days to find some of the familiar faces I had struck up conversations with previously. Another means of avoiding a loss in the material was to arrive early at the courts before proceedings started. This time would usually be enough to conduct interviews with people in the galleries. Conversing with people worked well for understanding the current setting of Braamfontein Court, and offered an a-historical understanding but failed to address the epistemology of the processes used in the courts daily. For this reason, I turned to archival material and documents. The next section deals with the rationale for relying on archival material. It will also address how and why I narrowed my scope concerning my focus on certain actors and the omission of others. This kind of ethnography allowed me to "describe tensions and discrepancies between official pronouncements and unofficial practices" (Goffman, 1959) and to circumvent "speaking for others" by positioning myself "in relation to the actors, texts, and audience" (Bate, 1997: 1167-1169).

Part III: A close reading or archival sources and documents

After spending my first few months in the courts, I narrowed my focus to Legal Aid attorneys and the work they do. The courtrooms are dynamic and rigid at the same time. Ebbing and flowing between the two states. Once the magistrate enters the court, the formalities become essential to a

speedy trial. Missing actors at this point would bring the courtrooms to a standstill and I witnessed this in my third month. A Legal Aid attorney could not be in court for the day, and this resulted in a halt in the proceedings. The importance of individual actors in the court was apparent. After conversations with lawyers and administrators, it became clear that this was not always the case. Having microscopic knowledge of the history of legal aid in South Africa, I turned to the University of Witwatersrand's archives. After a brief internet search into the Legal Aid Board in South Africa, I came across these archives. They were the most accessible and affordable for this project – forming the basis of the previous chapters.

I approached the archival material with suspicion. Archives are not a full picture of history and only offer a glimpse into moments in history. Trouillot's '*Silencing the Past'* draws attention to the process of actual production particularly the argument about making of sources, making of archives and the making of narratives (2015: xxiii). This book works well to problematise sources used in writing history, and I used these archives, with caution, as companions to my 'observing' and 'conversing.' The documents I relied on are post-1990s until 2000 and are correspondences between legal aid attorney and their supervisors. I found it useful to incorporate papers on how LASA came to have such a prominent role in the legal system and subsequently a crucial role in Braamfontein Court. The archival material and documents were used to provide detailed texture to the complex descriptions of Braamfontein Court. The archival material had never been used in research and offered clarity on legal aid and its relation to the courts in South Africa.

Documents (some of which were in the archives) also played a crucial role in understanding legal aid in the courts and clarifying processes in the organisation of the court. Harper (1998: 13-44) makes an excellent case for the value of documents. Harper in his study of the International Monetary Fund as an organisation made use of records and shows how "the working of an organisation may be displayed" and "following a document through the various stages through which it goes…will highlight the framework of organisational action as they are oriented to step by step, and phase by phase, by organisational actors". The archives offered chronological documents such as drafts of annual reports, arguments between lawyers and thoughts about how legal aid should develop, and a vast collection of emails addressing questions as to why legal aid is needed and how it should be formed in conjunction with the demands of the Constitution post 1996. The recent history of legal aid, the formative years, are crucial for understanding the current

work of legal aid provision and access to the courts for the poor. This brings me to the last section on ethical considerations, positionality and reflexivity.

Ethical considerations, positionality and reflexivity

Ethical concerns arise when working in courtrooms, particularly when dealing with case sensitive information that may have a direct impact on criminal proceedings and their outcomes. The methodologies mentioned above rely heavily on interpersonal relationships, observations of other peoples lives and engaging in conversations with various actors in the courts. It was important to ensure that anonymity remained key in the research. Field notes and transcriptions of interviews remained in my custody and coded for the safety of the participants (Anthropology Southern Africa (2005).

Informed consent and avoiding harm are significant ethical concerns and crucial to research in public spaces and organisations. Fetterman (2010:42) notes that during fieldwork the "cost of exploiting an individual is too high, and the ethnographer must either wait for another opportunity to come along or create one". The courts did not allow me to "create one" but using my relationship with the attorneys and administrative staff other opportunities were later presented to me. There were times where individuals agreed to be interviewed and then changed their mind. In these cases, I simply moved on to other participants, one benefit of spending such a long time in the courts meant that more promising opportunities usually came along.

My interest in the courtrooms and criminal procedure started in 2011, I conducted fieldwork in a South African prison. My research focused on the life of an informant (and later friend) who had spent six and a half years in prison and was released early for good behaviour. He had described his trial in detail and about how traumatic and degrading the ordeal had been in his life. He was unable to afford private representation and relied on the state provided legal aid attorney. This peaked my interest concerning criminal procedure and the experiences of accused in awaiting trial detention. Since then I have had friends working in the private sector of law and have heard their accounts of working alongside legal aid attorneys. These combined experiences resulted in a narrowing of my research to the courtrooms where peoples' lives are change. I entered the field with little knowledge of procedures and erred on the side of caution when talking to certain people (particularly state prosecutors who I was warned "have alternative intentions"). One way to navigate this was to ensure that individuals who engaged with me spoke about their experiences of

the processes and the experiences of being in the organisation rather than their clients and the active cases in the court.

In the courtrooms, I sat in the gallery and only started discussions with people who approached me (this was also limited by language barriers since I only speak English and Afrikaans). I would explain to them who I was and what my reason for being there was. I usually did this on a case-by-case basis. Occasionally I was asked by private lawyers if I was working for the state, or if I was friends with the state prosecutor. I clarified my position in the courts in these interactions. In some instances, this interaction lead to discussions after the court times and people had questions about the kind of research and why I was there as an "anthropologist without legal training". This lack of knowledge served me well, in the end, I was a plebe in need of education by attorneys. My naiveté, and my status as a student from university, worked in my favour – not without moments of frustration though.

My identity as a researcher also had its benefits and downfalls in the courts. I was not a trained professional to be in these courtrooms, what if my presence got in the way? What if I was privy to knowledge of a case? While I had informed consent from the attorneys, warrant officers, magistrates and administrators, what right did I have to be witness and observer to another person's trial? Moments arose in these public spaces where private information was discussed and when people in the gallery also discuss private matters. I had to be cautious and alert, relying a great deal on making decisions in the moment. For example, there was once incident where families of the accused were discussing amongst themselves the possibility of bribing officials, where do my obligations lie in a moment such as this? This was when I felt it was time to reflex on my moral position and then to approach an attorney about these kinds of dilemmas. Although the focus of my initial research was not solely on the accused or the people in the gallery, interactions had shown that I could not help interacting with them because they were the people on the receiving end of "access to justice".

Without their experiences a study into access to the courts and justice would be meaningless. Confidentiality played a vital role in my research with the dual purpose of protecting research participants as well as myself. I put measures in place, such as coded field notes, to ensure research participants' anonymity were maintained. The courts can be a tough research space to negotiate, but with the correct credentials (a naïve student), meeting the right officials (those in Legal Aid South Africa and a formal introduction with the magistrate) and familiarising myself with the

administrators of the court (the officers and "paper pushers") it went a long way to making research possible in the district courts.

Conclusion

This chapter worked through the methodologies I found most useful in undertaking research in the courtroom. By using ethnography, access to justice comes to life as more than a concept or ideal, but finds expression in the daily activities of the courts. The access was interrogated through reflecting on the experiences of the accused; this approached provided rich qualitative accounts of what access to justice entails in the district courts. If there is to be changes in understanding "access to justice" beyond the confines of providing legal advice and representation to a more equitable access to justice it should be based on the experiences of those in the current system. In other words, a move to understand the impact of law as it unfolds in the interactions of the legal aid client and their lawyer. The study of the courts through ethnographic means has allowed for both in-depth personal accounts of processes as well as broader extrapolations on legalities of criminal procedure. These methods offered me a unique position as a researcher, offering me first-hand experience of what the life in/of a court might look like.

3

(RE)DEFINING ACCESS TO JUSTICE

Three months had passed; I became increasingly familiar with Braamfontein Court. The early Monday morning rush of trials, followed by the midweek lull and the wasted efforts on Fridays to finish early. The weeks are long and relentless in their ebbs and flows. The courts see their share of misunderstandings between people, a flood of new faces and delays as the legal proceedings unfold. The cool winter wind rushes through the corridors and creeps under the courtroom doors. I am spending another Monday morning observing trials. The morning rush to get the day's proceedings started takes its usual form of paper collections, file distributions and reminders amongst the officers of the court. Sipho, a Legal Aid lawyer turns to me and with a sigh says "this is going to be a long day". The gallery is filled today and police officers, witnesses and those with summonses line the corridors. We start late again, by 9:30 the courtroom proceedings are under way. The first case, a first-time appearance for a man accused of stealing from his employee. The second case, a man charged with mugging a street vendor. The third case took me by surprise, I knew the one accused, not personally but through brief interactions in my neighbourhood.

The warrant officer marched four young men, in their 20s and 30s, from the holding cells bellow. Siyabonga (Siya) shuffled into the client/accused stand, hand cuffed and head bowed. I knew him as one of my neighbourhood's waste-pickers in Bes Valley, a mixed income suburb on the boarder of inner-city. He lived in an abandoned and derelict city building, along with two of his co-accused. The waste-pickers regularly walk the streets on garbage collection day, making a living from other people's waste. He usually collected paper, glass and the odd piece of scrap metal. The trial starts and Siya's experience goes from bad to worse as the weeks pass.

This chapter works through Siya's experience. I argue that Siya's story is one of access to courts, but not access to justice. I follow a chronological flow of Siya's story and interject with issues that prohibit access to justice. Siya's story is not a unique one, and demonstrates how the vulnerable (despite the provision of a lawyer) are not necessarily receiving access to justice. The key issues that prohibit access to justice are usually a) postponement of cases, b) extended periods spent in

awaiting trial detention c) a lack of, what I call, auxiliary justice and d) inadequate advice shared in the court which can hinder access to justice (this also speaks to the quality of access to the courts).

Day 1: Siya's story: the social context of access to justice

If this chapter is about access to justice; how does it get defined, does Siya have it? How could there be an improvement in provision of access to justice? How do the courtroom interactions allow or disallow for access to justice? Would Siya have had a better chance if he could afford private representation? These are some of the questions that came to mind in writing his story.

This was not the first time Siya had appeared in court, it had happened once before in 2010. He was released. Siya has been living in Johannesburg since the early 2000s, he has not finished schooling and has been living on the streets for the past 7years, working on piece-jobs and more recently as a waste picker. He has a wife and a daughter, apparently residing in Hillbrow. Making under R3000 a month he qualifies for legal aid and having dependents also works in his favour when taking the Means Test. He has been arrested again and has spent the weekend in awaiting trial detention since Saturday morning, accused for stealing copper and metal light fixtures from a local business's property. The state prosecutor, a fast talking and experienced lawyer, pushes for breaking and entering, theft and damage to property. The LASA attorney, in their first interaction with Siya, consults with the accused. In earshot of the public in the gallery and in sight of all the officials, Siya is expected to plead poverty and in a hushed voice explain his innocence. This public display leaves little room for dignity. Regardless of his guilt, the courtroom shows little patience or sympathy. The day ends with a denial of bail, with citation of his previous appearance in court and lack of permanent address or rather a lack documentation. He spends the next week in awaiting trial detention.

The socio-economic and historical conditions of people like Siya affect their ability to bring a case before the court. In criminal matters, the case gets to court quickly, but due to Siya's lack of income and lack of an official residence he is relegated to awaiting trial detention and the case is postponed for a week later. As Nyenti (2013: 912) suggests "A broad approach to the concept of access to justice goes beyond access to the institutions that resolve dispute and to legal services. The socio-economic condition of claimants (especially poverty) has an inevitable impact on the ability of the poor and marginalised to utilise the legal system". This becomes clear in Siya's experience of court, with access to the court he was still facing a week of no income from his work,

compounding his socio-economic struggles. Drawing from Baxi (2007) it becomes clear that a broader understanding of access to justice is needed; one that considers the temporal, spatial, social or symbolic barriers. And while this is supported by the South African Constitution it is not always implemented in practice. The poor, while receiving access to a LASA attorney are still subjected to attacks on dignity in courtroom proceedings and are managed differently. I witnessed first-hand how those represented by private lawyers and who have a physical address are given bail. There needs to be a better way of ensuring that the poor are not subjected to extended time spent in awaiting trial detention.

Day 8: Siya's main barrier against access to justice

Looking dishevelled, a week has passed and Siya has been in awaiting trial detention for a week. The trial commences and the LASA attorney represents all four men. The state prosecutor starts the proceeding by requesting a postponement. The LASA attorney objects to the extension and explains that two of the men have residential addresses and have in the past week proved that they live with family in a nearby suburb. Siya unfortunately, does not receive bail and will be spending more time in awaiting trial detention. The investigation had not been completed over the past week, leaving the state prosecutor without witnesses or evidence. The postponement was granted on the condition that "the investigation take place as soon as possible". The magistrate, after consulting the next month's schedule realized that training was taking place in the following week and that the date be set for two weeks later. Siya along with his co-accused were put in detention. The postponement of cases is a symptom of ineffective investigations and ineffective state-prosecutor and police officer cooperation. The postponement results in extended stays in awaiting trial detention for those who are not granted bail.

Nyenti (2013: 915) elaborates and states that one of the major barriers against access is the length of time for cases to be concluded, specifically in the busier courts. As Nyeti also asserts "access to justice only becomes complete when one's dispute is settled speedily". The time spent in awaiting trial detention prevents Siya from earning an income and compounds his poor socio-economic conditions. The right of access to courts is addressed by providing a LASA attorney; however, the right to a speedy trial is also endangered by the dire consequences for Siya. If the concept of access to justice goes beyond the functioning of institutions that resolve legal process and are understood in light of "meaningful access to justice" as Klaaren (2014) suggests, then it

should entail defining access to justice within the context of economic and social conditions of those in the judicial process. In Siya's case, the courtroom should have ensured he was not left without income, his placement in detention for an extended period left little room for economic stability and drew the proverbial rug from beneath him.

