

https://dspace.org/

# Stuck in legal limbo: a case study of migrants accessing the law in Johannesburg

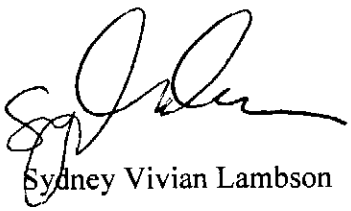
**Lambson, Sydney Vivian**

**2014-11-11**
http://hdl.handle.net/10539/15862

Downloaded from a DSpace repository. https://dspace.org/

# DECLARATION

I declare that this thesis is my own unaided work. It is submitted for the degree of Masters of Arts in Forced Migration Studies, at the Graduate School for Humanities, University of the Witwatersrand, Johannesburg. It has not been submitted for any other degree or examination at any other university.



Sydney Vivian Lambson

31/07/14

31 July 2014

# Stuck in Legal Limbo:

# A Case Study of Migrants Accessing the Law in Johannesburg

Sydney Vivian Lambson

727451

African Centre for Migration and Society

University of the Witwatersrand

July 2014

Supervisor

Dr. Julia Hornberger

To our Edelweiss, may you bloom and grow forever

# DECLARATION

I declare that this thesis is my own unaided work. It is submitted for the degree of Masters of Arts in Forced Migration Studies, at the Graduate School for Humanities, University of the Witwatersrand, Johannesburg. It has not been submitted for any other degree or examination at any other university.

Sydney Vivian Lambson 31 July 2014

## Abstract

This study looks at the experiences of migrants accessing notions of justice at the Wits Law Clinic, the pro-bono public interest law clinic of the University of the Witwatersrand, Johannesburg, South Africa. This study explores the way migrants engage with public interest law in the light of an overwhelming adversarial and threatening experience of the law. The law in the form of state law and its powers embodied in law enforcers and petty bureaucrats is mainly used against them and confines them to a 'state of bare life'. One could therefore expect that this compels migrants to keep their heads down and avoid any form of formalization, and instead reverting to a total reliance on informal survival strategies. This study however shows that migrants retain a strong faith in the law and draw a huge sense of hope from the services they receive from the Wits Law Clinic – even though the only action that is sometimes taking place is the endless writing of letters. But it appears that the reduction of the law to absolutely mundane bureaucratic activity still holds enough symbolic power of giving migrants a sense of moving closer towards the promise of justice, which the law also holds, even though it might be over and over deferred.

**Acknowledgements**

I would like to thank the many people who helped make this project possible. To the African Centre for Migration and Society, for creating an environment of learning. To my fellow colleagues in the Forced Migration Program, for providing lively conversations and space to relieve the stress. To the Wits Law Clinic, for allowing me to undertake this study.

I would like to thank my supervisor, Julia Hornberger, for her continued support throughout this project. Every time I left Julia's office, I felt invigorated and edified. Julia, you showed so much confidence in me and my abilities that I began to believe in myself. Thank you for never giving up on me and never discouraging me.

I would also like to thank my husband for encouraging me from day one to pursue this path. His help and support made all of this possible. Thank you for never doubting me.

# Contents

Abstract ..... 4

Chapter 1: Introduction ..... 8

Section 1: Overview ..... 8

1.1 Background ..... 9

1.2 Research Question ..... 10

1.3 Research Objectives ..... 11

1.4 Rationale ..... 11

1.5 Structure of Research Report ..... 12

Section 2: Literature Review ..... 12

2.1 Legal Anthropology ..... 13

2.2 The Law and the State- Legal Pluralism ..... 14

2.3 Anthropology of the State ..... 15

2.4 The Law and the Migrant- Legal Consciousness ..... 16

Conclusion ..... 18

Section 3: Methodology ..... 19

3.1 Study location ..... 19

3.2 Research Interviews ..... 20

3.3 Access ..... 21

3.4 Reflexivity ..... 22

3.5 Ethical Considerations ..... 23

3.6 Limitations ..... 24

Chapter 2: Wits Law Clinic and Public Interest Law in South Africa ..... 26

Context: Public Interest Law in South Africa ..... 27

Section 1: Legal Assistance- a triage approach ..... 29

Section 2: Doing good in the law ..... 30
Section 3: The State and the law ..... 32
Conclusion ..... 34
Chapter 3: Migrants Perceptions of the Law ..... 35
Section 1: Perceptions of the Law ..... 36
Section 2: A Sense of Hope from the Law ..... 39
Section 3: Bureaucratic Forms of the Law ..... 41
Conclusion ..... 42
Chapter 4: Adversarial Law ..... 44
Section 1: Trapped by the state- state of exception ..... 46
Section 2: The waiting game: Indefinite Detention ..... 48
Section 3: Tactics of liminality ..... 50
Conclusion ..... 51
Chapter 5: Conclusion ..... 53
References ..... 56

# Chapter 1: Introduction

## Section 1: Overview

Abdulkhadir, a refugee from Somalia, attempted to apply for an asylum seeker permit through the Cape Town Refugee Reception Office[1] ("Immigrants to SA", 2014). He was denied access since, according to the security guards, no new asylum seeker permits were being issued at that time. This information was in direct opposition to a court order that had been issued in 2012 stating that the RRO needs to remain operating and take new asylum applicants ("GroundUp: Home Affairs", 2014). Due to the closures of other Refugee Reception Offices (RRO), Adbulkhadir was forced to travel to Pretoria to apply for his asylum seekers permit. He was stopped along the way and detained for not having proper papers. After hiring lawyers, he was eventually released and allowed to apply for asylum, as was his right given by South African law.

Abdulkhadir's experience, as reported by Lawyers for Human Rights in their article "Immigrant to SA have a Torrid Time" (2014), is not unique among the stories of migrants to South Africa. Many migrants seeking to apply for asylum face insurmountable barriers from a government and community that are hostile to their presence. Regarding the closure of the Cape Town Refugee Reception Office, a few court cases had been won in favor of reopening the offices, yet the Director-General of Home Affairs stated their intention to not reopen the offices (Ibid). In light of these events taking place among the political powers of South Africa, how much protection do asylum seekers and refugees have from the law? Although, asylum seekers and refugees formally enjoy a liberal constitution with a bill of rights that covers basic privileges, the reality of this protection is rarely received. This research will look at the access migrants have to protection from the law. More specifically, this research will look at the following questions: What is the relationship between migrants and the law? How do the public interest lawyers that assist migrants, perceive and affect change with the law? In reality, how well are migrants protected?

[1] Refugee Reception Office is an office through the Department of Home Affairs where all permits and requests are processed for asylum seekers and refugees in South Africa. Since 2011, the DHA has closed several Refugee Reception Offices in Johannesburg, Port Elizabeth and Cape Town. It is their intention to move the RROs to the border areas (Ngwato, 2013)

## 1.1 Background

South Africa has a bill of rights that proclaims a right to administrative justice and a strong legal framework with rights for asylum seekers (Amit, 2011a). Public interest law has gained little ground in terms of protecting asylum seekers and refugees from harsh realities and the violation of rights, including illegal detention and deportation. Many of the challenges faced by asylum seekers and refugees have been challenged in court. This challenges include: barriers to access, fairness of asylum procedures and decision making and an arbitrary system of arrest, detention and deportation. Though court cases that have been won, these successes have done little to affect the system and advance asylum seekers rights. "Many of the legislative and constitutional protections for asylum seekers and refugees have not been implemented because they are embedded in an environment of weak political and public support, combined with bureaucratic mismanagement and inefficiency" (Amit, 2011b, pg. 9). This is not to say that public interest lawyers have had no success in litigation. In fact, Amit describes a win for public litigation, yet with longer-term adverse effect on the refugee population:

> Perhaps the most significant change in practice has come in the area of access. Asylum seekers no longer face long queues, nor do they spend multiple nights outside of a reception office in the hopes of gaining entry. The DHA (Department of Home Afairs) has also stopped using pre-screening procedures and appointment slips outside the reception offices. These advances, however, have come at a high price. In an effort to improve efficiency at the reception offices, the DHA has implemented a virtual assembly line in which individuals apply for asylum, have their status determination interviews, and receive their decisions all in one day. ( pg. 17)

Ngwato (2013) has noted a recent policy shift for refugees and asylum seekers. She argues that these policy shifts, like bringing RROs closer to the border, increase barriers for migrants to receive adequate protection within the law. These policy shifts include increased barriers to access, limitation to basic rights and vulnerability to illegal detention and deportation.

According to George and Elphick (2013), immigrants in South Africa fall between the cracks. Some scholars believe that migrants are victims of widely exclusionary practices. Vigneswaran (2011) argues that, "exclusionary practices are deeply embedded in the formal procedures, everyday routines and unwritten codes of practices that officials in the Department of Home Affairs and the police re-enact. Regardless of their personal specific disposition towards

foreigners" (pg.151). Even outside of the Home Affairs, migrants face discrimination and corruption from other departments of the South African state. For instance, the South African Police have been criticized for being corrupt and militant and for being deeply xenophobic[2] (Bruce 2013, Vigneswaran 2011).

Yet in spite of this hostile environment migrants cope and resist the structure. Landau and Monson (2008) and Simone (2004), quote international migrants who have moved to Johannesburg. These migrant mention that in Johannesburg they have found a site that is hostile to their presence. In defense to the hostile and sometimes violent reception to foreigners, these migrants have adopted a discourse that resists the order and asserts their desire to not be a part of the city. Landau and Freemantle (2010) call it a tactical cosmopolitanism. The examples of these articles show migrants with a discourse that allows them to resist and cope with the hostile environment of Johannesburg. Yet does this mean that migrants give up completely having their rights, which the law confers on them, realized? Or how do migrants cope when trying to access legal status in the face of a hostile legal climate?

This research will look at the type of access to legal protection that is available for migrants. In Johannesburg, there are a number of public interest firms that cater to refugees and asylum seekers. Research was conducted at one of these firms, for the purpose of investigating the relationship between migrants and the law. What kind of law is being produced in these places of public interest law? How do lawyers play a part in this interaction? What is their effect?

## 1.2 Research Question

What is the relationship that migrants have with the law?

- What kind of law is being enacted by the lawyers at the clinic?
- How do migrants engage with daily practices of public interest law at the clinic?
- What is the migrant's experience of the law outside the clinic?

[2]Steinberg (2012) and Vigneswaran (2011) both cite the police as being one of the catalysts and enablers of the 2008 xenophobic attacks in South Africa. In 2008, 62 foreigners and South Africans were killed by an uprising of citizens against the presence of foreigners in the community.

## 1.3 Research Objectives

This study aimed to investigate the way migrants access the law, how the law works for them and against them and what is the lawyer's role in their access from the perspective of migrants and lawyers at a law clinic located in Johannesburg, South Africa. It accomplishes this through studying the way the law in South Africa assists migrants by examining research on law, legal anthropology, public interest law in South Africa and primary research with migrants and legal professionals. Additional objectives include:

- Determine the relationship between the history of apartheid public interest law and the role it plays in post-apartheid South Africa
- Examine the ways in which migrants use the law to cope and find hope
- Study the way in which the state manifests itself in enforcing the law and the ignoring the law

## 1.4 Rationale

This study looks at the access to the law, via the Wits Law Clinic for a normally excluded population, the international migrant. The popular discourse about migrants is that they are a victimized population that does not receive proper access to justice. Yet somehow migrants do access justice, despite this not being portrayed in the dominant discourse on migrant rights. There are a number of studies that have been undertaken by established academics about migrant rights and the lack thereof in South Africa (Hoag, 2010; Amit, 2011a; 2011b; Crush, 2001; Handmaker et al, 2008; Vigneswaran et al 2010). Much of this research focuses on the exclusionary practices of the government. They do not address how migrants relate and navigate the law. In addition, there is lack of understanding about the link between the practice of public interest law and the migrant rights. There is however also a large body of literature that addresses the implications of public interest law in the post-apartheid South Africa (Wilson, 2000; Comaroff, 2001; Comaroff & Comaroff 2001; Haibib & Taylor, 1999). Yet again in this body of literature questions of migrant's right are only minimally discussed. Instead it focuses on socio-economic rights of citizens and non-nationals without discussion on engagement with the law. While this study is informed by these bodies of literature, it aims at filling the omission of migrant's engagement with the law in general and with public interest law as practiced at the Wits Law Clinic in particular.

Perhaps more importantly this research will look at the relationship between the migrant and the law facilitated through the Wits Law Clinic through the theoretical framework of legal anthropology and the practice of law in everyday life. Throughout the research, it will come to light how the law is accessed through the migrant and how migrants give a particular meaning to this kind of law. How the law comes to be imagined and how it is reshaped and utilized in the interaction between public interest law lawyers and migrants. This study will contribute to the body of knowledge on imaginings of the law and migrant access to it in South Africa.

