

**Social Justice Lawyering in Post-Apartheid South Africa:
Rules and Ideals in Everyday Legal Practice**

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for the Degree of Doctor of Philosophy*

by

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Abstract

Law has been central to successive state-making projects in South Africa. Most recently, the 1996 Constitution was said to mark a “break” from apartheid and its “wicked” system of law, providing both the tools and moral vision to forge a transformed society. Yet, thirty-one years after apartheid’s end, racialised patterns of inequality and poverty persist. For socio-legal scholars, this coexistence of a progressive rights regime with deepening inequality represents a “paradox” (Mnisi-Weeks, 2021).

This thesis explores this paradox through a novel ethnographic analysis of lawyers who seek to advance social transformation in South Africa. Working within what I term the “access to justice (ATJ) legal field”, these lawyers provide clinical legal assistance to poor clients while pursuing strategic litigation aimed at broader systemic change. Their everyday work embodies the constitutional ideal of law as a means for both individual and societal improvement. Yet it also generates professional and moral dilemmas centred on tensions between a commitment to law as a system of rules; belief in law’s transformative moral potential; and self-conceptions as professionals who “help people.”

Drawing on the concepts of “legalism” (Dresch and Scheele, 2015) and “legal culture” (Chanock, 2001; Mnisi-Weeks, 2021), the thesis analyses how these lawyers navigate such tensions and how they are shaped by the conditions of legal practice itself. This reveals a fundamental dynamic in South Africa’s project of law-based transformation: the struggle between lawyerly adherence to rules, at least partly anchored in the past; and the normative commitment to new legal ideals, oriented to remaking South Africa’s future. By examining this dynamic ethnographically, the thesis develops a grounded account of contemporary professional legal culture in the ATJ field. It argues that this culture – shaped by how lawyers negotiate rules and ideals – is central to understanding the possibilities and limits of law-based social change.

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Prologue

On a Wednesday afternoon in July 2022, I entered the conference room with Zach, a candidate attorney (CA) I had been shadowing since February. Zach worked at one of South Africa's foremost public interest litigation organisations (PILO). It provides pro bono legal representation to poor and marginalised people with the twin goals of providing "access to justice" (ATJ) through individual legal assistance and advancing socio-economic rights in South Africa through public interest litigation (PIL).

Zach and I took our seats in the sparsely decorated room, facing the pull-down screen onto which a Microsoft Teams window was projected. A few minutes later, a couple of Zach's colleagues entered, and took seats next to us. Then the clients came in. Between twenty and thirty women and men of varying ages, many of whom had spent the previous cold winter's night sleeping outside, filed into the room and sat down. The atmosphere was tense. We had come to watch the virtual court session in which Zach's supervisor, John, would argue that his and Zach's clients' eviction, which involved their forced removal from, and then demolition of their home, was illegal.¹ The day before, when witnessing the aftermath of the eviction in Alexandra township, it was difficult to reconcile the scene with the ideal of "post-apartheid" South Africa. Zach, John, and I had observed their clients, including young children and elderly people, scrambling to secure their possessions which had been put out on the road as a bulldozer pried apart the building that had been their home. But unlike apartheid-era forced removals which were sanctioned by law, their eviction, according to Zach, was plainly "illegal". It was in violation of post-apartheid statute, transformed common law property principles, and the "spirit" of the Constitution. As far as Zach and his colleagues

¹ COVID-19 restrictions were still in place in South Africa and so most court hearings were done virtually.

were concerned, it was up to PILOs like theirs to vindicate the rights of people like his clients by applying the law, and in so doing realise the Constitution's transformative potential.

We sat in the conference room and watched as Zach's supervisor made his argument before a magistrate, the slightly slow internet causing a delay between the words spoken and the movement of the figures on the screen. Although John conceded that many of the evictees were "unlawful occupiers" of the building, he emphasised that many had lived on the property for years and had paid rent in the past.² Moreover, because of their evident poverty, many had nowhere else to go. The main thrust of the argument was that the eviction had led to homelessness, in direct contravention of the law.

Despite the eviction being ordered by a court of law, a prerequisite for a legal eviction under existing legislation, two additional prerequisites had not been fulfilled.³ First, it had been made without sufficient inquiry into the "relevant circumstances" of the evictees and the potential harm the eviction might cause them; second, the owner of the property (the applicant) had failed to make an effort to join the local government to the proceedings so that it could fulfil its legal obligations to provide the evictees with emergency temporary accommodation to avoid them becoming homeless. It was thus argued that the eviction order was procedurally flawed and did not pass the substantive test of being "just and equitable". On these grounds, John argued, the eviction order should be rescinded and their clients reinstated in their homes. To Zach and his colleagues, the argument was legally straightforward, in accordance with a plain reading of existing legislation and case law relating to evictions of unlawful occupiers. But beyond the legal argument, as expressed

² According to the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (PIE), 1998, an "unlawful occupier is "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land" (Section 1, xi).

³ PIE was adopted, "To provide for the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers; and to repeal the Prevention of Illegal Squatting Act, 1951, and other obsolete laws; and to provide for matters incidental thereto" (1998). In essence PIE provides the regulations to implement Section 26(3) of the Constitution which explicates the right to housing.

informally amongst these professionals over coffee and at copy machines, it was plain that what had happened to Zach's clients was morally wrong. The intervention of these lawyers in this case was both legal and moral.

Despite the legal arguments proffered by John, the magistrate upheld the eviction order. Her reasoning, expressed orally, was that the eviction order had been made by a court of law and was thus legal. Furthermore, as the evictees were unlawful occupiers, there were no grounds for rescinding the eviction order. Upon announcing her judgement, many of the lawyers in the room were in uproar, ridiculing the magistrate for what they saw as her flawed logic that neither complied with a plain text reading of relevant legislation, nor engaged with the substance of the legal arguments and the case law cited to support them. Magistrates like this one "don't know the law", they exclaimed. Meanwhile, their clients maintained a resigned silence.

Cases like this, and how they are read by legal professionals, encapsulate the complexity and multi-faceted nature of post-apartheid South African law. These kinds of cases, which were common across the PILOs and pro bono legal clinics I shadowed, often involve a group of poor, marginalised people who through force of circumstance are unable to secure livelihoods through formal and informal employment. In the absence of affordable state housing, they resort to the unlawful occupation of private property to meet their basic need for housing. Their occupation violates a property owner's right to access their property, contravening common law property rights principles that used to prevail in South Africa, and are still prevalent in other common law countries (see Wilson, 2021). But under South Africa's post-apartheid constitutional dispensation, recognising the country's history of racialised dispossession of land and violent urban forced removals, South African common law has developed to balance the interests of private property owners with those of the poor who still suffer the consequences of colonial and apartheid dispossession. This area of law,

among others, is informed by moral and constitutional concerns regarding the well-being of historically disadvantaged, and currently vulnerable, people.

The case described above, and others like it, demonstrate that the rapidity of South Africa's political and legal transition has produced an uneven legal landscape rife with conflicting legal principles with distinct moral valences. In turn, the boundaries between legality and illegality are drawn differently by different actors, highlighting the fraught relationship between rules, ideals, and justice that typify South Africa's legal system. The tensions are especially stark in legal assistance for marginalised people. Through its ethnographic study of South Africa's access to justice (ATJ) legal field, this thesis examines the nature of these relationships and how they are refracted in legal practice.

From the perspective of Zach and his colleagues, their clients' eviction was unlawful based on a formal reading of the relevant rules. To remedy this, the application of these rules by the relevant authority was required. But these rules were themselves, in part, the product of public interest litigation (PIL) and adjudication that sought to transform apartheid-era common law in line with both the text and underlying moral values of the Constitution and its vision for the transformation of South Africa. An acceptance of the view that what had happened to Zach's clients was morally wrong had already been incorporated into the rules that constituted the new law. Justice for his clients, in the form of their reinstatement in the property that was once their home, was eventually achieved when a High Court judge formally applied these rules. Zach's, his colleagues', and their clients' satisfaction with this legal outcome was partly a consequence of what they viewed as the alignment between law, morality, and justice. More broadly, for the legal professionals involved, the case exemplified the law's potential to achieve social change, albeit limited.

The view that South African law represents an alignment between law and morality is widespread amongst legal practitioners like Zach and legal scholars (see Chaskalson, 2003;

Klare, 1998; Dugard, 2013a). Indeed, the coherence of these views is partly explained by the fact that many scholars are also practising ATJ lawyers and are part of the same social-professional field as my interlocutors. They argue that the Constitution, formally adopted in 1997, is uniquely progressive and potentially transformative by virtue of its inclusion of a “generous” list of socioeconomic rights, the horizontal applicability of constitutional values to both public and private law, and the preamble’s explicit directive that the role of law is to create a transformed South African society based on the *values* of freedom, (substantive) equality, and dignity (Klare, 1998; Bilchitz, 2013; Mnisi-Weeks, 2021; Dugard, 2013a; Roux, 2013).⁴ Cooper-Knock writes that the new legal order that emerged in the aftermath of apartheid expresses the attempted reconciliation between the “legal and moral universe(s)” of jurists, activists, and politicians (2021: 59). This is evidenced in the writing of Arthur Chaskalson, the inaugural Chief Justice of the Constitutional Court who argues that the “new South African Constitution is a moral document” (2003: 599).⁵ Underpinned by normative moral values, the Constitution is explicit that the law and organs of the newly democratic government operate under a positive duty to facilitate egalitarian transformation that makes a “break” with the past’s “wicked” uses of law (see Ellmann, 1992; Chaskalson, 2003; Dyzenhaus, 2010). Expressing this view, Justice Mohammed wrote in his oft-quoted concurring opinion in one of the first judgements issued by the newly established Constitutional Court:

In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and

⁴The interim Constitution of South Africa was adopted in 1993 and was replaced with the final Constitution which was adopted in 1996. Throughout the thesis, if not otherwise specified, all references to “the Constitution” refer to the final Constitution.

⁵ The article from which this quotation is taken is subtitled “the moral transformation of South African law”.

aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. (*State v. Makwanyane*, para 262)⁶

By placing the newly democratic state under positive, legally enshrined obligations to address the socio-economic aftermath of apartheid, many read the Constitution as providing both the tools and a moral vision with which to fashion a transformed South African society. The project of realising this transformative potential became known as “transformative constitutionalism” (Klare, 1998; Langa, 2006; Brickhill and van Leeve, 2015).

But despite the Constitution representing, to some, a “break” with the past, all existing law, as well as legal forms, were kept intact at the time of the transition to democracy. As Wilson notes,

Much of the colonial and apartheid legal regime would have to be carefully unpicked by the development of a strongly egalitarian, transformative constitutional project in the months and years to follow. (2021: 3-4)

Public Interest Litigation Organisations (PILOs) like the one Zach works at are at the forefront of efforts to unpick this regime. While some areas of law, like the one described above, have been significantly transformed by striking down apartheid laws or infusing common law principles with constitutional values, others have only just begun to be addressed. The remnants of the “wicked” apartheid legal system remain in both text and application. Indeed, in the case described above, the initial adverse outcome in the Magistrate’s Court was, as understood by Zach and his colleagues, incorrectly based on the formal application of the old, *untransformed* common law of property. The case above thus highlights the tensions between law as it was in the *past* and attempts to break with it, and recently transformed law as it is *now*, and which demands adherence. This tension is mediated by the ongoing project of transformative constitutionalism which involves the

⁶ Although written before the final Constitution was formally adopted in 1997, this excerpt arguably still captures the sentiment and set of ideals that came to encapsulate “post-apartheid” law.

transformation of “wicked” past law into new “moral” law, and the enforcement of that new “moral” law, both in service of progressive social change for the *future*. The scene described above therefore does not simply reflect the triumph of new, morally inflected law in South Africa, but the enduring temporal tensions that permeate both law and legal institutions. These tensions produce an uneven landscape of legal transformation in which different parts of the law are morally valued differently.

This thesis tells the story of the professional field at the centre of these tensions: South Africa’s access to justice (ATJ) legal field. It traces this field’s historical emergence during the final decades of apartheid when activist lawyers used their legal expertise to advance the antiapartheid struggle, and it ethnographically examines this field’s contemporary practices. Today, ATJ lawyers provide pro bono legal assistance to poor, marginalised, people to ensure that transformed law is enforced. They also institute public interest litigation (PIL) that seeks to transform past law, making it constitutionally compliant. Through their work, these lawyers attempt to instantiate the ideal of South African law expressed in the Constitution as not only moral, but also a means for individual and societal improvement. Providing a novel empirical account of this field and its work constitutes a key contribution of this thesis.

As this thesis will demonstrate, like their apartheid-era predecessors, ATJ lawyers continue to understand their legal practice in terms of a wider project of social activism. These self-understandings are shaped and sharpened by contemporary socio-economic dynamics. Almost thirty years since the adoption of the Constitution, South Africa is still marked by enduring and deepening racialised inequality, poverty, and deprivation that affect the majority of its citizens (McKeever, 2024). This is reflected in the country continuing to hold the world’s highest Gini coefficient with roughly 85% of the country’s wealth being held by 10% of the population (World Inequality Database, 2020); by continued structural

unemployment, reflected in an unemployment rate that for years has hovered around 28% (World Bank, 2025); by almost 40% of individuals and 50% of households depending on government grants to meet their basic needs (Statista, 2024); and by 63.5% of households facing food insecurity (Human Sciences Research Council, 2023: 16).⁷ These interlocking economic indicators have rippling effects in relation to poor people's ability to access quality housing, education, and healthcare and therefore the fulfilment of their rights as enshrined in the Constitution. In addition, members of South Africa's political elite, at national, provincial, and local levels, have been mired in corruption scandals for decades, some of which are attributed to the dire state of public infrastructures and institutions. Against this background, the work of South Africa's ATJ field, which attempts to facilitate the constitutional ideal, remains a significant feature of South Africa's socio-economic and socio-political landscape.

Given the significance of this field and South Africa's legal framework, an enduring question that underlies much South African socio-legal literature regards the "paradox" of a relative lack of socio-economic transformation since the end of apartheid, despite a Constitution that appears equipped to facilitate such social change (Mnisi-Weeks, 2021).⁸ One answer suggests that "access to justice" in the form of access to courts remains beyond the reach of ordinary South Africans because they cannot afford the kind of legal representation required to realise their constitutional rights (see Dugard, 2015; Dugard and Wilson, 2011; Holness, 2013; Budlender, 2004; Brickhill, 2005; Kruuse, 2022). According to this argument, despite the transformative potential of South African law, it remains a tool for those with financial resources, not the poor. This claim, and the wider literature of which it is a part, emphasises that an access to justice "gap" remains in South Africa (see Klaaren, 2019).

⁷ For a comprehensive overview see Davis and Klare (2024: 490).

⁸ Of course, this question is also addressed by macro analyses of political-economic dynamics.

A second answer suggests that even if poor people can find affordable or pro bono legal representation, the conservatism of South Africa's professional "legal culture", as evidenced by post-1994 socio-economic rights jurisprudence and the development of the common law, has limited what people may demand from state and private actors, and therefore the transformative potential of the law in practice. Scholars argue that contemporary professional legal culture remains steeped in apartheid-era traditions of legal positivism, formalism, and governmental deference that are ill-suited to the "new open-text provisions" of the Constitution that demand "purposive, value-laden interpretation" (Wilson and Dugard, 2014: 38; see also Davis and Klare, 2010, 2024; Mnisi-Weeks, 2021; Froneman, 2005; Hoexter, 2008). To realise the Constitution's transformative potential, a transformation in legal culture is required.⁹

These debates, their underlying problematic regarding the relationship between law and social change, and the answers they have produced in scholarly accounts, are mostly pursued by practising and academic lawyers in South Africa. These discussions have significant legal stakes. But in addition, the problems this literature has identified are also *concrete* problems about the nature of institutions, processes, and their effects. First, how do poor and marginalised people get access to a legal system that is presented so normatively as the means of individual and social improvement? Second, what legal culture are poor people exposed to when they pursue their problems in legal fora, and how does it mediate their ability to access just outcomes? These questions are amenable to ethnographic investigation and guide the empirical focus of this thesis.

In attempting to answer these questions, this thesis departs from the normative, academic-legal accounts that dominate debates about the relationship between law and social

⁹ Beyond South Africa, socio-legal scholars interested in the relationship between law and social change have pointed to the significance of legal culture in shaping the course of legal struggles for social change (see Rosenberg, 2008 [1991]; Scheingold, 2004 [1974]).

change in South Africa, adopting, instead, an ethnographic approach to explore this relationship. Drawing on a tradition of socio-legal and anthropological studies that explores the roles of lawyers in projects of law-based social change (McCann, 1994; Shdaimah, 2016; Rosenberg, 2008 [1991]; Scheingold, 2004 [1974]; Sarat and Scheingold, 1998; Englund, 2004), this thesis takes ATJ lawyers and their everyday legal practices, particularly their engagements with poor and marginalised clients, as its empirical focus, using this as a lens onto ATJ legal culture.

Social justice lawyering is often rife with normative and professional quandaries (see Sarat and Scheingold, 1998; Shdaimah, 2016). This is also true of South Africa's ATJ field. In this thesis, I argue that within this field, these quandaries centre on the tension between lawyers' professional commitments to law as a system of rules that must be followed; ideals of law as a morally sensitive and capacious tool that can facilitate broad-based social transformation; and their self-conceptions as professionals who "help people". These tensions are thrown into relief in lawyerly practice that involves both providing clinical legal assistance to the poor to help them achieve immediate relief and using the law expansively through strategic litigation thus attempting to change "the world by changing the law" (Shdaimah, 2016: 11). I take the normative and professional tensions my interlocutors experience as objects of ethnographic investigation, examining what they reveal about ATJ legal culture and its impact on the provision of legal assistance, and more broadly, the nature of South Africa's "constitutional project".

Using the analytical concept "legalism" (Dresch and Scheele, 2015) whereby law is understood in terms of rules and abstract categories as well as wider social ideals, I argue that underlying the normative and professional tensions that ATJ lawyers experience is their often-multiple understandings of, and commitments to, legal rules. While there has been significant ethnographic scholarship on how marginalised people use and experience the law (see Merry,

1990; Ewick and Silbey, 1998; Silbey, 2005), less ethnographic attention has been paid to how legal professionals understand and relate to law, and how this informs their legal practice in projects of law-based social change. This thesis centres these understandings in its analysis of ATJ legal culture.

I show that from one perspective, ATJ lawyers, like most lawyers, are legalistic, understanding and practising law in terms of abstract rules and categories (see Dresch and Scheele, 2015). This is evidenced by how they “translate” their clients’ problems, which are often shaped by wider social, economic, and historical forces and expressed in a moral discourse, through a framework of abstract rules and categories, and how they mobilise legal arguments based on these (see Fuller, 1994; Conley and O’Barr, 1990; Sarat and Felstiner, 1995). But importantly, ATJ lawyers subordinate the “legal” to wider societal goals, understanding law as an evocation of ideals that ought to be realised. These lawyers draw a connection between the practical and idealistic elements of law (see Pirie, 2024).