Day 27: What about Auxiliary (holistic) justice or (Re)defining access to justice?

A different magistrate was overseeing Braamfontein Court today. The four accused finally get called to the accused stand, Siya and his co-accused are wearing the same clothes I saw them in last time. Siya's red jacket with a stag emblazoned on the back is looking worn and dirty. The magistrate looks over the case and starts the trial by asking why the case has taken so long. The state prosecutor explains the situation and again asks for a postponement, the magistrate visibly upset, turns to the state prosecutor and starts to reprimand her for her "inability to do a decent job". Turning to the LASA attorney, he exclaimed: "you should not be letting them sit in jail for so long". The state prosecutor had, once again, failed to produce a witness or even the business owner. With no evidence or witnesses to build a case. The magistrate, with frustration and anger, dismissed the charges and let them off with a warning. The four were released, but Siya and his co-accused had spent four weeks in awaiting trial detention. The court, in the process, had provided little support to Siya. He was arrested, detained and then released in a worse state than when he arrived. With no provision of a social worker or attempts to provide Siya with compensation or even accommodation after the trial, it left me wondering how long it would be before he landed up back in the courts?

The research problem and objectives

Despite South Africa's provision of legal aid in criminal matters, meaningful access to justice is a challenge in the district courts. Klaaren (2017) highlights that "meaningful access to justice remains a function of economic resources" largely and with the increasingly high cost of private representation in courtrooms, legal aid is crucial in ensuring poor people attain representation. Klaaren recommends three approaches for researching "meaningful access to justice". He suggests (2017: 21) a "national survey of need, a sketch of the quantity and quality of available legal and advisory services, and a comparison of average costs (legal fees) to average household income". My research focused on the "quantity and quality" of available legal aid provision in the district

courts. The main means of legal representation for the poor in criminal matters remains legal aid provided by the state through LASA's lawyers. As AfriMap[8] concluded in 2005 "the overwhelming majority of state legal aid funding is still directed at criminal matters; more than 90 percent of cases funded between 1 April 2003 and 31 March 2004 were criminal matters. Given that the right of accused persons to legal representation at state expense is constitutionally enshrined, the demand for state legal aid in criminal matters is unlikely to decline in the near future". With no reprieve from the request for legal aid; understanding if the access to justice provided is effective for the poor will remain a crucial concern.

The main objective of this thesis is to critically investigate how legal aid provision by LASA allows for a degree of access to justice for the poor in Braamfontein Court. Legal Aid lawyers provide free legal advice to those who cannot afford private representation. Open access to counsel and representation for the poor is often equated with access to justice. However, those relying on legal aid often need additional support beyond legal advice and are at a disadvantage in the courtroom. This thesis leads to two questions, namely; How does LASA interpret "access to justice" in the criminal matters presented in the district courts? Moreover, does access to justice entail more than legal advice and representation in the courtroom? Furthermore, this thesis aims to address how "access" to justice is not "equitable access" to justice (Nyenti 2013). My strategy in this thesis is to focus on three themes to illuminate how Siya's story is one of access to courts and to understand what a more equitable access for Siya might require.

Towards equitable access to justice: historical denial, interactions and advice

An ethnography of access to justice's relation to poverty is an innately open ended project. In terms of themes, levels, quality, places, and approaches to researching access to justice there are infinite possibilities in which obstacles to access to justice in particular and governments conceptions in general could be studied. Access to justice is now ubiquitous in the experiences of people in the district courts of South Africa, offering legal representation to those who cannot afford it all the while meeting the demands of the Constitution by ensuring representation in trials and offering legal advice, representation and counsel to accused criminals who need it.

[8] AfriMap, has conducted extensive research into access to justice across Africa. With their mandate to promote good governance. This project offers systematic assessments of governments' compliance with human rights. Their work expands across 18 different African countries and they have provided reports on numerous legal aid schemes across the continent. http://www.osisa.org/general/global/africa-governance-monitoring-and-advocacy-project-afrimap.

Since I am specifically concerned with how to provide equitable access to justice and to understand how the poor come to experience the current access that the state affords, I have chosen three comprehensive themes to organize the ethnographic materials. I focus on the themes of historical denial of access to justice, the client-attorney interactions and how these hinder and or assist access to justice, and how sharing advice in the courtroom may be a response to or symptom of inequitable access to justice. My argument is that at the heart of equitable access to justice in the district courts is the interaction of legal aid attorneys and their clients; pushed together through historical forces and reliant on an interwoven network of advice sharing in the courts.

In Part 2 of this thesis I offer a historical account of legal aid provision in South Africa. This comprehensive historical mapping of how the presence and work of LASA attorneys have become indispensable in the courtrooms of current South Africa emphasis how access to the courts and justice was denied to the majority Black populous of South Africa before 1990. Offering, in conclusion, an explanation for how it came to be a fruitful and efficient (cost wise and judicially speaking) aspect of the justice process. Making use of archival material I show how earlier, post-1990 interactions between clients and attorneys presented themselves and lay the ground work for current client-attorney interactions. This section also reveals how Legal Aid attorneys became a distinctive means and an invaluable approach in facilitating access to justice, in high courts, magistrate courts and at times the Constitutional Court in the present time.

An ethnographic account, with an emphasis on using dense description, of the client-attorney interaction is captured in Part 3. This section looks at the exchange of advice in the day-to-day criminal case proceedings. It also serves to highlight the severe limitations in the official portrayal of court cases, which are used to justify the increased spending of LASA and changes in judicial procedure. While offering insight into the operations of the courtroom, an elaborate description of experiences of the court is offered at the same time.

Part 4, expanding on the client-attorney interaction deals with the consequential advice sharing in the courts. Although brief, this part follows on closely from the ethnographic description of the courts and offers an argument for how the courts remain a space of frustration and, despite efforts, still favour those who can afford private representation. This section highlights the biases and explains the court as an extension of punishment for those who should rely on the LASA services, not due wholly to the failings of the individual attorneys, but also due to failures in the criminal justice process and by association, the Braamfontein Court.

I did not write this report just for anthropologists. I like to think that it might be of some interest to social theorists and those in legal studies in general, and those currently struggling, like myself, with how to relate theory to the courts in South Africa and the experiences of those working the courts. As one attorney liked to say "we work to make a difference, in the lives of those discarded": an attempt at least to begin to imagine a fairer judicial process – one that does not limit the potential of those who work in it, nor disregard those who are subjected to it.

PART TWO **HISTORY OF DENIAL AND ACCESS THROUGH LEGAL AID**

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FROM FRINGE TO FRONT ROW: A HISTORY OF LEGAL AID SOUTH AFRICA

"Law, legal and judicial institutions are crucial to reducing poverty, strengthening social and economic equality, and achieving human security and development, and they should therefore be people centred. In that regard, rule of law, accessible legal and judicial institutions, and a legally empowered citizenry facilitate the enjoyment of social, economic and political justice and its benefits should be all inclusive and sustainable". Geraldine Fraser-Moleketi (United Nations Development Programme 2013)

Legal Aid South Africa (LASA) is an essential component of the everyday functioning of South African courts specifically with regards to criminal matters and has in recent years moved towards extending the service to representation in civil matters. The presence and work of LASA's interns and attorneys are unmistakable and invaluable in facilitating access to justice, (regional and district) magistrate courts, the high courts and at times the Constitutional Court. Legal Aid South Africa and other legal empowerment efforts (for example university law clinics) constitute the utmost essential part of legal reform – not only the reform of laws but also formal legal systems – because they are critical to the rights and realities of the poor (Golub 2007). It is not the objective of this research to argue the definitions or understandings of justice: such as its moral, social or political meanings, nor will it discuss the various theories of justice, or justice as a moral worth. This research is focused on justice in the legal sense, more precisely, access to justice in criminal matters in the district courts of South Africa. The Awaiting Trial Detainees (ATDs) and others who use these courts want to have their cases considered by professionals who have knowledge, savoir-faire and an understanding of their personal circumstances – desiring access to appropriate and reasonable hearings.

Through the creation of the Constitution (1996) in South Africa came the need to reform the judiciary, altering the court system which had been previously staffed by white people and failed to reflect the gender and race composition of the country (McQuoid-Mason 1999). While I do

address this at a later stage in this section, it should be noted early on that the Constitution did establish a general right to access to the criminal courts, including representation for detainees, the accused and those arrested. As McQuoid-Mason explained, by 1999, the government had set mechanisms in place to achieve these aims and consequently offer improved access to justice, despite these efforts non-government organisations (NGOs) remained the key role players in facilitating access to the courts. The reform that followed the Constitution was not the first to take place in the history of LASA and only reflects one of the moments that saw a change in the judicial system.

This chapter offers a history of legal aid in South Africa, with emphasis on how LASA came to be a fruitful and efficient (cost wise and judicially speaking) aspect of the justice process. The history shows how access to justice, as a concept, has changed over the years since the implementation of the first Legal Aid Act of 1969. With earlier conceptions emphasising "access to legal services and other state services" and later "to a broader one that includes social justice, economic justice and environmental justice" as seen in the amended Legal Aid Act of 2014 (Nyenti 2013: 902). Working through three texts; firstly, the archival material available at the University of Witwatersrand, secondly, on the memories and experiences of attorneys and how they understood the development of LASA and thirdly, the documents that constitute the literature regarding LASA and their publications, this chapter traces the changes in legal aid provision in terms of access to justice. The intention is to integrate historical and ethnographic perspectives with the purpose of bridging a gap between "large meta-narratives and the life experiences of individuals" (Wilson 2012).

The Profession of Law in South Africa

The South African legal profession consists of 24 330 practising attorneys and 4909 candidate attorneys in South Africa who serve 52,98 million people[9]. South African lawyers are divided into advocates, attorneys, and candidate attorneys, all three are classified as officers of the court and are responsible and accountable to courts in respect of cases and the people they represent. The official distinction concerning advocates, attorneys and candidate attorneys is their different "rights regarding the court in which they may appear" (The Department of Labour 2007). Before 1995,

[9] Accessed 7 December 2016, this site offers valuable insight into the demographics of the law profession. http://www.lssa.org.za/about-us/about-the-attorneys--profession/statistics-for-the-attorneys--profession-2

attorneys had the right to appear only in lower courts, i.e. district and regional magistrate's courts. However, in 1995 the Right of Appearance in Courts Act, 62 was introduced which stated that attorneys "could acquire the right of appearance in the superior courts, i.e. the high court, supreme court of appeal and Constitutional Court, through an application to the registrar of the provincial division of the relevant high court" (ibid.). To get approval to appear the attorney is required to have a minimum experience of three years in the courts and have an LL. B (Legum Baccalaureus) or equivalent degree. Advocates, on the other hand, "have the right to appear in any court. Despite these liberties, they can only do so on instruction from an attorney, i.e. they are not entitled to take instructions direct from a member of the public" (Right of Appearance in Courts Act 1995). Candidate attorneys are still in training and under the guidance of a practising attorney, and will in time become attorneys themselves. According to the Attorneys Act of 1997, a candidate attorney will complete his Articles of Clerkship after a period of two years as well as attend part-time law school. Legal Aid South Africa relies on candidate attorneys in their district courts.

As McQuoid-Mason (2000) and The Law Society of South Africa have argued; the law profession is dealing with the legacy of apartheid particularly in the private sector, with a sixty percent white-dominated legal profession and only thirty-nine percent black attorneys. Candidate attorneys are more in line with transformation goals regarding representing the population of South Africa, comprising sixty percent black and forty percent white. Conversely, LASA in their annual report boasts eighty-four percent (2295) black staff members. Around 4000 students graduate from universities in South Africa with an LLB degree, all of whom should continue into internships "either as pupil advocates or candidate attorneys before they can be permitted to practice" (Emdon 2017). For the period of 2015-16, 2733 LASA staff worked to finalise 432,210 legal matters[10].

Currently, only twelve percent of the LASA budget is spent on cases dealing with civil matters, and this is, as McQuoid-Mason clarifies (2000: 112), a result of the demands made in the South African Constitution. Civil matters are slowly gaining support again from LASA, despite budget constraints, and criminal matters have been the focus of LASA over the past two decades. This is interesting considering the earlier years of the Legal Aid Board in 1969 as structured by the apartheid government and its insistence on providing legal aid in civil matters. The earlier years, before 1994, dealt with a government service that predominantly catered for the needs of the white

[10] Per the 2015/16 annual report by LASA. http://www.legal-aid.co.za/wp-content/uploads/2016/09/Annual-Report-2015-2016.pdf Accessed 7 December 2016.

minority in the country and are best understood looking at the political changes that influenced the country and consequently the access to certain kinds of justice.

Development of legal aid from 1969: the (de)formative years of the Legal Aid Board under the National Party regime and subsequent access denial

The Legal Aid Board (The Board) from conception in 1969 to current criminal courts underwent numerous reforms. The Board was created by the Legal Aid Act of 1969. The Act made provision for legal aid for indigent persons, to establish "The Board" (as well as define its functions) and to provide for other incidental matters (The Republic of South Africa 1969). As the South African "National Party shifted to a more aggressive and authoritarian phase of policy-making, its support from white South Africans markedly increased" (Bundy 2016: 79). In 1966, three years before the Legal Aid Act, Verwoerd won an electoral landslide, the National Party (NP) gaining 126 of 166 seats. The creation of Legal Aid in this period was no coincidence, with the banning of ANC and PAC and their subsequent move underground and the launch of violent forms of struggle, Verwoerd and Minister of Justice B.J. Vorster responded with "legislation providing for detention without trial, solitary confinement and swingeing penalties for sabotage and terrorism (offense almost laughably broadly defined)" (Bundy 2016: 79-80). In terms of legal aid funded by the apartheid state, which only served the interest of the white minority, I argue it worked as a means of providing access to justice for solely white accused, and consequently, when, or rather if, trials on Black people made it to court they were left with little or no means of access to justice. As McQuoid-Mason explains the limited access to justice for Black people in South Africa;

> *"the right to counsel in criminal cases was recognised by the common law in South Africa and confirmed by statute. However, this right was severely curtailed by security legislation during the apartheid era, when arrested and detained persons were denied access to counsel unless they were charged or brought to court. Even then the right to counsel was usually expressed as a right not to be deprived of legal representation rather than a right to demand legal representation" (1999: 5)*

The state-funded legal aid service was divided along racial lines. In the earlier days of legal aid, the independent so-called "TBVC states" of Transkei, Bophuthatswana, Venda and Ciskei states were subject to specific legislative dispensation for these apartheid "Bantu" legal aid services and were only repealed in 1996 (Gutto 2001: 264). As Gutto (2001) argues:

The six "self-governing homelands" of KwaZulu, Lebowa, Gazankula, Qwaqwa, KwaNdebele and KaNgwane refused to accept the official status of "independence". They remained part of South Africa. In theory, this may complicate the issue as to who truly benefited from the "white South Africa" legal aid system.

