THE COST OF JUSTICE

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In his paper, Jonathan Klaaren critiques the disjuncture between South Africa's constitutional enshrinement of legal rights and the limited access to justice experienced by most of its population. Klaaren identifies the prohibitive economic burdens of access to legal representation as an institutional failure that remains the legacy of apartheid, and suggests possible avenues forward.

INTRODUCTION

Although South Africa's legal and constitutional regime is one of the best in the world, meaningful access to justice remains largely a function of economic resources. This briefing paper examines the reasons for -- and controversies around -- the costs of legal representation in South Africa as well opening up the concept of access to justice more broadly. Framed within the social justice concerns of the Public Positions series, the paper largely conceives of the legal services sector as a market consisting of the producers of legal services, the consumers of legal services, and the product itself: legal services. The aim here is to ask the social justice question of this 'market': over the long term who is meant to bear the costs of justice? The state? Citizens? Corporates? Donors?

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LEGAL PRACTITIONER	IN TRAINING	FRESHLY QUALIFIED	W/ 5 YRS EXPERIENCE	W/10 YRS EXPERIENCE	SENIOR
ADVOCATE	n/a	R800/hr	R1200/hr	R2000/hr	R35000/R40000+/day
ATTORNEY (CORPORATE)	R900/hr	R1100/hr	R2300/hr	R3000/hr	R4000/hr
ATTORNEY (SOLO/SMALL)	R400/hr	R500/hr	R600-900/hr	R700-1100/ hr	R700-1200/hr

WHERE ARE WE? WHAT IS THE CURRENT STATE OF ACCESS TO JUSTICE IN SOUTH AFRICA?

There are at least three ways in which we could measure access to justice: a national survey of need, a sketch of the quantity and quality of available legal and advisory services, and a comparison of average costs (legal fees) to average household income.

Although it has not been done in South Africa, a national survey of household needs for legal services could probe the extent to which households use formal legal services to resolve disputes. According to Legal Aid South Africa, "In 2010/11, 2,728,305 civil matters (including new cases, trials, motions and judgments) were processed through the lower courts. It is not known which proportion of these cases required legal aid assistance. It is however predicted that demand for civil legal aid is set to increase and therefore the gap between supply and demand will continue to increase." (LASA, 2012).

The true extent of the access to justice gap may be unknowable – as its extent may be tied up with the boundary of what is considered public and what is considered private. For instance in the area of domestic violence, many victims are unwilling to proactively seek access to justice.

That said, it is also remarkable that a tradition exists of the poor in South Africa seeking and using formal legal services in many of their dealings with the state and market (Bradford 1987, Hirson 1990, van Onselen 1996). Indeed, the poor in South Africa were arguably in a better place from which to access justice 80 years ago than today (James 2007: 146; Beavon 2004).

Another way to assess the state of access to justice would be to survey the cost structure of the legal services market. Legal services in South Africa are expensive, particularly for the poor. In 2005, AfriMAP concluded "the major barrier to access to justice in South Africa remains the high cost of legal services... [T]he average South African household would need to save a week's worth of income in order to afford a one-hour consultation with an average attorney." Things do not seem to have improved significantly. In 2013, Dugard and Drage reported that "[SERI] clients with a monthly income of R 600 ... are frequently charged fees in the region of R 1,500 ... just for an initial consultation." (2013). Even in terms of High Court rules (which are often interpreted loosely) a 15-minute consultation may cost R177.50 and a page of drafting can be charged at R50 (Holness 2013). These fees restrict access to justice for the poor, especially civil justice

which is largely not available from Legal Aid South Africa. These fees also restrict access to justice across the board for the not-so-poor, for instance persons in a household earning over R6000 a month and thus not qualifying for Legal Aid.

As the table of average fees for legal services below makes clear, legal costs in South Africa are substantial. Costs may well be higher as hourly fees for South African lawyers vary considerably (DNA, 2009). Public interest litigation is often but not always done on contingency or at reduced rates.