In existing South African accounts these understandings are framed in terms of the “paradox” of South Africa’s legal culture (Mnisi-Weeks, 2021) in which transformative constitutionalism is the “hegemonic discourse” (Brickhill, 2021: 35; see also Sibanda, 2020; Madlingozi, 2017), and yet apartheid-era traditions of formalism and positivism, which ostensibly undermine transformative constitutionalism, are constantly reproduced. In contrast, I argue that the concept of “legalism” offers a new non-normative perspective on this “paradox”: as a tension between lawyerly adherence to rules, at least partly anchored in the past; and the normative commitment to new legal ideals, oriented to remaking South Africa’s future. Examining *this* dynamic through an ethnographic focus on legal practice enables a novel grounded analysis of contemporary ATJ legal culture, the conditions of its reproduction, and its effects on efforts to advance the constitutional project.

At the same time, mobilising the analytical concept of legalism in an examination of ATJ legal culture in South Africa highlights the significance of politico-legal transitions in shaping the fraught relationship between rules, ideals, and justice in projects of law-based social change. While these relationships have long been a concern in scholarship on legalism (Pirie, 2013; Pirie and Scheele, 2014; Dresch and Scheele, 2015; Clarke, 2012), they have rarely been explored in relation to contexts of transition. Part of what underlies the fraught relationship between rules, ideals, and morality in relation to law in contexts of transition like South Africa, is precisely the unevenness of legal transformation noted above, and the ideals of law that transition itself evokes.

It is thus by bringing the analytical concept of legalism to bear in an analysis of legal culture that this thesis offers a novel perspective to theories of law and social transformation.

Introduction

This thesis draws on, and contributes to, debates in a range of typically disparate scholarly fields. These include legal and socio-legal scholarship on “access to justice”, socio-legal theories of “impact” in legal struggles for social reform, legal anthropological discussions of “legalism”, and legal and historical exploration of “legal culture”. In the literature review that follows, I address each field in this order, explicating how it informs the analysis in this thesis, and in turn how this thesis’s analysis contributes to the field. This discussion will also reveal that these fields explore a range of questions in diverse empirical sites and use a variety of distinct methodological and conceptual tools. While some of these fields intersect either empirically or conceptually, others have not yet been placed in conversation with one another. A contribution this thesis makes is showing how bringing these fields of analysis together enables a new perspective of each.

Following the literature review, I discuss this thesis’s methodology and then provide a chapter overview.

Literature Review

Setting the Scene: Access to Justice

Across a range of settings, exploration of how poor people access state legal institutions has often been approached through the framework of access to justice (ATJ) (Whalen-Bridge, 2022; Brickhill, 2005; Budlender, 2004; Dugard, 2008; McQuoid-Mason, 2013; Klaaren, 2019; Durojaye et al., 2020; Durojaye et al., 2018; Palmer et al., 2016). The concept of ATJ refers to the ability of all people, particularly the poor and marginalised, to secure relief from a state legal system. ATJ thus invokes core tenets of legal liberalism as well as democratic ideals such as equality before the law (Cappelletti and Garth, 1977). Scholars emphasise that the inaccessibility of legal assistance to “poor and powerless people” –

whether in the form of a lawyer or other kinds of legal advice – undermines their ability to “challenge and improve their position” (Budlender, 1988: 320).¹⁰

Underlying this conceptualisation of ATJ is a substantive account of justice that considers how legal systems work in practice and a “desire to make rights of ordinary people real” (Cappelletti and Garth, 1977: 182). ATJ scholarship, both theoretical and empirical, is often normatively oriented. Historically it has focused on evaluating the effectiveness of existing ATJ policies (largely an American preoccupation), and the “gap” between the need for legal assistance and its financial accessibility in contexts where there is insufficient state-funded legal assistance for the poor (Palmer et al., 2016; Klaaren, 2019; Dugard, 2008; Budlender, 2004; Albiston and Sandefur, 2013; Sandefur, 2014; Wallat, 2019; Whalen-Bridge, 2022; Cappelletti and Garth, 1977).

Recently this approach to ATJ research has been critiqued by mostly American socio-legal scholars who argue that a preoccupation with unmet legal need “conflate[s] access to justice with access to law and the courts”, thereby confining conceptualisations of how just outcomes might be reached (Wallat, 2019: 614; see also Sandefur, 2019).¹¹ Scholars argue that this conflation treats disputes not as social constructs that emerge from a process of “naming”, “blaming”, and “claiming” (Felstiner et al., 1981), which are informed by socio-economic conditions and subjective meanings, but rather as “found objects in the world” (Albiston and Sandefur, 2013: 103). This analytic framing assumes that people understand their problems as legal, thus eliding an analysis of how they came to do so. An additional critique of the “gap” conceptualisation of ATJ is that it produces policy prescriptions described as an “emergency room model” which typically centre on increasing the number of

¹⁰ For a wider comparative account of ATJ in a range of contexts see Whalen-Bridge (2022). Implicit and explicit in the chapters of this book is the connection between access to legal representation and improving the conditions of the poor.

¹¹ Critical perspectives on the ATJ “gap” approach vary and extend beyond what is presented in this review. For purposes of space, I have only addressed critiques that are relevant to this thesis’s analysis.

pro bono lawyers but fails to illuminate what precise difference lawyers make in legal processes (Albiston and Sandefur, 2013: 114). This model treats “the acute symptoms” of a person’s problem, failing to address the structural underpinnings of poverty and marginalisation that often drive them to seek relief from a court (Wallat, 2019: 615; Albiston and Sandefur, 2013: 114).

Given these critiques scholars have urged an approach to ATJ research that explores the processes by which people come to understand their problems as legal (see Merry, 1990; Ewick and Silbey, 1998), examining the different kinds of assistance lawyers can provide that may have more enduring structural effects than the “emergency room model”, and the processes of “access” itself. This critique can be read as an implicit call to incorporate the methodologies and insights produced by scholarship on cause lawyers (Sarat and Scheingold, 1998; 2004; 2006), poverty lawyers (Alfieri, 1991), progressive lawyers (Shdaimah, 2016), and to engage empirically with the processes of access. Using a combination of ethnographic and case analyses, scholars have shown how these kinds of lawyers employ a range of strategies to “do good” (Menkel-Meadow, 1999) and self-consciously contend with the limitations of using law to do so (I return to this scholarship in the next section).

Although not typically tied to ATJ scholarship, ethnographic analyses of how legal experts assist disadvantaged people navigate legal and bureaucratic systems, and the normative tensions this work produces, has also been addressed by an emerging field of ethnographic studies of “advice” (see Koch and James, 2022). A core component of this field is set against the rise of austerity in Europe and Britain and analyses the work of bureaucratic and legal advisers to elucidate the “welfare state’s changing character and role” (Koch and James, 2022: 1). Within this scholarship, advisers are often not lawyers, but they do have requisite expertise that enables them to assist vulnerable people as they navigate changing state-society-market relationships under neoliberal capitalism. In their everyday work these

actors “translate” legal and institutional frameworks, often becoming the last resort for their clients or dependents who are increasingly subject to the control of local authorities, immigration systems, landlords, banks, and debt recovery agencies (James and Koch, 2022; Wilde, 2022; James, 2022; Kirwan, 2016; McDermont, 2013; Forbess, 2022; Forbess and James, 2014).

As indicated, advice varies from dealing with debt (James, 2022), to housing (Wilde, 2022; McDermont, 2013), and immigration (Tuckett, 2022). Central is analysis of how advisers negotiate the demands and expectations of their clients in relation to their welfare needs and the logics of austerity politics and extractivism. Part of this negotiation are advisers’ own moral commitments that may or may not align with the imperatives of austerity arguments and ideologies embedded within the institutions for whom they work (Wilde, 2022). This itself stems from how advisers are differently positioned: in some cases, as representatives of powerful institutions, standing in for a particular political-economic order; in others, as challengers to this order and its underlying moral, political, and economic logic (Forbess, 2022).

The South African context has produced scholarship that both reflects and challenges aspects of ATJ literature elsewhere. But, given that much of it is written by academic lawyers, it often does not directly engage with wider anthropological accounts of legal assistance. However, it is necessary to review it as it reflects the ongoing debates within the empirical field this thesis examines and elicits the empirical questions this thesis pursues.

The idea of access to justice resonates in South Africa because of the Constitution’s promise of individual and social transformation. This is already evident in the inclusion of “access to courts” in South Africa’s Bill of Rights (Section 34). Echoing the emphasis of ATJ “gap” literature, South Africanist scholars argue that realising the right of access to courts and the transformative potential of the Constitution requires bridging this “gap” through the

provision of legal representation to the poor (Brickhill, 2005; Budlender, 2004; McQuoid-Mason, 2013; McQuoid-Mason and Mubangizi, 2013). But in South Africa, the continuation of the ATJ gap is underpinned by the particularity of South Africa's legal history and consequent mixed legal system, the scope of socio-economic inequality, and the normative framing of the Constitution. While scholars do emphasise a "gap", they nevertheless analyse poor peoples' recourse to legal fora in terms of structural and historical dynamics and longer struggles for social justice amongst marginalised groups (see for example, Dugard, 2008; Madlingozi, 2014). This literature produces an account of the ATJ gap that is arguably more nuanced than critiques of this approach might suggest.¹²

South Africa has a mixed legal system comprised of Roman-Dutch civil and English common law – inherited from successive colonisers – and, since the adoption of the Constitution, the formal recognition of customary law. It is argued that the endurance of English common law which "utilises...an adversarial mode of adjudication", produces the "inevitable consequence that lawyers play an important role in access to justice, as the South African courts have recognized" (Kruuse, 2022: 329). The complexity produced by this mixed legal system, including the "complex rules of recognition regarding customary law, mean that lawyers are especially important in translating and accessing justice for those who need it" (Kruuse, 2022: 329). Hence Dugard notes that "access to justice means more than mere physical access to courts – it incorporates the ability to be effectively heard and responded to" (2013a: 304; see also Dugard, 2008; Budlender, 2004). In describing the necessity of legal representation in South Africa and how this is related to wider patterns of inequality and the complexity of formal legal processes, Budlender writes:

Access to court...means more than the legal right to bring a case before a court. It includes the ability to achieve this. In order to be able to bring his or her case before a court, a prospective litigant must have knowledge of the applicable law; must be able to identify that she or he may be able to obtain a remedy from a

¹² See Budlender (1984) for an early nuanced account that addresses the ATJ "gap" in South Africa.

court; must have some knowledge about what to do in order to achieve access; and must have the necessary skills to be able to initiate the case and present it to the court. In South Africa the prevailing levels of poverty and illiteracy have the result that many people are simply unable to place their problems effectively before courts. (2004: 341)

Although written in 2004, scholars writing on South Africa still understand problems of access to justice in these terms, as similar conditions of inequality and poverty exist (Dugard, 2015, 2013a; McQuoid-Mason, 2013; Durojaye et al., 2020; Klaaren, 2019; Kamga, 2015; Holness, 2013).¹³ The right of access to courts, and by implication access to justice, is thus treated substantively in South African “gap” accounts by taking cognisance of how law mediates and is mediated by socio-economic inequality and power relations. As Budlender aptly puts it, “poor people are not simply wealthy people without lawyers” (1984: 7). Furthermore, although there is an emphasis on the dearth of lawyers who are financially accessible to the poor, underlying this analysis is the view that the *form* of law, traceable historically to periods of colonisation and apartheid, is key to the production of the ATJ gap.

Given the nuanced treatment of the ATJ gap in South African scholarship, it is unsurprising that it has not produced a homogenous “emergency room model” of ATJ practice – whether in scholarly writing or in practice. Indeed, as indicated above, what I found and what this ethnography shows is a diverse network of organisations pursuing distinct ATJ projects, underpinned by distinct understandings of the relationship between law and social change. For example, many large corporate law firms have established dedicated pro bono departments.¹⁴ Some provide clinic-style assistance to individuals, enabling poor people to defend their established rights and claim their corresponding legal entitlements. Others pursue an impact litigation approach either to transform old law to bring it in line with

¹³ Beyond the cost of legal representation, administrative costs of legal processes are also considered prohibitive for most South Africans (Holness, 2013; Klaaren, 2019; Dugard, 2015).

¹⁴ Much of this is underpinned by the newly amended Legal Practices Act (amended August 2023) which now requires legal practitioners to undertake a minimum of 40 hours per calendar year of “community service”, and 8 hours for candidate practitioners. For the amendment see: https://www.gov.za/sites/default/files/gcis_document/202308/49104rg11614gon3788.pdf

the Constitution or use existing constitutional provisions to make new claims that potentially benefit entire classes of people (Holness, 2013). There is also a range of non-profit pro bono legal clinics, community advice offices (CAOs), and public interest litigation organisations (PILOs) that provide pro bono assistance to indigent clients. The latter, drawing on the legacies of anti-apartheid lawyering but harnessing new legal tools, also seek to *advance* structural transformation through PIL, and often include an array of legal activism and community organising as part of their broader goal of advancing social change.

Despite the existence and significance of this heterogenous network of organisations, their practices have yet to be the subject of sustained empirical investigation. Drawing on the insights and methodologies of ethnographic ATJ and advice scholarship which foreground legal professionals, this thesis addresses this lacuna by analysing the processes and practices that constitute ATJ work, and the tensions they elicit. Significantly, this thesis examines the ATJ field's historical emergence during the final decades of apartheid. It analyses how the legacies of anti-apartheid lawyering, apartheid-era formalistic legal culture, as well as post-apartheid ideals of transformative constitutionalism, shape contemporary legal practices and their effects. In doing so, the analysis foregrounds the tension between ideals of law oriented to the future, and the historical pull of past frameworks of law.

A similar concern, while not analysed ethnographically, is evident in South African ATJ literature that moves beyond even the relatively nuanced analysis of the ATJ gap already discussed. Here, scholars conceptualise ATJ in relation to the constitutional project. Brickhill writes, “‘access to justice’ must mean shaping the legal institutional framework to better serve the whole population and make good on constitutional promises of genuine social and economic advancement” (2005: 303). Considering this conceptualisation of ATJ, the barrier that undermines access is not simply the dearth of pro bono lawyers, but how the law has been instantiated in practice. This has been examined and assessed almost exclusively

through an analysis of jurisprudence of socio-economic rights (Bilchitz, 2013; Dugard, 2013, 2008; Dugard and Wilson, 2014; Roux and Dugard, 2006), and to a lesser extent jurisprudential development of the common law in accordance with the Constitution's values (Davis and Klare, 2010, 2024). Like ATJ gap scholarship, jurisprudential analyses are often written in a normative mode.

Bilchitz (2013; see also 2008), one of the foremost critics of the Constitutional Court's jurisprudence, argues that given the country's inclusion of justiciable socio-economic rights, South Africa has a firm textual basis for rendering socioeconomic rights "meaningful for the poor" (Bilchitz, 2013: 68). But he argues that the Constitutional Court's jurisprudence has "weakened these rights significantly", undermining the ability of poor and vulnerable people to access justice (Bilchitz, 2013: 68; see also Dugard, 2008; 2013; Dugard and Roux, 2006). Central to his and others' (see Dugard and Wilson, 2014) critique is the Constitutional Court's adoption of the "reasonableness standard" first articulated in *Grootboom*.¹⁵ Here, the Court established that the role of the judiciary in adjudicating socioeconomic rights is not to establish the core content of socioeconomic rights, but rather to discern whether the executive and legislative arms of the state have taken reasonable or appropriate action in realising particular rights (Bilchitz, 2013, 2008; Dugard and Wilson, 2014; Brickhill and LEEVE, 2015; Roux, 2013). For many critical scholars this approach to socioeconomic rights jurisprudence has undermined the transformative potential of South Africa's Constitution to the detriment of South Africa's poor (Bilchitz, 2013; Dugard, 2014, 2011).

In an additional line of jurisprudential critique, scholars argue that the reasonableness approach is largely acontextual in application (Dugard and Wilson, 2011; Bilchitz, 2013). Jackie Dugard, a legal academic and practicing public interest lawyer, and Stuart Wilson, a High Court judge and legal academic who was previously a public interest lawyer, suggest

¹⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000], para 33.

that this manifests in how the Constitutional Court has “turned away from what claimants say about their lived experiences of poverty in favour of an abstract evaluation of the state’s justifications for its refusal to respond to them” (2011: 665). In other words, the specific needs of litigants are largely ignored in the adjudication of socioeconomic rights, with attention paid instead to state policy.¹⁶ These legal scholars thus argue that even if a poor person secures legal representation and access to a court, the approach taken to adjudicating socioeconomic rights in South Africa significantly limits how far an expression of experience can be heard, and thus what litigants may demand from the state (see also Bilchitz, 2013: 74).

In explaining the Constitutional Court’s socioeconomic rights jurisprudence and its limits, scholars often point to the persistence of a “conservative” professional “legal culture” that bears the traces of the positivistic and formalistic legal culture of apartheid-era South African jurists (Dugard and Wilson, 2014: 38; see also Mnisi-Weeks, 2021).¹⁷ Implicitly, these jurisprudential analyses grapple with the tension between the pull of past frameworks of law, and an ideal of law as a tool to forge a new future. This tension produces the so-called “dis/empowerment paradox endemic to South Africa’s legal culture” (Mnisi-Weeks, 2021: 57).

This thesis takes as its starting point the insights from South Africa’s ATJ literature and the problematics it throws up. Whereas the aforementioned discussions treat ATJ as a normative problem of how to better enable poor people to access a lawyer or improve their experiences of the legal system, this study pursues the wider conceptual questions that are not explicitly addressed in existing ATJ scholarship. It asks: how does the historical emergence of South Africa’s ATJ field as a form of activism, and its contemporary practices in the context of politico-legal transition, elucidate the tension between the ideals of law oriented to

¹⁶ This is often illustrated with reference to the *Mazibuko v City of Johannesburg* Case which centred on the right to water.

¹⁷ Conservatism here refers to styles of legal analysis, not political position (see Klare, 1998: 168).

forward-facing projects of social change, and the pull of legal legacies manifest in lawyerly adherence to rules?

As I show in the chapters that follow, this question emerges *from* the ethnographic perspective this thesis adopts. Drawing on the wider ethnographic tradition of ATJ and assistance scholarship, this thesis addresses it by empirically focusing on ATJ lawyers, their tactics and strategies, as well as their initial encounters with potential clients. Echoing scholarship on “advice” it pays close attention to how different kinds of ATJ practices (strategic litigation and clinical assistance) differently position lawyers relative to legal rules and institutions and the tensions these produce. This focus enables a concrete (but not normative) analysis of poor people’s barriers to accessing legal assistance, thereby contributing to ATJ scholarship. The analytical and methodological approach taken by this thesis highlights that the ATJ “gap” in South Africa is often produced through the very processes meant to mediate it.

Further, pursuing the broader conceptual question from an ethnographic perspective enables a wider examination of the relationship between legal legacies and futures in projects of social change through law, and how this in turn mediate people’s ability to use the law to improve their position. Below I turn to scholarship that deals more squarely with the relationship between law and social change.

Law and Social Change and Lawyering for Social Change

Anthropologists writing on a range of contexts have grappled with how to conceptualise and empirically study law in relation to social change (Moore, 2011). These include explorations of land in post-apartheid South Africa (James, 2007), transitional justice in post-conflict contexts (Wilson, 2001), and ethnographic examination of how human rights work in practice (Merry, 2005, 2006; Cowan et al., 2001; Riles, 2006; Goodale, 2006; Englund, 2006). A parallel body of largely American socio-legal scholarship evaluates the

impact of strategic litigation or “legal mobilisation” in advancing social change (McCann, 1994; Rosenberg, 1991; Scheingold, 2004 [1974]; Rodríguez-Garavito, 2011; Brickhill, 2021). I engage this literature because it is empirically closer to my own work, shapes much South African legal commentary (see Wilson, 2021; Brickhill, 2021), and highlights how legal culture mediates struggles for social justice.