The discrimination and inequality along racial lines were maintained, the six "self-governing homelands" while included in the provisions of legal aid, in implementation of the law, black people still received limited coverage under the Legal Aid Act of 1969. In other words, in 'white South Africa' (which included black people in the 'self-governing homelands'), formally state-funded legal aid was provided under the Act, but this was far from the reality of providing access to justice for Black people.

The Legal Aid Act of 1969 has been amended over the years. The first taking place just two years later in 1971, the amendment saw the extension of legal aid services to the "territory of South-West Africa, including the Eastern Caprivi Zipfel" (Legal Aid Amendment Act, 1971). While increasing access to the courts with the provision of state-compensated private counsel (judicare) to the people deemed needing it by The Board. The spending was left to the discretion of The Board. In the formative years, under apartheid, The Board allocated its limited budget to civil matters catering predominantly for the minority white population of South Africa.

The state at the time, through the Suppression of Communism Act, "outlawed the privately funded International Defence and Aid Fund" (Cook, 1974: 33-34), established by Canon Collins, served as a fund for the legal defence of political activists and their families (Herbstein, 2004). The intention of creating the Legal Aid Board was to reduce the political pressure of the time, with the benefit of determining who would (or rather would not) qualify for representation and a fair trial before the courts. The Board, as described in the Legal Aid Act of 1969 "consisted of attorneys, advocates, representatives from the bench, government departments and independent experts on legal aid, such as the Association of University Legal Aid Institutions". The Board had full discretion as to how it would provide legal assistance to indigent persons, and for this purpose, it established a set of working rules that are incorporated in the Legal Aid Guide (McQuoid-Mason, 2010: 4-5).

The Legal Aid Board Guide: 1971 to 1989

The last two decades of apartheid saw inflation, stalled economic growth, and soaring unemployment. The demand for legal aid would only increase as fewer people could afford private representation. Before the operation of The Board, uncompensated private counsel (*Pro Bono*; which sees private lawyers doing work for free in the spirit of giving) was the main sources of legal aid. These services were not addressing the demand adequately. *Pro Bono* work did not fall away with the introduction of The Board but continues even today. The state started offering legal aid by providing access to justice through a mechanism called the judicare model, which continued until 1989.

Broadly speaking judicare is state-compensated private counsel. This model, until 1989, was the primary means of providing access to the courts for 'indigent' people; complete discretion was given to The Board in the 1971 amendment to the Act. Rather than salaried lawyers, The Board opted to rely on attorneys in the private sector, who would then bill The Board for services rendered. To this end, The Board created a set of working rules. Under this system, legal aid clients were prevented from applying for assistance directly to private lawyers of their choice. The clients first had to go through a screening process by a state-appointed legal aid officer and then referred to lawyers. The reason for this was to ensure the client met the Means Test requirements as set out in The Board guide. This model was not completely discarded, and is still relied on by Legal Aid South Africa when the salaried lawyers are not able to provide the service.

The Legal Aid Act of 1969, nor any of the amendments that followed, did not offer a precise definition of the 'indigent person' leaving it to the discretion of the Legal Aid Board to decide who qualified for legal aid at state expense. This is one of the ways that the apartheid period legal aid ensured the monopoly of access to justice remained in the hands of the ruling white minority. Legal Aid officers administered the Means Test with clients to determine if they qualified. The Means Test took into consideration the monthly income of the client. If the client failed the Means Test, the onus to provide representation was, and still is, on them. The indigent person remains vaguely defined in the Act and the Means Test is the key determining factor. As of 2015, the LASA guide stipulates the following as criteria for the Means Test; a) the "applicant must have an amount not exceeding R5 500 remaining after deduction of income tax from his gross income. For a claimant who is a member of a household, the amount is R6 000"; b) "The value of immovable property owned. Clients are permitted to have immovable property to a value not exceeding R500 000 to

qualify"; moreover, c) "The value of movable property owned. Clients are permitted to have movable property to a value not exceeding than R100 000 to qualify" (Legal Aid South Africa 2014: 6-7). These specifications were only created post-1990.

With the focus on using judicare model to provide access to the courts, The Board had full authority over who was represented and by whom. The Legal Aid Board in this period (1971-89) was also more concerned with civil matters than criminal matters. Little changed in the functioning of The Board occurred during this time. However, there was an increase in spending and a subsequent increase in the provision of funds by the state.

Introducing the public defender in 1990-1994: a step away from judicare

In 1990, the state experimented with a public defender programme. The introduction of the programme was due to an increase in demand for legal aid in criminal matters. In the district courts alone, there was an increase from 478 825 cases in 1990 to 631 166 cases in 1992 (Legal Aid Board 1997). This increase in trials meant that there was an increase in the demand for legal aid to provide representation. Still relying on the judicare model at the time, the budget of The Board came under strain. The Board started planning the introduction of a new kind of legal aid; this took the form of state-funded candidate attorney interns in rural law firms. This new model moved away from the judicare model and instead offered state-funded attorneys. These new attorneys would be trained and offered work in the courts.

By 1994 the Interim Constitution had been created, and the responsibility to provide Legal representation fell squarely on the shoulders of The Board. Judicare was slowly faded out as the main means of legal aid provision. The Board increased its hiring of legal staff. The Board developed the capacity to represent accused persons who could not afford representation in criminal matters. This was a direct result of the Constitutional requirement to provide representation should "a substantial injustice otherwise result" if they were not represented (Republic of South Africa, 1996). The resulting system favoured criminal over civil matters and increased the cost of private representation, as Klaaren argues (2014), forcing The Board to consider other avenues of providing legal aid. The Board was forced to undergo changes, ones that had taken place through trial and error.

The Legal Aid Board continued to grow and adapt to the new Constitution. In doing so it began to expand legal aid provision and access to justice through two key developments. Firstly, through

the growth and development of the state-funded legal clinics and secondly with the use of candidate attorneys to assist with cases. In 1994 The Board attempted to improve access to attorneys and courts through a "Pilot Board-Funded law clinic scheme" which later formed the backbone of LASA and its approaches to providing access to the courts and improved access to justice (Golub 2007, 101). In the next section, I draw on the story of A. H. Swanepoel (one of the firs advocates to work on the pilot scheme) that offers insight into the learning processes and the vital role advocates play in establishing new processes and improving facilitation of access to justice through their work experiences in the courts and prisons. The story of Swanepoel is one of learning, adapting and laying the foundation for what would later come to be known as Legal Aid South Africa.

5

ADVOC. SWANEPOEL'S STORY: DEVELOPING A SYSTEM FOR STATE-FUNDED LEGAL AID

"At first the inmates were rather sceptical. They saw some women, although I am an advocate, they [prisoners] did not want to speak to us [during the prison visits]. After the first visit, we came back [from the Vereeniging prison] with about ten complaints and no new cases". A.H. Swanepoel 1996 from the Wits archival material

The correspondence between Advocate Swanepoel and the Pilot scheme leader Advocate Richard are part of several discussions that took place about the obstacles faced in the earlier days of LASA by the advocates and attorneys working in the prisons. Legal Aid South Africa was the name of the organisation that was formed by the Legal Aid Board. Legal Aid South Africa was established to provide the state-funded attorneys, advocates and subsequently the law clinics (such as the one Swanepoel worked in). A great deal in implementation and development of this model was made possible due to the experiences of individuals such as Swanepoel. The Constitution of 1996 demanded that the previous legal aid models accommodate all South Africans.

Swanepoel worked as an advocate. She also had four years of experience working as a *pro amico* lawyer. As with *pro bono* work the lawyer works for free until a judgment is given, a settlement is reached or another form of 'victory' is achieved. Once the case is won, the *pro amico* lawyer will take their fee from the proceeds recovered. Should a positive result not be reached, the lawyer does not get paid. Swanepoel started working for The Board as an advocate and was appointed to a research project on their behalf. She was asked to report on the implementation of the state-funded legal clinics scheme and the experiences of clients of the new model and their interactions with their lawyers. Swanepoel was leading this group of attorneys and candidate attorneys.

The story starts when Swanepoel travelled to a prison in Vereeniging, south of Johannesburg, to evaluate the success of Legal Aid workers and the programme they had implemented. The "prison experiment" as Swanepoel describes it, started in June 1996. The experiment was

concerned with a) the client-lawyer, b) the lawyer-prison official and c) the official prisoner relations (an organisational network) which worked together to bring about changes in the processes of Legal Aid South Africa's attorneys and their management of criminal matters. On arrival at the prison, several issues were flagged. The first complaint was that prisoners

> *get appointed attorneys at court, but these attorneys do not consult with them before they enter the courtroom on the trial date...they [the clients] are put on the accused stand to briefly tell the lawyer they want to plead guilty or not.*

This complaint by the prisoners was part of the reasoning behind how processes unfold in the current courtroom as I will discuss in the next chapter. The second complaint by the prisoners was, as Swanepoel described it

> *that [prisoners] are not informed as to the reasons for postponements. Cases are postponed at random, and everyone said that lawyers were not present when the cases were postponed. Most of them saw their lawyers for the first time on the date that their case went to trial.*

Swanepoel goes on to elaborate on her relationship with the police officers and the magistrate court personnel and how it changed when she started carrying out formal bail applications in court. Before her persistence of formal bail proceedings for the accused, bail was usually not an option for many prisoners. Swanepoel explained that:

> *I have been involved in pro-Amico bail applications for the past four weeks…I feel that the Constitution grants accused persons these rights…moreover, it shows to both the police and the prisoner inmates that we mean business. I do get the idea that police officers are starting to concede to the granting of bail…it has caused me to be less popular among the police and the magistrate personnel, but that is proving to me that I am doing my job properly (Swanepoel 1996)*[11]

Swanepoel's use of the Constitution to address poor access to justice worked to establish new norms in the practices of LASA and the courts. She makes specific reference to the Bill of Rights which ensures that "everyone is equal before the law and has the right to equal protection and benefit of the law" (The Republic of South Africa 1996). As her relationships strained, and in many ways,

[11] This was the correspondence between A. H Swanepoel and Tony Richard from the Vaal Legal Aid Clinic in 1996.

this still characterises the experience of LASA lawyers in the courtroom today, Swanepoel offers insight into how these relationships could be improved if the attorneys where present in the courts daily (the current LASA approach).

On the 18th of September 1996, four months into the prison project, a riot erupted in the Vereeniging prison. The riot started when prisoners and awaiting trial detainees demanded to be seen and represented by Swanepoel.

On Friday the 17th September Swanepoel received a distressing phone call to go back to the prison due to the threat of a riot. The prisoners were upset that Swanepoel was only seeing ten prisoners on Saturdays. By the end of the day on the 17th, Swanepoel was not able to see all the prisoners and promised to return the next day with more clerks. On the Saturday morning of the 18th a riot had broken out, and Swanepoel was urged to get to the prison as soon as possible. Swanepoel arrived, along with some clerks, to work through some cases on the day. The prisoners insisted on having Swanepoel represent them in court. A result of the representation received by Swanepoel and the prison project the prison and magistrate court personnel reported that:

> *for the period of the project the mood inside the awaiting trial section had changed…there were fewer fights between inmates themselves and they were more cooperative with the prison authorities.* (Swanepoel's liaison with Richard, 1996)

The change was not only in the perceptions by the officials but also that the awaiting trial prisoners were "receiving what the Constitution promised, they were, as a rule, less assaulted by the SAPS and they were experiencing the fruits of being properly represented".

Swanepoel's experience of working more actively in the courts was summed up as follows "the prosecutors and magistrates were also aware of our involvement and cases of persons being held in custody were starting to be removed from the role if the investigation was not completed within three weeks. The situation that one had to wait at least eight weeks before being asked to plead in the normal less serious criminal matters have vanished".

Change has always been a part of the operational aspect of LASA, with the intention of streamlining processes and making it easier for attorneys to offer services to the poorer and underrepresented peoples of the courts and prisons. LASA has, since 1994, run pilot projects to consider alternative ways of using salaried public defenders. As McQuoid-Mason (2000, 2010) explains, the move towards a public defender model "included both qualified lawyers in public defender offices and law interns attached to Board-funded law clinics". McQuoid-Mason explained

that the setting up of justice centres was the final stage in the "evolution of a holistic approach to legal aid services" which incorporated the "two public defender models as well as paralegals and legal aid officers" (2010: 6). I argue in my final chapter, that a holistic approach has not been reached in terms of providing access to justice and the result is a reliance on a network of advice sharing in the daily activities of the courts.