### 1.5 Structure of Research Report

This report is divided into five chapters. The first chapter is the introduction which includes background and contextual information on the project. It also includes a broad literature review covering topics of legal anthropology, the state and the law, and migrants and the law. Furthermore, it includes a description of the methodology that is used to carry out this project at the Wits Law Clinic. Chapter's two to four are the analysis of the research information collected on site. Chapter two covers public interest law in South Africa and the role of the Wits Law Clinic in assisting migrants with the law. Chapter three breaks down the experience of the migrants at the law clinic and the hope and feelings they have about the law and the ways in which it assists them. Chapter four explores how accessing the law can be a disadvantage and shares the experiences migrants have, despite the formal protection of the law. Lastly, chapter five concludes with connections of themes from these chapters and how they help answer the research questions. It also explores options for further research and additional questions that can be addressed for future study.

## Section 2: Literature Review

How is the law portrayed through mundane practices? This research is situated within the literature of legal anthropology and anthropology of the state. Legal anthropology gives a lens in which how the law functions in society and for individuals can be seen. Legal anthropology explores themes of formal and informal modes or regulations and the type of power it holds over individuals. It is through the literature on the state that I come to understand where power lies through formal rules and regulations. In the same vein as everyday practices of the state, practices of the law are portrayed through mundane bureaucratic practices. These imaginings of

the law and state shape individuals owns imaginings and how these practices take shape in individual's lives. This will provide a theoretical framework for the research study. I will end with how this study will contribute to this body of work. This review also forms the basis for my rationale.

## 2.1 Legal Anthropology

Traditional views of legal anthropology fit into three main categories, these are law as domination, law as culture and law as problem-solver (Moore, 2001). Law as domination looks at law as a tool that supports the elite's interests. Law as culture looks at indigenous law and juxtaposes customary law from the formal European law. And law as problem solver sees law as a necessary, functional unit of any society. Parts of these paradigms are still present in the way anthropologists view law today. The study of law is pulling away from being state-centric or location-specific. "Now, however, national and international contexts are increasingly important in developing theoretical understandings of local situations, particularly as research demonstrates how the law of the nation-state and even international regulations have penetrated and shaped local social arenas" (Merry 1992, pg. 357). It is now important to use transnational processes in theorizing and talking about local legal phenomenon. Even as I approach the public interest law through the context of South African political history, it is important to keep in perspective the way transnational processes creates a space for human rights law in South Africa.

A prevailing sentiment in legal anthropology is that the law is neither monolithic nor stagnant. The cannon of the law and the realities of the law can differ greatly. Law is a system of meaning that negotiates social control. Yet, as Merry (1992) explains

> "Law is no longer only a mode of social control; it is also a constitutive system that creates conceptions of order and enforces them. Moreover, law as an ideology contributes to the social construction of the world as fair and just and at the same time provides a language and forums for resisting that order. Law, of course, as Hoebel argued, is more than a system of meanings; it is also a form of violence endowed with the legitimacy of a constituted authority" ( pg. 360)

Here Merry points out many useful points about the law. The law creates ideas about order and how it is enforced. The law also creates a perception of a world that is fair and equal. Most importantly, she states that law is a form of legitimate violence. The state, as the enforcer of the law, uses the law to enact violence and protect the law. This is an important point in analyzing

migrants' relationship with the law and the state. Often times these relationships oppose one another, as the state circumvents the law, in the name of protecting the law, to deal with threatening forces. This is known as state of exception (Agamben & Hiepko, 1998). This becomes an important theme in understanding migrants' relationship with the law within the state.

Comaroff (2001) looks at the way colonial governments used law as violence toward the 'native' inhabitants. "That 'mode of warfare'-or rather lawfare, the effort to conquer and control indigenous peoples by the coercive use of legal means-had many theaters, many dramatis personae, many scripts. Most commonly noted among them was the creation of so-called customary law" (pg. 306). Comaroff argues that colonial ideologies seeped into the legal consciousness of the colonized. This made them more exposed to the violence of the law. The violence of the law requires a subject, but in becoming that subject there also lies a right to speak and be heard. He illustrates this in the following expert, "when they begin to find a voice, people who see themselves as disadvantaged often do so either by speaking back in the language of the law or by disrupting its means and ends" ( pg 307). As I explore how migrants relate to the law, this literature supports how the migrants also find their voice with the language of the law to fight back an oppressive state.

## 2.2 The Law and the State- Legal Pluralism

The kind of law that is discussed in courtrooms and written in law books is not the only type of rules that are followed. The question of where power lies can lead us to a clear answer that power comes in multiple forms. There are multiple forms that exercise power over individuals (Latham 2000). Varying types of power require varying rules and obligations. In legal anthropology, this is termed legal pluralism (Merry 1988). Legal pluralism describes mulitple coexisting legal systems. It argues that every subgroup of society has its own legal system- such as the family, community, political groups,etc. Furthermore, it argues that the " State was not the only producers of obligatory norms" (Moore, 2001). The formal law is not the only facet of mandatory rules and obligations. "Nor is the law the repository of all forms of mandatory rules. The rules and institutions attached to governments are only one category of a vastly more extensive set of sites producing rule and obligations" (Moore 2005, pg. 246). These sites are often informal.

Opposed to legal pluralism is legal centralism. Griffiths (1986) argues that all normative rules come from the state and these obligatory norms and practices stem from the government. While this seems a rather rigid way of looking at forms of regulation, Wilson addresses the dangers of the legal pluralism, stating, "critiques to the effect that collapsing legal and social norms into the same category mistakenly turns all social norms and values into 'law.' This move makes defining law problematic in that every norm is defined as 'legal'" (2000, pg.77). Keeping this in mind, "legal pluralism provides an important descriptive model of society as made up of a diversity of modes of conflict resolution, shattering the myth of state law's unchallenged empire" (Wilson, 2000, pg 77).

Wilson specifically describes legal pluralism in the newly formed post-apartheid South Africa with multiple forms of power attempting to control how justice is distributed. "There are various competing discourses and systems of values around justice and reconciliation. Christian discourses on forgiveness advocated by TRC officials often swayed individuals at hearings, but they clashed with the retributive notions of justice which are routinely applied in local township and chiefs' courts" (Wilson, 2000, pg. 79). Yet understanding that there are multiple forms of rules and regulations, does not make the state and state laws obsolete. While the state does not hold the overarching powers, as once thought, the state does hold some power. Looking at the law through the anthropology of the state, helps to visualize the role the law has in every day practices and interactions.

### 2.3 Anthropology of the State

The anthropology of the state takes root in social science theory. Max Weber (2006) explains the power of the state lies within the bureaucratic system. A key feature of modern states is its bureaucracies. These bureaucracies maintain social order and inhibit social change. In thinking about power of the state, Weber portrays the state as being the sole authority on the right to use violence (Loader & Walker, 2001). In addition, Foucault (2006) introduces the theory of governmentality to describe how society is being disciplined through discursive practices that partly find their embodiment in institutions like the police and prison. At the heart of this theory, questions of politics arise on, "how certain disciplinary forms, certain styles of knowledge and governmentalities made specific policies plausible, specific forms of rationality thinkable, and forms of political discourse possible and intelligible" (Hansen & Stepputat, 2001, pg. 4).

Foucault is less interested in the state and more interested in how "human practices become objects of knowledge, regulation and discipline" (ibid). From this stance, the power of the state becomes decentralized, and is rather allowed to be displayed in the different forms of disciplinary powers, such as the law and the legal processes the state employs.

The state is not an overpowering body, but rather an entity that can be shaped and negotiated by individual's everyday experiences with the state. Sharma and Gupta refer to the process of state formation. They assert that states are formed through, "everyday tracks of rule" (2006, pg. 8) Therefore, "rule is coordinated and consolidated in many different institutions and social networks" (Sharma & Gupta, 2006, pg. 8). These are called everyday practices and are encountered by people when they stand in lines, pay taxes or certify a copy of their passport. These seemingly mundane bureaucratic procedures provide insight into how the government and state authority operate in individual's lives. More importantly, they explain "how the state comes to be imagined, encountered and re imagined by the population"(Sharma & Gupta, 2006, pg. 12). How the law manifests in migrants lives and how they in turn interact with the law forms how the law is imagined and ultimately how the state is imagined, the law being an extension of the state. In the next section I look at how the law is shaping and being shaped by individuals experiences.

### 2.4 The Law and the Migrant- Legal Consciousness

Polzer (2007) and Merry (1992) explain the benefit of examining the law from below. This includes looking at ways in which people interact with the formal law, how they interpret it and "the agency of those affected by law to subvert, oppose and evade it" (Polzer, 2007, pg. 23). This section looks at ways the law plays out in individual's lives and those who act as the gate keepers, particularly lawyers.

Legal consciousness is the term used to describe why people submit to a legal system and process despite its unequal treatment or "how the law sustains its institutional power despite a persistent gap between the law on the books and the law in action" (Sibley, 2005, pg. 323). As in many professions, there is a gap between ideology and practices. Law as an ideology of the state seems to reflect the free will and democracy of the society but the law played out in reality, in everyday practices, many times reflects opposing principles. "Instead of looking simply at the role law plays in enforcing rules, it examines how law creates images of social relationships that

seem natural and fair because they are endowed with the authority and legitimacy of the law. This perspective focuses on the culturally productive role of law rather than on its sanctioning and limiting role" (Merry,1992, pg. 361).

Merry's (1986) case study of working-class Americans accessing the law is a useful example in examining legal consciousness in everyday lives. She explains the significance of law in everyday lives as "law plays a critical role in justifying and legitimizing the social order by inducing citizens to perceive the power of ruling groups as fair and acceptable. It confers legitimacy on the rule of dominant groups by mystifying real power relationships, making them appear to the mass of the population as reasonable and just" (pg.254). She describes two types of ideologies of justice; ideas of formal justice and situational justice. Formal justice is the idea that all men are equal before the law, and by very nature of being human are entitled to certain rights and privileges. Situational justice is a more negotiated ideology. Situational justice is when an individual justifies their right to justice based on other, more context specific factors. For instance, someone can say that they are a hardworking person who pay their taxes and thus are entitled to certain rights. In this example, their right to justice is situated in the fact that they are contributing in some way. Ideas of formal and situational justice are useful in understanding how people negotiate the meaning of the law.

Central to how people access formal justice are lawyers. Bourdieu introduces the idea of legal habitus. The lawyers roles in the legal field are determined by tradition, education and their everyday experiences in the legal custom, "They operate as learned yet deep structures of behavior within the juridical field" (1986, pg. 807). The lawyers work on the law is shaped by this legal habitus. And it should be noted that the legal field does not exist in a vacuum, but is closely link to other social realms and practices.

Lawyers are considered the "gatekeepers of justice"(Michelson 2006, pg.10). The relationship between client and attorney determines the relationship with the law. Hosticka (1978) explains the power struggles that exist within this relationship. Power lies in who controls the definition of reality or what is going on. If the lawyer controls this, he has the power in the relationship. Lawyers exercise power and control of meaning, using language to cloud important rights. This language can be a tool in blocking and screening clients from their rights to the law. "Legal discourse is a double-edged sword: it both facilitates and deprives access to justice. The study of

lawyers' use of language, how they reframe, reinterpret, and deny the legal legitimacy of claims asserted by the poor and the powerless, explicitly links micro level discourse to the macro level issue of access to justice" (Michelson 2006, pg. 3). Bourdieu (1986) further notes that lawyers use linguistics to maintain legitimacy over their interpretation over the law. This is a crucial par to how the law is reproduced. Lawyers are not the only gatekeepers to justice, other players shape individuals experience with justice, like judges, state officials, etc. Yet it is this figure of the lawyer which features centrally in my case study of the Wits Law Clinic.

## Conclusion

This literature builds the foundation for the tools I use to analyze this study. A few points from this literature review stick out as the most poignant in considering. First, the law is a legitimate force of violence. This force of violence can be used by the state in opposition to the law in defense of public order, a term referred to as exceptionalism. This is key to understanding migrants' relationship to the law. Second, the formal law is not the only form of control acting on people. There are obligations and rules that people follow that are outside of the dictates of the state law, such as family and social networks. This is called legal pluralism. This is important in recognizing where power lies. This helps establish that the state and the law are not the only forms of power. This further supports the third point that the state and the law are not sedentary but are shaped by people's everyday interactions. One can have imaginings of the law that differs from the state. This study follows along those lines. It examines the everyday interaction migrants have with the law vis-à-vis the law clinic. Their perceptions and view of the state and the law, while sometimes opposing, are shaped by these encounters. Finally, these interactions and perceptions of the law are heavily shaped by the interaction with the lawyers at the Wits Law Clinic. As gatekeepers of the law, they possess a type of power in the way migrants view the law.

