

# Access to justice for all: a reality or unfulfilled expectations?

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## SUMMARY

While the constitutional imperatives related to access to justice, the legislative framework of Legal Aid SA (LASA), the regulations for the attorneys' profession and the Legal Practice Act 28 of 2014 suggest that citizens are adequately catered for in accessing justice, the lived reality for poor persons is that this is not substantively attained. The formal framework creates unfulfilled expectations. First year law students at a Law faculty were required to report on their observations in the lower courts and on an interview with a litigant or official at the court visited. The focus of the assignment was on access to justice: identifying barriers and making recommendations for enhancing access to justice. The observations of the novice law students in the courts speak to the experiences of indigent and middle-class persons seeking to access the courts in largely urban areas. Ethical clearance and informed consent of the participants was obtained in accordance with the requirements of the Ethics Research Committee of the Law faculty. What is evident is that the achievement of access to justice is impeded by a number of factors, including socio-economic inequalities, systemic inefficiencies caused by poor administration at the courts and an unmet demand for legal services. It will require the allocation of significant financial and human resources to overcome the obstacles preventing those who cannot afford the cost of private legal representation from effectively accessing the legal system.

The aim of the paper is to review the position pertaining to access to justice in the various regulatory sources and then to consider the obstacles identified by the students related to 'law in practice' in the lower courts of South Africa. Finally, the paper proposes some recommendations to address the observed impediments to accessing justice by the poor.

## 1 Introduction

First year law students at a South African Law faculty completed an assignment based on their observations during visits to a district or regional magistrates' court. Informal interviews were also conducted there by the students with an official or litigant about access to justice. The court visit reports provide empirical evidence of how law in practice unfolds in the lower courts on a daily basis. The research and perspectives discussed are the work of student observer participants, while the data analysis was conducted by the author. Ethical clearance and informed consent of the participants were obtained in accordance with the requirements of the Law faculty Research Ethics Committee.

The perspective of law foregrounded in the assignment is a realistic theory of law as propounded by Tamanaha.<sup>1</sup> This approach adopts a holistic view of law in its social totality, influenced by its social context. It requires that law be understood empirically and is built on observations about the past and present reality of law.<sup>2</sup>

Methodologically, observational participant research enables the researcher to understand and capture the context within which people interact.<sup>3</sup> The student participant/researchers were able to unobtrusively observe and collect rich data by immersing themselves in the first-hand experience of being present in the lower courts.<sup>4</sup> The reports were structured around research questions which interrogated the context, observed impediments to access to justice and elicited reflections on proposals to enhance access to justice. A deliberately critical framing, emphasising awareness of injustices and inequalities was adopted. Perspectives of the less powerful and the potential for change-making strategies were emphasised through the prescribed readings and design of the questions.<sup>5</sup> Data analysis by the author took the form of coding of the observer reports, followed by thematic content analysis.<sup>6</sup>

While most students visited courts in urban areas surrounding the university, their reports cover a wide geographical range across the country. Observations in rural magistrates' courts might have provided some very different perspectives. It is likely that in rural magistrates' courts additional challenges to access to justice such as difficulties of physical access to courts, language barriers and higher levels of poverty, illiteracy and lower levels of education would have had a significant impact on the conclusions.

This paper firstly defines what is meant by access to justice, then the current formalised frameworks for the provision of legal services for those who cannot afford legal representation are reviewed. Thereafter, an analysis of the observations of students during their visits to lower courts reveals that within these frameworks created to enhance access to justice for the poor, many substantive impediments and gaps exist. It is argued that the current provision of legal representation for indigent persons fails to ensure access to justice for the majority of citizens who cannot afford the fees charged by private legal practitioners. Finally, the paper makes some proposals and evaluates the feasibility of the students' recommendations to address the challenges identified during their court visits.

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1 Tamanaha *A Realistic Theory of Law* (2017) 2.

2 Tamanaha *A Realistic Theory of Law* (2017) 4.

3 K DeWalt & B DeWalt *Participant observation: a guide for fieldworkers* (2002).

4 Bryant "Conducting observational research" [https://www.deakin.edu.au/\\_data/assets/pdf\\_file/0004/681025/Participant-observation.pdf](https://www.deakin.edu.au/_data/assets/pdf_file/0004/681025/Participant-observation.pdf) (accessed 2020-04-10).

5 Patton *Qualitative Research & Evaluation Methods* (2002).

6 Krippendorff *Content Analysis: An Introduction to Its Methodology* (2004).

## 2 Access to justice

In response to our history of exclusion and impediments to access to justice for most citizens during the dark years of apartheid, section 34 of the Constitution provides that: “everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, in another independent and impartial tribunal or forum.”<sup>7</sup> In a narrow sense, access to justice includes the formal right to a fair hearing. However, unless every citizen, including those who cannot afford legal representation, has access to legal advice and “equality of arms”, it cannot be said that access to justice for all is achieved.<sup>8</sup> Heywood and Hassim note: “there is a necessary continuum between access to legal services and access to justice.”<sup>9</sup> The equality clause in the Constitution reminds that: “everyone is equal before the law and has the right to equal protection and benefit of the law.”<sup>10</sup> Clearly, substantive equality before the law is unattainable as long as the huge disparities in wealth continue to exist between the rich and poor and impact the provision and quality of legal representation in South African courts.<sup>11</sup>

According to the student reports, access to justice in the lower courts is compromised by a number of barriers including socio-economic inequalities, inadequate resources for legal aid provision, systemic operational inefficiencies, and lack of knowledge about legal rights, remedies and the legal system. These observations resonate with the statements of Didcott J in *Mohlomi v Minister of Defence*:

“South Africa is [a] land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce these, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons.”<sup>12</sup>

To establish a context, in 2017, 55.5% (30.2 million) of the population lived in poverty- with an income below R992 per month.<sup>13</sup> This data demonstrate a trend in rising levels of poverty, which are most prevalent among citizens below the age of 17, black South Africans, women, rural people and those with little education. The likelihood of such indigent

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7 S 34 of the Constitution of the Republic of South Africa 1996.