Legal Aid South Africa then entered cooperation agreements with the independent university law clinics and legal service providers such as public interest law firms. These developments came together and created a legal aid model that worked to entrench the Constitution into the justice system, with different consequences. Attorneys, such as Michael Kuper (the chairman of the Johannesburg Society of Advocates (JSA) in 1995), pointed out that at the time "the biggest issues facing the courts was that litigants are not well treated. The courts are slow; the hours are fixed; the environment is unpleasant; the costs high and the eventual results often unsatisfactory" (Smith, 1995: 29). These problems were commonplace in courtroom proceedings, some of which are still major problems in the current day courtroom. The recommendations made by JSA at the time was a call for the improvement of government-sponsored legal aid and the cooperation with the private sector to deliver the necessary legal assistance for those who could not afford it. The former became the solution, the increase in budget allowed LASA to expand and employ more candidate attorneys to stand for their clients in the courts.

Legal aid workers, such as Advocate Swanepoel, played the part of ombudsman in the justice system and created the option of legal aid as a career path as well as a means of making law understandable to community members through justice centres and reinterpreting the law and its applications. The work in this formative moment of LASA went a long way to establishing a precedent for the provision of legal assistance in the courts, through hotlines[12] and in more recent years online[13]. When the justice centres or impacting litigation division are unable to handle cases, they are referred to private lawyers. LASA has developed into an essential aspect of the courts. The section that follows looks at LASA over the past five years and asks whether LASA has

[12] This is a telephone service for people requiring access to a legal aid attorney. The call is free and LASA plans to meet with the client. This service is increasingly valuable for the increase in civil matters as not all civil matters start in trials and courts but require legal insight outside the courts.

[13] The internet has also provided a new avenue for receiving legal advice, while not explicitly discussed in this research it should be noted that it also offers access to information regarding legal procedures and contacting legal aid lawyers if needed.

transformed from being an entity of the apartheid state to becoming independent as an entity created post-1994. The question is largely focused on whom LASA attorneys represent, what cases they have undertaken in recent years and what vision of South African access to justice LASA is advocating. The move to being front and centre in courtrooms across the country makes them essential for future research and development of what it means to have access to justice.

6

COMING INTO ITS OWN: A SOUTH AFRICAN LEGAL AID MODEL

In its formative years, the Legal Aid Board was massively under-funded and only in later years (post-1994) did funding gradually increase. The increase in budget mirrored the move towards a democratic state, and after the new democratic dispensation, the budget mushroomed. From a meagre R66.3 million in 1994-5 to nearly four times that amount in subsequent years. This increase saw Legal Aid South Africa acting as the agent of the state in addressing the constitutional legal aid obligations and is funded by the state. In the current year (2015-16 financial year) the budget sits at R1.752 billion (Legal Aid South Africa, 2016). LASA had a budget cut of R92 million rand for the 2016-2017 period, making up the shortfall from cash reserves.

Legal aid has continued to expand; not only has LASA managed to establish itself as a key proponent of the state's attempts to address access to justice in courts, but they have also managed to foster connections between multiple legal aid entities in South Africa (justice centres, law clinics and judicare). These entities continue work under the mandate set by LASA. The structure of LASA has been shaped along the lines of a business organisation; in "respect of all cases the Chief Executive Officer (CEO) has discretion to authorise legal aid in civil matters" (Legal Aid South Africa Report 2016), and the courtrooms run independently contingent on the size of the case. This has been a development since 2014 as LASA moves towards improving access to representation in civil matters, especially concerning the provision of access to justice for women which is currently poor[14]. LASA always provides representation to persons under the age of 18 years as stipulated in the constitution for the right to legal assistance at state expense.

One of the main proponents of the justice process is the Means Test that gets carried out in the first interaction between the Legal Aid attorney and the client, except in the case of children under 18 years of age. The test is applied to both civil and criminal matters.

[14] Women are less likely to require legal representation in criminal matters. As I observed in the courtroom, more men commit crimes. This might be an avenue of further research into the courts of south Africa. More women require assistance in civil matters, making access to justice skewed along gender lines. This is discussed in the most recent Legal Aid South Africa Report of 2015/2016.

The Chief Executive Officer does not get involved with the daily operations of the district courts. The district courts rely on the work of legal aid attorneys employed and trained by LASA. These attorneys are usually recent graduates from universities who are registering to be candidate attorneys. They are expected to learn on the job and be independent workers in the courtrooms. The backbone of LASA is the work conducted by the candidate attorneys (CA). In 2016, LASA employed approximately 600 CAs every year. These CAs learn courtroom procedure through trial and error, relying heavily on their experiences representing clients. They constitute around thirty percent of the overall legal staff at LASA. Legal Aid South Africa trains and employs twelve percent of all candidate attorneys in South Africa. These candidates complete their two-year contracts and can be practising attorneys in South Africa's justice system (whether that be private or public work).

The experiences and legal knowledge acquired places a restriction on the kind of work these candidates can move into after candidacy. LASA creates a particular kind of candidate attorney, one that specialises in the kinds of cases LASA takes on. The candidates are then trained to work in certain conditions, deliver on their mandates (such as meeting an expected target of cases in a month) and to manage clients in a particular way. This organisation will continue to adapt and change with the requirements of the poorer members of society.

The 2014 Amendments to the Legal Aid Act:

The 2014 amendments to providing access to legal aid ensured a broader eligibility of clients. The amendments ensured that children have better access to legal representation, the provision of legal aid in maintenance cases (this is a step towards improving access in cases of civil matters), also offering clarity on the impact litigation and clarifying the granting of legal aid in commission inquiries. Much of the amendments ensure that LASA plays an even larger role in South Africa's judiciary. In conversations with LASA lawyers, the idea of impact litigation seems to be the main approach to ensuring more people receive access to the courts. Impact litigation promises to offer access to justice for as many people as possible.

A more recent development has seen a shift toward impact litigation, while this has been a part of LASA it has gained momentum in the approach to dealing with numerous cases with the same legal matter. Regarding future development and the work of LASA one need only look to the development of the Impact Litigation Unit. This unit works on addressing failings in the law which

affect vulnerable people in South Africa. A landmark case, regarding the provision of access to justice in class action matters, for LASA, was Bongani Nkala and 55 Others V Harmony Gold-mining Co Ltd and 31 others (Legal Aid South Africa, 2016a: 22). The gold mining industry employs up to half million miners at any one time, and this case was a concerned with an increase in diagnosis of silicosis in mineworkers' lung, and 25 percent of these workers suffered from the disease due to long service in the mines. The case of the 56 mine workers was taken to the courts as a class action case and is currently being heard in the courts. If the case is in favour of the mine workers, it would be the largest ever class action lawsuit in the country and the continent. In this case, LASA worked alongside the Legal Resources Centre and Leigh Day of the United Kingdom to put together the case for court. This work could set a president for future laws regarding employment of workers in mines in the future as well as class action jurisprudence in South Africa. The case is on-going, but the Gauteng High court ruled in favour of the mine workers taking the class action against the mines. These are the cases that take place alongside the smaller cases in the district magistrate courts. The future of LASA seems to be making a turn towards impact litigation and civil matters. The attorneys in the district courts do not work on case such as the one above. The attorneys in Braamfontein Court work with their clients face-to-face. Braamfontein Court is understaffed and the LASA attorneys are over-worked making their compromising their ability to provide good and fair representation for their clients. The present-day experience is vastly different from those of earlier efforts by advocates such as Swanepoel. The recommendations, such as those made by people like Swanepoel, influence the experience of access to justice.

Remembering the court as an attorney

A person never forgets their first day in court.

Sipho reminiscing in an interview (June 2016, sitting in court)

It has been a long day in the court, as we slump into the more comfortable seats at the magistrate's feet. Sipho[15] and I each find a comfortable chair. The torn green plastic coverings are split and expose a soft yellow sponge. The courtroom is not much to look at; the walls are bare. A sun beat calendar curls in the afternoon heat, a police officer starts closing the dirty windows that tower above the beige walls and the South African flag hangs wilted in the background. It is almost four

[15] All the names of the Legal Aid Attorneys in this research have been changed to ensure anonymity. Interview with Respondent A2.

in the afternoon; the magistrate has retreated to his chambers in the back of the court. Officials sit in silence, some chat about the day's events.

Today was a memorable day in the court, two awaiting trial detainees(ATDs) handcuffed to one another offered comical relief to some of the gallery members and officials today. The first was handcuffed to the second. The second needed a toilet break. The officer agreed to un-cuff him and escorted him to the toilet, leaving the first alone in the witness box – in front of the gallery members. The officer returned only to find the first man wrestling his wrist in silence (like a scene from a Charlie Chaplin film), he had managed to double-over the handcuff on his one wrist and subsequently lock it. The officer returned with running commentary "look what he has done, you cannot think?" soliciting a couple laughs from people in the court. Sipho returned moments later "That is enough, get those sorted and remove the cuffs, he is not a threat, and this is no way to behave in the courts. Those cuffs are hurting him".

Sipho has been in Braamfontein Court for the past year as a candidate attorney; not all days are memorable, sometimes they just roll into one. Like other LASA attorneys, Sipho came to the courts in Johannesburg for the professional opportunities and a chance to "make a difference" in the lives of "disadvantaged people in the judicial process". He plans to continue working in the district courts for the next two years. Much of his work time is spent on criminal matters, and less so on civil matters. Today he spoke confidently in the courtroom; with the authority of a legally savvy attorney, juggling several cases, and the patience to know when to pause and reflect. He says with a raised eyebrow and a tilt of the neck "it took me a year to learn the ropes…and I am heavily reliant on the assistance of people in the courtrooms". From the first day in court to a year later, Sipho explains that "the courts can be difficult places to work, you are always busy, and you must manage many cases at the same time, all the clients are important".

In an earlier discussion, Sipho mentions that he did not always envision working for LASA as an attorney. He worked in education previously but was happy to be in the courts now. Having grown up in rural Limpopo, he studied an LLB degree through correspondence courses at the University of South Africa. "I realised how little people knew about the law and the rights they had in their lives". Having come from a poor background and witnessed first-hand the lack of support for poorer people and their legal matters, Sipho decided to start his candidacy to become an attorney. Sipho remembers his first day in court as "the most nervous moment of my life" when he stood sweating and fumbling nervously before the magistrate. "A person never forgets their first day in

court" he continued, he had told me this story before only this time he spoke about the value of having more than one language as a major benefit when working with clients. He alluded to the idea that because of where he came (poor and black from Limpopo) and from his ability to understand the client in a language they were both comfortable with as having made a massive impact in the courtroom moment. "Maybe that is why there are more black legal aid attorneys? We speak the languages" he asked me as if I had the answer. He made it through his first court case and many more that followed thanks to the assistance of magistrates, officials and other attorneys in the courtrooms afterwards. He spoke about how the learning process "was a steep one and required quick learning if things were to run smoothly in the courtrooms and clients were looked after".

The courtrooms become more than just spaces for access to justice and legal processes, they encompass learning for the candidate attorneys and foster the professional development of attorneys in criminal and civil matters. The attorneys who go through the course of learning in the courtroom have a two-fold experience; they impact the lives of those they represent and are themselves impacted upon. Of course, the learning is not restricted to the LASA attorneys, but they are the focus of this research and will serve as the pivoting point for the chapters that follow.

Sipho speaks of the relief of having finished his first day in the courtroom and how it is vastly different from the work he does outside the courtrooms. A large part of the Legal Aid attorney's day-to-day experience is also about paperwork, one-to-one meetings and pushing people to produce documents when needed. The heavy work takes place throughout the week in preparation for the courtroom appearance. Their experiences and memories have the potential to shape future interactions with their clients.

The LASA attorney explains and introduces the legal process to their clients, all the while doing regular legal work necessary to secure a favourable outcome for the case (Herman, et al. 1979). The attorney is both educator and defender, professional and emotional supporter, listener and instructor. While this may not apply to all LASA attorneys, these various roles did surface in the client-attorney interactions to a greater and lesser degree. Broadly speaking, the ideological production and performance of roles occur within the framework of a cooperative relationship in which attorneys work to realise their clients' goals (Sarat and Felstiner 1995). When the attorney and client interact, they each take on the world that the other represents, something unfamiliar and

occasionally obscure, and yet still something of unquestionably relevance for their relationship. As Sarat and Felstiner (1995:5) explain:

> *In the world of the law, the client faces unknown rules, alien processes, and forbidding surroundings, all manipulated by strangers who can influence or decide matters of great moment… In the social world of the client, the lawyer's professional skills may be severely tested by the consequences of the client's guilt.*

For both, the stakes are high as each determines what to reveal in his or her interactions. While the attorney must rely on the client's interpretation of their social world, the client (with no choice in who represents them) is dependent on the attorney's legal experience (Sarat and Felstiner 1995: 7). What becomes important to this analysis and narrowing of focus is a discussion on the ways these interactions "produce legal and moral frameworks that justify a decision to handle a case in a particular way" (Yngvesson 1988). In creating, conceptually, a distance between the two actors; the attorneys appear to play a dominant role in the courts, using their expertise and knowledge of the law to legitimise some interpretations and label others irrelevant, clients are seldom passive in the process. They contribute to the interactions by offering their ideas of what is relevant and offer their interpretations of events to the attorney consultations. They contest the "ideological productions of their lawyers. Thus, attorney-client interactions always involve the playoff, and contests about, power in a relationship in which both parties have, at least in theory, a common agenda and shared goals" (Sarat and Felstiner 1995: 8).

It is becoming increasingly evident that the client-attorney interaction could share crucial insight into the pressures and challenges faced in the Braamfontein Court.

The day is done in court, Sipho looks at me and says, like a closing statement, "the best lawyers can do their research and can make time for their clients". The courtroom is empty now, yet voices still echo down the corridors and from the holding cells beneath the courtroom, tomorrow is another day.

Conclusion

Despite the demand for access to justice for civil matters, criminal matters remain the cornerstone of candidate attorney work and the work of LASA as an organisation. With the development of a pro-civil matter organisation in the 1970s to a conglomerate type structure in the current developmental period, LASA has been and will continue to be a crucial part of legal aid provision.