## Section 3: Methodology

The main aim of this study is to look at the relationships between immigrants and the law. The dominant discourse of the victimization of migrants portrays the picture that immigrants do not receive proper access to justice. While immigrants do access the law, it is not displayed in the same explicit way as the dominant discourse of victimization. These interactions can become visible through observation and in-depth study. These interactions can be a difficult scenario to encounter and this is why in-depth interviews and ethnographic details are being employed as the best method of research. This research focused on a legal aid office at Wits University in Johannesburg. This was in-depth research embarked on over a two-month period. While an ethnographic model over a three-month period of time was considered, time constraints and requests from the legal aid clinic did not allow for that model. Migrants and attorneys were interviewed on site and some ethnographic detail was captured.

### 3.1 Study location

This study took place at the legal office located within Wits University, in Johannesburg, South Africa. It is a non-profit organization that provides legal advice and legal aid to those that are unable to afford legal services. Here, lawyers and students interact with urban poor to assist in addressing legal matters. Wits Law Clinic is part of a few public interest law firms in the Johannesburg CBD that cater to the urban poor- among these are Lawyers for Human Rights, Johannesburg Justice Centre and the Legal Resources Centre, to name a few. Wits Law Clinic stands out from these other firms, as it is a teaching clinic. Wits Law Clinic uses students to work on cases and attorneys supervise.

The Wits Law Clinic is a teaching clinic. All fourth year law students are divided into one of the six units of the clinic. These are Labour, General, Family and Gender, Refugee, Criminal Law and Delict, and Property. Each unit has assigned attorneys (typically two) and one candidate attorney. The students consult with clients during the designated time. For instance, the Refugee clinic is open for consultations on Monday and Wednesday from 1200- 1400. They consult clients in a pair with the supervision of the attorneys. Students meet with their supervisor once a week for help and guidance on case files during the week. When students begin to write exams

in October, the consultations and client files are taken over by the attorneys and candidate attorneys.

The Refugee unit is made up of two attorneys and one candidate attorney. Although labeled as a refugee unit, they assist refugees, asylum seekers, migrants and undocumented migrants in a range of asylum and immigration issues. The Refugee Unit made an ideal location for this study. The location allowed for a broad range of migrants from Johannesburg with varying nationalities. Wits Law Clinic itself provides services similar to the other legal aid offices in Johannesburg although with a different type of staff.

## 3.2 Research Interviews

For this project, I interviewed ten migrants and two attorneys over the course of two months. All interviews were recorded and held at the Wits Law Clinic. Sampling was convenience. Efforts were made to sample a diversity of migrant nationalities, but because of the small pool of candidates due to the end of the year (see limitations) the majority of the interviewees were from the Democratic Republic of Congo (DRC). For the purposes of this research, the terms immigrant and migrant are being used interchangeably and only refer to foreign born, non-nationals. While this definition seems a bit arbitrary, it mostly established for convenience and consistency. The term 'refugee' is also a bit vague. While this was a refugee clinic, and their target clientele is refugees, not all clients can legally define themselves as refugees. In order to be legally classified as a refugee, a migrant must apply for asylum and then be granted refugee status by the Department of Home Affairs. Many migrants I interviewed did not reach this stage or were gaining legitimacy by other means (such as being married to a South African or having child) but many still referred to themselves as refugees. Certain types of international foreigners, namely refugees and undocumented migrants are seen to be the victims of persecution and violence from the police and the state. In addition to migrants, legal officers, such as lawyers and candidate attorneys, were interviewed to get a holistic picture of the law through the Wits Law Clinic. As this is an ethnographic case study, there was no predetermined amount of immigrants or legal officers as participants that was included in the design of this study.

### 3.3 Access

Obtaining written permission to the Wits Law Clinic, took a lot longer than expected, as this was my second law clinic that I was pursuing permission from. The first law clinic I approached seemed promising but after two months of failed calls and emails, I had gotten nowhere. Eventually formal, written permission was given from the Wits Law Clinic to do research.

Access is more than written permission, but also the ability to gain entrance and be trusted. I found the lawyers and candidate attorneys are Wits Law Clinic to be very welcoming and helpful. When I first approached them about the project, they were excited and happy to help. When the project was changed, due to ethical considerations, they were equally disappointed and wanted to help me modify my project so that I could still proceed. On the days I attended consultation, I sat in the waiting room, observing clients and attorneys as they came into the clinic. The two attorneys always greeted me and asked if they could do anything for me. I found their hospitality very warming. I took time to interview a few of them outside of clinic hours and found them very forthcoming and open.

The attorneys had warned me that many clients would not be as open to being interviewed. Yet I found that each client I asked to interview consented, and I did not get a single rejection. However, I wasn't able to interview everyone that I asked. I would ask them while in the waiting room, and tell them we could do it after they had seen a lawyer. Sometimes, after they had seen the lawyer, they would forget about our arrangement and walk straight out. Other times, by the time they came out, I was in a different interview and they couldn't wait.

Although I made sure to read the information sheet and explain the consent form, I found many of the interviewees thought I was a lawyer and was going to help them with their case. At the end of the interview, I always asked if there was something else they wanted to ask. One interviewee asked me if there was anything I could do to help them. I again reiterated my role as a researcher and the role of project. Yet it leaves a place open to consider and reflect on my role as a researcher in this project.

### 3.4 Reflexivity

It is obvious as a researcher that I have influenced the kind of information that has been portrayed, described and analyzed. I cannot take myself out this research. Hammersly and Atkinson (2007) say it best:

> "As has long been recognized by ethnographers, he or she is the research instrument par excellence. The fact that behavior and attitudes are often not stable across contexts and that the researcher can influence the context becomes central to the analysis... Data should not be taken at face value, but treated as a field of inferences in which hypothetical patterns can be identified and their validity tested" ( pg. 17)

As pointed out earlier, some interviewees thought I was attached to the Wits Law Clinic and asked if I would be able to help them with their situation. To one migrant, I again explained my position as a researcher. She said something disparaging about the South African government and then apologized. I told her that I wasn't a South African and she didn't need to apologize. I said I was actually from the United States. She then told me I must tell my government what is happening to refugees here, so that they can help.

It is important to reflect on the advantages and disadvantages of conducting research with a research population that is different from me. I am a young, white female from the United States. I am also an immigrant and have found South Africa to be a very difficult place for a foreigner and the immigration system to be very oppressive and frustrating. I have had many encounters with the Department of Home Affairs that have left me in tears. Yet my own migrant story differs greatly because of my circumstances and opportunities. In a battle with Home Affairs, I might have also been in the circumstance where I needed to obtain legal advice but fortunately, through connections I found a link to someone in the Home Affairs office who was able to find my file and sort out my issue without a consultation with a lawyer. The disadvantages of performing research as an outsider are difficulty in gaining trust, not understanding certain norms and gaining access (Hsiung, 2010). These differences, while they seem to have created power dynamics that might be overt, have also created advantages. Coming from a different background and a different class, created an easy environment of learning. I also could not assume to understand everything that was being described, not even in the way the lawyers and students understand things. For instance, there were many references

made to the standing committee, a term I was not familiar with. Because I didn't understand it, I was able to ask questions for clarity and get more information on the subject, than had I understood the concept from the beginning.

Some stories were difficult to hear, and were a bit disturbing emotionally. I have worked with refugees in the past, and was familiar with the types of issues and persecutions that arise during an ethnic conflict and civil war. One refugee had had his appeal rejected and had been told by a law clinic that there wasn't anything they could do, and that he needed to leave the country. This young man was terrified to go back to his country and was willing to do anything to stay in South Africa. He talked of wanting to kill himself before going back to his country of origin. I had a referral sheet and referred him to a counseling centre in Johannesburg for support. Yet these experiences weigh on me and they certainly garner my empathy for the refugee cause (to be fair, my empathy for the refugee cause has always been strong). Yet, because I had an interview model, I did not have the time to get emotionally attached to the interviewees and this can also be an advantage. Problems like these bring on the type of ethical considerations that have to be reviewed and noted.

### 3.5 Ethical Considerations

This study engages in topics and themes that can sometimes lie in a legal grey zone. Some immigrants were undocumented or entangled in illegal practices. It remains important for me to maintain confidentiality. Within the work of the legal field, client attorney privilege is one of confidentiality. Once I was granted access to this research site, all research conducted had to be confidential as well. As this is a research project not all information can be kept secret but during the analysis process, information was altered with pseudonyms (such as names and places) and anything that can identify an individual was be kept out. While confidentiality could be ensured, anonymity could not. It would be easy for someone who works at the clinic, especially within the refugee unit, to identify some of the clients and the attorneys interviewed. I do not describe their physical appearances, but a basic description of the case is one way. In my participant form, I did let interviewees know that this would be the case.

As the relationship between researcher and participants unfolded, I attained permission from relevant participants to be included in the study using a participant consent form for legal officers (signed) and immigrants (verbal). I was not researching covertly, but my position as a

researcher engaged in a project was overtly stated and made clear often. One of the critiques about participant observation is that because the researcher is always present, participants often forget that the researcher is in fact doing research and divulge information, forgetting the consequences. This often happened, as stated earlier. While this was one of the advantages of participant observation, I attempted to regularly reinforce my purpose to interviewees. Marshall and Rossman (2010) give the responsibility to the researcher. "The researcher must be diligent about being sure that the participants are aware and willing. The practice of informed consent can be complex... it is not an event, but a process" ( pg. 142).

Harm in research can be a result of the process of research or consequence of the findings. "At the very least, being researched can create stress and provoke anxiety, especially if the researchers is believed to be evaluated one's work, one's life or oneself" (Hammersley and Atkinson 2007, pg. 214). In this case study, harm might have been caused by compelling participants to telling painful stories. This was mitigated by offering references to professionals (as in the story detailed earlier), offering them the option to exit the study or just listen.

Sometimes social research can be seen as disadvantaging the participants and advantaging the researcher. And perhaps this research can add to the body of literature about public interest law in South Africa and over the long run, help improve the field.

### 3.6 Limitations

It had been my original intent to pursue this case study at a law clinic in downtown Johannesburg. After my initial contact with a staff member from this law clinic, I got positive feedback and went ahead with the process of obtaining permission but after two months of emailing, calling and walk-ins I had reached a dead end. I needed to start over and began at a new law clinic. I then approached the staff at the Wits Law Clinic (WLC). After a few emails and a walk-in, I had made contact. The attorneys at WLC were happy to accommodate and see what they could do. My initial research plan of doing ethnography of the refugee unit was denied. They had said that an ethnographic case study at the clinic was not possible. They explained that they are under ethical obligations under the Attorney Bar Association and felt that my research design would compromise those commitments. As I was under pressure for time, I was forced to re-design my research plan. I moved from an ethnographic model to an interview model. I was disappointed in this new arrangement, and I still feel I could have obtained richer

data had I been allowed to follow attorneys with the clients. As it was, I was given permission only to interview attorneys and clients separately.

I also encountered an additional set back with time. Wits Law Clinic is a teaching clinic. Their clinic operates with fourth-year law students advising clients. This begins at the end of February and ends around mid-October. Once the students begin to write their exams, the attorneys and candidate attorneys advise clients until the clinic closes in mid-December. Because there are no students, attorneys will not open files for any new clients until the following year in February- when the students begin consultations. I was not permitted to begin my research until the students where beginning their exams and had finished with consultations. This meant that I delayed the start of my research and had less time to conduct interviews. Unfortunately, this also meant that the clinic became less and less populated as the close of the year approached and my selection of interview candidates dropped severely. The clinic operates on Mondays and Wednesdays from 12:00- 14:00 yet towards the end of November and into December, most clients came at 12 and by 13:00 the refugee clinic would be done for the day. This lack of activity affected my pool of candidates and my number of people interviewed.

## Chapter 2: Wits Law Clinic and Public Interest Law in South Africa

"Look, we've written them a letter but they haven't responded yet. I think the best thing for us to do is wait another week and see where we take it from there." I overhear Neil, one of the two lawyers that run the Refugee Unit, speaking to a client in the cubicle two down. Although all conversations and information shared between client and attorney within these cubicles are confidential, it is not difficult to overhear the cases being discussed in cubicles.