8 *Bernstein v Bester* 1996 2 SA 751 (CC) footnote 54; *Shilubana v Nwamitwa* CCT 03/07 2007 ZACC 14.

9 Heywood & Hassim “Remedying the Maladies of ‘Lesser Men or Women’: The Personal, Political and Constitutional Imperatives for Improved Access to Justice” 2008 *South African Journal on Human Rights* 263.

10 S 9 of the Constitution.

11 Heywood & Hassim 2008 *SAJHR* 268.

12 1997 1 SA 124 (CC) para 14.

13 Stats SA “Poverty on the rise in South Africa” <http://www.statssa.gov.za/?p=10334> (accessed 2020-04-09).

people being able to access justice and be represented adequately in courts becomes even more remote when considering the geographical location of courts and Legal Aid South Africa (LASA) satellite offices that physically limit the opportunities for the rural poor to access the courts.<sup>14</sup>

Budlender opines that if “people in need” are not able to present their cases effectively when bringing their cases to court then the courts cannot fulfil their constitutional obligation.<sup>15</sup> In operationalising access to justice for the poor, legal services are provided through LASA and through *pro bono* work carried out by legal practitioners. These mechanisms will be examined below.

### 3 Legal Aid

Bodenstein comments: “Legal Aid, by its very nature, is concerned with law and poverty, and as such, constitutes a corollary for ‘access to justice’.”<sup>16</sup> In South Africa, the primary source of legal services provision for persons who cannot afford private legal services is state-funded legal aid. LASA is a national public entity established by the Legal Aid South Africa Act 39 of 2014. It is the vehicle through which legal advice and representation, at state expense is delivered. The mission of LASA is: “to be the leader in the provision of accessible, sustainable, ethical, quality and independent legal services to the poor and vulnerable.”<sup>17</sup> The entity is mandated to provide legal advice, education about legal rights and legal representation according to the constitutional and legislative provisions imposed on it.<sup>18</sup>

LASA’s constitutional mandate is based on the following sections: Section 35 (3) of the Constitution provides that everyone has a right to a fair trial which includes... “that every detained person, including a sentenced prisoner, has a right to have a legal representative assigned by the state, at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly”. Section 35 (3) (g) of the Constitution provides the same guarantees for accused persons.<sup>19</sup> “Substantial injustice” has been defined in the Legal Aid Manual (2017) as: “When a person without legal aid would experience significant injustice by being sentenced, or having the possibility of being sentenced, to direct imprisonment of more than 3 months in a criminal

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14 Nyenti “Access to justice in the South African social security system: towards a conceptual approach” 2013 *De Jure* 901.

15 Budlender “Access to Courts” 2004 *SALJ* 339 and 355; Dugard “Courts and the Poor in South Africa: A critique of systemic judicial failures to advance transformative justice” 2008 *SAJHR* 216.

16 Bodenstein “Access to legal aid in rural South Africa: in seeking a coordinated approach” 2005 *Obiter* 304.

17 Legal Aid South Africa “Integrated Annual Report 2016-2017” [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/Legal\\_Aid\\_AR\\_LR\\_201617.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/Legal_Aid_AR_LR_201617.pdf) (accessed 2020-04-10).

18 Legal Aid South Africa “Integrated Annual Report 2016-2017”.

19 Dugard 2008 *SAJHR* 219.

case, or where his/her constitutional or personal rights are affected in a civil matter.”<sup>20</sup> Both detained and sentenced persons have a right to legal representation in an appeal or review by a higher court.<sup>21</sup> Section 28(h) provides that every child has the right to have a legal practitioner assigned to the child by the state, and at state expense in civil proceedings affecting the child, if substantial injustice would otherwise result.<sup>22</sup>

The bulk of the matters undertaken by LASA each year are criminal cases: 385 972 (87%) cases out of 444 962 new cases in 2017) in order to satisfy the section 35 constitutional mandate.<sup>23</sup> Only 58 090 (12%) of the matters taken on were civil cases. During 2016/2017, LASA also represented the majority of appellants in criminal cases that appeared before the Supreme Court of Appeal and five impact matters supported by LASA were argued at the Constitutional Court.<sup>24</sup> A total of 767 656 persons were served by the entity.<sup>25</sup>

Several authors have critiqued the predominance of legal aid in criminal cases, as it fails to interpret section 34 sufficiently widely to include legal representation in civil matters, in line with international instruments.<sup>26</sup> The LASA website specifies that legal aid in civil claims may be provided in the fields of family matters, evictions, employment, contract, criminal cases and impact litigation, but an assessment of the merits of the case and the projected costs of the litigation are considerations that are taken into account before legal aid is granted.<sup>27</sup>

Other legislative mandates guarantee the provision of legal services and advice in accordance with LASA’s budgetary and funding resources.<sup>28</sup>

Legal aid services are delivered through 64 Justice Centres in urban areas and 64 satellite offices.<sup>29</sup> Criminal legal aid is provided by salaried legal practitioners at Justice Centres.<sup>30</sup> LASA aims to have at least one practitioner per court at most district and regional magistrates’ courts.<sup>31</sup> Legal services and advice in civil matters are delivered through Civil Units

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20 Dugard 2008 *SAJHR* 221.