In socio-legal studies that evaluate the impact of “legal mobilisation”, the term refers to instances when “the law...is mobilised when a desire or want is translated into a demand as an assertion of rights” (Zemans, 1983: 700). Social change is often not explicitly defined but broadly refers to far-reaching shifts “in relation to access to social goods, behaviours, practices, power relations, social roles, values or the operations of bureaucracies or institutions” that affect significant numbers of people, particularly disadvantaged groups (Brickhill, 2021: 15).

Much of the early legal mobilisation literature is set against the backdrop of the American civil rights movement in which organisations like the National Association for the Advancement of Coloured People (NAACP) and the Advancement of Civil Liberties Union (ACLU) turned to law to achieve far-reaching socio-economic reforms (see Bond and Jonas, 2005; Walker, 1990). These studies empirically focus on actors (lawyers, activists, union leaders) and social movements who engage in strategic litigation in which laws are challenged and transformed, and the latent effects of court decisions on policy developments, social norms, and access to social goods. Although this field has since expanded and is not limited to American socio-legal scholarship (see Brickhill, 2021; Rosenberg et al., 2019; Rodríguez-Garavito, 2011), early American debates in the aftermath of the civil rights movement were central to establishing two distinct perspectives regarding how to evaluate law’s impact in advancing social change: the materialist/instrumentalist perspective and the

interpretivist/constructivist perspective (2021: 59; see also Rodríguez-Garavito, 2011; McCann, 2006).

The materialist perspective understands law as a set of norms that shapes human conduct and evaluates impact based on an assessment of the “direct and palpable effects” of judicial decisions (Rodríguez-Garavito, 2011: 1677). In this account, “law... matters to the degree that official institutional actions, cause direct, immediate, tangible effects on targeted behaviours” (McCann, 2006: 21). This perspective is exemplified by Rosenberg’s seminal text, *The Hollow Hope*, in which he argues that the American courts “can almost never be effective producers of social reform” largely because of their institutional and political constraints (2008 [1991]: 338). He further suggests that “litigation steer(s) activists to an institution that is constrained from helping them”, and “siphons off crucial resources and talent, and runs the risk of weakening political efforts” (2008 [1991]: 338). Underlying this argument is Rosenberg’s tempered criticism of lawyers who urge litigation as a tool for social reform to the neglect of political mobilisation (see also Scheingold, 2004 [1974]).

The interpretivist perspective centres the dynamic relationship between law and society and the “intersubjective power of law in constructing meaning” (McCann, 2006: 21). Both Scheingold’s *The Politics of Rights* (2004 [1974]) and McCann’s *Rights at Work* (1994) are emblematic of this approach. Scheingold’s interpretivist theory of the “politics of rights”, in which “it is possible to capitalize on the perceptions of entitlements associated with rights to initiate and nurture political mobilization”, underscores the significance of the often-indirect ways in which rights can be politicised to effect social reform (2004 [1974]: 131). It is through harnessing the political, rather than legal, dimensions of rights, that law can facilitate social change. This is both an analytic argument and a “message...to lawyers interested in altering the status quo” (2004 [1974]: 151).

Scheingold argues that even activist lawyers will resist the “mobilizing potential of litigation” because they have “internalized the myth of rights”: the belief that the recognition of rights naturally leads to justice and that legal reform translates into social reform (2004 [1974]: 151; see also 2004 [1974], Chapter 2). He suggests this is a consequence of lawyers’ “socializing experiences” and legal education (2004 [1974]: 152-162). For Scheingold, this paradigm produces a “narrowing vision” (2004 [1974]: 158). While he acknowledges that other paradigms may be similarly narrowing, he argues that “what may make legalism a bit more deluding than some other world views” is its often-subtle character. Rather than being understood by legal experts as one among many ways to understand the world, it is perceived as the natural consequence of logical thought: precisely what is taught in their legal training (2004 [1974]: 161; see also Shklar, 1964; Conley and O’Barr, 1990).

McCann’s study of pay equity reform in the United States demonstrates the ways in which rights can be used by social movements to generate attention and support around a particular issue, to place an issue on the political agenda, as a bargaining chip that mediates power relations between unequal parties, and as a linguistic tool with which to “interpret, or ‘name’, a long-experienced injustice in new, more compelling and sensible terms” (McCann, 1994: 89). McCann thus argues that “legal norms” can shape the “terrain of struggle” and are an “important resource” for social activists in advancing their cause (1994: 4). From this perspective, law’s power lies less in rulings than in its symbolic and discursive effects.

Despite their differences, both the interpretivist and materialist perspectives share an emphasis on the use of legal tools *in combination* with other forms of activism and political mobilisation both directly (Rosenberg, 2008 [1991]) and indirectly (Scheingold, 2004 [1994]; McCann, 1994) to effect systemic social change. Describing the overarching approach, Wilson writes, “[c]hanges in law...signal symbolic recognition of the ends they embody,

which must then be made ‘real’ through other forms of political struggle” (2021: 25; see also Buckel et al., 2023).

Stuart Wilson, as noted, is a South African High Court Judge and former public interest lawyer who recently posited his own theoretical model to explain the relation between law and social change. He argues that an effect of foregrounding the limitations of law in both the materialist and interpretivist theories – what he calls “the liberal tradition” – is that law itself is decentred in analysis (2021: 25). In turn these theories fail to construct an account of “the ways in which law itself constitutes and structures social action” (2021: 26). Elaborating this argument, he writes:

While often claiming critical distance from the law, it [the liberal tradition] overlooks the way in which those who are wielding law as an instrument, or implementing legal strategies, are themselves enmeshed in legalistic ways of thinking about social action and carrying it out, and the ways in which the law itself subtly imposes values and attitudes on the person who wields law as an instrument. (2021: 27)

Central to Wilson’s critique – which is perhaps overstated (see Sarat and Kearns, 1993: 31; see also McCann, 2006; 1994; Scheingold, 2004 [1974]) – is that existing theories of law and social change treat law as an instrument that is used to act on social structures (including identities, language, ideals, and social practices) rather than conceptualised as constitutive of them (Wilson, 2021: 27).

Responding to the limitations of this perspective, Wilson argues for an “agent-centred” approach to law and social change that interrogates the ways in which law shapes the values and attitudes of those who deploy it and how “law actually restructures the spaces in which normative agency is exercised” (2021: 33; see also Shdaimah, 2016). Despite situating his argument in socio-legal debates about law and social change, much of Wilson’s argument relies on an analysis of the development of post-apartheid jurisprudence. Elided from Wilson’s agent-centred approach is an empirically thick account of the choices,

practices, experiences, and understandings of law amongst those who are using it to advance social change – both lawyers and litigants. It is precisely through its empirical focus on ATJ lawyers and the choices they make that this thesis contributes to law and social transformation scholarship. In so doing, it draws on the themes and methodologies of a parallel socio-legal discussion about “cause lawyers” (see Sarat and Scheingold, 1998).

The concept and analytical study of cause lawyers emerged in the late 1990s with Sarat and Scheingold’s first instalment of a series of edited volumes (1998, 2004, 2006, 2008). Cause lawyers can be understood as legal professionals who “deploy their legal skills to challenge prevailing distributions of political, social, economic and/or legal values and resources” (Sarat and Scheingold, 2001: 13; see also Marshall and Hale, 2014). These diverse practices include clinical and strategic pro bono representation provided by private law firms (Boutcher, 2013), public interest litigation performed by dedicated PILOs (Hilbink, 2002), pro bono clinical legal assistance (Shdaimah, 2016), and mobilisation lawyering in which lawyers direct efforts at mobilising wider civil society around a particular cause (McCann and Silverstein, 1998). These different legal practices are underpinned by lawyers’ distinct understandings of the relationship between law and social change (Kilwein, 1998).

Cause lawyer scholarship often foregrounds analysis of lawyers’ understanding their professional roles (Marshall and Hale, 2014). This is achieved both in studies of the organisation and fields of practice of cause lawyers (Kilwein, 1998; Boutcher, 2013), and to a lesser extent through ethnographic accounts of lawyer-client encounters (Shdaimah, 2016). Both reveal lawyers’ diverse participation in social struggles – typically with social movements – and throw into relief the normative and professional tensions they experience. In particular, the latter include the tension between professional responsibility and political commitments (Sarat and Scheingold, 1998; McEvoy et al., 2022), and between “social justice goals and the hierarchical, disempowering aspects of lawyering and the legal process”

(Shdaimah, 2016: 21). But despite foregrounding these tensions, cause lawyer scholarship rarely analyses the legal cultures that shape them.

Through its ethnographic focus on South Africa's ATJ legal field, this thesis contributes a new perspective to both law and social change and cause-lawyer scholarship. It moves beyond analyses of litigation outcomes or organisational structures to examine the *everyday practices* through which lawyers negotiate the relationship between rules and ideals, and situates these practices within a wider legal-bureaucratic infrastructure (Byrne et al., 2024).¹⁸ Doing so opens a window onto how ATJ lawyers translate moral and constitutional ideals into bureaucratic and procedural work, revealing the everyday processes through which ATJ lawyers shape possibilities for social change. Moreover, building on cause lawyer scholarship, key to what this thesis shows is how these practices are often normatively fraught, highlighting the tension between rules and ideals in legal struggles for social change. In its analysis of these tensions and the practices that elicit them, this thesis thus addresses Wilson's critique of the "liberal tradition" while extending it through empirical depth. As the chapters will demonstrate, adopting such an approach in the South African case, marked by uneven legal transition and legal institutional fragility, throws into relief the often-overlooked relationship between *transformation* and *maintenance* in projects of law-based social change, and the place of legal rules in mediating it.

The following section develops the conceptual lens that underpins this analysis. Building on anthropological and socio-legal debates about the nature of law, it turns to the idea of "legalism", a concept that elucidates the relationship between rules and ideals that together constitute law.

¹⁸ I return to this concept in Chapters 5 and 6.

Legalism: The Multiple and Contested Meanings of Law

Recent anthropological scholarship on “legalism” has been a fruitful site of analysis regarding the composite meanings attached to law. Legalism may be understood as “an appeal to rules that are distinct from practice, the explicit use of generalizing concepts, and a disposition to address in such terms the conduct of human life” (Dresch, 2012: 1; see also Pirie, 2013: 131). Legalistic approaches refer to recourse to abstract and universal rules and categories (see also Hart, 2012 [1961]: 124). Pirie argues that studying legalism, an approach that emphasises the form rather than function of law, enables anthropologists to specify “what is distinctive about law amongst other social forms” (2013: 223). Legalism often manifests in codified legal texts and informs kinds of argumentation. Even in contexts where rules are not explicitly stated, as in many common law legal systems where legal principles guide decisions, legalism can be observed in how the world is organised through generalisations and categories that provide the basis for authoritative reasoning (Postema, 2004). For example, property laws may categorise actors as tenants or owners, giving rise to hierarchical (or other) sets of rights and duties attached to these categories, and impose distinct rules that in theory should govern the relations between them. “Legalism thus promises definitions, distinctions, and right answers” in contexts where difficult and authoritative decisions are required (Pirie, 2013: 143).

Apart from transforming the world through a prism of abstract rules and categories, part of the significance of legalism is that the rules invoked stand apart from practice, apart from the “flux of events and personalities” (Pirie, 2022: 323; see also Dresch, 2012). A consequence of this is that the rules themselves are often idealistic. As noted by Pirie, “law tends to invoke an ideal order” (2013: 226). This may regard the exercise of power, visions for the future, or ideals of justice (Pirie, 2024; see Merry, 1990). In providing rules or principles, law also provides the practical tools with which *potentially* to achieve these ideals,

and the wider vision attached to them (Pirie, 2013: 221). Law thus has the capacity to link the “the real and the ideal for a community of people” (2024: 415). It is this idealism that often underpins both the law’s authority and its longevity.

But the link between the real and the ideal is fraught, revealed both in this thesis’s analysis, and wider legal anthropological scholarship that examines the relationship between legalism and the ideals of justice (Pirie, 2013; Pirie and Scheele, 2014). Although law and justice are often implicitly linked, as evidenced by the conflation of access to justice with access to the resources necessary to make a legal(istic) argument, anthropologists studying legalism have shown that the relationship between the two is often characterised by tension (Clarke, 2012; Pirie, 2013; Pirie and Scheele, 2014). The generality and universalism of law and the rules and categories it may rigidly mobilise often sit in tension with the messiness and complexity of life that require greater flexibility and attention to context if just outcomes are to be achieved (Pirie and Scheele, 2014; Pirie, 2013; Clarke, 2012). As Pirie notes, “[m]ercy, compromise, and equity are qualities or virtues that relate to the particulars of an individual case; they can only be conceptualized in context” (2013: 228). A common and long-standing criticism of legalism is its preponderance for rigidity in instances that require greater flexibility (Pirie, 2013: 149; see also Shklar, 1964).

This critique is reflected in much South African socio-legal scholarship and by my interlocutors. As will be elaborated further in the next section of this literature review, central to the discourse of transformative constitutionalism (TC) is a recognition of the historical specificity of South Africa and the complexity of the “legal” problems that people, especially poor people, encounter. Hence the emphasis scholars place on substantive, rather than formalistic (or legalistic), readings of law that consider the kinds of ends that law should be designed to achieve. Implicitly, it is the abstraction of legalism that is argued to be in tension with TC.

The tensions between legalism and justice are further illustrated by an examination of actors who are charged with applying the law. For example, in his study of sharia judges in Lebanon who straddle the roles of bureaucratic agents of the state and religious specialists, Clarke (2012) describes these actors as “tragic heroes” because the requirements of these two roles are experienced by many as “irreconcilable”, and yet necessary (2012: 114). While the former requires applying the rules formalistically in line with the practices of a lawyer, the latter “demands personal engagement with the morally needy” in the vein of a religious specialist (Clarke, 2012: 107). While this tension might be regarded as specific to Islamic law, Clarke instead suggests that it reflects a wider problematic at the heart of law and those who must apply it: “the inherent tension between following the dictates of the law (where they are phrased as rules) and following the impulsion to justice that those rules are intended to secure” (2012: 116).

This thesis’s examination of the practices and consequences of ATJ lawyering reveals similar tensions. On the one hand, following their training and sense of professional duty, lawyers understand the law in terms of rules and categories and so translate their clients’ problems through a legalistic framework. Their conviction regarding the morality and just nature of South African law frames this project normatively, in terms of providing “access to justice”. In some instances, especially when the law in question has been subject to constitutional transformation, ATJ lawyers are able to secure real and significant gains for their clients by following the rules. The link between the real and ideal is sustained. But more often, when dealing with untransformed law, or encountering the complexity of the problem the client faces – rooted in wider and deeper social, economic, and historical dynamics – legalism is ill-suited to achieve any semblance of “justice”. This produces bitter disappointment not only for desperate clients, but also for their lawyers. The latter’s disappointment is precisely because law is bound up with wider moral and social ideals. Like

Clarke's judges, for the lawyers in this study who are committed to using their expertise to advance social justice, rule-following often raises moral quandaries.

The tension between legalism and the realisation of justice has also been addressed by anthropologists interested in the aesthetics of legal form. Underlying this research is a drive to make explicit the assumptions, ideas, interests, and conflicts that are often obscured by the aesthetics of the legal form. It includes ethnographic analysis of documents (Riles, 1999; Hull, 2012), technical legal knowledge (Riles, 2005), and soft legal forms such as quantitative indicators (Merry, 2016), and demonstrates the ways in which the "aesthetics of legal form are used as techniques of depoliticising governance" (Canfield, 2023: 37). It echoes analyses of law in colonial and post-colonial settings, pointing to how legalism can and has been used "to launder brute power in a wash of legitimacy, ethics, propriety" (Comaroff and Comaroff, 2006: 31). If the rules themselves are unjust, or if they impose categories inappropriate to the problems people face, legalism thus has the capacity to undermine the very ideals it evokes.

But rather than only being in tension with justice or just outcomes, legalism has also been argued to facilitate justice. As famously argued by Hart, there is no necessary connection between law and morality. He argues that a precept of justice is "treat like cases alike" and "treat different cases differently" (1961: 159). Legalism provides categories and explicit rules with which to distinguish between likeness and difference (Hart, 1961: 159; Pirie and Scheele, 2014). Legalism and the kind of logical argumentation it requires in theory enables the equal application of law, and from this perspective, justice (see Hart, 1961: 159). Hence Pirie notes, "[t]he use of abstract rules is justified by the impartiality of their application and the goals of fairness and objective order" (2013: 228).

Hart also observes, however, that the formulation "treat like cases alike" and "treat different cases differently" is "incomplete" until it is decided, when constructing laws, what

criteria of difference and similarity are relevant in the application of law (Hart, 1961, 160). As Pirie and Scheele note, “not all traditions, or periods within a tradition, make the same sorts of choice” (2014: 5). While numerous legal philosophers attempt to build abstract universal theories of justice, these rhetorics “tend to obscure the fact that what people think or claim to be a just social order varies from one self-defining group or polity to the next” (Pirie and Scheele, 2014: 7). But notwithstanding the inchoateness of the ideal of justice, historically, justice often remains accompanied by some reference to rules or laws. Pirie and Scheele argue that rather than considering justice as something universal that is to be “achieved through law”, it might be better to consider law a resource through which “claims to justice can be articulated” (2014: 8).

Recently this has been demonstrated in Susanne Verheul’s (2021) ethnographic analysis of political trials in postcolonial Zimbabwe. Drawing on the work of Lauren Benton (2001), Verheul shows that despite acknowledging the politicisation of courts and their limitations for achieving “just” outcomes, Zimbabweans continue to use these spaces. A reason for this is that the law exists as a language and social practice through which citizens can “reaffirm their ideal of the state and their understanding of citizenship within the state, demanding that their government engage with and be held accountable to this ideal” (Verheul, 2021: 10; see also Verheul, 2016; Cooper-Knock et al., 2022). Verheul thus echoes the insights of interpretivist law and social change scholars by pointing to the often-indirect ways that law mediates and is mediated by power relations, and in this way conduces to social change.

These dynamics are further demonstrated by the history of anti-apartheid lawyering (see Abel, 1995) and scholarship that reflects on the “Janus-faced” workings of law under colonial regimes, illustrating how legalism can produce justice or progressive ends (Comaroff, 2001: 306). As Verheul notes, law “works as a double-edged sword that both

legitimises the legal categories and rules through which states control their populations, and aids those marginalised by this form of state control to resist it” (2021: 4; see also Karekwaivanane, 2017; Lazarus-Black and Hirsch, 1994; Abel, 1995; Dugard, 1995; Merry, 1990). Legalism does so by appealing to the very ideals of justice that the law evokes, holding out the promise of forcing powerful actors to live up to them. Appeals to legalism, rather than simply entrenching unequal power relations, can subvert them (see Canfield, 2023). Illustrating these dynamics through the framework of translation, Karekwaivanane describes how, when African lawyers in colonial Zimbabwe translated their African clients’ “grievances into the language of the law”, they “reframed the disputes into questions of rights” (2016: 66; see also Merry, 1990). Framing grievances through these categories and the ideals they evoke enabled Africans to “assert themselves as rights-bearing citizens”, thus limiting “the state’s authority over them” (2016: 66). This scholarship emphasises that legalism must also be read as an invocation of ideals that lay the basis for claims, and in some instances produces concrete, just, and even progressive ends.