If its history is anything to go by, LASA is set to incite and radiate constitutional rigour and increase their work in the delivery of legal assistance (in all its forms) to the public of South Africa. The role of the private sector cannot be dismissed either and nor should we assume that LASA is the only driving force behind legal reform in South Africa, but rather that it is a major champion on behalf of those that may not have had a fighting chance in a system which favours those that have the means. If access to courts is equated with access to justice, then LASA is providing the service successfully with regards to criminal matters.

However, I argue that access to justice, equitable to access to courts, is only the starting point in the process, as seen in Siyabonga's case. Access to justice needs to be understood as more than the provision of a lawyer. Unpacking the client-attorney interactions in the courtrooms and the interactions with the administrators (such as magistrates, and translators) in the judicial process is crucial because access to justice is also hindered or facilitated by others in the interwoven matrix of courtroom relations. Understanding these relations was only possible by employing an ethnographic approach to researching, which I discuss in the following chapter.

PART THREE THE CLIENT-ATTORNEY INTERACTION

7

REALITIES OF COURTROOMS IN JOHANNESBURG: IN SEARCH OF ADVICE IN MOMENTS OF UNCERTAINTY

The experiences of legal aid attorneys have been absent in accounts of the courtrooms in Johannesburg in this narrative so far. Foregrounding these experiences is, however, crucial to understanding the realities of courtroom work and the outcomes for those they represent in the courts. The experiences reveal inconsistencies in the idea of working as a legal aid attorney in the justice system, as well as gaps between policy expectations and the needs of people awaiting trial and advice on legal matters, which would otherwise remain hidden. They also serve to highlight the severe limitations in the official portrayal of court cases, which are used to justify the increased spending of LASA and changes in judicial procedure. Bringing to the fore the ways in which criminal prosecutions are conducted and experienced and the ways in which this is managed, reveal the disorder and extended periods of waiting, often attributed to the courtrooms, and the people who make them work, but are more often a result of ineffective support infrastructure and overflowing prisons, than anything else. This chapter explores some of the experiences of attorneys, administrators, and other courtroom officials; focusing on the lawyer-client interaction. I use the term lawyer to simplify the dialogue. In this section lawyers includes candidate attorneys, attorneys and advocates and I use attorney and lawyer interchangeably.

The LASA lawyer-client interaction that I observed in the research, is a process of storytelling (see Bennett and Felman 1981) and cross-examination in which legal aid attorneys and their client attempt to construct for each other satisfying interpretations of their unique worlds. Borrowing from Sarat and Felstiner (1990:17-18), in this thesis I "treat the stories that [attorneys] and clients construct as a process of negotiation of ends, means, and meanings, a process in which [attorneys] bring the alleged distinct interpretive lens of law to bear on a human and social process, and in which a lay perspective, though one already saturated with taken-for-granted legal meanings, to legal process". It is in this process of negotiation and making meaning that 'advice' becomes essential to understanding the relationships and the outcomes of certain cases. A description of this interaction offers insight into how access to the courts is understood in terms of a lawyer's

expectations concerning their work and their handling of clients in a bid to provide access to justice. The interaction is the means for accessing justice.

This thesis is based on my personal observations of attorney-client interactions in actual criminal matters as they occurred in the Johannesburg district courts[16]. Over a period of eight months, I studied twenty criminal matters and spent twenty-five or more days attending courtroom proceedings. I also spent time outside the courtroom with administrators and other officials in the corridors of the district court and the surrounding offices. I followed the cases by observing and writing notes during attorney-client interactions in the courtroom and outside when the opportunity presented itself (usually on the smaller cases). Around eight attorneys were interviewed. Interviews also took place with administrators, magistrates and other officials that were available during the day to supplement my understandings of interactions.

The spaces used by LASA lawyers offer a very different kind of office; the courtrooms are sweltering in the summer and chill you to the bone in winter. The corridors and waiting rooms offer bare beige walls and old wooden benches. The lawyers move around the halls, and their black capes trail behind them as they stride between the courtroom and clients. Gloomy and dirty windows instead replace the dark wood bookshelves afforded to the head office. The attorneys and clients interact in these 'offices' of the courtroom throughout the day and huddle in corners and waiting rooms to discuss the matters, or are relegated to the lower-level holding cells of the accused. Moments of waiting take place over the course of the day; waiting for documents, waiting for the defendant to march up the stairs, waiting for witnesses and waiting for the stamping and signing of records.

The offices in which I conducted my observations tended to be near the local courtroom. On days of rushed bail applications and the residual of weekend arrests the corridors, waiting rooms and occasionally the courtroom during recesses served as consultation spaces for attorney-client interactions. The offices ran the gamut of professional accommodations. At one end, those at the LASA head offices in Braamfontein, smack of new paint, conference facilities, private security services and numerous support staff. As I walked through the crisp office spaces and corporate-

[16]In the research, I decided to base the research on observations of criminal matters, particularly petty crimes (such as theft, robbery, and assault). I choose to work in the criminal matters because it is a serious and growing social problem in which the involvement of legal aid attorneys is becoming increasingly needed and at times controversial. The access was easily negotiated once I built a rapport with familiar attorneys and courtroom officials after attending the same District courts over a period of two months.

like offices, I notice the fingerprint analysis stations at all levels of the building, a grand foyer of equal parts mirror and brass lining the walls and the occasional crisp suit walking by in a hurry. In some of the offices the usual accoutrements of professional status; the degree neatly framed, the dark wood bookshelf hovering over the shoulder of the attorney and documents strategically balanced on shelves, desks and any other flat surface. All in stark contrast to the courts.

This chapter will delve into the operations of the courts by drawing on cases I witnessed. The ethnography offers insight into the daily activities of legal aid attorneys and establishes an understanding of the relations that are crucial in the courtroom proceedings and the finalisation of cases where legal aid attorneys are involved. The interviews with lawyers that supplemented my observations of the court processes and rulings were conducted outside the courtroom, during smoke and lunch breaks and in the occasional coffee shop, where the boundary between ordinary conversation and interview was quite smooth. This chapter also argues that Legal Aid South Africa lawyers are crucial in providing people who may otherwise have had no representation with access to the court, and facilitate access to justice to a certain extent. The work of LASA attorneys does not take place in isolation but finds its grounding in the interactions with courtroom officials and support staff. This chapter speaks about access to courts, not necessarily access to justice. The chapter particularly deals with the former and the chapter that follows provides a discussion about access to justice in a broader sense.

The interviews with the clients were a little harder to organise, and conversations were usually limited to breaks in courtroom proceedings and when attorneys though it would be appropriate[17]. It should also be noted that neither the client nor the attorneys were randomly selected, nor could they have been, given the known struggles in securing access to attorney-client interactions (see Sarat and Felstine, 1995). I started the process by attending cases in the courtrooms in which I knew legal aid attorneys would be working. I usually received this information from the administrator of the court. I introduced myself to the magistrate of the court; usually in his offices

[17] The limitation of access to clients could be due in large part to my own restrictions as a full-time student and a clash in schedules. Due to the numerous delays in cases and postponements, the clients remained in their detention facilities while cases where active and I found it difficult to always time court appearances with my research times. I did find a chance to interview clients after cases and during recesses in courtroom proceedings. I was not able to visit the awaiting trail detainees. This was not possible, because of the short duration of the research project and the extended ethical clearance process involved. If a longer project was undertaken this would have been ideal. Many of the discussions in this text are held in the public gallery of the courts, I did not record the conversations but had to rely on my notetaking.

before the day's trials took place. I met with the state prosecutor, and I began to secure participation by explaining my interest in LASA and asking those in the courts to introduce me to LASA attorneys.

The clients with whom I managed to secure interviews were selected by the attorneys, other than that my observations and discussions with clients took place in the moments of waiting. The attorneys who agreed to work with me or let me sit-in on matters were not a representation of all LASA attorneys in South Africa. However, having spoken to other LASA attorneys working at different courts they had met with similar frustrations[18]. In all the times the attorneys allowed me to listen in on a case, I asked them why they had selected the clients and this issue became part of my study.

The interactions that exist in the everyday work of the Legal Aid attorneys need to be examined according to how cases are developed and influenced by different kinds of advice given in the defence process. While the attorneys are a key focus of this chapter, with the use of ethnographic vignettes the courtroom, as a space for making meaning and sharing of advice in moments of learning, will also be discussed. The LASA attorneys offer the first access to the courts, but this is rarely followed up with efficient management of clients and the provision equitable justice. Early observations showed that despite the representation offered, the poorer clients often receive less time with their attorneys and are subjected to longer time spent in awaiting trial detention. These issues are addressed later, but before the barriers to equitable access can be discussed a thorough description of existing processes should be made.

[18] The attorneys that work at Braamfontein Court are facing similar struggles in the justice system of the District courts in other regions of Gauteng. The LASA attorneys I worked with shared similar stories about what it is like working in the courtrooms and working with the "indigent" daily. Of those that work outside Braamfontein Court, they did not seem to have different kinds of clients (some do have more work focused on foreign nationals), or practices, or different approaches to working in district courts.

8

WALKING IN ANOTHER'S SHOES: AN ATTORNEY'S JOB IS TO OFFER 'CORRECT' ADVICE

"I think that when Legal Aid [South Africa] started, I believe they did not realise how necessary it will become. I do not think that it gets the recognition it should. For example, [in] these branch courts, people get very frustrated because there aren't enough Legal Aid [attorneys] in the offices. In the regional courts the Legal Aid attorneys seem to stick around, the pay is better, and they have offices. However, in these district courts they change, usually, once they finish their articles, so once every two years"

– an interview with Ms Teal (Braamfontein Court, May 2016)

Ms Teal has seen the development of LASA in the lower courts. Having worked in the district courts for over two decades, her insight into LASA's development become crucial to my understanding of LASA. Ms Teal was not always a court administrator. In her earlier years she was a primary school teacher, later she studied law and started working as an attorney and is now a vital manager of courtroom proceedings as an administrator. We often met to discuss the courts and access to justice, usually over a cup of tea in the mouldy and dusty offices.

The courts were full today, typical of a Monday morning at Braamfontein Court. Ms Teal, with her usual haste and anxiety, rushes through the documents received from the police that morning. The Monday morning rush is usually the busiest time in the court, attributed to the closing of courts over the weekend, and the need to offer first appearances before the court and the magistrate. The moments of waiting are tense and the courtroom is filled with uncertainty. A mixture of family, friends and witnesses line the dark wooden pews of the public gallery; all were waiting for the processes to start. For many clients, today would be their first time standing in a courtroom and is also the first time they require the services of an attorney. While sitting in the packed pews, an anxious mother turns to me and says:

Do you know when they will start? They said I must be here at 8 in the morning. Now I am

here waiting, and I have to be at work". I explain to her that the "courts are supposed to open at eight but that it rarely starts on time because they have many people to process on a Monday.

Her son's case was only heard in the court after three in the afternoon, and she was left sitting. The Monday rush stretched to an afternoon lull, as the courtroom slowly emptied and people were ushered to the holding cells below the courtroom or headed home for the day.

The courtroom proceedings starts the same, the usual ritual of an officer of the court belting out "All rise!" and gesturing at the gallery members and those in the accused box in the front of the courtroom to "stand", "straighten-up", "remove the hat", or "put away the cell phone". Attempting to bring order to the courtroom as the magistrate shuffles into the seat, sometimes works other times the officer moves to whispering in the ears of the guilty. The translators, magistrate, stenographer, the state prosecutor, Legal Aid attorney and warrant officers all brace themselves for the day's full case load. Morning banter takes place before the magistrate arrives. Those requested to appear in court (witnesses, officers and the accused) are told to be available from 8 am until court closes at 4 pm. The formal proceedings only start at a quarter past nine today. The courtroom is hot already in the summer morning and the air stagnant – the South African flag hangs lifeless in the background.

Stacy, a LASA attorney, is assisting in the court today. A young graduate from university is joining Stacy to assist with the workload and whilst completing her articles. The young graduate is working on managing the mountains of paperwork on the desk. The graduate is one of many candidate attorneys employed by LASA to work in the district courts. Stacy, having worked for LASA for numerous year has already completed the article phase and is a fully practising attorney for LASA. With a mixture of confidence, frustration and tiredness in her eyes, she explains to me why she started working for LASA.

You see, I began this with a good idea of what I wanted to do. I wanted to start my practice someday, but it has been difficult to leave for me. I have always wanted to help other people, and this lets me do that. However, sometimes I get so tired I just want to give it up and make money.

The courtroom days are long and the work is tiresome. The LASA attorneys are in the courts three to four days a week with Thursdays usually used as a consulting day. Without them, the courts

come to a standstill, and cases are not processed. Today was a particularly busy day, many accused and awaiting trial detainees could not afford private representation and needed the LASA attorney representation. LASA attorneys are sometimes assisted by candidate attorneys, who have less experience in the courtrooms. As Ms Teal would regularly say "not all attorneys are created equal" and she would site stories of those corrupt attorney, poorly educated lawyers and those lacking experience who created the biggest problems for her. References to sharing advice and learning regular came up in our discussions and sometimes with a tone of frustration, Ms Teal would remark:

> *They do not come to me for advice, I have been her a long time, and sometimes that would be easiest…when they do ask me for help, it makes my job easier because I do not have to do a job twice.*

The moments of advice sharing and exchange in the courtroom, and in the outlying offices, usually take place in the quiet moments, the moments of waiting. Advice on how to manage a case has consequences for the outcome of the trial and influences the experience of the people in the court. The advice ranges from 'correct' advice offered by the attorney who is "a professional in the law and knowledgeable about the courtroom processes" and the advice shared amongst those awaiting trials and occasionally involves their family members. Advice can be a tricky aspect of the interaction to follow as the advice does not always take place openly and can be vague at times. The advice shared in the courtrooms and their surroundings is not limited to legal advice, but at times is about surviving the trial and the day-to-day frustrations of the courtroom.