21 S 35(3)(o) of the Constitution.

22 S 28(h) of the Constitution.

23 Dugard 2008 *SAJHR* 221.

24 Dugard 2008 *SAJHR* 221.

25 Dugard 2008 *SAJHR* 221.

26 Budlender 2004 *SALJ* 339; Brickhill “The Right to a fair civil trial: the duties of lawyers and law students to act pro bono” 2005 *SAJHR* 293; Vawda “Access to justice: from legal representation to promotion of equality and social justice - addressing the legal isolation of the poor” 2005 *Obiter* 234; Dugard 2008 *SAJHR* 216.

27 Legal Aid South Africa “Legal Aid Manual” <https://legal-aid.co.za/wp-content/uploads/2018/11/Legal-Aid-Manual.pdf> (accessed 2020-04-10).

28 Legal Aid South Africa “Legal Aid Manual”.

29 Legal Aid South Africa “Legal Aid Manual”.

30 Legal Aid South Africa “Legal Aid Manual”.

31 Legal Aid South Africa “Legal Aid Manual”.

which are spread over a number of magisterial districts- there being 13 civil units based at the permanent seats of the various divisions of the high court.<sup>32</sup> Litigation is also facilitated through Judicare agreements with lawyers in private practice, through co-operation and agency agreements with law clinics; and through an impact litigation division.<sup>33</sup>

Despite the Legal Aid Act mentioning the provision of legal services for the “indigent”, no definition is provided in the Act.<sup>34</sup> However, in *Smith v Mutual and Federal Insurance Company*, the court defined indigent as “those in extreme need or want, while ‘poor’ refers to those having few things or nothing”.<sup>35</sup> The inability of poor people in general to fund legal services, bearing in mind that half the population of the country lives below the poverty threshold, and the extremely high fees charged by legal practitioners suggests that access to justice is the preserve of the wealthy, or a very small number of indigent persons in narrowly specified circumstances.<sup>36</sup>

In order to set a threshold for who is indigent and qualifies for legal aid, a means test is set for an individual at a maximum income of R7, 400.00 per month after tax, and for a household the monthly income must not exceed R8000.00 per month after tax.<sup>37</sup> If the applicant does not own immovable property, their movable assets should not exceed R128 000.00; if the applicant is a member of a household that owns immovable property then the value of their movable and immovable assets may not exceed R640 000.00. The particularly low threshold excludes the middle class from the benefits of legal aid. As Brickhill notes, the means test prevents “the working poor, the lower middle class and parts of the rural population” from adequate representation.<sup>38</sup> This group of citizens is referred to as the “missing middle” who are effectively precluded from accessing the legal system.<sup>39</sup>

Severe budgetary constraints are however impacting the delivery of legal aid services. A budget cut over the next three years of R503 million is likely to further undermine the provision of legal services to the indigent.<sup>40</sup> In the LASA Annual Report for 2016/17, the Chief Executive Officer (CEO) reported that the organisation whose main source of

32 Legal Aid South Africa “Integrated Annual Report 2016-2017”.

33 Legal Aid South Africa “Integrated Annual Report 2016-2017”.

34 Legal Aid South Africa Act 39 of 2014.

35 1998 4 SA 626 (C).

36 Klaaren “Towards affordable legal services: Legal costs in South Africa and a comparison with other professional sectors” delivered at SALRC conference on Access to Justice in Durban in October 2018.

37 These amounts were increased from 1 April 2019. See Legal Aid South Africa “How it works” <https://legal-aid.co.za/how-it-works/> (accessed 2020-04-10).

38 Brickhill 2005 SAJHR 294.

39 Brickhill 2005 SAJHR 294.

40 Cape Argus “High cost of legal fees impedes access to justice” <http://www.pressreader.com/south-africa/cape-argus/20181102/281779925129269> (accessed 2020-04-10).

revenue is a government grant from the National Revenue Fund received R1,577 billion in the 2016-2017 financial year, which is 3.6% more than the 2015-2016 allocation.<sup>41</sup> The increase was minimal due to the budget cut of R92 million effected for 2016-2017.<sup>42</sup> LASA CEO Vedalankar stated that in moving forward, “the biggest organisational challenge for LASA relates to fiscal constraints and the poor economic climate”.<sup>43</sup> This framework is in place to provide access to justice through state-funded representation for the indigent. The following provisions apply to the delivery of free legal services to the poor by private attorneys.