Scholarship on legalism thus shows how law is often conceptualised in terms of rules, categories, and as ideals, highlighting the often-fraught relationship between law and justice. Because the law has been framed so normatively as a tool to achieve an ideal future – at least within the ATJ field – South Africa is an appropriate site to explore these attendant tensions. By mobilising the concept of legalism in an ethnographic study of ATJ lawyering, this study both illuminates this tension conceptually in relation to legal anthropological scholarship, and offers a new perspective on how the law itself produces normative tensions in projects of social change. This thesis illustrates that how lawyers navigate these tensions is fundamental to shaping these projects in the first place, and the place of legal rules within them.

The particularity of South Africa’s recent, and rapid, politico-legal transition, highlights further features of the meanings articulated through legalism and the tensions they

produce less commented on in existing accounts. First, particularly in highly unequal societies that undergo politico-legal transition, questions regarding what, and whom, law is for, who gets to benefit from the law, and therefore what makes a rule “good”, may remain live issues long after constitutions or broad legal frameworks are formally adopted. Despite broad ideals of law being popularly and professionally accepted during periods of transition, the South African case illustrates that contestation remain over how these ideals are translated into the rules that ordinary people and legal professionals encounter and must use. This is demonstrated in existing debates between political actors and legal activists regarding post-apartheid eviction legislation that has wider implications for the development of common law property principles (I discussed the legislation and its implications earlier, in the Prologue).¹⁹ It is also thrown into relief in this thesis’s distinctive ethnographic focus on the *initial* encounters between indigent clients and ATJ lawyers.

In these initial encounters, lawyers must not only navigate their own competing normative commitments, but also grapple with desperate clients who (often mistakenly) assume that the ideals of law that moved them to seek legal assistance will translate into rules that will materially assist them. The precise nature of the relationship between ideals of law and the rules (and processes) that constitute it become a point of contestation, raising fundamental questions about how the link between the real and the ideal is sustained, or alternatively collapses. As will be seen in what follows, it is often ATJ lawyers who take it upon themselves to try and maintain this link – with varying degrees of success.

Second, legalism as a way of encountering and constructing the world, and as an expression of legal practice, can evoke histories and traditions that sit in tension with

¹⁹ A prominent example of this has been debate between PILOs and members of government regarding suggested amendments to the PIE Act (see footnote 3) of 1998. See opposing op-eds written by Members of South African Parliament (<https://www.dailymaverick.co.za/opinionista/2022-11-01-da-bill-aims-to-stop-legislatively-enabled-expropriation-without-compensation/>) and public interest lawyers (<https://www.dailymaverick.co.za/opinionista/2022-10-24-da-amendments-to-pie-act-an-attempt-to-criminalise-a-lack-of-housing-in-a-housing-crisis/>).

contemporary ideals. In the South African case, these are a tradition of crude positivism and an imposed colonial legal system that was formally applied in the service of successive racist and oppressive socio-political and economic orders. The practice of legalism in lawyers' everyday encounters with indigent clients draws this past into contemporary legal practice, which ideally is meant to "break" with that past. This thesis thus illustrates that in contexts of transition marked by a history in which law was a central tool in an oppressive state apparatus, new legal ideals can produce a suspicion of rules-based thinking.

In addition, central to what the concept of legalism offers an investigation of ATJ legal practice and legal culture, is a non-normative framework with which to analyse the relationship between rules and ideals in legal practice and thus extend debates about the relationship between formalism and the constitutional project.

In the next and final section of the literature review, I address these debates in detail.

Transformative Constitutionalism and South African Legal Culture

Transformative Constitutionalism (TC) occupies a distinctive place in South African legal discourse. Unlike comparative socio-legal and anthropological scholarship, where legalism and rule-adherence are often treated as normatively neutral features of professional practice, in South Africa formalism has been read as potentially undermining the project of TC (Dugard and Wilson, 2014; Mnisi-Weeks, 2021; Davis and Klare, 2024). This framing is inseparable from the historical role a "formalistic" legal culture played in enabling racist and authoritarian governance (Chanock, 2001; Meierhenrich, 2008). TC therefore enters contemporary debates already positioned as an aspirational corrective to a compromised legal past.

Despite the normative inflection of these debates, it is necessary to engage with them. TC encapsulates how the link between law's ideal and real elements is imagined within the legal professional field – both by legal scholars and by my interlocutors. Among these practitioners, TC remains a powerful orientation, even if its conceptual boundaries are indistinct. This section therefore examines TC not in terms of doctrinal debates, but as a central component of contemporary ATJ legal culture.

TC first entered South African legal discourse with American critical legal studies (CLS) scholar Karl Klare's (1998) seminal text, *Legal Culture and Transformative Constitutionalism*. References to this piece and to transformative constitutionalism more broadly in academic as well as in court orders are legion (Langa, 2006; Brickhill and van Leeve, 2015; Moseneke, 2002; Froneman, 2005). In this article, Klare argued that South Africa's new Constitution clearly contained "transformative aspirations" evidenced in its inclusion of socio-economic rights and substantive account of equality; positive state duties "to combat poverty and promote social welfare"; and its horizontal application in both public and private law (Klare, 1998: 154). The project of realising these aspirations was termed TC:

...a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. (1998: 150)

But central to Klare's argument was that achieving this kind of law-based social change would require a transformation of South Africa's dominant "legal culture" which he defined as "highly structured, technicist, literal and rule-bound", and what other scholars framed as "formalistic" (Klare, 1998: 161; see also Dugard, 1978; Roux, 2013; Chanock, 2001; Meierhenrich, 2008; Ellmann, 1992; Dyzenhaus, 2010; Cockrell, 1996). Formalism in these accounts refers to the "internal logic of rule derivation and the making of decisions by the

application of rules to facts, not by considering substantive outcomes” and had been dominant for much of the twentieth century (Chanock, 2001: 24; Meierhenrich, 2008).²⁰ In defining legal culture more broadly, Klare referred to:

...professional sensibilities, habits of mind, and intellectual reflexes: What are the characteristic rhetorical strategies deployed by participants in a given legal setting?... What counts as a persuasive legal argument? What types of arguments, possibly valid in other discursive contexts (e.g., in political philosophy), are deemed outside the professional discourse of lawyers? What enduring political and ethical commitments influence professional discourse? What understandings of and assumptions about politics, social life and justice?... (Klare, 1998: 167)

Despite acknowledging that this was a “stripped down, bare-bones definition” (Klare, 1998: 166) of legal culture, he nonetheless argued that to realise the Constitution’s transformative potential would require replacing the prevailing formalistic legal culture with one that is policy-oriented, inflected with legal realism that “explores how law is practiced in everyday life” (Merry, 2006: 975), and deploys substantive reasoning (1998: 165).²¹ A central feature of the discourse of TC – in both Klare’s work and in subsequent scholarship (see Mnisi-Weeks, 2021) – is thus the implicit binary between formalism and TC in which the two poles are ideologically loaded. But as will be discussed below, while formalism is often well-defined in these debates, TC remains somewhat vague.

Subsequent scholars largely adopted Klare’s framing, using TC to describe the orientation toward law that seeks societal transformation and prioritises “legal outcomes for substantive reasons supported by the political morality embodied by the Constitution and not merely on the basis of formal reasons” (Brickhill and van Leeve, 2015: 152; see also Langa,

²⁰ While there is some scholarly debate about the precise definition of formalism, the one Chanock uses in his analysis is broadly what is invoked in other South African literature which uses the term (see for example, Froneman, 2005).

²¹ Legal realism emerged in the US in the early 19th century and challenged the dominant understanding of common-law change as “a process of discovery rather than creation” (Schauer, 2009: 125). Contrary to the view that through logical argument and investigation, judges could discover legal principles that were immanent in legal doctrine, legal realists argue that changes in law are largely a product of “empirical determination by judges who, when changing the law, were undoubtedly making policy choices dictated neither by logic nor by preexisting law” (Schauer, 2009: 125). Simply, legal realism exposes the “politics of law”, showing how legal decisions are often influenced by “ideology” and other extra-legal dynamics (van Marle, 2009: 294).

2006: 357; Mnisi-Weeks, 2021). Yet beyond affirming law's potential to address the socio-economic legacies of apartheid, TC has remained conceptually imprecise. Even its proponents acknowledge its multiplicity: "there is no single stable understanding of transformative constitutionalism", writes former Chief Justice Pius Langa (2006: 351; see also Moseneké, 2001: 315). Similarly, scholars and ATJ lawyers, Brickhill and van Leeve note that "there is no unanimity on the meaning of 'transformative constitutionalism' or even the use of that term" (2015: 147). But the conceptual imprecision of TC has not undermined its significance and entrenchment within professional legal discourses in South Africa. As Sibanda writes, TC has achieved "near hallowed status as a descriptor of the current South African project of constitutionalism" (Sibanda, 2011: 487; see also Madlingozi, 2017). Indeed, the ethnography that follows illustrates how TC-related ideas about law continue to be pervasive in South Africa's ATJ field amongst a new generation of legal professionals with diverse political and ideological positions.

It is perhaps because of, not despite, its vagueness that TC has had an enduring appeal to ATJ lawyers. As Mosse's (2004) analysis of development policy suggests, ideas that are interpretively flexible persist because their ambiguity allows different actors to map their own goals onto them. He writes: "vagueness, ambiguity and lack of conceptual precision is *required* to conceal ideological differences, to allow compromise and the enrolment of different interests... (original emphasis)" (Mosse, 2004: 663). In a similar vein, it appears that TC's capaciousness and imprecision enables a professional field of ideologically diverse lawyers possessing distinct understandings of the relationship between law and social change – and what that social change should be – to embrace the idea of law-based social change and its feasibility in South Africa. As will be seen in Chapter 2, even when lawyers criticise the Constitution, they nonetheless espouse a commitment to law-based social change, considered possible *because* of South Africa's Constitutional dispensation. This interpretive flexibility

can thus be understood as what makes TC useful as an organising framework for legal practitioners who must reconcile potentially conflicting moral commitments, ideological positions, institutional constraints, and strategic trade-offs in everyday practice (Mosse, 2004).

For this thesis, then, the significance of TC lies in how it is *invoked* and *used*. The empirical task is to trace how TC structures expectations, tactics, and the meanings lawyers attach to their work – and how it helps them navigate the moral and strategic tensions their practices elicit. What this thesis crucially shows is that TC as an aspirational imaginary often sits in tension with the rule-bound practices through which ATJ lawyers must actually operate. Even lawyers deeply committed to TC ideals of achieving broad-based social change, routinely resort to practices that are rule-bound and formalistic in ways that bracket the moral concerns a client's case raises from the legal problem at hand. This is vividly illustrated in Chapter 3, where lawyers oscillate between expansive invocations of transformation and tightly circumscribed interpretations of how the law can be used in everyday practice. As I show throughout this thesis, this tension – between ideals of transformation and the procedural demands of legalism – is fundamental to contemporary ATJ legal culture.

Tracing this tension ethnographically, this thesis adopts a view of legal culture as expressed by Merry:

Cultural ideas are contested and connected to relations of power. Cultural repertoires include values and practices, ideas and habits, and innovations along with commonsensical ways of doing things...Culture is the product of historical influences rather than evolutionary change. It is marked by hybridity and creolisation rather than uniformity or consistency. This is a more dynamic, agentic, and historicised way of understanding culture. It emphasises the active making of culture, society and institutions, and the grounding of this action in specific places and moments. (2010: 42)

Indeed, legal culture is treated throughout this study as a question of history, expressed in a range of practices, values, and discourses that moves beyond analysis of legal doctrine. And significantly, it is informed by social, political, and professional dynamics that constantly reshape the nature of this culture(s). In employing this approach to analyse contemporary ATJ legal culture and its effects, this thesis extends Chanock's (2001) and Meierhenrich's (2008) seminal historical analyses of legal culture in the late nineteenth and twentieth century South Africa. I do so first by providing a detailed historical account of South Africa's ATJ legal field (Chapter 1), locating its genesis in a particular historical and political moment, foregrounding ideas and ideals of law and lawyering that underpinned it. Second, the ethnography I present of South Africa's ATJ field shows how this recent history shapes contemporary practices. As I argue throughout this thesis, approaching legal culture from an ethnographic and historically sensitive perspective provides an opportunity to examine the range of ideas and ideals that encompass professional understandings of law; how they are produced in the context of a social-professional field; and how these understandings exist in relation to wider legal-bureaucratic conditions that consequently inform legal practice. This approach allows an account of legal culture, as Merry suggests above, "marked by hybridity and creolisation rather than uniformity or consistency" (2010: 42).

This thesis achieves this account of legal culture by bringing the *analytic* concept of legalism to bear in its ethnographic analysis of ATJ practice. This analytic framing suspends the normativity typically applied to the TC-formalism binary, enabling an analysis that highlights that the application of rules can rarely be divorced by the ideals they evoke. In the case of South Africa's ATJ legal field, these ideals are often tied explicitly to transformative constitutionalism, in which law is idealised as a value-laden tool capable of achieving both individual and societal improvement. ATJ legal practice must thus be understood as residing in the space of tension between rules and the ideals they evoke. By analysing how lawyers

negotiate this tension, this thesis offers a grounded account of the relationship between legal culture and progressive social change.

Central to achieving this account is highlighting how legal practice is shaped by the concrete socio-political conditions in which ATJ lawyers operate. As will be seen in what follows, a key component of existing ATJ work is attempting to move basic bureaucratic processes along to meet the needs of clients, but effectively operating as an appendage to a functional state. When engaging with state legal bureaucracies, the arguments ATJ lawyers make must conform to their internal processes and procedures which are often based on the formal application of rules. The emphasis is not on the substance, but on the form of the claim, and it is often the difficulty of getting this form correct that is the basis of people's recourse to professional legal assistance. Insisting on adherence to legal rules therefore often yields progressive ends that secure (limited) justice for clients. But moreover, I argue that this insistence reveals that formalism is constantly reproduced to instantiate the ideal of a distinctly post-apartheid legal system itself: a system of rules, institutions, and actors that reliably and predictably enables marginalised people to improve their position.

Similarly, in instances where lawyers engage in public interest litigation that seeks to advance the law, either by attempting to give content to socio-economic rights or transform the law in accordance with constitutional principles, they sometimes resort to technical rule-bound arguments because of the anticipated difficulty of legal enforcement. There is often a trade-off between imaginative legal arguments that foreground the moral imperatives of law and its relation to a wider vision for South Africa, and the necessity of producing narrowly transformed, but enforceable, law that has the potential to yield material change. In these ways, lawyerly adherence to rules is thus revealed as inseparable from wider efforts to advance progressive social change that evokes the imaginary of TC.

This thesis's analysis thus complicates the binary between formalism and TC and the value-laden framing of the two poles of this binary, in which the former is associated with apartheid-era legal culture that facilitated the racist oppression of the majority, and the latter is framed as necessary to realise the Constitution's transformative ideals. By demonstrating that appeals to rules-based thinking are deeply informed by wider social ideas, questions of material change for marginalised people, as well as government intransigence and capacity, this thesis instead highlights that *in practice* the project of transformative constitutionalism is constituted by attempts both to *advance* South Africa's constitutional project, and to *maintain* it. Doing both often relies on an insistence on following the rules. But as will be seen, this insistence in the context of ATJ work has ambivalent consequences for marginalised people trying to achieve relief using the law.

The following sections discuss this thesis's methods and provide a chapter outline.

Methods: Being a Legal Outsider but Writing from the Inside

During seven months of fieldwork, from February to August 2022, I conducted participant observation at nine different ATJ organisations: four PILOs, two legal clinics, and three community advice offices (CAOs).²² Multiple field sites were chosen for several reasons. First, I sought to map the network of South Africa's ATJ field, and how lawyers and clients move through it. While my field sites were not exhaustive of this field, moving between different kinds of organisations nonetheless revealed the distinctions between them, and the ways in which they were linked. Second, multiple field sites enabled an analysis of the differences between the ATJ projects that organisations pursue, as they are underpinned by distinct and multiple commitments to, and understandings of, law.

²² Throughout the thesis, I will refer to the ATJ field to describe this collection of organisations. PILOs will be referred to as PILO A, PILO B etc. Legal clinics will follow the same convention, referred to as clinic A, clinic B etc.

Across different organisations I was granted different degrees of access at different stages during my fieldwork. At three organisations (PILO A, clinic A, clinic B) I was able to observe weekly consultations for the entirety of my fieldwork, enabling me to gain familiarity with the organisation and their personnel. At two PILOs (PILO A and PILO B), I became a de facto member of staff, observing consultations and participating in work within the office. My embeddedness at these organisations enabled me to cultivate long-term and close relationships with legal professionals. While I did not become embedded at two other PILOs (PILO C and PILO D), I was able to accompany legal teams on multi-day trips to consult with their clients outside of Johannesburg. Spending time traveling, living, eating, and going to consultations together fast-tracked my familiarity with these lawyers despite the relatively short periods of time we spent together. In addition, these trips gave me access to the same kind of informal discussions that I observed at PILOs A and B and clinics A and B.

Given the breadth of the legal field I was investigating, I delimited the organisations I observed by the areas of law they practised, choosing the areas of labour law and access to basic services and housing. Beyond the purpose of delimitation, focusing on these areas of law enabled me to ascertain the kinds of legal issues that were most commonly brought to ATJ organisations. This sample facilitated comparison of how different kinds of organisations dealt with and conceptualised similar kinds of legal problems. Moreover, given my lack of legal training, delimiting my research to these areas of law in conjunction with long-term fieldwork allowed me to develop sufficient understanding of relevant law and its everyday workings.

Notwithstanding this, having multiple field sites was challenging, forcing constant decisions about balancing depth and breadth of data gathering. But the structure of how organisations worked helped to ease this tension. For example, most legal clinics are open at prescribed times on specific mornings each week. I attended these legal clinics for their

duration, arriving early to socialise informally with the lawyers present. At PILO A, my closest interlocutor conducted his consultations in the afternoon. So, for most of my fieldwork, I attended legal clinics in the morning until about 12pm and then drove the short distance to PILO A. On days when no legal clinics were operating, I spent the entire day at PILO A. Consultation trips inevitably interrupted this schedule and thus my embeddedness within other organisations, but I felt it necessary to get exposure to as wide a range of organisations as possible as my research was about a legal field and not a particular organisation.

In other instances, circumstance determined where to spend my time, particularly in cases when offices were closed because of a positive COVID-19 test amongst staff. In those situations, I simply went to the organisations which were still operating in person for as long as they were open. Alternatively, I used those days to visit CAOs or conduct interviews. CAOs constituted a part of the legal field I was investigating, but were peripheral to my overall ethnography because I gained access to them late into my research, and many were far from my established field sites in central Johannesburg. But the purpose of these visits was to gain some understanding of how these organisations operated, and how they were different from, and connected to, the other legal clinics and PILOs I frequented.

The data used in this thesis can broadly be categorised thus: data gained through participant observation within ATJ organisations, including observation of consultations (about 180 in total); information gained through longer-term and close personal relationships with lawyers; information gained through medium-term and professional relationships with lawyers; information gained through brief encounters with clients before, during, and after consultations; archival data; and 46 semi-structured interviews with lawyers and their (potential) clients which lasted between 50 and 120 minutes.