Another and final way to assess the state of access to justice in South Africa is to look at the quantity and organization of the providers of legal services – e.g. the legal profession (Godfrey 2009, Godfrey & Midgley 2008). The assumption is that the figure of lawyers per capita might be a rough proxy for access to justice. Indeed, as detailed in the next section, South Africa appears to have fewer lawyers per capita than many of its trading and economic peers.

There are a number of organizations employing persons to provide legal services in both the public (including not-for-profits) and private sectors. These include various services offered by the Department of Justice. Of particular interest here is Legal Aid South Africa, discussed further below. Outside government, there are sectors such as the public interest law community, consisting of both donor-funded NGOs such as the Legal Resources Centre and of pro bono units of commercial law firms, university law clinics and a number of NGOs engaging both in rights education and in providing free and open access to law (on the latter, see e.g. SAFLII, http://www.saflii.org.za/). Finally, there is also a network of community advice offices and paralegals providing legal advice. For instance the National Alliance for the Development of Community Advice Offices (NADCAO) claims membership of 230 community advice offices with 500 paralegals across South Africa, out of a total paralegal population of 3500 (NADCAO Submission to Parliament, 2013 at 2.13, 3.1).

A growing number of firms, especially within the financial sector, provide legal services for profit without using the traditional structures of the legal profession. For instance, firms such as Legalwise, Scorpion Legal, and Clientele Legal sell group legal services. Traditional banking groups also sell legal services. Indeed, the growth in the labour market for legal skills in the first decade of the 21st century is attributed primarily to the financial services industry (DNA, 2009). One estimate of the total legal services market in South Africa as of 2009 is R11,573 million, which constitutes 0.7% of GDP (DNA, 2009).

COUNTRY	LAWYERS	POPULATION	PEOPLE/LAWYER
USA	1,143,358	303 million	265
BRAZIL	571,360	186 m	326
NEW ZEALAND	10,523	4 m	391
SPAIN	114,143	45 m	395
UK	151,043	61 m	401
ITALY	121,380	59 m	488
GERMANY	138,679	82 m	593
INDIA	1,000,000	1237 m	1,237
FRANCE	45,686	64 m	1,403
SOUTH AFRICA (LSSA)	24,356	52.9 m	2,176
KENYA (KLS)	10,000	41 m	4,100
MALAWI (MLS)	300	14.9 m	49,666

WHERE ARE OUR EMERGING ECONOMIC PEERS?

This section briefly surveys how the issue of access to justice is being addressed in other societies, especially Brazil and India which might be considered our peers in terms of per capita GDP and some aspects of their history.

As one can see from the above table, South Africa has substantially fewer lawyers per capita than either Brazil or India, though more than African countries sharing a British legal tradition, like Kenya and Malawi.

Image courtesy of OSISA.

Perhaps surprisingly, South Africa has only one quarter as many lawyers proportionate to its population as does Brazil, as well as having fewer lawyers per capita than India.

Both Brazil and India have engaged institutionally with providing legal services to the poor. In Brazil, "[the Brazilian bar's] Ethical Code of 1930 established free services to the poor as an obligation. Now, following the impoverishment of large portions of the legal profession, the Bar began to view its mission as the protector of market spaces for the legal profession." As a compromise, pro bono service may only be provided to NGOs, not to individuals, at least within the state of Sao Paulo (Chen and Cummings). The Brazilian experience points to a potentially worrying trend: the bifurcation of the legal profession into corporate and non-corporate spheres under pressures of a globalizing market may result in the reduction of broad-based professional support for access to justice.

In India, "Legal Services Institutions are government funded bodies led by the judiciary and comprising a range of stakeholders from the judiciary, bar, government and civil society. The Legal Services Institutions provide legal aid in both civil and criminal matters to a range of stakeholders including those earning below USD 2000 annually, all women, children, Schedules Castes, Scheduled Tribes, people in custody and those living with disabilities etc. They are also mandated to create legal awareness and assist people in settling their disputes using alternate dispute resolution mechanisms." (Harvard PLP, 2011).