#### 4 *Pro bono*

Whilst the provision of legal services to the indigent is primarily effected by LASA, Kruuse observes that state-funded legal aid and *pro bono* services by the legal profession should be seen as complementary means to provide access to legal representation for the indigent.<sup>44</sup> The huge unmet demand for legal representation for indigent people cannot be met by LASA alone: a commitment by legal professionals to contribute to improving access to justice for the poor should be a moral as well as a legal imperative.<sup>45</sup>

Prior to the promulgation of the Chapter 2 provisions of the LPA in November 2018, compulsory *pro bono* services by lawyers in private practice was mandated, with some slight variations across provinces, in the Rules for the Attorney’s Profession promulgated on 1 March 2016. Under these rules, attorneys were required to complete 24 hours of compulsory unremunerated work each year. Rule 25 states: “*pro bono* services shall include, but not be limited to, services ...relating to, the delivery, through recognised structures, of advice, opinion or assistance in matters falling within the professional competence of a member, to facilitate access to justice for those who cannot afford to pay for such services”.<sup>46</sup> Persons who cannot pay are those who fall below the threshold set in the LASA means test. Recognised structures include, but are not limited to: the office of the registrars of the high court when issuing in *forma pauperis* instructions, small claims courts, community (non-commercial) advice offices, university law clinics, non-government organisations, the office of the Inspectorate of Prisons and other specialist committees of the society.<sup>47</sup>

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41 Legal Aid South Africa “Integrated Annual Report 2016-2017” 17.

42 Legal Aid South Africa “Integrated Annual Report 2016-2017” 19.

43 Legal Aid South Africa “Integrated Annual Report 2016-2017” 21.

44 Kruuse “Vuk’uzenzele (‘Arise and act’): Lawyers and Access to Justice in South Africa” in H Whalen-Bridge (ed) *Lawyers and Access to Justice: Challenging Pro Bono* (forthcoming).

45 Kruuse 3.

46 Government Gazette 39740 of 2016-02-26 “Rules for the Attorneys’ Profession” Rule 25.1.

47 Government Gazette *supra*.

A certificate of completion of 24 hours of *pro bono* work by practising attorneys had to be submitted annually to their respective law societies for recording and monitoring. It appears that punitive sanctions for non-compliance have not been imposed.<sup>48</sup> At best, a complaint of failing to give attention to the affairs of a client could be made.<sup>49</sup> In informal conversations with the author, several Cape Town attorneys of many years' experience mentioned that they never completed the 24 hours of mandatory *pro bono* service because referrals from the law society are rare and the requirement of working through a 'recognised structure' is a long-protracted process. None of the attorneys was aware of any consequences that might arise should they not complete the 24 mandatory hours of *pro bono* work.

Advocates are required by the General Council of the Bar to complete 20 hours of *pro bono* work each year.<sup>50</sup> Records of the completed hours are retained by the Bar Council, but again, the imposition of punitive sanctions for non-compliance seems unlikely.

No clarity exists as to who shall be responsible for the monitoring of *pro bono* hours now that the Legal Practice Council (LPC), a unifying body with disciplinary powers over attorneys and advocates, has been established in terms of the Legal Practice Act promulgated on 29 October 2018.<sup>51</sup> A recognition of the lacuna that exists at present was implicit in a communique issued by the Director of the LPC on 12 March, 2019. In this document, the director acknowledges that:

"the LPC has taken a policy decision that free legal services (what is referred to as *pro bono* services) provided to indigent members of the public by the legal profession will be regulated....Therefore practitioners are encouraged to continue to attend to free legal services to provide and promote access to justice to the indigent members of the public who cannot afford the same... The Council is currently in the process of formalising the regulation of *pro bono* services to give effect to the above."<sup>52</sup>

The LPA has also created some confusion about whether *pro bono* service is now to be regulated through the Act. The term "*pro bono*" is not used in the LPA, nor is mention made of services to indigent persons to provide increased access to justice, one of the stated aims of the LPA.

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48 Kruuse 2

49 Kruuse 3.

50 The Cape Bar "*Pro Bono* Rules" <https://capebar.co.za/wp-content/uploads/2015/04/Pro-Bono-rules-after-amendment-in-September-2016.pdf> (accessed 2020-04-10) Rule 1.

51 Government Gazette 42003 of 2018-10-29 "Commencement of Certain Sections of the Legal Practice Act, 2014" brings chapter 2 of the Legal Practice Act 28 of 2014 into effect.

52 <https://lpc.org.za/important-notice-to-members-pro-bono/> (accessed 2020-04-11).



## 5 Community service in the LPA

The term “community service” has been used in the Legal Practice Act to refer to certain types of legal practice activities that will be regulated by the Minister, in consultation with the Legal Practice Council, to apply to candidate attorneys and to practitioners.<sup>53</sup> Although a proclamation has brought Chapter 2 of the Act into effect, the regulations for community service have not yet been drafted.

Section 29 of the LPA states that –

- “(1) The Minister must, after consultation with the Council, prescribe the requirements for community service from a date to be determined by the Minister, and such requirements may include –
- (a) community service as a component of practical vocational training by candidate legal practitioners; or
  - (b) a minimum period of recurring community service by practicing legal practitioners upon which continued enrolment as a legal practitioner is dependent.”<sup>54</sup>

The section further states that community service may include, but is not limited, to service in the State, at the South African Human Rights Commission (SAHRC), academic institutions or non-governmental organisations (NGOs), or other service approved by the Minister, in consultation with the Council.<sup>55</sup> It is notable that the types of services described do not include the provision of legal representation to the poor.

It is unclear whether the requirement of community service is applicable to candidate attorneys, or alternately to legal practitioners, or to both. The use of the word “or” renders the import of the section ambiguous. The confusion that exists between the meaning of community service and *pro bono* also gives rise to speculation about what is intended by this wording.<sup>56</sup>

The question of whether “community service” as contained in the LPA is to be remunerated and whether the term is intended to carry the same meaning as “*pro bono*” legal services also arises.<sup>57</sup> In section 29(1)(c), there is an express reference to work as a Small Claims Court Commissioner being unremunerated.<sup>58</sup> The lack of clarity and possibly a missed opportunity to unequivocally impose compulsory, unremunerated *pro bono* requirements on all practitioners and candidate attorneys seems to be unfortunate.