It is towards the end of the year, and the academic year is over, leaving the cases and clients to the two attorneys and a candidate attorney. Occasionally, candidate attorneys from other units come to assist with the consultations of clients.

It is a very different image then what can be seen when the students are in the midst of their academic year and are the ones consulting clients. Then, the cubicles buzz with sound, and no distinctive voice is detectable. The attorneys roam the aisles as student after student comes to track them down to ask them about their client's particular issue.

On this day, the flow of the clinic is quiet but steady. The students finished their term in the clinic the week prior and are now preparing for their exams. Yet, the waiting room is full. Officially, the clinic opens with the Refugee Unit twice a week from 12 pm to 2 pm. On alternating days the Family Unit or the Labour unit meets in the time slot before the refugee unit. Just after 12, the candidate attorney comes into the waiting room and goes to the reception desk. She pulls out a book and then asks all who are here for the refugee unit to please come up and write their names in the book in the order of when they arrived. She then asks their name, nationality, if they have a case open at the clinic and what the nature of their problem is. After writing their names and information, she calls the first one through to one of the cubicles. The two hours proceed with attorneys calling names from the books and inviting the client to come through to one of the cubicles. The length of the consultation varies greatly from client to client. Attorneys stream in and out of the clinic into the main building to make copies, fetch a file or make a phone call, as the clinic building does not hold a copy machine or file cabinets.

Many times, consultations consist of either feedback, giving a letter to the client to give to Home Affairs, to give to the bank, or to hold onto for purposes of traveling. They make copies of important documents to put into their file, interview the client for clarity, or prep with the client

for refugee appeal board hearings or court appearances. Neil, the attorney, calls these 'career level duties'. During the academic year, these are given to students to perform. But as it is the end of the year, the supervising attorneys and candidate are left to consult and perform these career level duties themselves.

Neil's quote at the beginning of this chapter displays a very strong picture of the type of law that is taking place in the clinic. Letters are a very common form of law that is carried out within these consultation cubicles. It is a very mundane activity, which repeats itself over and over again, that it is not just a means to an end, but a professional form in of itself. Yet this is not how the lawyers and students working at the clinic see their work. They are aware of their bureaucratic routines, but there is something grander that motivates what they do. By doing public interest law, students and attorneys are sharing in the proud history of the role of such law critical of the post-apartheid South African= state. This chapter will look at the history of public interest law in South Africa and examine how Wits Law Clinic fits into this context. It will then analyze the ways in which the lawyers relate with the law, namely the type of law they practice, how they perceive this law and the opposition they pose to the state.

## Context: Public Interest Law in South Africa

Public interest law and litigation has a rich history within apartheid and post-apartheid South Africa. Although few in number, anti-apartheid attorneys and advocates represented clients oppressed by the apartheid laws. Most notably, Nelson Mandela and Oliver Tambo started a law firm in Johannesburg in the 1950s before abandoning the firm for full political activity (Abel, 1995). Public interest organization began to pop up during these years of apartheid, including the Legal Resources Centre, Centre for Applied Legal Studies, Lawyers for Human Rights and the Black Lawyers Association. Their victories were few, but significant. "Organizations such as the Legal Resources Centre used the apartheid law, with all its limitations, to bring relief to the homeless and the landless. The work of public interest organizations dealt a severe blow to the infamous pass laws system, forced removals, police brutality, employment malpractices and consumer oppression" (Kathree, 2002, pg.33). Organizations such as the Legal Resources Centre called attention to injustices and "won modest victories that interfered with aspects of the apartheid's programme "(Ellmann, 1992, pg. 199). These organizations had a profound effect on the abolition of the influx control laws, including the pass laws that controlled Black movement

and settlement (Ellman, 1992, pg. 199).[3] Many of these public interest organizations were anti-government and others were openly affiliated with the African National Congress, like the Legal Resources Centre (Habib & Taylor, 1999). In the 1990s when the transition to the new government began, these human rights organizations found themselves in a position where they needed to re-orient their focus.

Anti-apartheid non-governmental organizations transitioning under the new democracy needed to find new niches within South African society. The end of apartheid meant that human rights law had to rethink what it was doing, as now people had seemingly reached a state of civil and political liberties. In South Africa's new society the creation of a liberal and embracing Constitution meant liberties for the previously oppressed. Soon new abuses and exclusions began to manifest themselves in South African society. Socio-economic inequalities remained, despite the new government and the nation became very hostile towards aliens (Comaroff & Comaroff 2001). The new human rights issue for public interest law became socio-economic rights and migrant rights. South Africa became the first country in Africa to start offering legal services for refugees and asylum seekers. Anti-apartheid organizations began to incorporate the rights of the asylum seekers into their focus in the mid 1990s. (Harrell-Bond 2007, pg. 730). Organizations such as Legal Aid Resources Centre, Lawyers for Human Rights and Wits Law Clinic began to open branches of their department dedicated to the interest of refugees.

Wits Law Clinic came out of the tradition of anti-apartheid legal aid organizations; with the end of the apartheid it transitioned, like the other organizations, to best address the new decencies of social and economic rights in South African society. Wits Law Clinic started out as an advice office over forty years ago, with students only volunteering. It then became a university requirement for practical legal studies, which made it compulsory for all final year students to gain experience at the clinic (Du Plessis, 2008). The clinic has grown to accommodate six different units (Labuor, General, Family and Gender, Refugee, Criminal and Delict, and Property) with the assistance of nearly 500 students last year alone (Interview with Neil).

In 2013, South Africa had 65,233 refugees and 230,442 asylum seekers (UNHCR, 2014). An asylum seeker is categorized as a migrant who has entered into the asylum process by applying

[3] For a more comprehensive history of role of the law and public interest law in apartheid South Africa see Abel 1995

for refugee status from the South African government through the Department of Home Affairs. Refugees are those who have been granted refugee status from Home Affairs. South Africa has the most asylum seekers in the world but does not have the most refugees. Although South Africa has a progressive legal structure for refugees, administrative delays and rights-violating practices block asylum seekers and refugees being properly served and protected (Amit, 2011a). This shows that there is some need for legal assistance for refugees and asylum seekers. And the Wits Law Clinic is one of a few legal aid offices in Johannesburg that fills the niche. During 2013, the Refugee unit saw 1664 clients, opened 299 files and closed 70 files. In 2012 the unit saw 925 clients, opened 100 new files and closed 238 files (personal communication with Neil). These numbers are indicative of the kind of demand there is on legal services for the migrant community.

## Section 1: Legal Assistance- a triage approach

> Look, it's almost like a, I mean to give you context to this, when I started off here, coming from this, 'I wanted to help the world and every client,' but you come to a point where you realize that you can't help every client and there are certain things you can assist and get involved in. It's almost like a triage approach. Just because the resources aren't provided and you won't be able to offer the appropriate and ultimately you're not going to assist the client (Interview with Neil, pg. 6)

The bulk of the work of individual client consultations is performed by the law students. In order for students to carry out their work, each step needs to be approved by their attorney supervisor. The amount of students allows them to see a high number of clients, yet their constraints on funding, and the very nature of non-profit work, leaves them under-resourced. Thus Neil likens their approach to their services to a triage approach. A triage approach is one that prioritizes the most important problems.

Michelson (2006) describes lawyers as the gate-keepers of the law. As the Wits Law Clinic use their triage approach to the law, some clients won't be served and some will be rejected because of many other considerations like budget constraints, faulty claims and fraudulent papers. "Legal discourse is a double-edged sword: it both facilitates and deprives access to justice. The study of lawyers' use of language, how they reframe, reinterpret, and deny the legal legitimacy of claims asserted by the poor and the powerless, explicitly links micro level discourse to the

macro level issue of access to justice"(Michelson, 2006, pg. 3). While the lawyers and students have an opportunity to facilitate justice, they can as easily remove the possibility of justice from clients.

At the very basic, most of the work performed by the students and lawyers is clerical- writing letters, following up, making phone calls, requesting files, making copies, etc. When all avenues have been exhausted, litigation is the last step. Yet these tasks are part of the triage approach, as described by the attorney. This is the habitus in the legal field described by Bourdieu. "The practices within the legal universe are strongly patterned by tradition, education and the daily experiences of legal custom and professional usage. They operate as learned yet deep structures of behavior within the judicial field" (1986, pg. 807). Although the habitus of the lawyer seems mundane and bureaucratic, it is a carefully crafted and negotiated space that continues to invoke justice.

Often, law is seen as very rigid process. Thinking about the law conjures up pictures of court rooms, closing arguments and a robbed judge. And lawyers themselves are portrayed to be dexterous and highly skilled. Lawyers and the law derive authority from this elevated sense of the law and its professionals, "Law maintains power relations by defining categories and systems of meaning. When these categories and systems shape consciousness, they can be seen as hegemonic"(Merry, S.E., 1992, pg. 362). Yet the reality of the work of the law is rather mundane and tedious. Yet given these realities of the bureaucratic form of the law, the lawyers themselves view the work they do as part of a grander work. The next section explores how the lawyers view themselves within the law despite the realities of their work.

## Section 2: Doing good in the law

> Yeah, it was the first time. I just wanted to help them. They came from that whole Orange Farm thing that we spoke about and I said I'll just. They said they had approached the UN and the UN weren't helping them and there were twenty-three odd initially. I said it'll write to them and see if I can get you an appointment. (Interview with Neil, pg. 11)

This quote was in reference to a specific case. Micah and his twenty-three friends were from Ethiopia. Micah had come to South Africa because he had been working with the opposition party in Ethiopia when it became too dangerous to stay. Micah was in his early twenties when

he came to South Africa. He met other Ethiopians and they helped him to start hawking on the streets of Johannesburg. Eventually he moved to Orange Farm with another Ethiopian and ran a spaza shop. In mid-2013 many foreign-owned spaza shops were looted and burned by residents of Orange Farm and Sebokeng (Evans, 2013). Micah and his friend were part of those that were looted and burned. A group of Ethiopian spaza-shop owners, together with Micah, opened a joint police file. Frustrated and discouraged, Micah and his friends from Ethiopia approached the law clinic wanting to be resettled to a different country. Resettlement was not an issue the Wits Law Clinic had dealt with. It was out of their scope. Yet, Neil recalls that these were nice guys who didn't do anything wrong and he wanted to help them. Neil then started the process of liaising with the UNHCR, to get them an appointment and see what he could do to help them get resettled.

When I met Micah, the case had gone flat. The UNHCR had interviewed the recognized refugees of the group and told them that resettlement was at least ten years out. The group came back to Neil, frustrated with the feedback and Neil wrote another letter, asking for another explanation. As of the end of 2013, the UNHCR had still not responded. Micah had come in to find out if there was any feedback. He comes in about once a week to hear about the possibility of feedback. But he also admits that he has relatives in Canada and has asked Neil to write a letter to the Canadian Embassy to try and help him to get another access to resettlement.

When I asked Neil why he takes on a case like this, one that has so little to do with legal issues, he admits, "I try to help as much as I can… I get accused of being a bleeding heart." Although this case is atypical and does not represent the usual cases the clinic takes on, it says something about the lawyer's relation to the work they are doing. Tumi, a candidate attorney who has rotated in the Refugee Unit, explains the purpose of the clinic is to provide access to justice to indigent people. Describing asylum seekers in this way invokes a certain humanitarian sentiment. Their job is to help people who come from places that are 'pretty atrocious' and 'messed up' only to get the run around from the Department of Home Affairs.

An imaginary of the type of law they practice is being built up: law is good and altruistic. This type of law, human rights law, seems to be at a perceived higher moral plane then other types of law. Neil talks about his previous employment at a commercial law firm, but he really wanted to get into human rights law, so he left, looking for something more meaningful and fulfilling.

There is this competition between the types of law. Bourdieu calls this division of juridical justice. "Professionals within the legal field are constantly engaged in a struggle with those outside the field to gain and sustain acceptance for their conception of the law's relation to the social whole and of the law's internal organization" (1986, pg. 809). In their own spheres and in the kind of language they use, lawyers struggle for control and legitimacy within their legal field.

These lawyers are part of the proud history of public interest law in South Africa. However, they're work stands in direct opposition to the state. The next section will examine how the law, an extension of the power of the state, and the lawyers derive their power and legitimacy from opposing the state.