Understanding the courtroom: frustrations and delays

Before the court proceedings start for the day, the state prosecutors can be found in their offices going over the day's cases. In preparation for the trial, this is usually the case for all involved. The officers check their call-lists of those in awaiting trial in the courthouse jail, the stenographer and clerks prepare documents for signing, open the windows of the courts, turn on the lights and computers, and organise the workspaces. The magistrates prepare in their chambers and check-in with Ms Teal to confirm the day's proceedings.

The public spectators wander through the corridors and find their way to the court they need to be in. The public spectators include family and friends of the people appearing the trial, the random group of students observing court cases, the media, and others who have been ordered to appear in court on a specific day. The usually private security staff stand watch at the main entrances and

search all those that enter the premises. The legal aid attorneys either spend the time preparing older matters where they sit at the main table in front of the magistrate in conversation with court administrators, or huddle in an adjacent office of the courtroom to plan the day's activities. The administrators of the court (those that assist the magistrate and attorneys in the case) sit between the magistrate's table and the attorneys. They work as the support staff in the courtroom. Court documents and copies are shared with both the state prosecutor and defence attorneys. The interactions between the two opposing sides are usually casual and comfortable outside of the formal processes.

Despite the assertion by LASA attorneys that they remain completely autonomous in the courtroom, a good working relationship between other officials in the court exists. Discussions around cases are at times tense but are in no way reduced to only formal proceedings. While LASA requires that their attorneys do not get directly involved with the state prosecutor this did not seem to be the case in the courts. What did seem to result in a speedier process (whether it was a more "just" outcome for the clients is another question) was when the two opposing sides had discussions in the preparatory time of the day. It offered smoother formal criminal case processing because both attorneys, despite their opposing stances, were all familiar with the bureaucratic processes. For example, both had all the documents needed for the case dockets, which is usually a problem and results in delays in the cases.

Legal Aid attorneys and the first interaction with the clients: Formalities of a District court

James, a twenty-five-year-old from Limpopo, is ushered up the steps of the courtroom. He comes up from the floor beneath the court hidden from the public and out of sight until necessary. The stairs lead from the holding cells of the court and the nearby police station. James trips on the top step, losing his balance for a second and nearly brings his co-accused to his knees because the cuffs that keep them shackled together force them to move in time with each other. The door to the holding cells is closed with a loud clank and turn of a key, and the two accused are escorted to the defendant's box behind Stacy's table. They are told to "stand-up when spoken to" by the warrant officer. He barks orders at them without hesitation. James is wearing a red jacket with tattered sleeves and a golden stag emblazoned on the back, stained pants and a pair of worn-out sneakers. His co-accused is not as well put together, with torn clothes and a bandaged hand. They stand with their hands cuffed and occasionally sneak a glimpse over their shoulders. Minutes pass in silence

as the judge reads a brief on his bench. He addresses the court and starts the official proceedings, asking if “everybody is ready to start, and if that case is put on the record”. A red light on the sidewalk flickers on, and the trial begins. James looks up at the light with an anxious look in his eyes.

James stands before the judge and reads his "right to silence" and "right to representation" by the magistrate. Once the defendant has listened to the judge read these rights in English, they are asked if they "understand”. The accused agree, or occasionally request a translation, and then ask for either a Legal Aid attorney, a private attorney or decide to defend themselves. Many of the cases I witnessed made use of the LASA attorney. The LASA attorney then goes through the Means Test with the accused, while the rest of the court sits in silence. The conversation is usually held in hush voices, but parts of the discussion can still be heard in the gallery.

The very public act of pleading poverty to attain LASA attorney is taken as par for the course of the proceedings. The accused, or sometimes two as seen in the case of James and his co-accused, discuss the Means Test and each accused seeking representation is required to give a brief breakdown of their level of poverty; the number of dependents they support financially, their monthly income and whether they have a registered physical address. The LASA attorney completes the form, and the trial continues. The duration spent with the accused in getting their details was inconsistent; if the fewer cases were heard in court on any particular day more time could be spent in this period asking for more information. It was not uncommon for the LASA attorney to prompt the accused for the correct answer; this was, of course, easier when both spoke the same language and there was no need for a translator. This prompting, while not legal advice, is advice about how to "pass" the Means Test. This does not imply that the person was not in need of the service and was acting to scam the system but rather points to a failing on the part of the Means Test to incorporate a diverse body of accused peoples. For instance, James did not have children dependents but had a mother whom he listed as a dependent. James also insisted that he had work and was making money to support himself, the prompt from the attorney was that “he [James] should rather say his work was piecemeal work and that income was not guaranteed”. After some quick prompting, the Means Test was passed, and James and his co-accused were now the responsibility of the LASA attorney.

The LASA attorney returns to the table; completing the paperwork and making notes. The prosecutor starts reading the "charges against the accused" and the accused remain standing

throughout the entire process. In this case, the prosecutor lays the charges against the accused and reads it out in the courtroom: theft and assault. The LASA attorney starts with bail applications for the two - if the bail application is successful the accused are released on condition that they appear in the courts on the date their trial starts[19]. The two bail applications were successful for James and the co-accused. By the end of this first appearance in the court, James and his co-accused are marched down the stairs back to the lower level holding cells. The next awaiting trial detainee is escorted up, and this is the rhythm of the day's proceedings.

Delays in the court's rhythm often occur when documents are missing or incomplete, if the wrong accused is escorted into the court, or if the demand for a translator cannot be met. These delays result in frustrations for all involved. However, the delays can also offer opportunities for interactions that might not have been possible. During my observations of the courtroom, the LASA attorney would regularly invite me for a sidebar discussion during these delays and would occasionally introduce me to the accused. The delays were often opportunities for offering advice. The kinds of advice differed according to the situation, for the attorneys the key responsibility was to offer the "correct" advice.

The idea of correct advice was about offering the main legal advice to the benefit of the client. This usually included a discussion on what to say during the Means Test or related directly to the criminal charges. The attorney would offer professional advice and sporadically put the concerns of the accused at ease by explaining that "things could always be worse" or with an exaggerated flick of the eyebrow and a whisper "it is a good thing this prosecutor is in court today…She does not know what she is doing". These 'advices' are in the eyes of the formal process the 'correct' kind, with attorneys often scoffing at the idea that 'other' advice might also assist their clients. There seemed to be a limit to the 'correct' advice, and it had everything to do with the duration of the attorney's time in a district court and their experience of courtroom procedures. Attorneys who spent more time in the court developed a keen sense of listening to suggestions of others in the court; this is by no means representative of all the attorneys. However, it is noteworthy. The illustration below is an example of the flow and sharing of advice (in all its forms) in the courtroom. The various actors in the courtroom can and in some instances, influence the judicial process and its outcomes. The arrows show the flow of advice from one person to the next.

[19] The bail takes effect when the accused pay their fees to the court. If the bail is paid and the accused are found innocent, the money is reimbursed at a later stage.

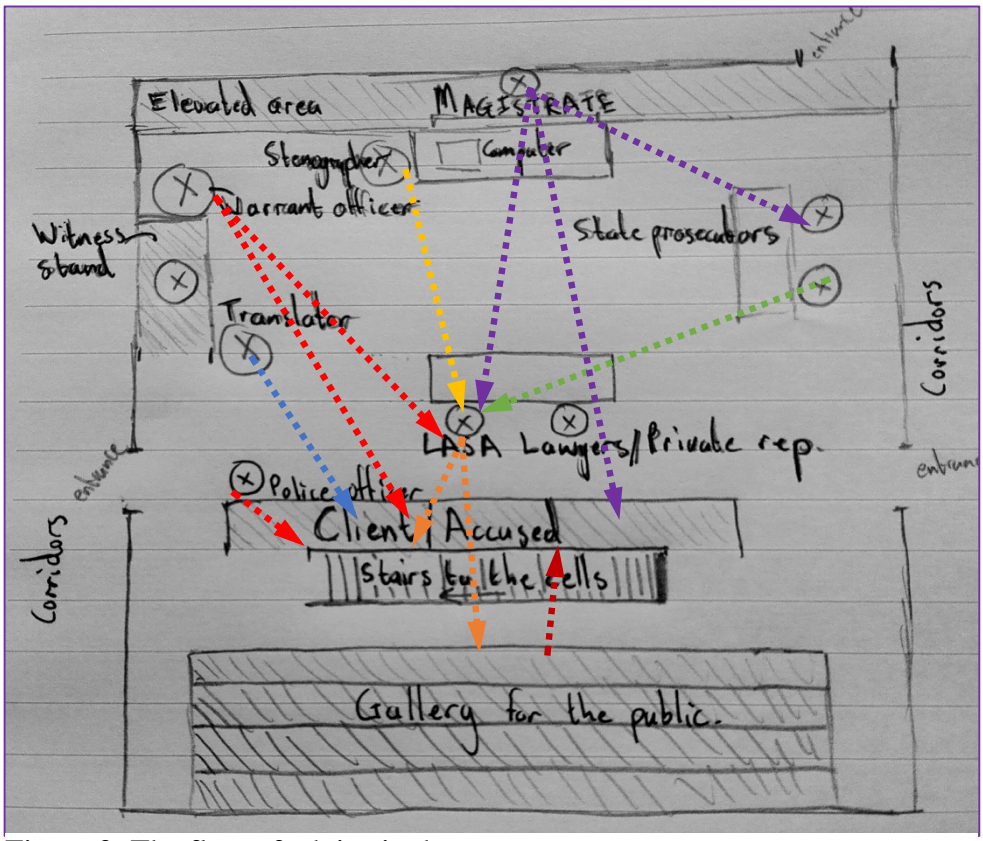

Figure 2: The flow of advice in the courtroom

Advice giving, usually associated with the experience of the court, its process and the people that work there, had a different outcome in the court cases that I observed. When the advising takes place in interactions (not only between client and attorney, as I show in the illustration above) it involves "ideological production" as Sarat and Felstiner (1990:23) suggest. This ideological production occurs "when reason is pitted against emotion, rules against insider knowledge, and equity against self-interest – entrenched positions in legal culture may be both hard for clients to overcome and, at the same time, available for them to exploit" (Sarat and Felstiner, 1990: 23). The attorney is "never solely in control of the production of ideology or legal services, and the client is never simply a timid consumer" (Sarat and Felstiner, 1990: 24).

"This is what you should do now": the client offers the attorney advice

The clients engage with one another throughout the course of the day, in the holding cells and in the time spent waiting in the courtroom. James later explained that "when I was in the jail another man was telling me that the free attorney is good, he will listen to you". The ability of the free

attorney is crucial to the outcome of the case. Of course, it is not financially possible for many, if not all of the accused who appear in the district court to pay for private representation. The choice then to accept the assistance seems to be a clear choice of the accused. James and his co-accused both accepted the help of the LASA attorney, with the idea that the attorney could make the case winnable. The attorneys are not always privy to their client's discussion. However, more than just settling for the attorney provided by the state, the client gets a sense of agency and control of the decision when he makes this choice.

James and his co-accused were standing trial for allegedly assaulting and mugging a young man in Jeppe (a suburb of Johannesburg). The second appearance in court took place one week later. The trial had started off well for James and his co-accused. However, the state prosecutor had not given all the required documents to the LASA attorney. This meant that all necessary staff would be needed for a later date. The witnesses and victims had to appear in court again and would have to return to settle the matter. The date was set for two weeks later. A postponement was offered and accepted by the magistrate. Two weeks later James appeared, and his co-accused failed to appear in court, and one of the witnesses also could not attend court on that day. The court could not postpone the case again. The case started with a description of the events; the prosecutor walked the court through the case. The LASA attorney returned with a "not-guilty" appeal. The accused was called to testify before the court. Both sides, LASA attorney and prosecutor questioned and cross-examined the accused. The next person to step into the witness box was the victim. The testimony was given, and the victim identified James as the "mugger and man who stole his shoes". James leant over to his attorney and said "I have never seen this man before, tell them that, and we can go. This is what you should do now"[20]. The attorney cross-examined the victim and placed enough doubt in the mind of the magistrate to have the case dismissed. James claimed he was with his friend, the now missing co-accused. With little other physical evidence and the missing witness, the case was dismissed, and the charges against James were dropped. Having put together the case and discussed it at length with James before the trial, they constructed a tale to present to the court. James learned from the courtroom and understood that with a lack of evidence the case became about his word vs. the victim's. The state prosecutor had not found evidence resulting in a loss.

[20]It should be noted that I did not record these conversations This was to ensure the protection of the identities of people in the courtrooms and involved in active cases. These conversations also took place in the public waiting areas on occasions. Sitting in the gallery the public are privy to discussions between the attorney and clients.

The attorney offered "correct" advice, and in the process, James learnt about the law through his interactions and consultations. Having spent the time with his attorney, James was able to recite some of the advice given to him throughout the process. I later asked the attorney why James said that to him and he responded with "he thinks he knows the law now, sometimes they believe they know best, but they do not always see the entire picture…In many ways, they put themselves in my shoes and try to think like an attorney. They then return my advice. However, this is why I do it. I think putting yourself in other shoes is essential for this job. I know where they come from. In my community, very few people know about their rights, and it is our job [as an attorney] to help make them aware. If the case is going to be successful, then I need to walk in their shoes…I knew what I was doing but it was good to hear it from him…it doesn't make him an expert, though".

Not all cases go this smoothly in Braamfontein Court. Sometimes the client's understanding of court procedure makes all the difference to the outcome. In James' case the 'correct' advice was used and applied to his situation, but what happens when the 'correct' advice does not work and what goes wrong? How is this a symptom of inadequate access to justice?