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53 S 29 of the Legal Practice Act 28 of 2014.

54 S 29(1) of the Legal Practice Act 28 of 2014.

55 S 29(2) of the Legal Practice Act 28 of 2014.

56 Emdon “More clarity on *pro bono* under the Legal Practice Act” 2017 *De Rebus* 26; Kruuse *supra* 22.

57 Emdon *De Rebus* 27.

58 Emdon *De Rebus* 27.

The above provisions describe the framework, the formal structures and rules in place regarding the delivery of legal services to the indigent. Although it appears that provision is made to deliver legal services in a variety of complementary ways to indigent people, the gaps that exist and the harsh realities of accessing the justice system are highlighted in the reports of the novice law students. Their observations and comments from interviews with litigants and officials at the lower courts reveal a lived reality that is substantively at variance from what is promised by the formal provisions.

## 6 *In forma pauperis*

Another way in which practitioners are able to expand their services to the poor is through participation in the under-utilised *in forma pauperis* proceedings.<sup>59</sup> Applications are made to the registrar in high courts and to the clerk in magistrates' courts, for leave to prosecute or defend an action in court on behalf of an indigent person. The means test applied in such cases takes into consideration the following: "a party shall be deemed to be indigent if he or she can satisfy the registrar (or clerk) that, except for household goods, wearing apparel and tools of trade, he or she is not possessed of property to the amount of R10 000 and will not be able within a reasonable time to provide such sum from his or her earnings or obtain legal aid."<sup>60</sup> Referrals where a prospective litigant satisfies the criteria are made by the clerk or registrar of the court to an attorney, who then engages the services of an advocate when necessary.<sup>61</sup> Both practitioners are required to agree to provide *pro bono* services. According to Dugard, judges seldom use this process because of its complexity and the time delays incurred.<sup>62</sup> Large *pro bono* divisions in law firms report receiving one or two referrals of *in forma pauperis* cases per annum, when this process could effectively result in widened access to legal representation in civil matters for indigent persons.<sup>63</sup>

## 7 Analysis of student observations

Several themes were evident in the students' court visit reports. These were: (i) socio-economic inequalities impacting the provision of adequate legal representation for the poor; (ii) systemic inefficiency in the

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59 Department of Justice and Constitutional Development "Rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa" (as amended) Rule 40; Department of Justice and Constitutional Development "Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa" (as amended) Rule 53.

60 Department of Justice "Rules concerning the SCA" Rule 15(2); Rule 40(2) a of Uniform Rules of Court.

61 *Potgieter v ABSA Bank Limited* (2344/2013) [2017] ZACPEHC 29 (11 May 2017).

62 Dugard 2008 *SAJHR* 225.

63 Dugard 2008 *SAJHR* 225.

administration and functioning of the courts, which leads to an inordinate number of postponements of cases; (iii) the high demand for legal aid services which remain unmet by the current resource provision.

## 7 1 Socio-economic inequalities

Participant 5 began with the following quote: “it is better to be rich and guilty than poor and innocent”.<sup>64</sup> The glaring disparities and concomitant unevenness in the quality of legal services provided to rich and poor was echoed in many of the student observations throughout the reports. Access to justice inevitably reflects the harsh realities of poverty and class distinction in a society that is possibly one of the most unequal in the world.<sup>65</sup> Accessing justice is often a function of the ability to afford effective legal representation and an understanding of legal rights and remedies. In an evocative observation Participant 16 captured the experience.

“Walking into the Wynberg magistrates’ courts the feeling of inequality surrounds you. From the petty criminal charged with stealing toiletries to a wealthy businessman being involved in a civil suit, one gets the sense that justice will be served to those who can pay and not to those who are innocent. The legal representatives mimic this same feeling of inequality, the rich lawyers dressed in tailored suits, ready to ensure their clients get the best possible sentence compared to the legal aid attorneys who look like they have had one too many energy drinks to stay awake.”

Even where legal representation is provided by legal aid attorneys, it was immediately evident to an observer that the quality of the services provided was inferior to those provided by private attorneys. Participant 6 noted that some litigants stated that they did not trust the services of a lawyer who was “funded by the State” to represent them in a criminal case instituted by the State. Litigants also described to students how it was apparent that the legal aid attorneys were inexperienced, less capable than private attorneys and over-burdened with cases.

The role that financial means plays in the legal system was described in several other contexts. Students reported that another disadvantage of poor-quality legal representation to indigent people is that they are prejudiced by the unaffordable costs incurred in having expert witnesses such as psychologists, accountants and medical professionals. Following on an interview with a litigant, Participant 29 stated: “the families of detained persons bear the most amount of stress as in some instances loans have to be taken out in order to afford a private lawyer. Private lawyers are highly esteemed and viewed as being more competent than lawyers provided by the State. The financial pressures double as there is a need to raise bail money and to cover money for lawyer’s fees.”

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64 United Nations Office on Drugs and Crime “Global Study on Legal Aid: Country Profiles at 4” <http://www.unodc.org> (accessed 2018-10-04).

65 Brickhill 2005 *SAJHR*; Kruuse 5.

Many observations related to people at the courts being ignorant of their legal rights and remedies, failing to understand the nature of court proceedings and not being aware of the availability of legal aid representation.<sup>66</sup> Levels of illiteracy, language barriers and the experience of alienation in the court surroundings also contributed to a heightened sense of socio-economic and class disparities that affect access to the courts and the legal system.