Throughout fieldwork I kept two sets of fieldnotes which recorded all observational data and data obtained through informal encounters with clients and lawyers. The first set was hand-written and was used to record observations as they occurred in the moment. My second set of field notes was kept in an encrypted Microsoft Word document.

A key challenge to my note-taking during consultations was that many clients could only relay their story in their mother tongue. Typically, this was Setswana, isiZulu, isiXhosa, or occasionally TshiVenda. My inability to understand clients in their mother tongue constitutes a limitation of this research. But in many instances the lawyers themselves were not fluent in the client's mother tongue and so relied on a translator, typically a paralegal or legal intern to translate the client's testimony into English. Notwithstanding this, most consultations were conducted in English.

Preceding the consultation, I negotiated consent with the client regarding my presence and note-taking. I explained who I was, emphasising that I was not a lawyer, the broad aims of my research, and briefly how my data would be used. I then gave each client an information sheet which detailed the project, provided my contact details, and informed them about how to withdraw from the study.

Another key source of data was my observations of, and involvement in, the everyday practices that ATJ lawyers engaged in. These included aiding in drafting affidavits, photocopying files, conducting basic legal research, accompanying candidate attorneys (CAs) as they filed documents in court and served them on their opponents, and watching remote court hearings with lawyers.²³ Participating in these practices gave me insights into the logic and nature of legal work. My presence in the office and willingness to provide an extra set of hands were key to my ability to cultivate close relationships with some of my interlocutors. It

²³ Many of the court hearings in which a party to the case was represented by PILO A were argued remotely via Microsoft Teams during my fieldwork.

also meant that I was able to observe and participate in informal conversations while getting lunch, making coffee, driving to court, and generally “hanging out” while working in office “bull pens”. These interactions were a rich source of data that provided insights into the nature of this professional field and the ideas and commitments that animate it.

Semi-structured interviews were used to supplement and deepen my insights about the meanings and understandings attached to law that emerged through consultations. This was particularly necessary in the case of clients and senior legal professionals whom I did not have longer-term access to. But in the case of the interlocutors with whom I had developed closer relationships, interviews served to record key elements of their life histories as well as their ideas about their work in relation to practices I had observed. Before all interviews I negotiated consent, informing interviewees of the scope and aims of my research. I also provided them with a detailed written overview of the research (the same document handed to all clients whose consultations I observed). I encouraged interviewees to ask questions or raise any concerns they might have before the interview began. With their written or oral consent, I then recorded the interviews using a Dictaphone.

Regarding confidentiality, most clients were comfortable with me using their first, but often not their last name. Most lawyers preferred to be anonymised as this enabled them to speak freely about professional frustrations. I chose to de-identify all research participants and used a pseudonym in my note-writing and transcriptions. Additionally, I also chose to de-identify my field sites. This decision was taken as it further protected the identity of my lawyer interlocutors because of the close-knit nature of this legal field. Adding this extra layer of anonymity enriched the data as it allowed lawyers to be forthright in their reflections and critiques of organisational practices within their professional field. Knowing that they would be de-identified appeared to allow lawyers to speak more freely outside of interviews while we worked or socialised together.

I also used three archives of interviews with major South African legal figures to inform this thesis's historical reconstruction of South Africa's ATJ legal field. Collectively, the archives consisted of 257 interviews and were conducted as part of separate oral history projects: the Legal Resources Centre Oral History Project (LRCOHP), the Constitutional Court Oral History Project (CCOHP), and the Carnegie Corporation Oral History Project (CaCOHP). The LRCOHP and CCOHP are archived in the Historical Papers Research Archive of the University of Witwatersrand (Wits). CaCOHP interviews are archived in the Columbia Oral History Research Office.

Brief Note on Normative Discourses Within the ATJ Field

As will be seen in the chapters that follow, many of my interlocutors describe their work, ideals of law, and the challenges to realising the Constitution's vision in similar terms and tones to South African socio-legal literature. In many ways, this is unsurprising, as many socio-legal scholars writing about South Africa are also ATJ lawyers. But a consequence of this was that many of the perspectives espoused by socio-legal scholars and my interlocutors were part of a taken-for-granted consensus within the field (this includes scholars). An example is the relationship between formalism and conservatism, discussed above, which has taken on a negative inflection.

Fundamental to this study's ability to examine the practices of South Africa's ATJ field and legal culture critically was suspending the value-laden framings of particular kinds of legal approaches that are pervasive within this field and its literature. Key to this study's contribution to an analysis of the practices and challenges of ATJ in South Africa stems precisely from my being an outsider to this field.

COVID-19 and Methodological Limitations

In December 2021 a new COVID-19 variant became prevalent in South Africa, and consequently government-mandated precautions remained in place for most of my fieldwork. These precautions significantly changed organisational practices, thus affecting my research. From February until July 2022, many of the organisations that I gained access to did not mandate working from the office. This limited the number of organisations in which I could conduct a traditional ethnography. For example, PILOs C and D, while being receptive to my research, suggested I not come into their offices since no one would be there for me to observe. My accompanying their lawyers on consultation trips was a solution that attempted to work within existing constraints. At PILO A, while lawyers were not expected to work from the office, many regularly did. This is largely why I became most embedded in PILO A over the course of fieldwork. But, even here, it was only a select group of professionals, mainly juniors, who worked from the office, and so they were the ones with whom I was able to cultivate closer relationships and shadow most often.

The pandemic also significantly impacted on how ATJ organisations conducted consultations, with many organisations adopting some version of hybrid consultation practices. For example, at PILO A, unless instructed to come to the offices, clients were consulted with remotely using a telephone. Legal clinics operated somewhat differently. Clinic A and clinic B work by having attorneys from private law firms conduct consultations. At these clinics, clients would come in person to the clinic office – itself staffed by a mixture of inhouse attorneys and paralegals – and then consult with the private attorney either via phone or Microsoft Teams. Although most consultations were done in this hybrid form, occasionally they occurred in-person. All CAOs I observed worked entirely in-person, itself a reflection of their funding constraints, and their own embeddedness in the communities they assist.

The methodological consequences of the ongoing pandemic were multiple. First, it limited the number of organisations I could embed myself in, and within organisations, the kinds of legal professionals I was able to observe depended almost entirely on who chose to work in the office. Typically, these were junior professionals, particularly candidate attorneys (CAs). My time with more senior lawyers was thus more limited. But as it is CAs who mostly do initial consultations (and often follow-up consultations too), this did not undermine the research objectives. Moreover, although more limited, I still managed to foster relatively familiar relationships with senior lawyers which developed either during consultation trips or simply spending time together in shared office spaces.

Second, there were multiple occasions during fieldwork when events or meetings were abruptly cancelled because someone tested positive for COVID-19. Per South African guidelines, for the week following the positive test, organisations would close their offices, thus truncating the time I had to observe their work. Moreover, as lawyers continued their work at home, there were instances when I arrived at offices once they had re-opened, but in the interim a follow-up consultation or a change in the strategy of a case had occurred. This dynamic made it difficult to follow cases ethnographically from their beginning to end. I attempted to plug these gaps in observational data with conversations with relevant lawyers about the events that occurred in my absence. But in essence, work-from-home dynamics blurred the boundaries of my field sites in ways that they simply became inaccessible.

Third, in the case of PILO A, because most initial consultations were telephonic, initiated by a lawyer returning a potential client's call, there were many days when lawyers did not do any consultations because they were preoccupied with working through their existing case load. This inevitably limited my ability to collect data on consultation dynamics, a key element of this research.

Fourth, I had initially planned to use consultations to access clients who approached PILOs and clinics for follow-up interviews, with the initial emphasis of my research being on client experiences. The hybrid nature of consultations as well as the clinic structure made this difficult. In hybrid consultations, the lack of a face-to-face engagement, in conjunction with my position as a mostly silent observer, undermined my ability to establish an initial rapport and base sense of familiarity with clients. When lawyers operated remotely, a similar constraint occurred in relation to them. My lack of engagement made it difficult to secure interviews with busy professionals.

Beyond the impacts of the pandemic, the structure and nature of consultations also posed difficulties in my attempts to secure interviews with clients. In organisations where clients did appear in person, I approached them as they waited for their consultation and inquired whether they had time to stay behind following the consultation to be interviewed. But this was limited by how many clients were early for their consultation, with most arriving at clinics only minutes before their consultation was scheduled, but after the clinic had officially begun. Moreover, the clinic structure, in which clients consult one after another with a lawyer – while I remained in the consultation room – also made securing and then conducting interviews difficult. Although a client may have consented to an interview following their consultation, on many occasions once all the consultations had finished, the clients had left the waiting room by the time I had finished shadowing. On most days, I mitigated this dynamic by only asking the final two clients for an interview since they would have to wait the least amount of time. But even in these cases, following their consultation, many clients left immediately.

I suspect that part of the reason for this was the nature of the consultations themselves. As will be detailed throughout this thesis, many consultations centre on issues that concern clients' core interests. In many consultations, lawyers advised clients that no

legal avenue remained which could remedy their problem. The potential effects of this advice appeared devastating to clients who entreated the lawyer to help them find some solution to their problem – often to no avail. In the aftermath of such a consultation, clients were often visibly distraught. In these instances, which were many, it felt inappropriate to follow up immediately on their experiences as research “data”. Moreover, many clients reacted with anger towards the consulting lawyer and understood me to be working with them. This further undermined my ability to negotiate consent and secure interviews.

The cumulative effect of these methodological limitations was that the richest and most nuanced data was collected through informal conversations with clients while waiting for their consultation to begin, observation of legal practices within organisations (including consultations), and from interlocutors with whom I had close relationships – lawyers. Consequently, rather than the emphasis of my analysis being on client understandings and uses of law, it shifted to professional understandings and practices. The shift in emphasis from client experiences to an ethnographic account of the everyday practices and experiences of ATJ lawyers became the basis for the contribution to debates about law, social transformation, and access to justice that I outlined above.

Positionality

Beyond my outsider status as a non-lawyer in a legal field, my position as an upper middle-class, mixed-race (but often perceived as white), Oxford-educated researcher shaped both my access to and interactions within South Africa’s access-to-justice (ATJ) legal field. My affiliation with an elite institution such as Oxford afforded me legitimacy within professionalised NGO and legal spaces despite my lack of legal training, and it significantly facilitated my ability to enter the organisations that became the focal point of my research. In several cases, interlocutors explicitly referenced my institutional affiliation when granting access or introducing me to colleagues.

Beyond formal access, my background also shaped the interpersonal dynamics of fieldwork. Younger interlocutors – particularly black early-career lawyers – often expressed curiosity about my academic trajectory and the experience of pursuing a DPhil at Oxford. My own story – being raised in a small Eastern Cape town and going to an elite global university – seemed to capture the intrigue and interest of these younger lawyers who were in the process of forging their own middle-class identities (see Chapter 2) and similarly aspired to further legal education at elite universities like Oxford. My presence and the curiosity it elicited may have thus subtly shaped how these lawyers presented their work and themselves to me. I was often the audience for performances of professionalism, empathy, or moral conviction. Rather than treating these performances as distortions of “true” behaviour, I analysed them as data in their own right: as windows into how lawyers represent their professional selves and the ideals of the constitutional project to different audiences – including, but not limited to, me.

My access was also facilitated by pre-existing networks. Contacts formed during my studies at Oxford meant that my character could be vouched for by prominent public interest lawyers. Combined with the political and ethical framing of my project, as well as my own family’s background of activism during the anti-apartheid struggle, this positioning led many to perceive me as a sympathetic observer who broadly shared their normative commitments to social justice and the constitutional project. As a result, despite my lack of legal credentials and the elite nature of my background, I was often treated – albeit to varying degrees – as an insider. This partial insider status allowed me to form close relationships with many interlocutors, providing sustained access to a socio-professional world that deeply enriched the insights of this thesis. However, my ability to relate to the lives and backgrounds of my interlocutors – particularly those raised in rural or township contexts – was limited by my own positionality. I am acutely aware that my upbringing and class position afforded

privileges and forms of cultural capital that were not universally shared. These asymmetries inevitably shaped the kinds of conversations that occurred and the layers of meaning that I could access.

Throughout my fieldwork, in the context of these close relationships, I attempted to remain reflexive about the necessity of retaining some analytic and normative distance, while at the same time acknowledging my imbrication in this socio-professional world, and my dependence on it for the data I was gathering. I used fieldnotes not only to record observations but also to track my own affective responses and assumptions. During writing-up, revisiting these notes required confronting the question of what constituted a “fair” account of this field: one that neither romanticised the normative burdens carried by ATJ lawyers nor dismissed them as professional self-legitimation, but sought to explicate the range of commitments and understandings that inform legal practice (see Mosse, 2006). My analysis, therefore, endeavours to accommodate the normative complexity of this work, and indeed, doing so is central to the argument this thesis makes.

Yet, while my class and institutional privilege facilitated intimacy with some lawyers, it limited it with others. Senior practitioners, particularly those in leadership positions within public interest litigation organisations (PILOs), tended to maintain a clear boundary between researcher and professional. They welcomed my presence but appeared to be more sceptical of me and my research than their more junior colleagues, thus keeping interactions with me formal. My data from these relationships thus came primarily from structured interviews, which, while valuable, offered a different texture from the insights emerging from prolonged everyday engagement.

Finally, in the context of consultations, my positionality as an elite researcher marked me as an outsider to the lived realities of the poor and marginalised clients whom ATJ lawyers serve. Notwithstanding this distance, the focus of my analysis foregrounds an

examination the subtle ways in which lawyers navigated the tension between professional distance and moral empathy, and how they performed expertise while expressing solidarity. As noted, while I recognise this navigation may have been part of a wider performance of professionalism, I nonetheless considered these performances as evidence of legal cultural commitments, consequently informing the argument this thesis makes.

Equally significant for this ethnography is the positionality of my interlocutors. As will be discussed in Chapter 2, almost all of them framed their decision to work in South Africa's ATJ field in terms of a normative commitment to help poor people and realise the Constitution's ideals. For some, this commitment was framed as being anchored in personal experiences of racialised socio-economic marginalisation, and the desire to accommodate this moral commitment within a professional project that could yield wealth and status recognition. For others, from more middle-class backgrounds, the commitment to ATJ lawyering was framed in less personal terms: simply expressed as being borne from a desire to help poor and marginalised people. Central to this thesis is an analysis of how the positioning of my interlocutors produces the very normative tensions that ATJ lawyering elicits. As argued throughout this thesis, an analysis of these tensions is central to elucidating ATJ legal culture, and in turn how this legal culture shapes the provision of both pro bono legal assistance, and efforts to "transform" South Africa more broadly.

Positionality within the legal field was also stratified. Differences of race, gender, seniority, and institutional affiliation shaped how lawyers saw themselves and how they engaged with me. For instance, younger black lawyers were typically more forthright with me about their frustrations and difficulties of working in the ATJ field, including their frustrations with their colleagues and organisational practices, as well as the emotional toll of their work. By contrast, senior lawyers (both black and white) typically appeared more tactful in discussing the difficulties and frustrations of their work, rarely mentioning colleagues

unless to praise them. Discussions of their frustrations were often limited to their experiences of the South African government. Moreover, while junior lawyers invoked morally charged language to discuss their work, many senior ones, while ardent in their commitment to using law to advance social justice, were more restrained in their language. Thus, while a key feature of ATJ legal culture is a general embrace of TC as a motivating ideal, the positioning of lawyers within the ATJ field nonetheless shaped, in subtle ways, how they framed and communicated their understandings of law, and experiences of lawyering.

The ethnographic insights presented in this thesis therefore emerge from relationships mediated by difference – of race, privilege, profession, and power – but also by moments of affinity. By situating both myself and my interlocutors within the layered hierarchies of post-apartheid South Africa, I aim to offer an analytically rich and transparent account of the ATJ legal field.

Thesis Outline

Chapter 1 traces the history of South Africa's ATJ field to the 1970s when the first public interest litigation organisations (PILOs) were formed. Using interviews in the oral historical archives mentioned above, this chapter provides an emic account of the ideas and ideals of law and lawyering that underpinned its formation, and the diverse legal practices that constituted it. The chapter shows that by approaching law not just as rules to navigate but a repository of moral ideals and tool to achieve progressive social change, a key contribution of this field to the anti-apartheid struggle was how it began reshaping legal cultural attitudes to law. But to do so, lawyers had to reckon with the prevailing formalistic legal culture, often co-opting it to achieve progressive ends. The tension between law as legalistic rules and a set of moral ideals that is said to characterise post-apartheid legal culture can thus be traced to this period.

Chapter 2 takes the reader into the contemporary ATJ field by introducing some of the lawyers who will recur throughout the thesis, analysing how they narrate their personal and professional trajectories. I argue that these narrations reveal the myriad meanings that ATJ lawyers project onto law and lawyering, offering a distinct vantage point from which to analyse the place of legalism in this professional field. As will be seen, many young black lawyers connect their upbringings in relative poverty, to their professional pursuits and their ideals of law and what it can do. This chapter shows how a biographical view enables understanding of how a range of ideals get attached to law, and in so doing, shape professional legal culture. A commitment to legalism must thus be understood in terms of these ideals and their deeply personal underpinnings. But, through its analysis of lawyers' narrations, this chapter also suggests that what it means to be an ATJ lawyer is imbricated within a wider ethical project of self-making. *This* project is also at stake in everyday legal practice, and hence why the normative and professional tensions that this practice elicits can be so distressing.

Developing the analysis of ideals of law and lawyering offered in Chapter 2, **Chapter 3** takes a consultation between a young lawyer and a potential client as its focus. It demonstrates that, while oriented to those ideals, lawyers also understand the law more narrowly in terms of rules and categories. Drawing on Bourdieu's (1987) concept of the "juridical field" I argue that commitment to rules-based thinking in South Africa's ATJ field is also anchored to how lawyers are trained to be, and who they think they are as professionals, and crucially, that their authority stands on their capacity to engage in legalistic problem solving. This is evident in how ATJ lawyers' transform, or "translate", the wide-ranging problems their clients face in terms of these, but in ways that often fail to accommodate the complexity of the problem. That failure to translate into adequate legal terms can mean ultimately denying them any legal representation at all. This produces anger

and disappointment amongst clients, and a sense of disillusionment amongst lawyers. Taken together, Chapter 2 and Chapter 3 demonstrate a key argument in this thesis: that the normative and professional quandaries that ATJ lawyers experience is underpinned by the tensions between lawyerly adherence to rules, and wider ideals of law.

Chapter 4 continues to explore the relationship between the rules and ideals that constitute law by describing a day of consultations at a labour law clinic in central Johannesburg. The chapter examines the nature of “rights consciousness” in South Africa and its relationship to the so-called ATJ “gap”. Existing accounts posit a lack of legal consciousness as the reason poor people do not pursue their problems in legal fora. By contrast, this chapter presents three clients who arrive convinced that the law should be able to assist them based on normative ideals about the nature of post-apartheid South African law as enabling “fairness”. Many ATJ clients therefore do in fact have a rights consciousness, what they lack, however, is what I term “legalistic consciousness”: an understanding of how to work effectively with legal rules. This has profound implications for their ability to both gain relief from legal institutions and attain legal representation from pro bono lawyers. The chapter thus demonstrates that a core facet of ATJ work involves lawyers’ being caught between the rights consciousness of their prospective clients who hold ideals of law as enabling just outcomes, and their own knowledge that to get things done in a legal bureaucratic system requires adhering to that system’s rigid rules and processes. Analysing this fraught position reveals that the “gap between people and the law” is produced by engagement with the law, not disengagement (Hodgson, 2015). But to understand why requires delineating between rights as rules, and rights as ideals.