Conclusion

The legal system is understood and discussed as localised; governed by specific and peculiar practices rather than by universal norms and hence requires an extensive understanding of the local scene. Both the underrepresented client and the new attorney are seen as having a real handicap. The insider status becomes valuable to the attorney as a means to get clients to rely on them. In taking this stance, the interest of the professional departs from those of the legal system. This suggests a process of law as more than restrained by legal formalism and rules, but one that is malleable when faced with local knowledge, insider access, connections, and reputation (Blumberg, 1967). A key strength of an attorney is then not only an understanding of the rules but also the knowledge of the court. The attorneys also suggest that the emotions of legal officials also make an important difference in deciding how cases are dealt with. Access to the courts is then only the first step in the process of accessing justice, the attorney's work reaches far beyond the scope of representation and needs to be understood in the context of the court.

In a legal process where legitimacy is said to rest on the claims of formalism, procedural justice, and, to a lesser extent on fairness, the "law talk" of the attorney's interactions with the client is

brimming with “rule scepticism” (Frank, 1949). Braamfontein Court offers the presentation of a formalist front, or of a legal system whose officials are fully committed to offering substantive justice, with the intention to lawful legal order. The attorneys work to convince their clients of their local knowledges and in turn attempt to mould narratives for presentation in courts according to the expectations of the courtroom and the type of crime committed. Through the interactions in the court, the law is given meaning and professionalism is constructed through the complex routine and interactions between attorneys and their clients that accompany the legal process of criminal matters. Understanding the courtrooms with their frustrations and delays requires an intimate look at the interactions between client and attorney, and consideration for the kinds of advice that influence the outcome of cases.

The clients who rely on LASA attorneys are not provided with access to justice by mere access to the courts, as I have argued. If access to justice is the end goal of the legal aid scheme then LASA attorneys need to be understood in the context of their local courtroom processes, and the obstacles that continue to work against the client need to be explored in greater depth.

PART FOUR ADVICE AND MEANINGFUL ACCESS

9

ADVICE COMES IN SMALL PACKAGES: ADMINISTRATORS WEIGH IN ON CASES

The work of translators is essential in criminal court processes by working alongside the attorney. The translators usually sit beside the witness box and have four distinct jobs. The first is to listen to the accused; this takes time and occasionally requires the client to speak in short sentences and to relay as little information as slowly as possible. The second job is to talk to the client, so in slow, monotonous tones the translator retells the client's story. Stripping away the emotional undertones and accents. The interpreter's third role is to ensure that the meaning is translated, this entails an element of assessment.

The translators working in Braamfontein Court have been operating in the district courts for numerous years. If the language translation is obscure, for example when an Urdu speaker is in court, then the translator is usually sourced from outside the courts. The translators are not always available, and this results in further postponement of cases. For the most part, the translators are fixed additions to courtroom proceedings and warrant further research. They have honed in on the ability to translate to the needs of the courtroom. In many instances, it seems almost darkly comical, the accused will speak for a couple of minutes, and the translator will respond with a brief remark rather than offer a direct translation. The translator's job transcends merely parroting the clients' statements in the witness box. The translator waits for the statement to be made and then responds to the court. The final and fourth step for the translator is to keep the client informed about what is being said during the court process.

The translator works to translate from English (the language used in the formal court process). The client-attorney interaction is placed under strain when the translator fails to relay the message between them, and this has led to misunderstandings. This is usually corrected through repetition of the questions and occasionally rephrasing them so that the statement makes sense in the court.

The translator plays a role in ensuring narratives are clear and succinct, with only the facts relayed. The translator is essential in building a case; they are the only means for the client-attorney interaction to take place and know what information is required by the court to continue the trial.

The idea is that a translator maintains a level of objectivity, hence the terse translations of answers to questions and trimming of a client's statement. However, the objectivity is not always ensured, for example, when a LASA attorney fails to understand that the question they are asking is not getting the answer required, the translator adjust the question slightly and then responds with what he thinks the attorney wants to hear. This happens when the attorney repeats a question for example, and it becomes frustrating for the translator. The interaction between the translator and the LASA attorney is placed under pressure in the courtroom proceedings, and the client is left having to repeat their statements.

When recesses occur in the trial, the magistrate leaves the room, and the attorney and translator get into a discussion about the meaning and can at times have heated deliberations in the courtroom about what each person is doing wrong. The attorney asks that "the translator phrase the question exactly as it is asked". This dynamic creates tension in the process because it creates a moment where the attorney feels they are the professional lawyers and that translators are expected to "listen and do as they are told", while the translators offer advice about how to improve the question in the next round of discussions. The translators are relegated to the status of tools to be used in the court, and their working knowledge of the law is regularly disregarded, and this has dire consequences for making fair judgements. Many of the translators have spent years working in the courts and have ample experience in observing courtroom processes and have a different understanding of what is important for the magistrate to hear in the trial.

When they offer advice to the attorney it occasionally gets ignored, the translator then bypasses the attorney and then has a direct discussion with the client (see the red arrows above). This has resulted in the client barking an order to his lawyer and puts a strain on the client-attorney interaction. The 'outsider' advice is often considered by the client and is then explained by the attorney. As Sipho, an experienced attorney, remarks:

> *The advice they give sometimes makes my job so difficult, I then have only a couple of minutes before the magistrate returns to explain the advice to the client and why it is not a good idea, sometimes they [the translators] help, other times they make it difficult and the client losses faith in me…we are already very busy and do not have enough time with the clients, and now we must work extra.*

For these attorneys, the advice offered by the translator was not always welcomed and had in their minds influenced the trial outcome. From the LASA attorney's point of view, if the client was to

have a good representation, then the translator should not speak to them about the law, that should be left to their attorney. This emphasises the idea that a clear boundary is drawn between positions and job expectations. However, this is far from the reality of Braamfontein Court. The clients become aware of 'outsider' advice and are eager to hear from those in the court.

The 'outsider' advice is not limited to that offered by translators. Other administrators in the courtroom offer advice as well. For example, Steve and Sam are accused of theft. Having apparently stolen supplies, a mobile phone and food, from the local grocery store. Steve pleaded guilty because he was in possession of the cell phone and Sam pleaded not-guilty. The two were represented by the same attorney in a single trial, during the first appearance a clerk was sitting in the courtroom. The magistrate ordered a short recess to take a break, during this moment the state prosecutor left the courtroom as well. The clerk then struck up a conversation with the attorney and suggested that he split the two accused into separate cases to ensure the swift sentencing of Steve and then to follow with a case built around Sam's defence. The attorney took the advice; Steve was sentenced to pay a fine and Sam was later found innocent after Steve admitted to being the only perpetrator. The advice worked in the second client's favour and made the job of the attorney easier in the process.

This outsider advice stems from personal and work experiences of being in the courts. The people offering advice have usually spent more time in the courts as Ms Teal explained:

> *They [attorneys] change courts and seldom remain in the district court circuit. The continuous turnover in attorneys in Braamfontein Court poses serious issues for processing trials and making legal representation consistent for the poor. When a new attorney enters the courts, they are given clients and expected to apply the knowledge learnt in school, and then to gain the experience in the courts.*

This has implications for the people who are already faced with complex courtroom proceedings. The already disadvantaged clients "are further disempowered when confronted with complex legal issues, and proceedings" as Dugard (2008:2) suggests.

The advice, while crucial to continuing the processes, are possibly a symptom of deeper issues. Advice only becomes necessary in the absence of understanding. Up until this point, I have put aside the socio-economic power imbalance (for example the dispute of Sam and Steve and the reality that they were being prosecuted by the state prosecutor who is better supported; financially

and in the workplace). The administrators in the courts are keenly aware of the struggles faced by the disadvantaged clients and their overworked attorneys as Ms Teal explained:

> *They [Legal aid attorneys] very seldom stay for more than two years. One of the main reasons is that Legal Aid South Africa cannot afford to pay private practice fees, so they have gained all the experience [working in the district courts] and then leave for better pay. Legal Aid South Africa then don't have enough money to bring in new attorneys a week or two in advance, and then the new attorney does not get time to learn. Then we have two weeks without a Legal Aid attorney, and we cannot get cases started. They then start, but are mostly new to the job and then we [administrators and other attorneys] should step in and help them through cases, and this is not right because you cannot have the state telling the Legal Aid attorney what to do. We do [help] because otherwise, we cannot get going. Moreover, once that person is settled then things can go on.*
>
> *(Interview with Ms Teal 2016).*

Dugard (2008: 3) emphasises a flaw in the process of attaining representation and attributes it to the judiciary's inability to be "actively involved in strengthening and promoting the courts' internal system for securing legal representation to the poor". The courtrooms continue to face challenges in their operations, slow case turn-over and overflowing with work. The attorney-client relationship is placed under strain from the first interaction. Advice, in its different forms, becomes the default mode for interactions. The advice shared can alter the outcome of the case through influencing the process and the decisions made by the LASA attorney or the demands made by the client. The types of advice shared could provide insight into the obstacles of the Braamfontein Court proceedings.

The LASA attorneys are aware that the courts are not working efficiently, but also acknowledge that their work – despite not being ideal – is essential to ensure the poor get fair representation. The attorneys explain that they work in areas that are poor and that their work is not only about courtroom proceedings, but that they are also working to make the law more accessible through meaningful interactions with their clients. The attorneys occasionally share the adage that it is important to "walk in our clients' shoes because if you do not, you will never understand". The attorneys express the importance of understanding another person's pain, frustration and concern if their story is to be heard in the court. This thought process also manifests itself in the pleas made

to the magistrate in the bail applications, and when asking for a lesser sentence. The attorney will present a narrative of the accused as "more than just another criminal".

Building a case: telling a story from start to finish and 'playing to' the magistrate

The cases are constructed over several days. Careful thought is put into creating narratives and the way in which the client is portrayed before the magistrate. A client plays a crucial role in writing and creating their case, despite on occasion being coached through the Means Test in the early days of the courtroom proceedings. As we see in the interaction below, between Ashe (the attorney) and Thabo (the client):

Ashe: Is this your first time in court? Why are you here?

Thabo: Haibo [no], I have been here before. Last time I was here for shoplifting. However, this time it was not my fault. I cannot stay here!

Ashe: But now you are here again? Why don't you learn?

Thabo: I told you. It wasn't my fault. The other guy - he took the phone. I was only drinking at the bar. I have been waiting all weekend. My family is worried about me, and I have two children. The one, she is only two years old.

Ashe: We will talk about it later, for now, you must tell me if you have more children, maybe you do not have a job, or you do not make much money?

Thabo: I have two children; I am not married, and I do piecemeal jobs. Maybe I make R500 a week. I work as a gardener and sometimes construction.

Ashe: But where do you get money for beer? Must you look after your family with that money?

Thabo: But it was a weekend, I always have a beer on the weekend. However, I send money home.

Ashe: So, you stay in Jozi alone? Do the children stay with your wife?

Thabo: Yes, I stay close to here [the court]. My money goes to the children sometimes, but last weekend I had remained in Jozi. My wife, she remains in North West. She does not have a job. She stays home with the children.

Ashe: Okay, this is good. I will be working on your case then. Everything seems okay. Let me talk, we will speak later. For now, you must keep quiet.

Thabo met the requirements of the Means Test, and they later gathered to discuss the details of the charges and to discuss his defence, all in the process of case building. Thabo was released on bail and had regular meetings with his attorney. The two would have lengthy discussions during Ashe's consultation hours. Thabo would regularly refer to his last trial and offer his insight into how the case should be built and presented. As he explained "the last one [the attorney] spoke very nicely in the court, she was loud and clear…the judge like that, you should do the same. You must fight for me; I cannot leave work to see you every time". This advice for the attorney was born from the experience of the court. Thabo was offering his 'coaching' to Ashe; despite having no understanding of the law he had expertise in the courtroom and acted upon it to start building his case. Ashe had years of experience in the courts and knew how the processes worked and how to speak in the courtroom. The attorney and client spent time putting the case together over the course of the next two weeks. Thabo would occasionally tell Ashe to "write this down" or "take note [because] this is important". Ashe later recalled the interactions with Thabo and explained that "building a case is all about listening to the client, sometimes they think they know best. Sometimes they are right, but it is our [the attorney's] job to put together a legal argument. One that will favour our client's story and take into consideration their life stories".

The initial attorney-client interactions are usually rushed in the courtroom, with little time to work through the details of the case. The attorney needs to work quickly and use the information selectively if they are going to be successful. The attorney later builds their case, and it is all documented and filed for later utilisation in the trial. The client-attorney interactions are not always elaborate, with the occasional client receiving little face-to-face time with the attorney. In these briefer, less informative interactions the client is left with questions and a sense of confusion.

This is usually determined by the specific attorney's case load for the week. For example, when the attorney has prior cases (which are a part of a backlog) the newer clients tend to get less face-to-face time. The cases are less descriptive, and the attorney is left fumbling through a trial with limited information about the client. In most cases, this frustrates the magistrate and leaves the client with less than adequate representation. If the attorneys do not have adequate face-to-face interaction with their clients, they struggle with the representation in the trial.

Those, such as Thabo, who have been through the courts previously are often more adept at managing the client-attorney interaction. Although Ashe is articulate and knowledgeable, his reactions to Thabo's advice are nevertheless considerate. For Thabo, despite having knowledge of

the courtroom, there remains a formidable barrier between his experiences and an understanding of law and legal processes. This is usually overcome by attorneys, such as Ashe, using past cases and the stories of those that came before Thabo to explain how things a will unfold in the trial and the court. The clients are put at ease when previous successful cases, which have similarities to their own, are used to explain their situation. Whether these cases are real or went according to the story put forward by the attorney is irrelevant to the client. The client wants to be told that the case can be successful and that they have a chance to win their case. These stories of past cases are as much a part of case building as the stories of those in the present moment. The advice is passed from story to story, from client to client and informs the interactions. The attorneys with more experience have more stories to tell their clients and in turn offer more to the clients regarding making law understandable, reducing the formidable barriers between legislation and expertise.