## 7.2 Systemic inefficiency in the courts

The day to day practices at the lower courts were of concern for many students. Comments such as: “Upon arriving at the magistrates’ court at 8.00, I noticed that queues of people had already started to form and it was getting more and more crowded as the time passed by. An hour had passed and neither I nor the people waiting were seen to yet. All that we were met with was a locked door and an occasional ‘wait outside’ if anyone tried to knock on the door. This was alarming to me... vulnerable members of society will not feel comfortable to reach out for help at a legal institution if they are treated in this way. I noticed that they appeared to be intimidated by the employees, attorneys and magistrates ... being treated disrespectfully in the process.”<sup>67</sup> At the Cape Town magistrates’ courts Participant 17 observed: “there were lines of people waiting outside court with one lawyer representing a large number of clients”, while another student noted that “overcrowded courts are the greatest barrier to accessing justice” – there are consequent knock-on effects such as delays and increased fees. This type of inefficiency and poor quality service to citizens is not formally documented anywhere, but impacts significantly on the ability of the vulnerable to access justice.

A recurrent theme in many of the student reports was the poor administrative systems, lost files and delays leading to litigants not having adequate representation on the date of their case. At the Knysna district court a student reported: “Court A was saturated with nothing but postponements. Whether it was due to outstanding dockets, acquiring representation or further investigation, the look of frustration on the defendants’ faces were evident.”<sup>68</sup>

Students reported that most criminal cases were postponed: “One trial was postponed due to a lost docket...the state prosecutor pointed out the problems of an inefficient docket system for cases, which resulted in postponements and innocent individuals spending more time behind bars.”<sup>69</sup> At the Wynberg magistrates’ court,<sup>70</sup> the following were observed: “court started late”; “postponements on the basis that there

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66 Nyenti 2013 *De Jure* 914; Mubangizi “Human rights education in South Africa: Whose responsibility is it anyway?” 2015 *African Human Rights Law Journal* 496.

67 Participant 33.

68 Participant 17.

69 Participant 4 interview with a prosecutor.

70 Participants 9 and 13.

was insufficient evidence on the day such as witnesses not showing up”. Participant 24 stated: “it (court) started very late reflecting inefficiency with regard to time. Hours later, postponements took place in the court and it was revealed that there is inadequate administration as many cases were overlooked because the demand of cases far outweighed the supply of court officials available to deal with them. During my court visit many cases were postponed due to the maladministration on behalf of the court.”<sup>71</sup> “Clerical errors made by the court, such as lost case files were common. On the upper floors (of the Wynberg courts) piles of cases littered the corridors. Poor management and the excessive volume of cases contributed to the disorder”. “The administration in the lower courts is slack and often leads to events such as misfiling, numerous documentation errors were discovered.”<sup>72</sup> Participant 36 commented: “the administration in the courts is very inefficient and because the judicial services still need to catch up in terms of technology, everything was written down and this is prone to human error.” The sense of chaos, poor management and under-resourcing of personnel at the lower courts creates an alienating and inaccessible system for those attempting to have their disputes resolved there.

Another category of inefficiencies raised issues of the facilities at the courts: microphones in the Durban courts were not working; and in Knysna, faulty microphones and open doors prevented the magistrate from hearing the witness testimony, causing delays and repetitive questioning during the proceedings.<sup>73</sup> Poor signage resulted in litigants and witnesses being confused about which courts to attend. Language and communication barriers were also noted by many students. These day to day realities to which litigants are exposed impede the functioning of the courts and engender mistrust of the system.

### **7 3 High unmet demand for legal aid and quality legal representation for the poor**

Many comments in the student reports noted the scarcity of legal aid resources and the heavy burden placed on the limited number of state-funded attorneys. In an interview one such legal aid attorney stated that they deal with 35 cases on an average day and that they have to explain the nature of proceedings repeatedly to many clients each day.<sup>74</sup> Other student comments included: “the legal aid attorneys seemed inundated with work and most of the matters were postponed, so much so that I and some of the other students who were there on the day named it ‘postponement court.’”<sup>75</sup>

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71 Participant 6.

72 Participant 31.

73 Participants 7 and 16.

74 Participant 14.

75 Participant 36.

The low threshold of the means test excludes all but the impoverished from receiving legal aid. The plight of the “missing middle”,<sup>76</sup> was described poignantly by a student: “the criminal case I attended ... was a charge of assault and the reason for appearance was to set a trial date. The accused did not have a lawyer and did not qualify under the means test because he earns R7000 and the threshold (at the time) was R5500. The accused assumed that he could present his own suggestion as to when his case should be heard. The magistrate was upset by the accused’s behaviour; the accused noted that he did not know what his options are, and without receiving any advice he was given another date to appear with his own lawyer.”<sup>77</sup>

In an interview with a prosecutor, the potential for *pro bono* work by private attorneys to assist with the demand for legal representation for the poor, the following was stated: “*pro bono* work is not a system that can work effectively in the long run because the lack of access to justice is a much bigger issue that is linked to economic status and the cycle of poverty. Ultimately, money will always be needed to attain a decent level of legal representation, thereby rendering *pro bono* work an ineffective, oversimplified solution to a much greater issue.”<sup>78</sup> None of the students reported the presence of a university law clinic attorney at any of the courts visited. This casts some doubt on the limits of the law clinics’ reach in terms of enhancing access to justice for the poor. The limited use of *pro bono* representation that was evident to many students suggests that this source of legal services for the poor is under-utilised and does not make any significant contribution to access for justice for the poor and vulnerable. The apparent lack of monitoring and compliance with the requirements for completing mandatory *pro bono* hours though the law societies, and now through the LPC, resonates with these views.