## Section 3: The State and the law

A common thread among all interviews with migrants and attorneys is the failure of the Department of Home Affairs to administer their duties fairly and in a timely fashion. Many clients come in because they have applied for a refugee travel document, and a year and a half later they are still waiting for the document. In a case like this, the Law Clinic will write a letter to Home Affairs demanding the client's identity document. If the identity document still does not come, the Wits Law Clinic will take Home Affairs to court, which they admit is the last resort. Most cases they deal with are addressing a violation of Home Affairs to deliver services in a timely fashion. Their defendant is almost always the Department of Home Affairs, an entity of the state. Neil admits that, "The guys from state attorney say that they are such a good client to have, Home Affairs, because there are just so many issues with them." Likewise, the Refugee Unit at the Wits Law Clinic is in active resistance to this entity of the state, while reinforcing the state by engaging the law (namely the Refugee Act and the Immigration Act). Yet the state is not quite a monolithic creature in the way it's traditionally thought of. The state, in its many different forms and entities, weaves different imaginings based on the interaction that take place (Sharma & Gupta, 2006). In the case of migrant law, the state is seen as Home Affairs and the imaginings of the state become shaped by the violent and discriminatory encounters that take place. This imagined state is somehow resisted through the law. Merry (1992) explains the following about law and resistance:

> Law is no longer only a mode of social control; it is also a constitutive system that creates conceptions of order and enforces them. Moreover, law as an ideology contributes to the social construction of the world as fair and just and at the same time provides a language and forums for resisting that order . Law, of course, as Hoebel argued, is more than a system of meanings; it is also a form of violence endowed with the legitimacy of a constituted authority ( pg. 360)

The law gives the language of resistance to the state, as seen with most of the cases at the law clinic. The law the clinic is most concerned with is the Refugee Act and the Immigration Act and these provide an avenue for attorneys and clients to be in opposition to the Home Affairs, while at the same time deriving their authority from this opposition and reinforcing its role in the lives of migrants.

Neil describes a case that he tried to pursue at the beginning of the year:

> We don't really do Lindela detention stuff at all. I'd like to. In the beginning of the year, we had a client who was detained there and we got the ball rolling. We were going to proceed and they released the client. Because LHR (Lawyers for Human Rights) has got a dedicated arm for that, we don't. And just cause it consumes too much time But we will if necessary (Interview with Neil, pg 6)

Here they had wanted to start working with clients who were held in the Lindela Detention Centre for deportation. And a client had been sent to Lindela and contacted them for assistance. They assembled a team and were ready to go into Lindela but the client was released. This seemed to be a great disappoint for the clinic. Neil later commented again on the situation, " I mean you'll do a lot for a client and then they'll turn around and Home Affairs will do something stupid. Like that Lindela thing, we go through all this trouble of launching and getting opinions from council and then the client has been released. So it's very inconsistent" (pg. 9). This is an interesting statement. Home Affairs had taken their client into the detention centre and were in the wrong, as a migrant with a valid asylum seekers permit or refugee permit is not illegible for deportation. It works in the client's favor to be released from Lindela, but it takes something away from the law clinic. They were going into new territory, a territory dominated by a similar legal aid office, Lawyers for Human Rights. Perhaps this move would have broadened their credibility or allowed for more funding possibilities. Yet the release of their client was a disappointment, giving the sense that the refugee unit at the law clinic derives some authority from the misdeeds of Home Affairs.

The law and the state seem to be inseparably connected. The law is the manifestation of the state's supreme power. Yet according to Bourdieu (1986), the law is not just a mere reflection of the state's power but is something of its own entity. While the state derives power from its authority of the law, many times the law and the state are in direct opposition of each other. This concept will be explore more in the following chapter.

## Conclusion

This chapter explores the relationship the attorneys at the clinic have with the type of law they practices. Throughout this chapter I explored the type of approach to the law the lawyers took which was self-described triage approach with a substantial amount of clerical work. I then looked at the humanitarian aspect of their work with refugees and how that affects their perceptions and the type of work they do. Lastly, I looked at how the type of law the practitioners use to serve refugees is in direct opposition to the state, while also reinforcing the state. The clinic derives its authority and right to work from the misdeeds of the government and continues to grow as the transgressions of the state become more frequent in number.

These factors give us a small glimpse of the relationships between the lawyers and the type of law they practice. Law is more than a set of rules and obligations but also linked to the regulation of social life. "The law creates images of social relationships that seem natural and fair because they are endowed with the authority and legitimacy of the law" (Merry 1992, pg. 361). In this instance, the law has created a relationship between the lawyers/students and migrants seeking assistance. These lawyers and students have been endowed with authority and legitimacy of the law. In the next chapter I will examine how the contrasting and sometimes similar relationship the migrants have with the law and the type of services they are receiving at the clinic.

## Chapter 3: Migrants Perceptions of the Law

Fatima is a refugee from Somalia. She left Somalia 13 years ago, and joined her husband in South Africa who had left three years previous. They had fled violence and persecution in their own country. After she initially applied as an asylum seeker, to be considered as a refugee, every three months she would renew her asylum seeker permit, waiting for an interview. It took three years to get an interview with the right personnel. After the interview, she was granted refugee status. She renewed her refugee status about five times. In 2010, her husband had received permanent residency. She and her four kids applied for permanent residency under his file. As they were applying, an officer at Home Affairs said she must produce a police clearance from her country of origin and her birth certificate. She explained to them that she doesn't have those things and hasn't been home in many years. They insisted that she must bring those documents. At the time, she had an aunt who was travelling from Somalia to South Africa. She asked her aunt to bring the documents. She procured the documents and applied for permanent residency. Later that year, all four of her children received a permanent residency permit but she received a rejection letter. They questioned how she was able to get the birth certificate and police clearance from Somalia if she was a refugee and wasn't allowed to leave the country. They accused her of crossing the border illegally and leaving the country.

After this incident, she sought help from a legal aid clinic in Johannesburg. They wrote a letter to Home Affairs, explaining how she came in possession of the birth certificate and police clearance. To this day, they have not received a reply. They changed strategies and told her to apply for permanent residency as an individual, based on her refugee claims and not under her husband and children. But she became dissatisfied with the legal aid office and opened a file with the Wits Law Clinic. Below is her response when I asked why she changed legal aid offices:

> Because they didn't do nothing for me. They didn't help. They never even contacted me, you see? I went and I checked. We are still waiting from Home Affairs. By email, you see? When I ask now the (Wits) Law Clinic when I came. It's different. It was another student, girls, at least they have been contacting me and calling me you need to do this and this. Like they were communicating with me, you see? I feel like they are helping me better at the Law Clinic. So I never go back to them. They just wait for an answer. So if some lawyers are going to go by face to face, by office you know, you find out everything until the truth, its

> better. But by sending email and no reply and there is no answering. I can't waste my time to go there all the time (Interview 11, pg.3 )

Fatima had been waiting a long time for a reply from the Home Affairs and was discouraged by the previous legal office's efforts. She found solace in Wits Law Clinic. It is not that they were able to receive a reply quicker (or at all) but that they were quick to communicate with her.

While the previous chapter dealt with how the lawyers saw the law and their work within it, this chapter will focus on the migrants experience with the law via the law clinic. It will explore ways in which migrants perceive the way the law should protect them. This includes discussions on human rights and civility. Second, this chapter will address the hope that migrants have in the law, despite their being caught in a 'legal limbo' (Coates & Hayward, 2005). Many migrants find themselves caught in cases that sometimes are open for years without resolution. Lastly, it will look at the ways in which they interact with the law, namely in a bureaucratic form. This includes letter writing, calls, appointments, making copies, etc. These mundane activities are the practices that sustain the hope that migrants have within their legal limbo.

This attempt to understand the perception of the law is an approach of looking at the law from below. Polzer (2007) describes what looking at the law from below entails:

> Looking at the impact of law and policy from below means paying attention to a range of factors rarely considered in the analysis of formal law. This includes considering the interstices between formal policies, the impact of changing policies over time, local interpretations of the labels and categories imposed by law, and the agency of those affected by law to subvert, oppose and evade it. (pg. 23)

By understanding the law from below, from the client's perspectives, we are able to see a clearer picture of the impact of the law on their lives.

## Section 1: Perceptions of the Law

Fatima had a very distinct vision on how the law should treat her fairly. She had been trapped. Home Affairs had asked her to deliver a document yet when she delivered that document it was used against her. She felt it was very unjust that she had been caught in this dilemma of the birth certificate. She and her husband had lived peacefully and didn't receive handouts from the governments. Katlyn, a refugee from the Democratic Republic of Congo (DRC), expressed a similar sentiment. She is a single mother of seven children. Although she has been able to

successfully receive refugee status and then permanent residency, her oldest child had still not be able to obtain refugee status. She has come into the Wits Law Clinic many times to try to merge her son on her file at Home Affairs. She has received much push back during her stay in South Africa for being a foreigner. When I asked how adequate the legal assistance was, this is how she responded:

> Actually we don't have legal assistance. I don't want to get anything for free but for me to have the power to continue, I need some protection. To the stuff that I get, they mustn't take it, like they take it for free. South Africa shows like we are nothing because we are foreigners that come from outside, we don't deserve to have something, even to work for ourselves… On top of that, when you go to the office, if you show the paper like you a foreigner, they neglect it. Why? I'm also a human being especially if I have responsibility, I have a family. I don't say I need people to give me anything for free, I work for it. I have to find some protection to help those who come after me (Interview 5, pg. 6)

Among the interviews with the migrants there is a prevailing sentiment that they work for what they earn and they don't want anything for free. As Katlyn points out, they want to be treated like human beings. This idea fits into a justice ideology, or what these migrants are determining to be fair and right.

In Merry's (1986) article, she describes the way working-class American's perceive the law. She points out the fact that there seems to be a divide between how the elite views the law and these of the working class. She refers to this as ideological pluralism. "The view of the law held by these working-class individuals is hardly a simple reflection of the legal ideology produced by a dominant elite. It is a negotiated, constructed reality developed in local social settings through repeated inter-actions, not a faithful replica of the dominant ideology" (pg 255). The legal ideology held by the working class is shaped by their settings and their interactions. The same applies to the migrants seeking help at the law clinic. Their perception of the law is a reflection of the setting and their situation. Many migrants have stories of being mistreated by the police, government offices and the public in general because they are foreigners. And there is a widely believed conception that South Africans are hostile to foreigners because they are afraid they will steal South Africa's resources (i.e jobs, healthcare and education). It is against this socio-political background that migrants are situating their view of justice and what it means to them.

In talking about what is fair and just, Katlyn recounts a story of her former landlord. Her landlord had promised to repair parts of the house before they moved in but when they moved in they found none of the repairs. Throughout her stay there were many disagreements about the condition of the house. He eventually cut off the electricity and then removed all their furniture from the house. Katlyn was furious and felt like she deserved justice. On several occasions, she went to the police and the housing authority but neither entity were of much help to her. She sought recourse through a lawyer at ProBono.org, an organization that outsources lawyers for free legal aid to qualifying clients. She believed the landlord's neglect and mistreatment were fueled by his dislike of foreigners in South Africa. "How can I pay someone who cuts off my electricity? …It was unfair because I had to stop going to work so I could start going to the offices. I've been working and going to the tribunal, the lawyers. I've been going there but still no one calls him. That man was even saying 'I will show you that I'm a South African.' That was not fair. That was not" (Interview 5, pg. 6). Katlyn's idea of justice and view of what is fair is negotiated and qualified by the facts that she views herself as an upstanding person, who works, provides for her children and pays her bills. A prevailing sentiment among citizens is that migrants come to South Africa to steal their jobs and social benefits. Katlyn is using her rhetoric to fight against this popular attitude.

Merry (1986) discusses the difference between situational justice and formal justice. Formal justices is the ideology that all citizens (and in this case persons) are bearers of rights given to them equally by state. In this sense, all persons are equal before the law, despite their character and behavior. Situational justice is the ideology where, "the person is socially constructed by his or her history, character, rank, and social or ethnic identity. Behavior is judged in terms of customary standards is presumed to exist for such persons" (pg.258). With this interpretation of ideologies of justice, Katlyn's sense of justice is situated by her good behavior and contribution to society. In her view, this is why she deserves to be treated fairly because is not a social parasite but works for the things she gets. Other clients' understanding of justice followed along the same lines, with many justifications for why they should be treated equally. On the opposing end, how migrants and refugees are treated by South Africans and civil and state services can also be seen through this ideology of situational justice. Migrants and refugees are perceived to be lower-class in social and economic ranking, and are deemed less deserving of justice and rights then a deserving native citizen of South Africa.