Chapters 5 and 6 take a step back to examine the wider legal-bureaucratic and legal-political context in which ATJ lawyering occurs, how this shapes the concrete dynamics of legal practice and thus legal culture, and in turn what these reveal about the place of the ATJ

field within South Africa's wider legal infrastructure. The chapters are organised analytically by using the emic binary of "positive" and "defensive" legal assistance. "Defensive" ATJ involves defending the existing rights of individuals and is the focus of **Chapter 5**. "Positive" ATJ, the focus of **Chapter 6**, typically involves strategic litigation oriented to "advancing" the constitutional project through transforming the content of legal rules or legal principles or establishing new legal entitlements.

Chapter 5 examines how defensive ATJ is practiced and valued in public interest litigation organisations (PILOs). Defensive ATJ involves defending the existing rights of individuals, typically through the formal application of rules. While some PILOs engage in both positive and defensive ATJ, most prioritise the former. Through an analysis of how this prioritisation is justified, this chapter explores how defensive ATJ is simultaneously recognised by PIL lawyers as being vitally important and yet undervalued through its deprioritisation. Exploring this question sheds further light on the ideals of "social change" through law within the ATJ field, and the multiple commitments that underpin ATJ lawyering, thus highlighting the morally fraught nature of this work. The chapter shows that one way in which defensive ATJ is devalued is through how it is positioned relative to positive ATJ: the latter is framed as enabling "systemic change", while the former is viewed as a form of palliative intervention. But by analysing the *nature* of defensive ATJ, this chapter argues that this work is also devalued because it has become a part of South Africa's "legal infrastructure", revealed ethnographically in how demanding a legal entitlement (with the aid of a lawyer) is increasingly a condition for having one in the first place. Understanding defensive ATJ through the conceptual lens of "infrastructure" elucidates that ATJ intervention has become part of the necessary, but taken for granted, work of making South Africa's legal system, operate systemically.

Building on the analysis of “legal infrastructures” in Chapter 5, **Chapter 6** examines positive ATJ in the form of strategic litigation. Whereas the analysis in Chapter 5 focused on the necessary but devalued work of sustaining a system, **Chapter 6** focuses on the limits to that system. From the perspective of ATJ lawyers, PIL is understood as a form of legal practice that has the potential to advance “systemic” change. In its ideal form it can thus be understood as oriented to establishing a distinctly post-apartheid legal infrastructure in which laws, institutions, citizens, and the government, reliably link up to facilitate the improvement of people’s lives and the transformation of South Africa. But as the chapter shows, a core feature of contemporary PIL is the slippage of strategic litigation into defensive ATJ concerned with protecting individual circumstances. Hence some PIL lawyers call the underlying principle of strategic litigation “a fiction”, others call it a “lie”. As the chapter shows, both “incapacity” and “malicious compliance” – restrictively complying with the letter but not the substance of a judgment – on the part of government institutions undermines both the short- and long-term goals of PIL. This chapter thus argues that rather than PIL establishing a stable legal infrastructure, ATJ intervention instead is what holds basic legal arrangements together in the first place, often through formally applying existing rules. On the one hand, appreciating this dynamic illuminates how a commitment to formalism is reproduced in a form of legal practice ostensibly oriented to breaking out of legal cultural strictures. On the other, it underscores that central to the work of ATJ practice is attempting realise the ideal of a distinctly post-apartheid system itself. Taken together, Chapters 5 and 6 foreground how the binary between positive and defensive ATJ, and therefore between TC and formalism, do not hold.

Together, these chapters provide an ethnography of South Africa’s ATJ field, illuminating a socio-professional world and its distinctive legal culture. Across the thesis, I show that ATJ lawyers are deeply committed to law as a system of rules that must be

followed – an attachment they ground in their sense of professional duty and status. At the same time, they idealise law as a morally capacious tool capable of facilitating social transformation, and understand their work as a vocation through which they can “help people” and “make a difference in this world”.²⁴ This thesis argues that these commitments, and the tensions between them, underpin the everyday practices of ATJ lawyering. Appreciating how lawyers understand and use legal rules is therefore essential to a textured analysis of social justice lawyering in South Africa and its concrete effects. More broadly, by centring these dynamics, this thesis shows how in practice, South Africa’s constitutional project is constituted by *both* legal change and legal maintenance. Considered in light of this, a strict adherence to legal rules, or what may be considered formalism, is thus revealed to be both a constraint on progressive transformation, but also one of its necessary conditions.

²⁴ These two quotes are taken from interviews with my interlocutors, Sanele, and Zach, respectively. They reappear in later chapters.

Chapter 1

Narrowing the Gap Between Law and Justice: The History of South Africa's PIL Sector

In a conference paper reflecting on the South African “experience” of public interest law, pre-eminent South African PIL lawyer Geoffrey Budlender writes:

... South Africa is not the only country in which a minority has exercised political power over the majority. It is also not the only country which has suppressed opposition through a repressive state apparatus. However, an unusual feature of the South African system [during apartheid] was that all of this was done through the law. The government could discriminate against its citizens – but first it passed a law saying that it could do so. People could be forcibly removed from their homes – through a law. Opponents could be detained without a trial – but there had to be a law to authorize this. If they were tortured, it was unlawful, and so there had to be an elaborate system of lies and censorship to deny that torture happened at all – not because it was brutal, but because it was unlawful. And so discrimination and repression were mediated through the law. (2005: 4)

Throughout the twentieth century, the law was central to successive South African state-making projects (Meierhenrich, 2008; Chanock, 2001). From the Union government to the National Party government's adoption of apartheid in 1948, the law was a principal tool in fashioning and enforcing racialised social, political, economic, and spatial relations. The law did not simply structure relations in ways that discriminated against and repressed the majority; it was also an ideological resource with which to justify it. Hence, in describing apartheid South Africa, Ellmann aptly writes that it was a society of “extreme injustice”, but also of “elaborate legality” (1992: 2).

But as Budlender and other scholars have also shown, precisely because the apartheid government used the law to entrench white racial supremacy, the law also became a site where this system could be challenged (Abel, 1995; Ngcukaitobi, 2018; Brickhill, 2018; Ellmann, 1992). As in other former colonies, the law was both an instrument of racialised

oppression, and a site of resistance against it (Abel, 1995; see also Verheul, 2021; Karekwaivanane, 2016; Lazarus-Black and Hirsch, 1994; Comaroff, 2001). While not decisive in the struggle against apartheid, legal efforts aimed at dismantling the apartheid state's legal architecture emerged as a significant component of this struggle (Abel, 1995). Key to these legal efforts were South Africa's nascent public interest litigation organisations (PILOs). These PILOs and the wider network of access to justice (ATJ) organisations with whom they partnered form the basis of the ATJ legal field that exists today. Using archival interviews with key actors in this legal field, this chapter traces its historical emergence in the late 1970s.²⁵

In telling this history, this chapter primarily focuses on four organisations: the Centre for Applied Legal Studies (CALS, 1978), Lawyers for Human Rights (LHR, 1979), the Legal Resources Centre (LRC, 1978/9), and the law firm, Cheadle, Thompson, and Haysom (CTH, 1979). As will be seen below, these organisations operated in urban centres (Johannesburg, Cape Town, and Durban) and were dominated by mostly white male lawyers during their early years. As Gibbs writes, the history of this field is the “narrative most often told” (2019: 1133). But there is an emerging field of historical research which attempts to address the elision of black lawyers in the history of legal resistance to both colonial authority and apartheid (see Ngcukaitobi, 2018, Broun, 2000; Gibbs, 2019). Scholars have used this history as an entry point to consider the implications of the segregated legal field (Gibbs, 2019; Broun, 2001); to interrogate fields of professional power outside of urban centres during apartheid – particularly self-governing Bantustan Territories – and how these shaped post-apartheid political power (Gibbs, 2020); and to trace the longer history of ideas of constitutionalism in South Africa (Ngcukaitobi, 2018). In an upcoming article, I attempt to

²⁵ The two main archives used in this chapter are the Legal Resources Centre Oral History Project (LRCOHP) and the Constitutional Court Oral History Project (CCOHP). In addition, interviews with Arthur Chaskalson, John Dugard, and Geoffrey Budlender from the Carnegie Corporation Oral History Project (CaCOHP) have also been used.

contribute to this emerging field, analysing the experiences of black lawyers *within* organisations such as the LRC, CALS, and CTH.²⁶

But in this chapter, I remain focused on the early ideas and practices of the predominantly white PIL legal field, and PILOs as a distinct institutional entity. While acknowledging that this narrows the historical scope of this chapter, I do so for a number of reasons. First, while there certainly existed a network of legal clinics and smaller legal organisations throughout South Africa during the twentieth century, PILOs as an institutional form – organisations dedicated to pro bono legal activism rather than individual lawyers – emerged in the late 1970s and marked a shift in approach to anti-apartheid legal activism. Their work was also considered distinct from the work of legal clinics in the rest of the country. Second, and relatedly, the organisations centred in this chapter – and their early white leadership – provided the institutional blueprint from which many post-apartheid ATJ organisations were modelled. Most ATJ organisations today continue to distinguish themselves as PILOs or legal clinics, and the two kinds of organisations are recognised as operating differently within a wider pro bono legal field, even if in practice many PILOs provide effectively clinical legal assistance (see Brickhill, 2022). A focus on PILOs thus forms the historical institutional backdrop of the ethnographic research I conducted. Moreover, as later chapters of the thesis will illustrate, the boundary between PILOs – which have wider horizons of social change in the vein of their apartheid predecessors – and legal clinics – which remain preoccupied with immediate legal problems – is key to structuring the expectations that ATJ lawyers have about their work and what it can achieve. This boundary is therefore central to sustaining the ideal of TC in their legal imaginaries as well as elucidating the frustrations and normative tensions they experience in their work. Third, while scholars like Gibbs suggest that the history of the PIL field constituted by CALS, the

²⁶ This article, ‘The Emergence of South Africa’s Public Interest Litigation Field: Unity and Tensions’ has been accepted for publication by the *South African Historical Journal*.

LRC, and CTH is the one most often told, it is in fact seldom told directly – much like the contemporary dynamics of the field. Instead, the emergence of the PIL field tends to be folded into wider legal-academic examinations of the interplay between oppression and resistance that characterises law. Often the focus is on key legal battles that PILOs handled, the jurisprudence their cases helped to develop, and their effects on the weakening position of the National Party government in the final decades of apartheid (Abel, 1995; Ellmann, 1992; Le Roux and Davis, 2019).²⁷

This chapter takes a different approach. It foregrounds emic perspectives of key PIL lawyers to produce a textured account of not only how this field formed, but also the ideas of law and lawyering that underpinned its emergence and the diverse practices of, and approaches to, law that constituted it. In doing so, I offer a novel account of this field: showing how it stabilised out of somewhat different approaches to legal activism but did so based on a shared commitment to using the legal system as a vehicle for progressive change, even when doing so was seen to potentially legitimate a hostile politics (Budlender, 1988).

As will be discussed further below and as noted above, the emergence of the first PILOs in the late 1970s marked a shift in approach to anti-apartheid lawyering. While this chapter elucidates how the practices of this nascent legal field were distinct from earlier iterations of anti-apartheid lawyering, it is unable to reflect on the changes within this field during the final decades of apartheid. This constitutes a limitation of this study but also highlights a fruitful avenue of future research. This limitation notwithstanding, by tracing the distinct approaches taken by PIL lawyers and the ideas of law underpinning them during the late 1970s and 1980s, I argue that the contributions of this field to the anti-apartheid struggle were not limited to creating space for political mobilisation, or destabilising key components

²⁷ Elements of this history are also told through biographical and autobiographical accounts of key lawyers (see Bizos, 1998; Ellmann, 2019), but they generally lack an account of the formation of this field.

of the legal architecture of the apartheid state (see Abel, 1995). They extended to self-conscious efforts to transform popular and professional legal cultural attitudes towards law. I suggest that a key part of PILOs' significance in South African legal history comes from their role in approaching law not just as rules to navigate, but as a repository of moral values and a tool to positively transform society. This approach was carried into the constitutional transition, where many PIL lawyers played prominent roles in drafting the Constitution, and entered the new judiciary and democratic government (see Gibbs, 2019; Cote and van Garderen, 2011). The work of South Africa's ATJ field in the final decades of apartheid thus laid the basis for a fundamental transformation in South African legal culture.

Centrally, this chapter shows that attempting to advance legal cultural transformation and materially contribute to the anti-apartheid struggle required lawyers to reckon with the prevailing formalistic legal culture, in some instances co-opting it to achieve just ends. It thus reveals the historical lineages of the fraught and morally ambiguous commitment ATJ lawyers have to formalism in South Africa: treated with suspicion, as a feature of a legal culture that sustains racist oppression, and recognised as offering possibilities for justice within a system. As I discussed in the Introduction, the tension between law as legalistic rules and law as embodiment of moral ideals has been viewed as characteristic of post-apartheid legal culture. This chapter shows the longer history of this tension and its imbrication in the emergence of the first PILOs. The ATJ field that exists today has been shaped iteratively by this tension, even as it has played out in starkly different legal contexts. Through its analysis of these dynamics, this chapter shows how histories of legalism can produce a suspicion of rules-based thinking amongst lawyers, even as they remain committed to it and identify its possibilities for "justice".

Tracing the history of these organisations, their diverse approaches to legal activism, and their growing politico-legal significance therefore sets the context for the chapters that

follow. Despite significant changes to South Africa's legal field – not least shaped by the 1996 Constitution – its practical organisation, the ideals of law and lawyering that run through it, and the tensions between the practices and the ideals, can be traced to the 1980s. Understanding the contemporary ATJ field thus requires a thick account of its history.

The chapter has two parts. The first details the development of South Africa's first PILOs: the Centre for Applied Legal Studies (CALS), Lawyers for Human Rights (LHR), the Legal Resources Centre (LRC), and the law firm, Cheadle, Thompson, and Haysom (CTH). This section highlights the personal-professional networks that facilitated the emergence of this field, and how it was underpinned by changing ideas about the uses of law in the anti-apartheid struggle. The second part of the chapter details how the public interest litigation (PIL) sector transformed following the advent of democracy.

The Emergence of an Organised Field

Finding the "Space": From Defensive to Positive Legal Activism

There had always been lawyers willing to do human rights work, and some of them made a living out of it. There'd been legal aid organisations, there'd been a range of things, but what distinguished the new wave was full-time practising lawyers, providing advice and going to court. This was the new thing from 1979.²⁸

As Budlender rightly notes, forms of public interest litigation (PIL), in which litigation pursued a strategic goal that affected entire classes of people instead of only the litigants in a case, had existed for much of the twentieth century in South Africa and was pursued by both white and black lawyers (see Ngcukaitobi, 2018). But it was in the late 1970s that the field of PIL as one currently recognises it, was established.

The establishment of this field through the founding of organisations dedicated to PIL was enabled by the close-knit professional and personal networks within the white legal fraternity of human rights lawyers. During the 1970s, discussions amongst lawyers and legal

²⁸ Geoffrey Budlender interview, 9 September 2022.

academics regarding the establishment of organisations dedicated to defending the poor against human rights violations emerged. Key players included Felicia and Sydney Kentridge (LRC), John Dugard (CALS), Geoffrey Budlender (LRC), and later Arthur Chaskalson (LRC). These discussions occurred during working hours but also extended into a much broader social ecosystem where these lawyers socialised. Edwin Cameron, former CALS lawyer and later Constitutional Court judge, referred to this group as “the elite of Johannesburg’s liberal left” (see also Ellmann, 2019).²⁹

Many of the relationships foundational to the establishment of the first PILOs were rooted in shared experiences of “anti-apartheid” lawyering, involving the defence of political activists from state persecution. It was largely political trials of key African National Congress (ANC) members, notably the Treason trial (1958-1961) and the Rivonia trial (1963-1964), that “first crystallized the networks of South African human rights lawyers” that were integral to the establishment of the first PILOs (Gibbs, 2019: 1134; see also Broun, 2012; Clingman, 1998; Ellmann, 2019). The 1975 trial of members of the National Union of South African Students (NUSAS) was also central to cementing professional networks. Reflecting on the significance of this trial, Budlender recalls:

I spent the first three years of my legal practice working with him [Arthur Chaskalson] very intensively...I learnt an enormous amount from Raymond Tucker, from George (Bizos), from Denis (Kuny) and so it...it gave me a different sort of understanding of what the law was about...these were very fine people who one could respect and they were showing us what the law could be, and they were showing us about...showing us the strategic use of law.³⁰

Beyond pointing to the close professional networks, Budlender’s account highlights “the strategic use of law”, a new, defining element of the first PILOs: a shifting conceptualisation of how the law might be used in the struggle against apartheid. This shift

²⁹ CCOHP interview with Edwin Cameron, 9 December 2011, 10; see also LRCHOHP interview, Arthur Chaskalson, 22 August 2008, 51.

³⁰ LRCHOHP interview with Geoffrey Budlender, 6.

was premised on the observation, as expressed by Budlender, that “apartheid...the system created legal spaces in which we [activist lawyers] could operate. We had a sense that the law when used strategically instead of defensively, could be useful”.³¹ Elaborating on this shift in conceptualisation of law and its uses, Budlender recalls:

In that time, the firm [that Budlender worked at] did a lot of political trial work, defending people who were accused of political offences, terrorism charges, suppression of communism charges, and so on. I started to think that this was very useful to be defending people and helping them make space for their own political activities, but I was interested in whether you could use the law more positively than that, other than in a purely defensive way. A group of us got together to start talking about whether there was a way to set up some organisation which could have that as its goal. And that’s what happened...³²

The shift in the late 1970s from defensive to positive legal activism constituted a key change in approach to anti-apartheid lawyering, which Budlender indicates had formerly focused on defending political activists and poor black South Africans against a punitive and repressive state. Hence, echoing Budlender, Nicholas “Fink” Haysom of CTH, recalls that central to his firm’s work was “to use law aggressively as opposed to defensively, to kind of roll back the pessimism, the legal pessimism, which characterised legal endeavours in the 70s and 60s”.³³ Illustrating the distinction between the defensive and positive or aggressive approaches, Haysom notes:

Instead of trying to stop people going to jail for long periods, and conduct defences, which would mitigate sentences, we were trying to challenge the very basis of the legal charges, and the way they framed treasonist [sic] behaviour.³⁴

The emergent PILOs thus developed a two-pronged approach to their legal activism. First, they continued to respond “defensively” to the excesses of the apartheid government by defending political activists and poor black people against the violation of whatever rights

³¹ LRCHOHP interview with Geoffrey Budlender, 7. See also CCHOHP interview with Edwin Cameron, 7.

³² Geoffrey Budlender interview, 9 September 2022.

³³ LRCHOHP interview with Nicholas Haysom, 3.