The trials are all about merging law and the stories of those that come into the courts. More importantly, they are about the client-attorney interaction and how the attorney presents the client to the court. The attorneys, through this process, emphasise people over rules, "law talk acquaints clients with a process in which [magistrates] exercise immense discretionary power. The message to the client is that it is the [magistrates], not the rules, that counts. What the [magistrates] will accept, what the [magistrates] will do, is the crucial issue in the [criminal] process" (Sarat and Felstiner 1995, 98-99).

What Thabo's advice does allude to is his experience of the magistrate. Thabo's advice to Ashe emphasises the relationship of the attorney with the magistrate in the public performance of the court. He suggests in his advice that the outcome of the case will be more favourable if the magistrate is on their side. When discussing magistrates with the attorneys of Braamfontein Court as another attorney stated it, "there are no 'guarantees,' you are working with subjectivities in the court rather than the objective, you are working with opinions, viewpoints and emotive responses".

While some magistrates are considered better than others, and better magistrates are thought to be "intelligent" or "practised" or "patient" or "fair", the clear inclination is to call into question their skill, dedication, and concern. Magistrates are portrayed as trying to be objective in all cases, but also that they can make judgements and decisions which have little to do with facts or rules. As one Braamfontein Court attorney said in explaining to his client what to expect in a trial, "You must try to look your best; dress in cleaner clothes and don't forget to comb your hair. You should take care of how you do certain things because you can make the magistrate angry and he might

not like you then, and he can make it difficult in the court". In another conversation, an attorney encouraged his client to adopt a specific demeanour in the courtroom:

> *Attorney:* You must stand and sit when instructed to do so. Always bow when you enter the court and make eye contact with the magistrate. Do not look down at your feet when the magistrate talks to you, okay? When you sit on the court, your hands must be in front of you or on the sides, don't wear a hat either.
>
> *Client:* [client makes a remark under his breath.]
>
> *Attorney:* Always remember to sit still. If you do not do it, I will gesture like this [the attorney, raises his hand to his side, to suggest speak up].
>
> *Client:* [Sits up and clears his throat.]
>
> *Attorney:* Perfect, you are going to do better now. Also, don't do this [he puts his head on his desk], even if you get tired you must stay awake and never fall asleep. You must look awake all the time; you will have a chance to rest. However, you must look concerned as well. This is important because the magistrate will be watching you, you are right in front of him, so you cannot sleep. He will not be happy if he must work and you are sleeping. He makes the final decision, and you must make a good impression.

In instructing the client how to dress, act and perform in the process, this attorney is emphasising certain behaviour and placing limitations on others. The client seemed content to make the changes and played to the idea that he was poor but respectable, homeless but presentable and black but well spoken. While this is an extreme case, discussing a case the "law talk" is peppered with references to "extra-legal factors that influence magistrates, including their background and experiences" (Sarat and Felstiner 1995, 100). Accordingly, one attorney cautioned a black client that his chances of receiving bail were not high because:

> *[m]agistrates do not like to give bail to people who live on the street and don't have a registered address. They think that because you do not have the address that you will not appear in court on a later date. In this court, they have a very specific idea of what it means to live in Jozi; they do not understand how it works on the street always. In their day, when they were practising attorney, you either have a house, or you do not. So, they do not quite know what to do with people staying in abandoned buildings.*

Some magistrates are influenced by the small details of client dress and behaviour in the courtroom. These processes involved in building cases for trial and the possibility of facing extra-legal factors in the presentation of cases in courts are all essential in understanding the courtroom as more that objective spaces and suggests, as attorneys and clients have suggested, that this not just the facts in some general sense that counts, but cases and their facts "in this court". As Sarat and Felstiner argue "the law is laced with references to how things are done in courts and with comparisons suggesting that no two courts (or even no two [attorneys]) operate in the same way" (1995, 107). The courtrooms are not only procedural, but are also personal for clients and their experiences of the courts. In these personal moments, access to justice can be limited and have dire consequences for the clients and their prospects of a fair trial and meaningful access.

Meaningful access to justice

In South African courts access to justice remains a procedural concept, when certain conditions are met it is assumed that people have access to justice. The views of magistrate, administrators, legal aid attorneys and other courtroom officials impact on the outcome of access to justice. By taking a broader approach to understanding access the legal aid clients, despite having representation, still struggle to receive fairer and more meaningful access. What I have hoped to achieve in this thesis is to suggests that access be understood not only procedurally, but as a) historically denied with resulting present day ramifications, as b) only possible through good client-attorney interaction and as c) involving a network of advice sharing through interactions in the courtroom. As I have tried to show and as Sandefur also argues "a law-centric approach, which is usually the approach taken by most legal professionals and involves subsidies to legal services providers located at courthouses, may not be broad enough to solve the access problem" (2009:942).

Confronting the "myriad of issues affecting justice" whether they are personal experiences in the courts or ineffective client-attorney interactions "requires a strategy that is more comprehensive and long-term than either political lobbying or improved inter-branch relations" (Kelso et al, 2009:1150). If there is to be a move towards meaningful access to justice it should first be acknowledged and addressed that there are "long-standing institutional and structural factors underlying today's barriers to justice" (Kelso et al, 2009: 1151). There needs to be a rethinking of LASA client-attorney interactions in and around the courts, otherwise the advice shared will

continue to be relied on to address issues in the court. Advice that might not always be geared towards providing a fair trial or improving meaningful access.

If meaningful access remains unattainable it will "erode the public's trust and confidence in the courts and the judicial process" (Kelso et al, 2009: 1172). What has been observed in this research is that the erosion of public trust, exacerbated by ineffective client-attorney interaction, creates additional barriers to access. In this way, as seen in Siyabonga's case earlier, the decline in trust and confidence and a lack of access to meaningful justice reinforced each other in a downward spiral. Access to justice is influenced by a variety of considerations, some of which are "direct and obvious" (such as the number of judges and the capacity of facilities, historical denial of access) and "others of which are just as important but subtler in their operation" (such as client-attorney interactions and networks of advice sharing). More work will need to be done to unpack the latter of these considerations if a more meaningful access to justice is to be achieved (Kelso et al, 2009: 1175).

10

CONCLUDING REMARKS

From Siyabonga's case it becomes clear that if there is going to be improved access to justice there will need to be additional justice. This auxiliary justice could entail additional support for accused, beyond the operational aspects of the courts. Of course, these are my insights on how to move towards a broader conception of access to justice. While operational support is crucial, such as the provision of translators and administrators, a deeper discussion about auxiliary support needs to be had. The norm of the accused being held in overcrowded awaiting trial detention creates not only emotional trauma but also compound economic strain. Siya left Braamfontein Court, only to return to the abandoned building on Commissioner Street, not knowing what he would be going home to. The case ended abruptly, almost as quickly as it had started.

I never got to speak to Siyabonga again. I still look out for him on the streets. However, a new face had replaced him as the neighbourhood waste picker and the courts were done with Siya. Siya's case had concluded after a month. The process was not nearly as simplified as I portrayed it above. He received the 'correct' advice from the LASA representative and it landed him in detention and left him even more economically vulnerable after his release. During his time, we only had the opportunity to speak once. It was after his second postponement. We talked briefly about the case, but his biggest concern was his wife and daughter.

Siya's story gives insight into the effects that poor access to justice has on many of those in the judicial process. The development of the concept of 'access' from access to courts (such as a legal representative and other operational services) to a more elaborate and thoughtful or meaningful access to justice in dispute resolution in the district courts, which might entail auxiliary justice, is crucial in ensuring the vulnerable receive fairer treatment in the courtroom. Understanding access can only happen when compared with the things that are denied to the vulnerable in South African society. For Siya, it was the denial of income, denial of a speedy trial and the ultimate denial of additional support during the trial process. It is fundamental to keep in mind as Roberts (1979, 2013: 23) explains:

Whatever view we take about the ultimate basis of the order in this society, we are likely to agree as to the important part played by the legal system; either as ensuring compliance with mutually agreed rules or as a means through which a few members of society manage to exercise power over the rest.

The poor and working class people are caught in a Catch-22 situation. On the one hand, accessing the court (i.e. the legal infrastructure) as a fragment of the broader struggle to access to justice is challenging enough on its own (Mckinley 2015). The criminal matters in Braamfontein Court are easily referred to Legal Aid South Africa, however, as seen in the cases mentioned in this thesis, this is no easy process. Even when the courts are accessed through LASA the overall experience is one of hostility, prejudice and more often than not "both personal and collective human dignity" are undermined (Mckinley 2015). In the case of Braamfontein Court, the judiciary that is constitutionally mandated and entrusted to administer justice –through the Legal Aid Act of 1969 and the subsequent amendments – has struggled to offer meaningful access on racial, gender and ideological grounds. In Mckinley's words:

The quality and character of the judiciary becomes crucial precisely because it is that judiciary's interpretation of the rights framework (at whatever level) as well as the separation and boundaries of their powers in the Constitution that directly impacts on those seeking justice and equality through the legal system.

For Siya, and many more like him, the judicial process becomes punitive in its inability to provide equitable justice. Borrowing from Blackwell and Cunningham (2004: 62) this process as experienced by the accused "that punishes based primarily on arresting officer's discretionary decision to arrest, combined with a defendant's poverty, carries the real risk condoning substantive injustice" and in my argument prevents meaningful or rather equitable access to justice for people like Siya, Sipho, and James. Without deriding the efforts (of people such as Swanepoel) and strides made in providing access to the courts (such as amendments of legal acts and the creation of LASA and all it already offers) it should be argued that more needs to be done in the lower courts of South Africa if equitable access is to be archieved. The advice shared in the courts, is a symptom of uncertainty and a process that favours the more fortunate. I conclude this section with quote by Blackwell and Cunningham (2004: 86):

If the punishment is taken out of the process, and the processes of criminal justice become

effective at restoration – and if rigorous empirical research might show that a restorative process costs less money and produces greater public safety – that would be a result everybody could embrace.

Ms Teal, my mentor during my time in Braamfontein Court, invited me to have a cup of tea. I was finishing my time in the courts, and this would be our small goodbye. As she poured the water and offered me the cup, she found her seat behind the mounds of paperwork. She showed me the workload for the week ahead by placing her hand heavily on the pile of documents in front of her. "I don't know if things are going to change in these courts anytime soon", she said as she flicked open a docket and stamped it, "the research is important, and things would be so much easier if even small things were changed, even just making sure the Legal Aid Attorneys had an office of their own or a change in the training". Cycling through the city on my way home, past waste-pickers, beggars at the traffic lights and informal traders working the streets of Johannesburg, Ms Teal's parting words were in my head. The dishevelled and inconspicuous exterior of the magistrate's courts that seemed intimidating on my first visit now seemed somewhat animated and familiar. Frustration, dismay, anger, sadness and tiredness infuse the conversations of the people in Braamfontein Court.

The fundamental question raised in this thesis is why access to justice (courts) may not necessarily translate to equitable access to justice for the impoverished who rely on legal assistance provided by the state. Despite the ideological underpinnings of the Constitution of South Africa in the provision of access to the courts, equitable access to justice remains out of reach for many in South Africa.

Currently, there is a reliance on advice shared *ad hoc* in the courtroom in the quest for accessing justice. This advice sharing, while valuable and indispensable to the matrix of interwoven relationships in the courtroom, in many instances it is a symptom of flawed procedures and overworked LASA attorneys. The reality is that the courtrooms remain aligned to those whose pockets run deepest. With the increasing inequality and reliance on formal legal aid provided it might stand to reason that advice ('correct' or 'outsider') only gets you so far and no further in the lower courts of South Africa, and will be inconsequential if the demand and strain on the courts continue to grow. For now, the search for advice continues and a new perspective on meaningful access to justice should be considered.

Ostensibly the most problematic of all the barriers in the pursuit of access to justice is the widening gap between the rights promised in the Constitution and the experiences of access to the courts. If this continues, then the Constitution may become little more than a legal abstraction at best. The sum of South Africa's crisis of access to justice points to the heightened risk of widespread rejection not only of the Constitution but of the institutional and legal pillars of 'the system' itself (Mckinley 2015).

The Legal Aid lawyers will continue to work under the strenuous conditions arising out of the dysfunction of the courts to provide representation, however, what is needed is additional support. Support for the LASA attorneys as well as for those awaiting trial. The support, as Ms Teal indicated, could be simple changes, such as the provision of offices for LASA attorneys. Perhaps meaningful access can be achieved by practical means, allowing the Means Test to take place in private, rather than in the public's view to begin with and alternatively, providing effective information desks at the entrances to the courts, as mentioned continuously by the gallery members.

I have argued throughout that meaningful access to justice is not merely access to a Legal Aid lawyer in the district courts. However, this argument presents us with one final problem. If, as I have established, meaningful access to justice demands auxiliary justice, what form should this auxiliary justice take and who provides it?

This thesis has attempted to encapsulate and analyse the experiences of poor and working-class people and their endless frustrations by the lack of practical assistance and effective redress in their search for equality and justice. People relying on their Legal Aid lawyers face insurmountable odds in comparison to those who have the comfort and peace of mind that private representation offers. Meaningful access to justice remains unattainable for Siya and others like him, because despite the adoption of a Constitution in 1996 which enshrines a plethora of rights and pours the foundation for an institutional, democratic architecture, meaningful access "remains a deferred dream for the very same poor and lack majority that were historically excluded, oppressed and discriminated against under the Apartheid system" (Mckinley 2015). Meanwhile, LASA continues to be one of the most prevalent forms of legal aid provision in the district courts and are an exemplary case of provision of access to courts. I hope that, in some way, the data and analysis presented here can contribute to a more nuanced conception of justice and its provision, or at least increase understandings of why current attempts fail in the courtrooms. There is no denying that better access needs to be provided. Moreover, it should be realised that practicality and idealism are not

incommensurable. Future lawmakers and purveyors of legal aid ought to initiate the process of taking the experiences of those attempting to access justice seriously by thinking about how access is prevented in the daily workings of the courts.

One thing is for sure, a little less waiting in the local courts would go a long way.

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