Although it cannot be said that situational justice is the ideology of all the clients. Even while holding that how she has been treated is unfair because of her behavior, Katlyn also invokes the idea of formal justice or universal justice, when she says "I'm also a human being." Although she qualifies the same statement by stating, "Especially because I have responsibility, I have a family." Implying she is more deserving because of her responsibility. Paul, an asylum seeker from DRC, had previously sought help at Lawyers for Human Rights (LHR) but became disgruntled as they refused to continue helping him and his sister. They had applied for refugee status and been denied. They then appealed with the help of LHR but were rejected. After that, the LHR told them there was nothing more they could do for them. Paul and his sister then came to Wits Law Clinic in hopes of help. When Paul and his sister were talking to me, they were upset about their experience with LHR. They found it disturbing that they called themselves Human Rights but didn't believe in human rights. "Paul: That is what we are saying, why? It's a human right to help refugee so why you can't they help the people. They say this is not a matter we can help you with, just go" (Interview 6, pg. 3). This appeals to a global ideology of justice. "It's a human right to help refugees." In other interactions with migrants, they refer to the UN as needing to help them and that South Africa needs to follow the UN. In these particular instances, where formal justice is the ideology, they cannot look to rights as citizens because as migrants they are not privy to them, but they can invoke a global citizenship by referring to a global governing body, such as the United Nations. This global sense of justice is being used in opposition to the situational justice ideology of the South African public noted earlier. It is rhetoric used to negotiate inclusion within the law despite a hostile and exclusionary environment.

These ideologies of justice help invoked a sense of hope in their situation, which is a legal limbo. The next section explores more this hope that these migrants find in a seemingly desperate situation.

## Section 2: A Sense of Hope from the Law

This section will focus on the hope that migrants derive through their experiences with the law, despite their precarious state.

> Jacob: Right now, as you can see I'm tired. I walked a lot with those lawyers. Going to all the appointments. The lady was phoning me, writing to me, and

> explaining everything to me. I am always tired. I'm hoping they can help me and if they can't I don't know what to do. Maybe I'll find myself in jail. Or I will kill myself because I'm at the end of my life. I'm just praying so that they might help me (Interview 3, pg. 6)

Jacob is a young asylum seeker from DRC. He had been with a lawyer from ProBono.org previously. Like Paul, they told him that there was nothing more that he could do for him. Jacob had been initially rejected for his claim for asylum. He appealed and was interviewed in front of the Refugees Appeal Board with his lawyer. After six months, he went into Home Affairs to check the progress of the decision. They took away his asylum seeker permit and gave him a letter to go to the Director- General of the Department of Home Affairs. He found out from his friends that that letter is essentially a letter for deportation. He called his lawyer, asking what they should do. His lawyer called him later and explained that they had rejected him and said there was nothing more he could for him. In the quote above, Jacob is describing his frustrations with the services he got from the lawyer from ProBono.org. In addition, in this quote he describes his desperate feelings towards having his case rejected. When I met with Jacob, this was his first visit to the clinic. He maintained a hope in the possibility of the Wits Law Clinic using the law to help his case. Despite his feelings of loss at the possibility of being deported, he had hope that the law would support him.

During my interview with Jacob, he brought up the fact that he was a student. "Because first of all, I'm a student. I don't see why they have to reject my case or deport me. It's impossible. I'm a student, they have to understand that I'm a student. They must understand that I have to finish my schooling" (Interview 3, pg. 3). His view of his own right to justice (or the right to stay in South Africa) was qualified by the fact that he is a student. He believed that this reason, out of the all the reasons to stay, invokes certain rights. This situational ideology of justice also gave him hope that because he is a student he will be able to obtain his desired end.

Looking back at Fatima's experience with the Wits Law Clinic, she finds hope in the progression, in the administrative tasks of the law student. Although she remains in a limbo stage with no perceived end to her problem, she hopes, feeling the law is on her side and can support her. It is though these mundane tasks that she sustains her hope- a hope grounded in the possibility of progression. The next section will detail the kind of administrative tasks that are

performed at the Law Clinic that perpetuates the feelings of hope and progress for migrant clients.

## Section 3: Bureaucratic Forms of the Law

In the quote from Fatima at the beginning of this chapter, she mentions how she has felt the Wits Law Clinic has done more for her then the other legal aid office because the students at Wits called her, made appointments with her and wrote letters. On that very day of our interview, she had just come in to give her clinic card so they could photocopy it and put it in her file. This would help with proof of her youngest child's birth in South Africa, as she had not been able to procure a birth certificate from the Department of Home Affairs. These routines and administrative tasks the clinic engages in with Fatima give her a sense that something is happening, even though it still moves at a very slow pace.

The majority of the clients I saw had come in for an administrative task with the lawyers. Only one client was being prepared for a trial the next day. Yet to get to that point, the lawyers had written to Home Affairs on several occasions and with no response and no outcome and the matter being very serious, they made the decision to litigate. Others came in to have their documents photocopied or to pick up a letter written by the lawyers. One man, Marcus, had come in that day because he needed a letter from the lawyers. His refugee papers had been stolen a while ago and he was not able to get a new set from Home Affairs. He was applying for permanent residency with the help of the Wits Law Clinic. Marcus has no documents to show his validity of stay in the country, although he does have a refugee number. He carries a letter from the Wits Law Clinic saying that lawyers are working on applying for his residency permit. He needed a new letter, as the previous one had expired. The lawyers are helping him by requesting the contents of his file (through a letter) and assisting in applying for permanent residency. The lawyers (and law students) main service to their clients is administrative.

Here, Neil describes the bulk of the work done by the law students:

> It entails basically running the show- dealing with clients, calling clients back, doing whatever clients need. And obviously we supervise things but the ball is in their court, to an extent that they've got to go and deal with these things. Yeah.

> So it entails liaising with clients, drafting whatever needs to be drafted and obviously to do that then entails a to and fro process. They'll draft and then we'll mark, give them input so that they learn by doing. That's pretty much how this whole clinical model is based. Then they deal with the clients, whatever the issue is. So if it's an ID that we need, they will draft a letter to Home Affairs and then send them out and wait for the response. If nothing happens then we look at escalating and litigating. But obviously this process is slow and drawn out. With the students and we've only got limited typist here (Interview with Neil, pg.1-2)

Perhaps it is no surprise that a large portion of the legal process happens outside the courtroom (see Abel 1982; Merry 1990). Mediation and administration play a large role in the legal system. The system of the Wits Law Clinic (and perhaps most public interest firms) is fairly bureaucratic. Often bureaucracy is associated with state entities and corporate organizations. Max Weber (2006) explains the power of the state lies within the bureaucratic system. A key importance of modern states is its bureaucracies. These bureaucracies maintain social order and inhibit social change. Perhaps the bureaucracy experienced at the Wits Law Clinic differs from the state systems, and it is certainly viewed by its clients differently. While the process is "slow and drawn out," as Neil explains, clients still find this activity productive and to their benefit. Some prefer the motions and tasks as a symbol of progress in their case.

Although the services provided at the clinic are somewhat mundane, most clients are still able to derive a sense of hope from the process. The contents of the letters that are sent are not the symbol as hope as much as the fact that the letter is sent. It feels as if things are moving and there might be an end in sight. The letter becomes a sign of hope and incision in the long and uncertain passing of time. This letter also asserts authority, as Weber pointed out that power can be derived by bureaucratic practices. And perhaps this authority is also a catalyst of hope, or it solidifies the hope because of the power of the act.

## Conclusion

This chapter explores the ways in which the migrants perceive the law and how they interact with it. There is a sense that the clients believe that the law is working for them. Their ideas of justice and what is fair is most easily described using Merry's definition of situational justice, "Situational justice is closer to the clients' commonsense understandings of justice, in that rights are viewed as embedded in social relationships and situations rather than as abstracted from

them" ( 1986, pg. 258). With this view of justice, migrants are able to negotiate a sense of justice that favors their circumstances and supersedes the harsh realities they experience in South Africa's society. The realities of the services they receive from the law clinic are quite mundane and bureaucratic. This is in contrast to the heroic and lively perceptions of law known through media and pop-culture. But these interactions seem to satisfy clients and engender a sense of hope in the progress. This is despite the limbo many migrant clients face, being trapped in a legal immigration battle that might last years.

In this chapter, public interest law has been made to seem friendly and hopeful. The next chapter will deal with the question of if public interest is enough to be successful next to the powers of the threatening state.

## Chapter 4: Adversarial Law

> I came here because I applied in 2011 for my ID after but a year and four months, they suspended it. They suspended it and said no because they had misspelled my surname. After that they called me into Home Affairs. I then showed them the document and proof of my surname. I had to apply again. After that, they suspended it again. After that, I went again, they suspended it again. This happened three times (Interview 10, pg. 2)

John had opened a file with the law clinic because Home Affairs had misspelled his surname. Because of their error, his file was continually suspended. He had come to the Law Clinic in October 2013 to help rectify the situation. The attorney had written a letter to Home Affairs but had received no response. They were now preparing to take Home Affairs to court that week to order them to deliver the document. John, a refugee from the Democratic Republic of Congo (DRC), has been engaged in a waiting game with Home Affairs long before this matter. He had arrived in South Africa in 2001 from the DRC. He applied for an asylum seeker permit, which he renewed multiple times before he was interviewed and given a refugee permit. He renewed his refugee permit three times and then applied for permanent residency in 2010. Shortly after receiving his permanent residency, he applied for a South African ID but has not yet received it. Although relatively successful in his pursuit of a refugee permit and then a permanent residency permit, John will admit that it was very tiring process and very long. During his time of waiting for the next step in this process, he has suffered many setbacks. An ID might be the last step in his process for legitimacy.

In South Africa, an ID is a daily essential. It is necessary in obtaining a bank account, a driver's license and other general day-to-day tasks. Refugees without an ID suffer many setbacks, although an ID is not legally necessary in all those areas. In John's specific case, his wife had passed away a few months earlier. His wife was a South African and when they bought their house, they put it in her name because she had an ID. Now the bank was interested in changing the ownership to John's name but could not do so without an ID. John is stuck. John seeks out help with the law through the Wits Law Clinic. He has hope that the law will help him, that despite the wait, he will eventually be ok. However the legal process and administrative malfunctions of the state forces him to interact with the state and legal professionals. We are terming this the adversarial side of the law. On all accounts, John will be able to win the suit

they bring against Home Affairs, with Wits Law Clinic asking for a timely delivery of the identity document.

The Wits Law Clinic- Refugee Unit is mostly in opposition to the state entity of Home Affairs, often citing them with infractions of delivering timely services. And while the law appears to be on the side of the migrant in most of the cases surveyed in this study, the state plays a powerful role in the way justice is administered. The South African state and citizenry is known for being hostile towards outsiders. The government of South Africa is known to pass xenophobic policies and laws. Vigneswaran points out that "exclusion is a basic practice of South African governance, the essence of the state itself" (2011, pg. 150). So it is no surprise that the police have been characterized as brutal and militant towards non-nationals. This type of brutality and militarization of the South African Police Service (SAPS) is embedded in the history of the apartheid. Landau makes a clear linkage between the state practices of post-apartheid and the lingering toxic sentiments of the apartheid government, "I direct my gaze to three facets of contemporary South African society that resonate with past political order and internalized social norms: the demonization of outsiders and human mobility; ineffective, arbitrary, and often extra-legal efforts to ensure socio-spatial separation; and the state's inability to effect a post-1994 national rebirth" (2010 pg. 218). Although the Constitution of South Africa is fairly liberal and friendly towards immigrants, these facets continue to shape the state's response to migration and mobility within South Africa.

This chapter will address the space these migrants navigate through as they wait for status determination, their ID or for the next move to be made, pushing them closer to becoming a legitimate presence in South Africa. Some of the migrants interviewed are undocumented, some recognized refugees and others formal permanent residents but all are waiting for more documents to legitimize their stay in South Africa. During this process of waiting they face many challenges and often their rights are ignored by a hostile state. They are essentially reduced to a kind of 'bare life', a concept introduced by Agamben & Heipko (1998) in their work on state of exception. In everyday practice, the state treats migrants as exceptional, and uses extra-legal measures in their conduct towards these migrants- as seen by the accounts of discrimination by Home Affairs and the police. All the while being given certain rights and entitlements by the law. This chapter will explore the legal limbo the migrants experience while

waiting for more legitimacy and it will explore the exceptionalism that the state uses with these migrants and their experience in this 'indefinite detention.'