³⁴ *Ibid.*

they did have.³⁵ Secondly, and significantly, they attempted to “positively” *advance* the anti-apartheid struggle, and social justice causes more broadly, through litigation that affected entire groups of people disadvantaged by apartheid legislation and its legal-bureaucratic practices (see Abel, 1995; Budlender, 1988). A key feature of the backdrop against which PILOs were formed was the banning of the principal political opposition groups: the African National Congress (ANC), the South African Communist Party (SACP), and the Pan African Congress (PAC). Thus, underlying PILOs approach to using the law “positively” was an attempt to destabilise the legal bases of the apartheid state, using law not only as a “shield”, but also as a “sword” (Abel, 1995: 3). Or as Abel (1995) famously put it, law became “politics by other means”. Despite increased political repression, Budlender observes that the 1980s was also

a period when internal resistance is growing...the sanctions movement is building, the calls for isolation of South Africa are building, and the government is under pressure to be seen to put its best foot forward...it can't be seen... [to take] reactionary measures, that pays a price... there was less certainty and confidence in government, I think. The 1980s was the beginning of the crack.³⁶

The changing nature of apartheid politics and the forces of resistance to it in the 1980s meant that “positive” PIL which succeeded in striking down or weakening apartheid laws was considered to have an increased likelihood of not being circumvented by government through the passage of new legislation.³⁷ And indeed, lawyers like Budlender and Dugard were conscious of how the kinds of cases they pursued related to wider socio-political dynamics.³⁸

Beyond the changing political dynamics within South Africa, the shifting conceptualisation of how the law could be used in the struggle was born from a combination of further factors: the influence of American PIL during the civil rights movement which

³⁵ See CaCOHP interview with Arthur Chaskalson, 6.

³⁶ LRCOHP interview with Geoffrey Budlender, 11; see also LRCOHP interview with Gilber Marcus, 31 July 2008, 12; Nicholas ‘Fink’ Haysom, 11.

³⁷ LRCOHP interview with Geoffrey Budlender.

³⁸ See for example John Dugard’s discussion of the “Werner case”, LRCOHP, 18-19.

emerged due to role of American funders of the first PILOs (Abel, 1995)³⁹; the political commitments of key lawyers which, while distinct, were rooted in a shared ardent opposition to apartheid; and a precise reading of the nature of South Africa's legal system and culture at the time (Budlender, 2005; Chaskalson, 1992, 2003).

In terms of the latter, courts during apartheid were subordinate to the legislature under the system of Parliamentary supremacy. But the courts were “formally independent” and operated within a “legal and political tradition” that “governments do not interfere with this independence” (Budlender, 2005: 5; 1987: 586). As such, while the courts were unable to review racist legislation established through Parliament that either expressly or implicitly “sanctioned discrimination or the deprivation of rights”, they were able to interrogate

whether, on a proper construction of the statute, such express or implied permission existed. If it did not, the discrimination or deprivation of rights would be invalid. The difference between “liberal” and “conservative” judges, in the application of this principle, depended on the reading of the statute and the interpretation of what it sanctioned. (Chaskalson, 2003: 592; see also Budlender, 1987: 586)

In other words, the courts had the authority to review government actions and regulations, and to interrogate whether they were authorised by the statute they were subordinate to. As legal scholars and PIL lawyers have highlighted, there were two key approaches that the judiciary took which, together with the tradition of judicial independence, created “space within the legal system” for lawyers and courts “to act against the overwhelming power of the State” (Budlender, 1987: 586; Ellmann, 1992; Dyzenhaus, 1992).

The first approach is arguably the one highlighted in existing accounts of judicial decision-making and the professional legal culture during apartheid. Here, according to the long-entrenched tradition of crude positivism (Dugard, 1978), premised on the distinction between morality and law, judges would interpret statute formalistically. Describing this

³⁹ See generally LRCOHP, esp. interviews with: Geoffrey Budlender; Felicia Kentridge; Arthur Chaskalson; John Dugard.

approach, Arthur Chaskalson, the inaugural Director of the LRC, writes: “if an apartheid statute was clear, the judge's duty was to enforce it, and, if not, there were rules of interpretation the judge had to follow in finding the answer” (2003: 594). Or as Dugard, the founding Director of CALS, observes,

In the early 1960s, lawyers and judges tended to view law simply as the command of the legislature, which they were required to accept. It was not their function to challenge the law, to question its morality, to question whether it complied with human rights.⁴⁰

This legacy of positivism, as well as a formalistic approach to statutory interpretation, enabled both “conservative” and “liberal” judges to frame their decision-making as purely rule-based, thereby immunising it from varying forms of political critique and interference (Ellmann, 1992). But as Ellmann and PIL lawyers also highlight, the legacies of positivism and formalism also provided progressive opportunities for lawyers pursuing social justice causes and human rights cases, even when heard before “conservative judges” (see Ellmann, 1992: 233). Describing this Budlender recalls:

there was this mad obsession [of the judiciary] with the form, rather than with the substance...of law and that created space...most of the judges...well they were almost all white men, almost all of them shared the values and the prejudice of the political system [apartheid], but most [of] them thought they were independent, and if you could reach their minds through a process of logical argument, they would think: oh, well, if that's what the law is then I must go that way.⁴¹

For Budlender, this “mad obsession with the form” coupled with the “tradition” of independence in which judges “generally acted out their belief [of independence]”, meant that “it was often possible to attempt to hold the system to its promises of consistency and lawfulness” (2005: 5). Echoing Budlender’s experience, Dikgang Moseneke, leader of the Black Lawyers Association (BLA) and later Deputy Chief Justice of the Constitutional Court, states:

⁴⁰ CaCOHP interview with John Dugard, 7 August 1999, 20.

⁴¹ LRCHOHP interview with Geoffrey Budlender, 14.

We truly and fully exploited the prim and proper rule of law approach that the Afrikaners have always had. It was always an enigma. They were vicious oppressors and exploiters, but they also believe that they were part of some civilized world where there were civilized norms. As for the judges...They were positivists; they believed that the law was sacred and had to be observed, even if the law was adopted for the wrong reasons. (Moseneke in Broun, 2001: 37).

Broun further notes that “Moseneke was not the only black lawyer to take advantage of the court's adherence to procedural strictness”, citing the work of other black lawyers such as Dullah Omar and Ismail Mohamed (2001: 38). Hence, scholars have argued that a formalistic professional legal culture thus penetrated the breadth South Africa’s legal field: it was adopted both as part of a longer politically conservative professional tradition, and as part of a politically progressive attempt to pursue causes of justice in an unjust political-legal landscape (Chanock, 2001; Meierhenrich, 2008).

But another approach was also available, although perhaps less often used (Dyzenhaus, 2010; Roux, 2013). This approach leaned on the “immanent principles of equality and liberty” in Roman Dutch law, which formed part of South Africa’s common law system (Chaskalson, 2003: 594; see also Dugard, 1978, 1984; Budlender, 1988). Under this system, according to the doctrine of statutory interpretation, ambiguous statutes ought to be interpreted “on the assumption that Parliament intended to act in conformity with common-law values” (Roux, 2013: 199; see also Dyzenhaus, 2010: 155-158; Chaskalson, 2003: 594; Dugard, 1984: 289). For Chaskalson, the ability of liberal judges to read these values into their interpretation of statute meant that there was “room for moral decisions in the development and application of the common law” (2003: 594; see also Dugard, 1984).

These two approaches are often cited by legal scholars as examples of the options available to activist lawyers in oppressive political regimes, usually through case or jurisprudential analysis (Abel, 1995; Ellmann, 1992; Dyzenhaus, 1992). My introduction of them here from the perspective of activist lawyers serves a different purpose. Foregrounding

how lawyers understood the “space” or “room” in the legal system to pursue social justice points to how they understood the constraints *and* opportunities presented by the legal structure they were encountering. Formalism was evidently viewed by ATJ lawyers with deep suspicion, as a core feature of a legal culture that used rules to enforce an immoral and racist political-economic regime. But it was also understood as offering opportunities to resist and destabilise that regime. This highlights that rather than simply practising law in line with the hegemonic legal cultural attitudes of the time, ATJ lawyers’ resort to formalistic arguments, and in rarer cases more moral ones, were conscious *strategies*. I suggest that these had both legal and legal cultural implications.

Appeals to formalism was a means to achieve progressive outcomes by lawyers who believed that law was not only a repository of rules but also had a “moral content” (Chaskalson, 1989: 297). Thus, when formalistic legal arguments were made, it was neither an endorsement of “crude” positivism, nor did it undermine the political commitments of the lawyers who deployed them. As the history of many key PIL cases attest (see Abel, 1995), foregoing a moral argument did not necessarily mean foregoing a morally just outcome. The accounts of the lawyers cited above illustrate the complex understandings of law and legal practice that permeated South Africa’s ATJ field. Law was both a set of rules, and an evocation of higher order values. Lawyering was both the instrumental use of law to achieve just outcomes, and a practice that vindicated these higher order values. These understandings and their relationship to practice reflect the tension between legalism and justice more broadly, highlighting the moral ambivalence of following the (bad) rules.

For organisations like the LRC, achieving a just outcome was fundamental to the overarching project of PIL in South Africa, which was not simply to make a material difference in the struggle against apartheid, but to transform the relationship between law and justice more fundamentally. “From its inception, the LRC saw its role as narrowing the gap

between *law* and *justice* (original emphasis)”, writes former LRC lawyer Wallace Mgoqi (1992: 2). Chaskalson reiterates this, noting that the “stated aim of the Legal Resources Centre was to encourage a belief in the value of law as an instrument of justice” (1989: 293). In other words, adopting formalistic arguments recast law as a resource that could limit the government’s power and enable fair outcomes, rather than as only a punitive tool wielded by the government against the black majority.

Similarly, eschewing formalism, and pursuing arguments that raised moral issues or relied on international standards of human rights, even if it meant losing a case in court, was done purposely by lawyers like Dugard as an attempt to introduce them into “proceedings before South African courts”.⁴² As a lawyer who advocated a “value-oriented approach to law” in contrast to the prevailing positivistic approach (1984: 287), he saw the role of lawyers as assisting “judges in the process of decision by focusing attention on the competing choices open to the judge and on the extent to which each choice promotes or defeats recognised legal values” (1978: 401). For Dugard, promoting this approach to law was also an essential part of his role as a legal academic and PILO leader. He notes, “as a teacher and then later as director of CALS... I wanted to assist in changing attitudes towards law, changing the nature of the law”.⁴³

Highlighting PIL lawyers’ perspectives demonstrates that their choice of legal strategies was not only because of their potential political or legal impact. Rather, they were part of a wider and concerted effort to transform both professional and lay legal cultural attitudes towards law. As indicated above, for PIL leaders, these two efforts were closely linked. But notwithstanding their unity politically and ideologically, there were nonetheless

⁴² CaCOHP interview with John Dugard, 7.

⁴³ CaCOHP interview with John Dugard, 22.

distinctions that marked this emergent legal field. I explore these below as they provide insight into the range of practices and approaches that constituted “anti-apartheid” lawyering.

Distinctions within a Field

Based on the aforementioned understandings of spaces within the law and funding secured from international donors (through the efforts of Felicia Kentridge and her networks with American charitable foundations), South Africa’s PIL sector emerged with the establishment of CALS in 1978 based at the University of the Witwatersrand, followed in 1979 by the LHR and the LRC (see Brickhill, 2018). The private firm Cheadle, Thompson, and Haysom (CTH) was founded as an offshoot of CALS in 1979. As Dugard recalls, CTH “was, in polite terms, a front for the Centre for Applied Legal Studies”.⁴⁴

The Black Lawyers Association (BLA), initiated by black lawyers who had been mostly excluded from the high-profile trials that brought together the coterie of white human rights lawyers, was formed in 1977 (Broun, 2000; Gibbs, 2019). In part because of their exclusion, but also because of their grounding in Black Consciousness (BC) ideology, which largely rejected the liberal politics of the 1970s and 1980s associated with organisations like the LRC and LHR, the BLA maintained a “prickly relationship” with the rest of the PIL field (Gibbs, 2020: 305; see also Broun, 2000; Moseneke, 2016). Although BLA members provided pro bono legal assistance to poor black South Africans and occasionally did PIL work, their primary focus was “developing and improving the lot of black lawyers”.⁴⁵ Largely for this reason, and the aforementioned tensions, the BLA developed independently of the white-dominated PIL sector.

In addition to the tensions that existed between the BLA and the rest of the predominantly white PIL sector, tensions also emerged among the latter group of

⁴⁴ CaCOHP interview with John Dugard, 14; see also LRCHOHP interviews with Geoffrey Budlender, 21; Reagan Jacobus, 18.

⁴⁵ CCOHP interview with Pius Langa, 13.

organisations. According to Dugard, the initial vision for PIL in South Africa was that CALS would be the “academic research wing” of the LRC which would focus on litigation.⁴⁶ Budlender, co-founder of the LRC, reiterates this, noting that “CALS and LRC were [meant to be] parallel organisations...we [the LRC] were going to be the litigators and that CALS would be the researchers and that we would work together”.⁴⁷ But these intentions never came to pass, giving rise to well-known professional tension between the two organisations.⁴⁸ Indeed, while there was occasional collaboration, CALS and the LRC developed independently.

The reasons for their split remain unclear, with their respective leaders giving contrasting accounts. But what is evident in early accounts of both the LRC and CALS is that despite working towards similar broad objectives, the two organisations developed distinct institutional identities rooted in their distinct relationships to the legal profession.⁴⁹ For Dugard, it was partly these distinctions that informed the split:

I was seen to be a bit wild, I always took the view that it wasn’t necessarily important to be professionally responsible in an unjust society...I think this was a philosophy that we had at the Centre for Applied Legal Studies which was not shared by the LRC, it was determined to be professionally responsible...[W]e at CALS were much more innovative... because we were not constrained by the legal profession. Whereas the LRC was determined not to alienate its constituency, the Law Society and the Bar, and we at CALS had been rejected by both...⁵⁰

As a respected legal scholar pioneering human rights law in South Africa, and having “dabbled in litigation”, Dugard nevertheless gained a reputation for being “highly critical of the legal profession in general, the judges and attorneys in particular” (see also Dugard,

⁴⁶ LRCHOHP interview with John Dugard, 15.

⁴⁷ LRCHOHP interview with Geoffrey Budlender, 16.

⁴⁸ LRCHOHP interview with Judge Dennis Davis, 5 September 2008.

⁴⁹ LRCHOHP interviews, Nicholas Haysom; Arthur Chaskalson; John Dugard.

⁵⁰ LRCHOHP interview, John Dugard, 21-22. Prior to the adoption of the Legal Practices Act, the Law Society was the regulatory body of attorneys in South Africa and the Bar was the regulatory body of advocates.

1984).⁵¹ Thus, although he suggests CALS had been rejected by the legal profession, the legal profession had also been rejected by CALS.

In contrast, LRC figures like Sydney Kentridge and Arthur Chaskalson were leading figures of the profession. Both had respected legal practices at the Johannesburg Bar and had also been elected as Chairman of the Bar.⁵² Theunis Roux writes that although Chaskalson was “implacably opposed to apartheid”, his political convictions were never overtly expressed but “sublimated...into his identity as a human rights lawyer” (2013: 222). Despite an explicit desire to use the law to achieve social justice and pursue political causes, the LRC’s alignment with an institutional figure such as Chaskalson rendered its work largely unthreatening to the legal professional establishment, giving the organisation a relatively conservative professional identity (see also, Ellmann, 1998: 367). This is expressed by Karel Tip, an early hire at the LRC and former NUSAS trialist, who recalls that the organisation was

very integrated... into the legal profession. Arthur (Chaskalson) was very concerned and sometimes we thought he was a little bit too conservative... [but] he just said: “...we need to have the protection of the legal profession”.⁵³

The success of this integration is evidenced by Chaskalson’s re-election as Chairman of the Johannesburg Bar in 1982 – three years after the LRC’s founding. But as Tip suggests, Chaskalson’s desire to remain close to the legal establishment was that it served the strategic purpose of insulating the LRC from state interference. This was achieved both by maintaining good professional relationships and populating the LRC’s Board of Trustees with senior figures of the legal fraternity.

⁵¹ LRCOHP interview, John Dugard, 13.

⁵² Kentridge in 1973 and Chaskalson in 1976 and again in 1982.

⁵³ LRCOHP interview, Charles Nupen, 6-7; see also LRCOHP interviews, Wim Trengrove, 27 November 2007; Charles Nupen; John Dugard; Reagan Jacobus.

CALS's and the LRC's divergent organisational identities are also reflected in how each was set up. That the Johannesburg Bar allowed the establishment of the LRC in which attorneys and advocates worked closely together – in contravention of the rules of the legal profession – was novel and somewhat surprising.⁵⁴ Describing this process, Chaskalson recalls:

It [setting up the LRC] then required quite a lot of work, because the professional rules didn't permit advocates and attorneys to work together, and there were statutory problems with the attorneys, and there were ethical problems with both the attorneys and the Bar. So we...had to negotiate with the legal profession to set up the structure, which...went surprisingly more easily than I had anticipated it would go.

Many lawyers at the time explained this in terms of Chaskalson's leadership of the LRC. For example, Wim Trengrove, another highly respected advocate who was the LRC's Director of Constitutional Litigation between 1995 and 1999, noted:

And you know, with his measured, conservative, logical, sensible, moderate way of putting his case, he persuaded the Bar to, not only permit the LRC, but largely to embrace the LRC.⁵⁵

In contrast, CALS's lawyers splintered off to form CTH for several reasons: partly the profession's resistance to allow litigation to be run from a university organisation; CALS's intention to represent nascent trade unions; and the co-working of attorneys and advocates.⁵⁶

Describing this experience, and betraying the tension between the LRC and CALS, Dugard recalls:

...Halton (Cheadle) [one of the first appointments at CALS], who had been an attorney in Durban, wanted to practise law, and the question arose as to whether the Law Society would allow him to practise from the Centre for Applied Legal Studies, and the legal profession, the Law Society, refused. At about the same time we appointed new staff to the Centre for Applied Legal Studies, we appointed Fink Haysom... Fink also had a criminal record...there was Halton (Cheadle), Fink (Haysom) and myself, and we said that one of the qualifications for working in the Centre for Applied Legal Studies was that one had to have a criminal record.

⁵⁴ LRCOHP interview, Arthur Chaskalson, 5; see also Karis Gerhart Collection, interview with George Bizos.

⁵⁵ LRCOHP interview, Wim Trengrove, 4.

⁵⁶ LRCOHP interviews, John Dugard, 17; Peter Harris, 8.

Which was not meant seriously by us, but I think it was an indication of the fact that we were somewhat more irresponsible perhaps, activists, than members of the Legal Resources Centre...So, it was quite clear that we were engaged in activities that were unacceptable to the legal profession and that meant that the Legal Resources Centre which was determined to maintain the goodwill of the legal profession, found us somewhat of an embarrassment... we had to decide what to do about the practice of law, and so it was decided to set up the firm of Cheadle Thompson & Haysom, because the Law Society insisted...they might not operate as attorneys from the university.⁵⁷

Echoing the views of Dugard regarding the institutional reputation that CALS and the LRC were generating, Haysom recalls that his decision to join CALS rather than the LRC was born from the impression that the former was more “politically engaged” than the latter.⁵⁸ Indeed, part of Chaskalson’s deliberate strategy of protecting the LRC from National Party interference was to ensure that “the Centre would only do law”, albeit law that had “a very strong political overtone”.⁵⁹

Thus, despite sharing similar goals and being united in their political opposition to apartheid, these organisations nonetheless occupied different positions within the professional landscape, underpinned by distinct understandings of professional responsibility in relation to political activism.