## 8 Evaluation of student recommendations and further proposals

### 8.1 Socio-economic inequalities

Many students identified the need to provide legal literacy education for those who are not aware of their legal rights and remedies, as well as for those who do not understand the nature of the legal proceedings in which they are attempting to participate. Recommendations were made that 60 hours of community service be required of all law students to facilitate an educative initiative, especially for people living outside of metropolitan areas.<sup>79</sup> Workshops, and classes for adults and school learners could be presented and pamphlets designed for distribution, with a view to enhancing legal literacy in the population at large. Work in legal aid offices, police stations and at the courts for the purposes of

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76 Brickhill 2005 *SAJHR* 296.

77 Participant 19.

78 Participant 22.

translation, explaining of legal rights, as well as administrative functions could be undertaken by law students. Training for this work could be presented in a six-week module at all Law faculties. A national curriculum to ensure that the content covered is appropriate could be developed by, or may already exist, from initiatives such as Street Law and Constitutional Literacy and Service Initiative (CLASI). As part of the 60 hours, students completing a clinical law course, could provide supervised advice to clients through university law clinics. Increased publicity to communities regarding the availability of legal assistance from university law clinics through social media, posters, pamphlets, radio and television could serve to expand the work done in clinics. Students at all universities could be required to complete a clinical law course as a pre-requisite for graduation.<sup>80</sup>

In 1985 a set of student practice rules were drafted with the purpose of enabling final year law clinic students to appear in criminal cases for indigent accused persons in district courts.<sup>81</sup> These rules were based on the American Bar Association rules for student practice.<sup>82</sup> However, the initiative, despite having the approval of the profession and the law schools, was blocked by officials in the Department of Justice.<sup>83</sup> In current times when there is a huge unmet demand for legal services, it is possible that this proposal could be revisited.

The above student proposals seem feasible and could be undertaken without too much disruption to the current LLB curricula. Requiring students to study a language other than their mother tongue, to be used in educating and advising citizens on basic legal matters could also serve to improve access to justice. Student recommendations about the use of mobile technology, websites, television, radio, You-tube videos and Facebook pages to reach more members of the public for educative purposes and for publicising the availability of legal advice and representation are realistic and practicable.<sup>84</sup> Sponsorship, possibly by advertisers such as large law firms and public companies, could help to defray the costs of such projects. On May 10, 2018 in his budget speech to parliament the justice minister advised that LASA has launched a social

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79 At the University of Cape Town Law Faculty, all students are required to complete 30 hours of compulsory community service as part of their degree. Students who complete the Legal Practice course are considered to have completed this component.

80 At present, a compulsory clinical law course is included in the LLB curriculum at many universities.

81 McQuoid-Mason, "Lessons from South Africa for the delivery of legal aid in small and developing commonwealth countries" 2005 *Obiter* 229.

82 McQuoid-Mason 2005 *Obiter* 229.

83 McQuoid-Mason 2005 *Obiter* 229.

84 Cabral, Chavan and Clarke, et al "Using technology to enhance access to justice" 2012 *Harvard Journal of Law and Technology* 248. Lessons from the United States, where technology has for many years served to enhance access to justice, may be usefully adapted to address critical challenges in South Africa.

media presence on Facebook, Twitter and Instagram.<sup>85</sup> A ‘please call me’ hotline service, permitting indigent persons to speak to a LASA legal advisor has also been introduced.<sup>86</sup>

To extend the students’ recommendations, I would propose a requirement of compulsory community service of six to twelve months’ duration for all candidate attorneys and pupil advocates after the completion of their articles or pupil training. The provision of legal services to the poor and “missing middle” could be considered a pre-requisite for admission by these groups of aspiring practitioners. They would be adequately prepared to appear on behalf of indigent clients or provide legal advice in community law centres, NGOs and university clinics. The financial, and administrative burden of implementing such community service would likely fall on the Department of Justice and Constitutional Development and would require the allocation of budgetary resources by central government.

Another measure directed at socio-economic inequalities and the impact these have on legal services has been the enactment of section 35(4) of the LPA.<sup>87</sup> This provision aims to regulate the fees charged by legal professionals with the objective of improving access to justice. The South African Law Reform Commission has been tasked with developing recommendations regarding professional fees over the next two years.<sup>88</sup>

## 8 2 Systemic inefficiency in the courts

Student recommendations focussed on the introduction of more sophisticated technology in the courts and improved capacitation and training of court personnel. Once again, the fiscal implications are not insignificant. A student suggested the introduction of night courts to extend the hours of operation to deal with backlogs, whilst a few other students urged that the jurisdiction of the Small Claims’ court be increased to take some of the pressure off the courts.<sup>89</sup> An increase in jurisdiction to R2000 has been implemented from 1 April, 2019.

I would further propose that quality assurance mechanisms be put in place to monitor the efficiency of the courts regarding hours of operation,

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85 Minister Michael Masutha “Justice and Constitutional Development Dept Budget Vote 2018/19” <https://www.gov.za/speeches/minister-michael-masutha-justice-and-constitutional-development-dept-budget-vote-201819-10> (accessed 2020-04-10).