## Section 1: Trapped by the state- state of exception

I met Marcus on my first day of interviews. I had been sitting in the waiting room, waiting for an opportunity to speak with a client. I was apprehensive at first to approach anyone, as I wasn't sure how someone would react to being asked to be interviewed. Marcus sat on the bench opposite to me. He wore jeans and a button up shirt. He was carrying a blue file folder. I stood up and sat next to him. I explained to him my purpose and asked if he wouldn't mind being interviewed. He happily agreed. I took him through the doors that separate the waiting room from the cubicles and we sat in a cubicle a few down rows down. Just as we were being seated, Neil, a lawyer, stopped at the door of the cubicle and greeted us. Marcus excitedly stood up and shook Neil's hand. They exchanged greetings. Marcus told him he was just going to see me and then he would come and see Neil, eager to let him know his name was in the book and he was at the top of the list. Marcus had been coming to the law clinic for a few months and was very familiar with the process. In 2008, his refugee permit had been stolen, along with many of his possessions. He had tried to recover the lost document from Home Affairs, and Wits Law Clinic had tried to assist him. They were now working out another way he could obtain documentation.

Marcus describes multiple incidences where he had been harassed and arrested by the police. He tells me the following story, "One day I called the police because there was a fight and I was there, but I wasn't involved in the fight but I felt I had to call someone and then I called the police. They came and then at the end of the day I end up by being in trouble because I didn't have my paper with me" (Interview 1, pg.6). Marcus has called the police because he had imagined that the state could be helpful to his situation, despite his being a foreigner. Yet this helpful state that was supposed to help him ends up turning against him. This is the very power that was supposed to protect him. To use Butler's (2006) term, the police were acting as 'petty sovereigns'- an officer of the state who acts in the name of sovereignty These 'petty sovereigns' embody state power, but act according to their own rules (in extra-legal ways) and are setting up their little (petty) sovereignties within a state that is overall pretends to be bound by the law. Marcus then describes being held at a prison for nearly four months for not having proper

immigration documents before letting him go. Although, he was supposed to be held at a detention centre for being undocumented, he was held at a prison. This case illustrates the kind of exceptionalism that everyday state officials engage in when dealing with migrants. This idea of exceptionalism comes from the idea of state of emergency. A formal declared state of emergency, usually enacted during times of warfare and emergency, allows state governments to act outside the law in efforts to protect the national order and law. Agamben & Hiepko (1998) uses this concept to expand on the idea of 'state of exception.' "Agamben argues, however, that when this control is threatened, the true sovereign can break from this uniformity and declare a 'state of exception'. Under such conditions, the state authorizes its agents to act outside the law in an anomalous zone where they retain the power of law, but are not constrained by it" (Landau, 2005, pg. 328). Commonly referred to examples of these state of exceptions are seen in camps such as Guantanamo Bay and refugee camps. These are camps are set inside the jurisdiction of a nation-state but where the inhabitants of that camp are not given the same privileges and rights of those that occupy the actual nation-state. South Africa differs from these other models, as refugees and asylum seekers are not isolated in a certain area but are free to settle where they choose. But its practices through state departments demonstrate an exceptionalism for migrants. South Africa fears that unwanted migrants will threaten its control, and breaks from its normal governance to a state of exceptionalism.

John also relates a story of when he was new to South Africa,

> During the time I was still new to South Africa, I had only been in the country for two to three years. Sometimes the police would arrest me. They asked me for this permit that is for two years, and then they would tear it up. And then they would lock me up. This happened because I didn't know how to speak English with them. Now they can't arrest me because I know my rights (Interview 10, pg 4)

He tells me that he had been arrested and taken to jail. But his friend was able to bring a copy of his permit and they released him. Stories of tearing up permits and violating the rights of asylum seekers and migrants abound. Landau further explains South Africa's exceptionalism to migrants, "immigration has become a perennial and irreversible feature of South Africa's post-apartheid urban landscape. South Africa's exceptionalism is consequently far less delimited and targets people residing in its economic and political centres. In doing so, the state's extra-legal responses not only affect both non-nationals and citizens, but also risk being institutionalised in

essential state agencies and departments" (2005, pg. 327). Landau refers to these extra-legal measures being institutionalised within government entities. It does not only exist in the police encounters, but with encounters with Home Affairs. Interviewed migrants talk of being turned away or their permits being torn up at the counter. At health clinics, one refugee told me she was made to wait until the last South African had been seen, even though she had come very early in the morning. This discrimination goes beyond state institutions, and seeps into the private sector. Several migrants complained about not being able to open bank accounts without an ID. Legally, a refugee has the right to open a bank account, even without an ID (as IDs are only allocated to permanent residents and citizens). Yet banks have restricted access to bank accounts for refugees.

These exclusionary practices towards refugees and asylum seekers are proof of the practices of state of exception the South African state uses towards undesirable migrants. Hansen and Stepputat further elaborate on how migrants seem to threaten the state. "Ethnic mobilization, separatist movements, globalization of capital and trade, and intensified movement of people as migrants and refugees all tend to undermine the sovereignty of state power" (2001, pg. 1-2). South Africa perceives migration and refugees as threatening their sovereignty and thus enact a state of exception towards them to protect their power. Although by law asylum seekers and refugees have a right to be in South Africa and the right to access services, their legitimacy is questioned and their rights are suspended through arbitrary and informal but everyday kind of state practices. This creates a space of liminality, a kind of indefinite detention, which will be explored in the next section.

## Section 2: The waiting game: Indefinite Detention

> Fatima: I have had refugee paper for four years, but I can't do anything. You see, its like I'm locked up in a prison here in South Africa for the past 13 years. I can't even go to Mozambique. Because then they are going to want a passport, and I don't have one. And I'm not even able to get a refugee ID or a travel document. Those things help a person to get around. My kids also want to go to Zambia or Mozambique for holiday. They have never gone for holiday in their lives. My son is 13 years now, he has never gone out of South Africa. He doesn't have his birth certificate and he doesn't have his passport (Interview 11, pg. 4)

Fatima describes her dilemma as a refugee in South Africa who is stuck in a legal process that, seemingly, does not end. She moves from getting her refugee document, to getting her permanent residency, and after that she will try to procure her identity document. The process could take years and has already taken her the 13 years she has been in South Africa. Fatima describes herself as being in a prison. While she remains free in a literal sense, with the freedom of movement in the country and the freedom to live with her family, she is symbolically in prison. Her rights have been constricted to such that she does not feel free. She is in a space of indefinite detention.

Judith Butler (2006) writes about indefinite detention in her book, *The Precarious Life: The powers of mourning and violence.* She describes the detention of prisoners in Guantanamo Bay after September 11th. These prisoners were not given rights of prisoners of war and were excluded from the right to trial, right to legal counsel and the right to due process. These things were done in the name of the state of emergency- to protect the national order. But these prisoners were held indefinitely and thus their right to, "the protection of law is indefinitely postponed. The state, in the name of its right to protect itself and, hence, in the name of its sovereignty, extends its power in excess of the law; for if the detention is indefinite, then so, too, is the lawless exercise of state sovereignty. In this sense, indefinite detention provides the condition for the indefinite exercise of extra-legal state power" (Butler, 2006, pg. 55). This is not to say that all migrants who come into South Africa have entered into an indefinite detention, comparable to the inmates at Guantanamo bay. This indefinite detention is more symbolic. It is reserved for undesirable migrants, like asylum seekers and refugees, stuck in an indefinite legal process to obtain legitimacy and subject to the state's 'indefinite exercise of extra-legal state power'.

Butler cautions that this indefinite detention means that the state's use of exceptional power is also indefinite. "Although the justification for not providing trials, and the attendant rights of due process, legal counsel, rights of appeal, and so on, is that we are in a state of national emergency, a state understood as out of the ordinary, it nevertheless follows from the practice of indefinite detention that this extra-legal power of the state will be extended indefinitely as well" (2006, pg 60). As long as a migrant remains illegitimate, they also remain in detention, being subject to extra-legal measures carried out by petty sovereigns, such as police office and Home

Affairs officials. Illegitimate in South Africa does not mean the same thing as undocumented or illegal. A migrant can have proper refugee status, with the right to reside in South Africa but still be treated as an exception to the law. Yet despite these harsh realities, the next section will explore how these illegitimate migrants negotiate this indefinite liminality.

## Section 3: Tactics of liminality

The state of being in indefinite detention requires tactics for migrants to move around and survive. Marcus illustrates his own strategy:

> Currently right now, I'm working behind other people. At that time when I had my papers, we registered our business. We had a business that we registered. So now I'm surviving behind that registered company. Because of that company, it's easy for me to get money and do other things. And when I have to rent a house, I have to go through someone who has an ID or a passport to use the name but it's me who is paying (Interview 1, pg 3)

Marcus, who has been without proper documents since 2008, has found ways to maneuver through the indefinite detention that he finds himself in. He is able to work, rent and maintain his lifestyle. Although, as he states, it is not a life. Other migrants I interviewed detailed ways they survived. One migrant spoke about using a particular man he had met at church. This man paid his rent and his school fees. Although this migrant lacks proper documents, his support system manages to keep himself safe, despite the threat of the state exceptionalism. For many that lay within this indefinite detention, the only way to survive is within informal zones of life. This is through social networks and other informalities.

This state exceptionalism towards migrants means that migrants are often subjects to illegal harassment. "Increasingly, however, these measures create a category of people who are extra-legal: who live in a realm that is beyond the law. In this zone, they are a priori denied the rights to appeal and legal representation granted to common criminals. They are instead subjected to states' unbridled and potentially arbitrary power" (Landau, 2005, pg. 330). There Landau describes the consequences of the space of indefinite detention that many migrants are abiding within. In that space, migrants are subject to the states' 'unbridled and potentially arbitrary power.' This can be seen in examples of migrants seeking help at the law clinic. John has been denied an ID from 2011 because Home Affairs has misspelled his name. This is an arbitrary

bureaucratic problem that was inflicted upon him by a state entity. And while seemingly simple, it has prevented him from full legitimacy and has prolonged his stay in this detention, not being able to fully realize his rights.

Yet, despite the realities of living in this realm beyond the law in the presence of a violent state, migrants survive, work, move around and are able to resist. Some have developed tactics and strategies to survive in their liminal state. In Landau and Freemantle's (2010) piece on the tactical cosmopolitanism, they claim that immigrants in South Africa use rhetoric of cosmopolitanism as a way to negotiate inclusion that goes beyond a nation-state paradigm. This was also seen in the previous chapter. Participants negotiated a global sense of justice, based on a global citizenship- as they had been kept out of the rights of South African citizenship. This portrays an imaginary weak state formed by the immigrant cosmopolitans. This weakening is a reaction to the experiences found in the interactions with the state, a state with a "harsh immigration regime" (Landau & Freemantle, 2010, pg. 375). The encounters with these banal powers, "not only shape people's imagination of what the state is and how it is demarcated, but also enable people to devise strategies of resistance to this imagined state" (Sharma & Gupta, 2006, pg. 17). These strategies can be seen as the negotiated inclusion to a state that is otherwise exclusionary.

## Conclusion

This chapter has moved from migrants experience with the law to the migrants experience beyond the law. While migrants are accessing legal help from the law clinic, they face real challenges in their everyday living that make it a struggle to survive, despite their right to stay in South Africa or their possession of the proper documents. In writing, the Constitution, the Immigration Act and the Refugee Act may shield them from certain misdeeds and entitle them to some basic freedoms, in reality the South African state supersedes these laws. The South African state practices a kind of exceptionalism towards certain migrants. This state of exception allows migrants to be harassed and to be denied certain rights. Examples were made of the harsh treatments experienced by some of the interviewed migrants at the hand of the police and Home Affairs. This state of exception for migrants creates a symbolic prison for many. Migrants feel as if they are detained indefinitely. Yet despite these harsh realities of a migrant's

long road to legitimacy, most migrants are resilient. They invoke tactics and strategies to help them negotiate the harsh realities of everyday living in South Africa.

In Marcus's story, he described how he had called the police for protection only for the police to come and arrest him. The law was supposed to protect him. The chapter on public interest law and the chapter on migrants' perceptions on the law have shown how the law via the Wits Law Clinic has tried to protect these migrants. But in these instances recounted in this chapter, people who are supposed to be law enforcers (petty sovereigns) often act outside of the law and turn the law against the migrants. This produces a sense of living in a state of exception. In this state of exception life is not possible, at best survival. Life only seems possible in living beyond the state or outside the state through forms of informal modes such as keeping the head down, avoiding the law or the police. In this sense it remains remarkable that these migrants again and again continue to believe that the law, in the form of the Wits Law Clinic, can do something for them.

## Chapter 5: Conclusion

This study sought to answer the question about migrant's relationship with the law. Specifically within the context of Johannesburg, the study displayed how migrants access the law through the Wits Law Clinic. Through a study of refugees and asylum seekers seeking justice at the Refugee Unit at Wits Law Clinic, this study was able to scratch at the surface of the relationship that is created through the migrant and the law.