SO, HOW DID WE GET HERE?

The current dearth of access to justice in South Africa is causally related to at least four factors: (a) the political and institutional legacy of apartheid, (b) state expenditure largely focused on criminal rather than civil justice, (c) a legal profession that has been to a great extent unregulated, and (d) several foundational rules of the legal system, militating against access to justice.

First, the financial and institutional costs of undoing apartheid organizations were considerable, not to mention addressing the simultaneous unraveling of the bureaucratic ethic in SA public administration (Chipkin & Meny-Gilbert, 2012).

Second, there has been an unintended consequence of constitutionalizing the right to legal assistance. The immediate effect of the Constitution was to increase state spending for legal representation for men. This was because, completely understandably, the courts developed and enforced the constitutional right to state-financed legal representation in criminal matters (Budlender, 2004). Women who are underrepresented in the accused population thus did not benefit proportionately. The judiciary has refused to develop a constitutional right to legal representation in civil matters (Dugard, 2008).

Third, in its economics, the legal services market has largely been self-regulated through apartheid and into the current post-apartheid era. Early in its development, the legal profession often worked closely with the mining industry and other business sectors (Chanock 2001). Nonetheless, questions have continually been raised about the efficiency of this market. For instance, one claim is that the split nature of the legal profession – the practice for a client to use an attorney to brief an advocate -- often duplicates services and costs (AfriMAP 2005: 146). This has led to some attention to the profession from the Competition Commission and negotiations against the backdrop of the Legal Practice Bill. Arguably, the self-regulated nature of the profession has allowed several segments of the profession – in particular advocates and corporate lawyers – to enjoy levels of remuneration which are high by South African standards. Nonetheless, the salaries of even these South African lawyers are relatively low by global standards (DNA, 2009).

Finally, there are several formal doctrines of law that are understood to reduce access to justice (Budlender 2004, Dugard 2008, Humby 2009). One is the still relatively narrow ambit of the South African doctrine of class action. Class actions hold out the promise of addressing legal matters on a cost-efficient basis by litigating on behalf of hundreds of persons at once. It is only as of 2013 that the Supreme Court of Appeal confirmed the availability of class actions for statutory and other non-constitutional rights as well as for constitutional rights (*Children's Resource Centre*). Another formal doctrine often understood to be contrary to access to justice is the basic South African rule on legal costs. The South African rule is that the loser pays for the costs of legal services on behalf of both parties before the courts. Other jurisdictions adopt a rule where each party pays its own legal costs regardless of the outcome. The loser pays principle is often argued to reduce access to justice by inhibiting persons from

taking matters to court. The Constitutional Court significantly adjusted this loser-pays costs rule for organisations asserting constitutional rights and where the issues are genuine and substantive (*Biowatch*).

WHAT HAS ALREADY BEEN DONE TO ADDRESS THE ACCESS TO JUSTICE GAP?

The legal profession has addressed the justice gap in at least three historical episodes. First, the profession has been interested in the provision of state legal aid largely for criminal matters since its formal establishment in 1969. Second, the profession provided significant support (as well as opposition) for the establishment of the PIL community in the late 1970s. Some firms also established public interest divisions during the 1980s that were quick to take up foreign funding for anti-apartheid lawyering. Most of these divisions shut down with the end of such funding around 1990. Third, over the past ten years or so, the large firms in particular have either re-launched public interest divisions with a pro bono slant or have joined in various institutional schemes designed to increase to a small but significant level the professional provision of pro bono legal services (Holness 2013). Building on the profession's tradition of voluntary pro bono, calls have been made and continue to be made to mandate pro bono service for lawyers.