86 Masutha *supra*.

87 Act 28 of 2014 s 35 (4).

88 South African Law Reform Commission “Investigation into Legal Fees: Project 142 Issue Paper 36” 16 March 2019.

89 Smith, Lurigio and Davis et al “Burning the Midnight Oil: An Examination of Cook County’s Night Drug Court” 1994 *Justice System Journal* 42. This article describes the operation of night courts in the United States. However, in a legal system where backlogs abound, the South African court system could take note of this innovation; McQuoid-Mason “Access to Justice in SA: Are there enough lawyers?” 2013 *Onati Socio-Legal Series* 561.



treatment of litigants, and the adequacy and quality of service provided by court personnel.

### 8 3 High unmet demand for legal aid and quality legal representation for the poor

It is clear that resource constraints hamper the provision of legal aid and have an impact on the threshold for the means test. Almost all students recommended that the LASA budget and the means test threshold be increased, but in light of current trends such measures seem unlikely.<sup>90</sup> The impending reduction of budget for LASA is likely to aggravate this current state of affairs. Justice Minister Masutha recently stated: “these successes (the number of cases taken on by LASA) were recorded notwithstanding a budget deficit of R45.3million, which is projected to rise to R92.8 million during this financial year (2017).”<sup>91</sup>

In my view, given the polycentric nature of decision-making regarding national treasury allocations, it is possible that LASA may have to engage in fund-raising from public corporations, international funders and other *ad hoc* sources to address its budgetary deficit.

The use of students, pupil advocates and candidate attorneys could address some of the unmet demand for legal services. Whether supplementing the work of the legal aid attorneys in an administrative capacity, at a grassroots advisory level, or as legal representatives of indigent clients, these cohorts could extend the reach of LASA to more citizens. This suggestion was made by many students in a variety of formulations as it could be an immediate and practical way to improve the services of LASA. Participant 27 suggested the use of more mobile legal aid clinics, sponsored by large corporations, to make legal advice more accessible to rural citizens.<sup>92</sup> Community service obligations could supply staff such as senior students or candidate attorneys and pupil advocates.

The interpretation of the term ‘community service’ as applicable to practitioners in terms of the Legal Practice Act is contested.<sup>93</sup> It remains to be seen how this will be interpreted once the regulations in terms of the LPA come into effect. However, it seems, that whether or not it is intended to refer to *pro bono* work in section 29, access to justice could be enhanced by imposing a 48-hour requirement of legal work from lawyers in firms with more than 10 partners. In small firms (one to nine

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90 These amounts were increased from 1 April 2019. See Legal Aid South Africa “How it works” <https://legal-aid.co.za/how-it-works/> (accessed 2020-04-10).

91 Masutha *supra*.

92 Wizner & Aiken “Teaching and doing: The Role of law school clinics in enhancing access to justice” 2004 *Fordham Law Revue* 997. Although the article describes initiatives by university law clinics in the United States, the suggestions about mobile legal aid clinics is particularly apposite in South Africa where many rural areas are not serviced by legal aid offices.

93 Emdon 2017 *De Rebus*.

partners) the current 24-hour requirement could remain in place. Similarly, for advocates, a requirement of 24 hours community service seems reasonable. In practice, many large law firms have established *pro bono* divisions for the purposes of carrying out the community service obligations of all their partners. Although defeating the purpose of individual lawyers giving back to their communities, the desired outcome of hours of legal services delivered by experienced professionals is attained. While the demand for a focus on a number of other socio-economic rights such as the right to education, health care and housing exists, the right of access to justice is fundamental to the gradual realisation of these second generation rights through the legal system.<sup>94</sup> Much impact litigation, directed at addressing inherent inequalities and a lack of provision related to socio-economic rights, is most often undertaken by public interest law organisations, NGOs, university law clinics and the *pro bono* divisions of large law firms.<sup>95</sup>

Regarding *in forma pauperis* proceedings, it is feasible that if policy directives from the Department of Justice were to be issued to magistrates and judges, alerting them to this process, more cases would be referred for *pro bono* representation by practising lawyers.<sup>96</sup>

## 9 Conclusion

Despite the existence of a framework of provision for enhancing access to justice for those who cannot afford private legal services, the realities in the lower courts of South Africa, as observed by novice law students, are such, that substantive access to justice remains outside of the purview of poorest citizens. Barriers to accessing the legal system, both socio-economic and physical, can be addressed in the form of increased funding from Treasury for legal aid provision. Although the threshold for the means test for legal aid provision has recently been increased, the amount still excludes all but the truly indigent from receiving legal advice and representation.

Compliance by all legal practitioners with a mandatory number of *pro bono* hours could assist in addressing the unmet demand for free legal services for vulnerable and indigent persons. The implementation of a system of community service by candidate attorneys, pupil advocates, law students and graduates could support the increased provision of legal advice and representation for the poor and “missing middle” who cannot afford the fees charged by lawyers. However, these measures too would have financial implications for government. The conclusion must be

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94 Nyenti 2013 *De Jure* 901.

95 Democracy, Governance and Service Delivery Research Programme of the Human Sciences Research Council “Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society Final Report” <http://www.justice.gov.za/reportfiles/2017-CJPreport-Nov2015.pdf> (accessed 2020-04-10).

96 Dugard 2008 *SAJHR* 219.

drawn that at present, access to legal services and thus access to justice remain an unfulfilled expectation rather than a reality for most citizens, other than an affluent minority, who can afford the exorbitant costs of legal representation charged by private practitioners.