I used literature located within the field of legal anthropology and anthropology of the state to build a lens in which we could understand the law and the state in everyday lives. Understanding the ideologies of the law helps us understand how it derives it power. The law, like the state, is not stagnant nor is it omnipotent. The legal field, like other social fields, possesses its own habitus where the realities of the law differ from the cannon of the law. Imageries of the law are shaped by everyday interactions. This is where I come to the understanding that there are different ideologies of justice that are negotiated by these everyday interactions. To get at these nuances, it is important to engage is a study of law from below. This study of the law from below gets at these nuances and helps us to understand the legal consciousness of everyday individuals. Understanding the anthropology of the state links up with the theory built around the law. The state derives power from its rule of law but can also be in opposition to it. This is explored more thoroughly in the idea of state of exception and the exceptionalism that is geared towards certain groups. This literature framework has helped us dissect the relationship between the migrant and the law with greater clarity.

The primary observation from this study is that migrants are stuck in a legal limbo. Many migrants have been in a legal battle that has lasted years. One example was made of a participant who had his ID taken away in the1990s and is still without documentation but has been attending a law clinic since that day but to no avail. Others possess the legal documents to reside in South Africa and are afforded certain rights to work and move, given to them by the Constitution and other policy documents. Yet the South African public does not regard them as legitimate. As such, they face xenophobic violence and discriminatory state practices. That is why participants invoke a universal justice ideology, qualifying for justice because of their global citizenship. Yet, I showed from research data that participants are still able to find hope within their legal limbo. The majority of the work done on the migrants' cases is administrative

and bureaucratic but these mundane practices sustain the hope and are a symbol of progress for those in this precarious state of indefinite detention. Despite their hope in the law and their beliefs about justice, migrants still face adversity through the state while in their quest for legitimacy.

Being in a legal limbo in South Africa creates a kind of indefinite detention for migrants. They face an exceptionalism to the law at the hands of officials and the community. This is seen by the way Home Affairs, the police and different entities of the government treat migrants. Despite these challenges migrants survive and are resilient. And perhaps more importantly, migrants are able to create hope within this limbo through their interactions with the law at the Wits Law Clinic.

In this study, the migrants' main access to the law was through the Wits Law Clinic. These lawyers acted as gatekeepers to the law and facilitated their access to justice. The role of the lawyers was important in sustaining hope even through the mundane activities that dominated the work of the law clinic. While the lawyers knew their reality of the work they did, they invoked a humanitarian sentiment. The interesting thing about their position is their clinic comes from a strong tradition of public interest law within the anti-apartheid government that assisted to usher in the new South Africa. Yet, their work now with the refugees is busy and full because of their opposition to the state practices, mainly the administrative errors of Home Affairs.

There are two types of limbo that migrants go through in this study. The first is the limbo they face while waiting for status determination or legitimacy. This is the limbo that migrants find hope in. Hope keeps them within this limbo of the law because migrant believe that the law (or their legal assistance with the Wits Law Clinic) will bring them closer to breaking through there adversarial limbo. This limbo is the indefinite detention described in Chapter three. This limbo is the kind of bare life that the state has migrants lives in. These liminal stages, while adversarial and hopeful, help us to understand the kind of relationship the migrants have with the law.

These observations and analysis have covered some gaps in literature around liminality and the law. It addresses how migrants sustain and negotiate through their pursuit of legitimacy through the law through the help of gate keepers. It is a small study but says something significant about the law. However, there remains a gap of literature on liminality and the law. The process of

waiting for a decision and going through the court process that can take years and sometimes can remain unresolved. This is especially significant with refugees and migrants as they face many adversities within the state, despite their legal status. It is as if citizenship is the only real legitimate status protected by the law. Further research could be done to explore this topic of liminality in the law and migrants and their journey to legitimacy. The limitations of this study were such that ethnographic details were limited and time was cut too short. Another complimentary study with more freedom to collect ethnographic detail and view the interactions between client and lawyers with a longer timeline would produce results with more depth and clarity. Another study might yield answers that are different, and of course another researcher would produce differing results.

## References

2014 UNHCR country operations profile- south africa. (2014). Retrieved 02/09, 2014, from http://www.unhcr.org/pages/49e485aa6.html

Abel, R. L. (1982). *The politics of informal justice* Academic Press New York.

Abel, R. L. (1995). *Politics by other means: Law in the struggle against apartheid, 1980-1994*. London: Routeledge.

Agamben, G., & Hiepko, A. (1998). *Homo sacer* Pre-textos Valencia.

Amit, R. (2011). No refuge: Flawed status determination and the failures of south africa's refugee system to provide protection. *International Journal of Refugee Law*, *23*(3), 458-488.

Amit, R. (2011). Winning isn't everything: Courts, context, and the barriers to effecting change through public interest litigation. *South African Journal on Human Rights*, *27*(1), 8-38.

Bourdieu, P. (1986). Force of law: Toward a sociology of the juridical field, the. *Hastings LJ*, *38*, 805.

Bruce, D. (2013). The police at war once again. Retrieved, 2013, from http://www.sacsis.org.za/site/article/1590

Butler, J. (2006). *Precarious life: The powers of mourning and violence* New York:Verso.

Coates, T., & Hayward, C. (2005). The costs of legal limbo for refugees in canada: A preliminary study. *Refuge: Canada's Journal on Refugees*, *22*(2)

Comaroff, J., & Comaroff, J. L. (2001). Naturing the nation: Aliens, apocalypse, and the postcolonial state. *Social Identities, 7*(2), 233-265.

Comaroff, J. L. (2001). Colonialism, culture, and the law: A foreword. *Law & Social Inquiry, 26*(2), 305-314.

Coutin, S. B. (2001). The oppressed, the suspect, and the citizen: Subjectivity in competing accounts of political violence. *Law & Social Inquiry, 26*(1), 63-94. doi:10.1111/j.1747-4469.2001.tb00171.x

Crush, J. (2001). The dark side of democracy: Migration, xenophobia and human rights in south africa. *International Migration, 38*(6), 103-133.

du Plessis, M. A. (2008). University law clinics meeting particular student and community needs: A south african perspective. *Griffith Law Review, 17*(1), 121-138.

Ellmann, S. (1992). *In a time of trouble: Law and liberty in south africa's state of emergency* New York: Oxford University Press.

Evans, S. (2013, ). Orange farm: Feeding the xenophobia beast. *Mail & Guardian*

Foucault, M. (2006). Governmentality. In A. Sharma, & A. Gupta (Eds.), *The anthropology of the state: A reader* (pp. 131-143). Oxford: Wiley-Blackwell.

George, J. P., & Elphick, R. (2013). *Statelessness and nationality in south africa.* (). South Africa: Lawyers for Human Rights.

Greenhouse, C. J. (1988). Just in time: Temporality and the cultural legitimation of law. *Yale LJ, 98,* 1631.

Griffiths, J. (1986). What is legal pluralism? *The Journal of Legal Pluralism and Unofficial Law, 18*(24), 1-55.

GroundUp: Home affairs uses 'sad' and 'bad' court ruling against refugees. (2014). Retrieved 03/11, 2014, from www.dailymaverick.co.za/article/2014-02-04-groundup-home-affairs-uses-sad-and-bad-court-ruling-against-refugees/#.Ux6w04Xbcfy

Habib, A., & Taylor, R. (1999). South africa: Anti-apartheid NGOs in transition. *Voluntas: International Journal of Voluntary and Nonprofit Organizations, 10*(1), 73-82.

Hammersley, M., & Atkinson, P. (Eds.). (2007). *Ethnography: Principles in practice* (3rd ed.). New York: Routledge.

Handmaker, J., De la Hunt, Lee Anne, & Klaaren, J. (2008). *Advancing refugee protection in south africa* Berghahn Books.

Hansen, T. B., & Stepputat, F. (Eds.). (2001). *States of imagination: Ethnographic explorations of the postcolonial state* United State of America: Duke University Press Books.

Harrell-Bond, B. (2007). Starting a movement of refugee legal aid organizations in the south. *International Journal of Refugee Law, 19*(4)

Hoag, C. (2010). The magic of the populace: An ethnography of illegibility in the south african immigration bureaucracy. *PoLAR: Political and Legal Anthropology Review, 33*(1), 6-25.

Hosticka, C. J. (1978). We don't care about what happened, we only care about what is going to happen: Lawyer-client negotiations of reality. *Soc.Probs., 26*, 599.

Hsiung, P. (2010). Reflexivity: The research relationship. Retrieved, 2013, from http://www.utsc.utoronto.ca/~pchsiung/LAL/reflexivity/relationship

Immigrants to SA have a torrid time. (2014). Retrieved 03/11, 2014, from http://www.lhr.org.za/news/2014/immigrants-sa-have-torrid-time

Kathree, F. (2002). Public interest law: Its continuing role in south africa. *Advocate, 15*(3), 33-34,40.

Landau, L. B. (2006). Immigration and the state of exception: Security and sovereignty in east and southern africa. *Millennium-Journal of International Studies, 34*(2), 325-348.

Landau, L. B. (2010). Loving the alien? citizenship, law, and the future in south Africa's demonic society. *African Affairs, 109*(435), 213-230.

Landau, L. B., & Monson, T. (2008). Displacement, estrangement and sovereignty: Reconfiguring state power in urban south africa. *Government and Opposition, 43*(2), 315-336.

Landau, L. B., & Freemantle, I. (2010). Tactical cosmopolitanism and idioms of belonging: Insertion and self-exclusion in johannesburg. *Journal of Ethnic and Migration Studies, 36*(3), 375-390. doi:10.1080/13691830903494901

Latham, R. (2000). Social sovereignty. *Theory, Culture & Society, 17*(4), 1-18.

Loader, I., & Walker, N. (2001). Policing as a public good: Reconstituting the connections between policing and the state. *Theoretical Criminology, 5*(1), 9-35.

Marshall, C., & Rossman, G. B. (2010). *Designing qualitative research* Sage Publications, Incorporated.

Merry, S. E. (1986). Everyday understandings of the law in working-class america. *American Ethnologist, 13*(2), 253-270.

Merry, S. E. (1990). *Getting justice and getting even: Legal consciousness among working-class americans* Chicago: University of Chicago Press.

Merry, S. E. (1992). Anthropology, law, and transnational processes. *Annual Review of Anthropology,* , 357-379.

Merry, S. E. (1988). Legal pluralism. *Law & Society Review, 22*(5), 869-896.

Michelson, E. (2006). The practice of law as an obstacle to justice: Chinese lawyers at work. *Law & Society Review, 40*(1), 1-38.

Moore, S. F. (2001). Certainties undone: Fifty turbulent years of legal anthropology, 1949-1999. *Journal of the Royal Anthropological Institute, 7*(1), 95-116.

Moore, S. F. (Ed.). (2005). *Law and anthropology; a reader*. Malden: Blackwell Publishing

Ngwato, T. P. (2013). *Policy shifts in the south african asylum system.* (). South Africa: Lawyers for Human Rights.

Polzer, T. (2007). Adapting to changing legal frameworks: Mozambican refugees in south africa. *International Journal of Refugee Law, 19*(1), 22-50.

Sharma, A., & Gupta, A. (Eds.). (2006). *The anthropology of the state: A reader*. Oxford: Wiley-Blackwell.

Silbey, S. S. (2005). After legal consciousness. *Annu.Rev.Law Soc.Sci., 1*, 323-368.

Simone, A. (2004). People as infrastructure: Intersecting fragments in johannesburg. *Public Culture, 16*(3), 407-429.

Steinberg, J. (2012). Security and disappointment policing, freedom and xenophobia in south africa. *British Journal of Criminology, 52*(2), 345-360.

Vigneswaran, D. (2011). Taking out the trash? a 'garbage can' model of immigration policing. In L. Landau (Ed.), *Exorcising the demons within: Xenophobia, violence and statecraft in contemporary south africa* (pp. 150-171). Johannesburg: Wits University Press.

Vigneswaran, D., Araia, T., Hoag, C., & Tshabalala, X. (2010). Criminality or monopoly? informal immigration enforcement in south africa. *Journal of Southern African Studies, 36*(2), 465-481.

Weber, M. (2006). Bureaucracy. In A. Sharma, & A. Gupta (Eds.), *The anthropology of the state: A reader* (pp. 49-70). Oxford: Wiley-Blackwell.

Wilson, R. A. (2000). Reconciliation and revenge in Post-Apartheid south africa. *Current Anthropology, 41*(1), 75-98.