The above efforts apart, the post-apartheid legal profession has arguably prioritized transformation of personnel over access to justice, driven by compliance with the Legal Services Charter and Legal Services Bill, spending more of their energies on 'aspects dealing with the ensuring of corporate legal work being spread out to include black members of the profession.' (Klaaren, 2009)

On the side of the public sector, the most significant development must be the transformation of the Legal Aid Board into Legal Aid South Africa in the 1990s, and the accompanying shift from the judicare system (where the state bought legal services from the profession) to LASA providing free legal services for qualifying individuals through state-salaried lawyers. Persons are not eligible who earn more than R5500 per month (after tax), who are in a household that earns more than R6000 per month (after tax), or who own a house worth more than R300,000. This organization now employs more lawyers and presumably provides a greater quantity of legal services than any other organization in South Africa. LASA was providing "legal services at all criminal courts through its 64 justice centres and 64 satellite offices and as at March 2011 employed a total of 2,489 staff, of which 1,932 were legal staff." In 2012, LASA was "providing legal assistance to approximately 420,000 persons per annum and legal advice to over 200,000 persons per annum across South Africa ". Criminal cases remain at least 90% of LASA's docket.

At the formal political level, sufficient consensus has finally been found among the ordinary members of the Parliamentary committee dealing with the Legal Practice Bill from both the government and opposition parties to bring that legislation near passage in 2014, despite opposition particularly from the advocates. That piece of legislation has some specific provisions (ss 34 and 35(4) & (5)) that aim to address the justice gap. One mandates the SA Law Reform Commission to investigate among other topics, "the manner in which to address the circumstances giving rise to legal fees that are unattainable for most people" (s 34(5)(a)). The timeline for reporting is two years after the commencement of the final Legal Practice Council, which will follow on from the interim National Forum on Legal Profession (which may exist for three years, s 96(1)), discussing the current R490m budget for the structures running the legal profession. The other mandates the final Council to investigate the statutory recognition of paralegals. Further, it is potentially significant that "access to justice" is the enduring (if somewhat elusive) framing concept chosen by the government and the ANC for its policy on reform within the legal system and the governmental structures for the administration of justice (Department of Justice, 2012).

CONCLUSION: WHAT MIGHT BE DONE?

This section aims to identify and highlight the structures and systems which can (and cannot) be addressed.

On the internal professional approach, more can probably be done to coordinate and organize pro bono, although there are limits to such an approach. Holness is correct to conclude "if mandatory pro bono is to be successfully implemented in South Africa, then there needs to be enforcement and regulation mechanism[s] in place to ensure that the quality of the service provided is of a sufficient standard to ensure access to justice for the poor." (2013: 154). The existing s 29 of the Legal Practice Bill at least seems inclined towards at least a minimal requirement for some mandatory pro bono, albeit in five years' time. More significantly, there are institutional initiatives that can be taken to increase the quantity, quantity and effectiveness of pro bono legal services such as greater diversity and formality of networks of pro bono providers and greater linkage to advice offices.

However, while the private sector can do more, the public sector can do and should do even more.

On the approach of reforms outside of the profession, several initiatives appear possible. First, the

funding to LASA could be increased with the scope of legal aid widened to civil justice matters. A different version of this reform would support the establishment of the right to representation in significant civil justice cases for the poor. Second, one could support the approach (used globally) of unbundling legal services within the market, as to some extent the Legal Practice Bill does. This might support more innovations such as telephone hotlines and pro se assistance centres. Advice offices of this type could partner effectively with greater pro bono coordination. Third, greater attention might be given to promoting new products (such as legal services insurance), competition and global innovation within the legal services market through attention from the competition and trade authorities as well as from a regulator. A fourth approach might latch onto the Legal Practice Bill institution of community service and attempt to institute a state-supported network of community advice and service organisations with significant staffing by law graduates prior to their service as candidate attorneys. One variant residing in the private sector but with some state support might build upon university law clinics or the burgeoning LSSA-supported legal practice schools to start up small firms –with government support through medium-term contracts – employing candidate attorneys and/or new graduates to provide legal services in civil matters.

Professor Klaaren's paper was presented as part of the WiSER Research Seminar initiative, "Public Positions on History and Politics". For more information please see: http://wiser.wits.ac.za/publicpositions.