These distinctions are further reflected in the approaches they took in their practice of law.

A Heterogenous but Coherent Legal Field

LHR began as a volunteer-based association for liberal lawyers committed to human rights, administered first by CALS, and later Judge Johann Kriegler.⁶⁰ Its early work concerned recruiting lawyers to provide free legal assistance to black South Africans in the

⁵⁷ LRCOHP interview with John Dugard, 17.

⁵⁸ LRCOHP interview with Nicholas Haysom, 10; see also CCOHP interview with Edwin Cameron, 10.

⁵⁹ CaCOHP interview with Arthur Chaskalson, August 7 1999, 8.

⁶⁰ LRCOHP interview, John Dugard, 18.

Pass Courts to grind these legal-bureaucratic processes to a halt.⁶¹ By 1987, the organisation established regional offices with a dedicated staff. Key focus areas were the abolition of the death penalty as well as several “projects” oriented to public education and human rights advocacy (Currin, 1989).⁶²

In the tradition of American public interest lawyering, partly influenced by founders Felicia Kentridge’s and Geoffrey Budlender’s engagements with American civil rights lawyers, the LRC adopted the test case approach involving litigation that challenged or tested a legal principle with the view to facilitate systemic change (Brickhill and Finn, 2018: 94).⁶³ Principles that were challenged in 1980s South Africa were those integral to the legal architecture of the apartheid state. Two of the LRC’s first and most notable test cases contributed to the collapse of influx control, a linchpin in the project of Grand Apartheid (Abel, 1995).⁶⁴ The first (*Komani*) did so by establishing the right of spouses of black men employed in white urban areas to live together in the urban area. The second (*Rikhoto*) enabled black people who had been working in white urban areas for ten consecutive years to acquire the right to live in those areas permanently. Together, these cases greatly weakened the legal tools the apartheid government used to control the movement and residence rights of black South Africans. According to Sydney Kentridge, test case litigation was an organising principle of the LRC since the organisation was not meant to be “a little bureau that would do the odd criminal case or divorce...you didn’t just do cases, you looked for cases... which would *establish* something” (original emphasis).⁶⁵

⁶¹ CaCOHP interview, John Dugard, 7.

⁶² See also A. Nel, ‘Address by Mr. Andries Nel, MP, Deputy Minister of Justice and Constitutional Development’, (Sunnyside Park Hotel, Johannesburg, November 20, 2009), <https://www.gov.za/news/speeches/address-mr-andries-nel-mp-deputy-minister-justice-and-constitutional-development-1>, accessed 10 June 2025.

⁶³ Interview with Geoffrey Budlender, 9 September 2022; LRCOHP interviews, Geoffrey Budlender; Arthur Chaskalson, 6; Sydney Kentridge, 5.

⁶⁴ *Komani v. Bantu Affairs Administration Board, Peninsula Area* 1979 (1); *Rikhoto v East Rand Administration Board and Another* 1983 (4).

⁶⁵ LRCOHP interview, Sydney Kentridge, 5; see also LRCOHP interviews, Arthur Chaskalson, Geoffrey Budlender, Karel Tip.

But this approach required access to large volumes of indigent clients “to find the best case to take on, the test case”.⁶⁶ The LRC thus established both its own walk-in legal clinic and collaborated with a wider network of organisations like the Black Sash and community advice offices (CAOs) in rural areas and urban townships. Budlender describes the relationship between the LRC and these organisations, and how this fitted into the LRC’s broader theory of social change:

[T]est cases [are] where we were trying to change the law. And the theory of it was that we would build relationships with organisations on the ground which would see high volumes of people’s problems and be able to identify the patterns and say to us, ‘here’s a problem which we see all the time’. And that worked...because we were very small, we couldn’t see thousands and thousands of people coming through our doors to find the patterns and to find the issues. We were going to be dependent on other organisations...And when we had a case and we needed a test case...we would say [to the organisations], ‘we’re looking for a client...fitting this description’, and they’d find them, and we would have a perfect test case... [because] the whole thing about test cases is you’ve got to have the right test case. [If] you’ve got the wrong test case, you lose⁶⁷

In addition to the role of legal clinics and CAOs in this process, Budlender also observes that doing clinical work was often necessary to enforce judgements that were the outcomes of test cases, thereby transforming the ways in which South Africa’s expansive legal-bureaucracy operated in practice (see also Abel, Chapter 3).⁶⁸ For example, Abel writes that the government routinely “flouted *Komani*” (1995: 30). But he also notes that “some applicants would find their way to the Black Sash, which referred them to the LRC for a ‘lawyer’s letter’ threatening legal action, usually producing prompt compliance” (Abel, 1995: 30).

Thus, despite the LRC being established to use the law “positively”, a consequence of having its own walk-in clinic and being networked with numerous other clinics was that a core component of its work became providing routine, often defensive, legal assistance to

⁶⁶ LRCOHP interview, Geoffrey Budlender, 8.

⁶⁷ Interview with Geoffrey Budlender, 9 September 2022.

⁶⁸ LRCOHP interview, Geoffrey Budlender, 9.

poor black South Africans.⁶⁹ In effect, the LRC did partly become a “little bureau”, much to the dissatisfaction of its leader who “was continually putting pressure on people not to allow that volume of work to overtake what was the main purpose of the LRC, which was to do impact work [test case litigation]”.⁷⁰

As Chaskalson indicates, while both clinical legal assistance (what LRC lawyers called “service work”) and PIL during apartheid were forms of providing ATJ, the nature of this work and its impact were distinct (see also Budlender, 1988). The former involved the provision of legal assistance to poor and marginalised *individuals* so that they could make use of existing or newly made legal channels to solve their problems. Often this involved the legal defence of their rights.⁷¹ While these defensive cases may highlight structural deficiencies that may lead to a test case, in practice, they are often not addressed at this scale. In contrast, according to Chaskalson, the purpose of PIL was to make a systemic “impact” by seeking to transform or “test” underlying legal structures that affect entire *classes of people*. The distinction between positive and defensive ATJ work that Budlender outlines above therefore maps onto the distinction between clinical legal assistance and PIL. The logics of how the law may assist people, and what kind of assistance is being given, are thus different in these two models of ATJ practice.

What grew out of the LRC’s attempt to do both was a tension between serving walk-in individuals and pursuing the grander organisational goals of dismantling apartheid’s legal infrastructure. In Budlender’s words:

⁶⁹ The LRC provided clinical assistance through its Hoek Street Clinic (see generally LRCOHP) and through its Advice Centre Program, which “transpose(d) what the LRC did to township venues” (LRCOHP interview, Mohamed Navsa, 5).

⁷⁰ LRCOHP interview, Arthur Chaskalson, 6.

⁷¹ LRCOHP interview with Syndey Kentridge, 11.

[O]ur continual battle was the tension between serving the people that came in the front door and doing the big test cases or the big impact cases, and it was a permanent tension.⁷²

Despite putting pressure on his lawyers to focus on impact work, Chaskalson nonetheless recognised that the importance of providing free clinical assistance to poor black people was that it enabled them “to assert rights which they did have, really to resist what was being done to them”.⁷³ Elaborating on how he understood the significance of this work, he says:

And we realised that there were very many people who were being exploited commercially who were being exploited at the workplace, and it was important to start generating, as it were, a culture of asserting yourself against powerful institutions.⁷⁴

Thus, even the defensive work pursued by the LRC through its legal clinic served part of a conscious attempt to transform South Africa’s wider legal culture so that the law was not solely experienced by the black majority as a punitive tool, but one that could be used to “challenge and improve their position” (Budlender, 1988: 320). Hence the “stated aim” of the LRC noted by Chaskalson above. Across the breadth of their work, wider ideals of law were constantly (implicitly) being invoked.

From one perspective, the LRC’s dual focus on impact litigation and the provision of clinical legal assistance further distinguished it from CALS which was primarily a research and academic organisation. Key to the institutional role it envisioned for itself within the legal anti-apartheid struggle was to engage in “public education”.⁷⁵ It did so through publications in academic and non-academic fora, and by hosting “closed seminars” for lawyers and judges to discuss key legal issues and to disseminate progressive ideas about law beyond the confines of the PIL sector.⁷⁶ According to Dugard,

⁷² Interview with Geoffrey Budlender, 9 September 2022.

⁷³ CaCOHP interview with Arthur Chaskalson, 6.

⁷⁴ *Ibid.*, 16-17.

⁷⁵ CaCOHP interview with John Dugard, 10.

⁷⁶ CaCOHP interview with John Dugard, 10.

...there's no doubt that we did influence the thinking of many judges so that most of the important – all of the important progressive judicial decisions of this time were taken by judges who had been at our seminars.⁷⁷

While focusing on these educational pursuits, CALS soon also began litigating strategic cases to apply the insights of its research.⁷⁸ Key areas of litigation were censorship, labour relations, pass laws, and challenging the Group Areas Act. In contrast to the LRC, which designed test cases around key issues brought to them by “communities” and the wider network of organisations it collaborated with, CALS did not serve a walk-in public and selected its cases based on its academic research into the social, economic, and political landscape.⁷⁹ In some instances, this research led to the provision of defensive legal assistance that sought to frustrate the legal-bureaucratic machinery of the apartheid state.⁸⁰ But as noted above, for Dugard, litigation provided an opportunity to introduce into South African legal proceedings international law and human rights arguments, as well as arguments that demonstrated to judges the range of choices available to them and their relationship to legal values.⁸¹ From a different perspective, although clearly engaged in distinct practices and doing so from distinct locations within the legal-professional field, both the LRC and CALS directly and indirectly sought to transform both professional and popular ideas about the law and its role in society.

In contrast to CALS and the LRC, which both provided exclusively pro bono legal assistance, CTH was technically a private firm that did accept fees – although much of its work was done for free. Unlike the LRC, CTH defended political activists in political trials and focused its energies on labour relations, becoming “organisationally linked” with newly

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, 6.

⁷⁹ See generally LRCHOHP.

⁸⁰ A key example of this was providing free legal assistance to people in the “pass courts” which dealt with the alleged violation of laws that controlled the movement of black South Africans.

⁸¹ CaCOHP interview with John Dugard, 7

legal trade unions, a number of which were becoming strong political forces in the struggle against apartheid.⁸² According to those involved, part of the purpose of building these organisational links was to create space for the cultivation and strengthening of wider movements that could politically challenge the apartheid order. For lawyers like Haysom, this was the “most important role” that lawyers could play.⁸³ Describing this approach and how it was distinguished from the LRC’s, which remained focused on test case litigation, Haysom said:

I think, you know, the question, you can defend the worker by establishing a precedent is important, but you can strengthen and build a trade union but you can only do that if you work for that trade union so that the trade union wins the battle, and that’s...was in a sense I suppose the dichotomy between two approaches, which led to some exchanges between the LRC approach and our approach.⁸⁴

Haysom’s reflection highlights that what distinguished the LRC’s work from that of CTH and CALS was that the former’s methodical approach to finding the best test case, foregrounded the law to restrain arbitrary power by forcing the government to live up to its rule-bound pretensions (see Chaskalson, 2003: 598).⁸⁵ In contrast, CTH and CALS rebuffed the legal establishment, took on overtly “political” cases, and pursued an approach to legal activism that bolstered and supported political activities in a time of extreme government repression. Both LRC and CTH lawyers observe that because CTH did not patiently weed through endless cases to find the best facts for a test case, they were often more brazen in their approach.⁸⁶ Describing the distinctions, Reagan Jacobus, former LRC Fellow, and later

⁸² LRCOHP interview with Nicholas Haysom, 3. Following the recommendations of the Wiehahn Commission in 1978, previously outlawed black trade unions were legally recognised.

Importantly, although the LRC did not officially partner with political or labour organisations, lawyers like Geoffrey Budlender worked closely with large communities to resist forced removals, and in so doing, engaged in the kind of organising work that Haysom describes (see for example, White, 1988).

⁸³ LRCOHP interview with Nicholas Haysom, 18.

⁸⁴ *Ibid.*, 10.

⁸⁵ This is not to say that the LRC did no work with organised groups or communities, but rather that doing so was not central to their approach.

⁸⁶ LRCOHP interviews, Nicholas Haysom; Reagan Jacobus.

CTH attorney, recalls that the LRC “were very choosy about what cases they’d take on”, while CTH “had bills to pay so they would take any client that walks in”.⁸⁷ Haysom concurs: “They [the LRC] were doing things much more thoroughly and much more engaged and throwing real effort into cases”.⁸⁸

As these brief accounts of key anti-apartheid legal organisations illustrate, the PIL legal sector that emerged in the late 1970s, was not homogenous. Rather, PILOs had distinct professional identities and pursued distinct legal projects. But notwithstanding these differences, together they formed a coherent legal field populated by lawyers committed to using the legal system, despite its constraints, to advance the anti-apartheid struggle. As Chaskalson notes, “[T]here were people who would write about law. There were people who would be speaking about it. There would be people who would be practicing [sic] it”.⁸⁹ Similarly, Dugard notes, “[H]ere was the Legal Resources Centre challenging apartheid legislation before the courts. Here was CALS, in its publications and in its other work, challenging the philosophy, legal philosophy, of the apartheid legislation”.⁹⁰ Or as described by Haysom, who also highlights the personnel overlaps between organisations:

Many of their [the LRC] lawyers would step out of the LRC and become private lawyers for Cheadle Thompson & Haysom, as you know were closely associated with CALS. And so we really had, sort of, three institutions which were exploring and expanding the boundaries of what... it was possible to do through the legal form. And secondly...there was a really natural divide, where the LRC largely responded to what...were seen as Public Interest claims...as opposed to the CALS more intellectual engagement, we’re (CTH) engaged in more political cases. And in a sense, that is...was the right complementarity.⁹¹

The view was that through this complementary practice, one might begin to fashion transformed understandings of both law and lawyering. Indeed, an effect of these

⁸⁷ LRCOHP interviews, Reagan Jacobus, 19; Paul Pretorius, 9.

⁸⁸ LRCOHP interview with Nicholas Haysom, 10.

⁸⁹ CaCOHP interview with Arthur Chaskalson, 49.

⁹⁰ CaCOHP interview with John Dugard, 21.

⁹¹ LRCOHP interview with Nicholas Haysom, 15.

complementarity organisations was that it entrenched the view of lawyering as a form of social-political “struggle” “to advance the interests of oppressed, marginalized communities”.

⁹² Law was recast as a tool to fashion justice even in an unjust system, thereby progressively transforming society (see also Roux, 2013: 222). This was recognised by PIL lawyers like Budlender:

[P]robably the most important thing [it] did was it promoted a belief that law could be an instrument for justice, and that doing things through law was of positive value, that this was something worth doing.⁹³

This was achieved both through modelling justice-oriented approaches to lawyering by highly respected legal professionals and using PILOs as training grounds for future generations of activist lawyers (see Gibbs, 2019: 1136). One principal mechanism for the latter was the LRC’s Fellowship Programme in which mostly black law graduates or law students worked under the mentorship of the LRC’s lawyers.⁹⁴ Chaskalson describes how the Fellowship was envisioned:

[W]e started a training program which was to try and perform a bridge from – a lot of black law students were coming out of universities with very bad education. To try and provide a bridge from the background of education into what would be a much more demanding task in legal practice, and at the same time to offer training and interest in what we were doing at the Legal Resources Centre, show younger people what law could do to change society, and also use our influence within certain firms to try and find people positions as article clerks.⁹⁵

While part of the purpose of the Fellowship Programme may have been to facilitate the entry of young black lawyers into the legal profession more generally (which it did), many remained within the PIL sector moving between different organisations at different stages in

⁹² CaCOHP interview with Arthur Chaskalson, 55; see also CaCOHP interview with John Dugard; CaCOHP interview with Geoffrey Budlender.

⁹³ CaCOHP interview with Geoffrey Budlender, 25.

⁹⁴ LRCHOH interview with Geoffrey Budlender, 8.

⁹⁵ CaCOHP interview with Arthur Chaskalson, 32; see also LRCHOHP interview with Geoffrey Budlender, 8. As with much else during apartheid, education was also racially segregated with black lawyers often forced to attend under-resourced “black universities” (see Nkondo, 1976; Pruitt, 2001).

their career.⁹⁶ By the early 1990s there was thus a sizeable, multi-racial field of lawyers trained in the tradition of public interest and human rights lawyering in South Africa. Lawyering as a form of social activism spread throughout the legal field. Dugard emphasises this, but also ties this transformation of legal culture to the Constitution that was later adopted:

[G]radually, lawyers changed their attitude towards the law, so that by the end of the 1980s, at the time of the political transition, there was a substantial group of what one might loosely describe as human rights lawyers in South Africa. I think that was why we got the kind of constitution that we did, with a bill of rights and protection for human rights.... And I think it's very clear that institutions like CALS, Legal Resources Centre, Lawyers for Human Rights, played an important part in that exercise.⁹⁷

Echoing this sentiment Budlender notes:

I think the LRC and like organisations actually played a significant role indirectly in the fact that South Africa became a democracy under law, with a bill of rights and with a belief that the legal system is the method people should use to enforce and vindicate their rights (see also Meierhenrich, 2008).⁹⁸

While it is impossible to account for the exact nature of this legal field's impact on the Constitution that was adopted in 1997, it is "indisputable" that many of its members emerged as key players in constitutional negotiations, emphasising the importance of human rights and, implicitly, a value-laden view of law (Gibbs, 2019: 1134, 1146; see also Dubow, 2012).⁹⁹ Indeed, these understandings of law are present in the Constitution itself. They are evident in the inclusion of a Bill of Rights that includes socio-economic rights; the substantive account of equality the Constitution espouses; the horizontal applicability of the constitutional values to both private and public law; and the preamble's declaration that the role of law is not just

⁹⁶ See LRCOHP interviews with Shamima Gabie; Ellem Francis; Reagan Jacobus; Thandi Orleyn; Mahomed Navsa.

⁹⁷ CaCOHP interview with John Dugard, 20-21.

⁹⁸ CaCOHP interview with Geoffrey Budlender, 25-26.

⁹⁹ See for example, LRCOHP interview with John Dugard, 28. Scholars of course also highlight the range of influences and factors that shaped the nature of constitutional negotiations that produced the final Constitution adopted in 1997 (see Gibbs, 2019; Spitz and Chaskalson, 2000).

to regulate relations between public and private parties, but to work actively to transform South African society. The new legal order that emerged in the wake of apartheid thus reflects an attempt to reconcile law, morality, and justice and situate the law within a wider project of socio-economic engineering (Cooper-Knock, 2021). As noted in the Prologue and Introduction, this legal order became the legal cultural basis of “transformative constitutionalism” (Klare, 1998).

As indicated by the lawyers quoted above, the significance of South Africa’s PIL sector extended beyond the impact of their legal efforts in the struggle against apartheid. It demonstrated how law could be used both to vindicate the rights of individuals and advance wider social change, laying the groundwork for a fundamental transformation in mainstream discourses of law and lawyering. Law became deeply imbricated with moral ideals about the future, and lawyering became a practice oriented towards achieving those ideals. This history saturates the ATJ field with a sense of historical significance, not least evidenced by how some contemporary lawyers draw a direct line between their work and that of their predecessors (see Chapter 2).

But despite the legal cultural change that accompanied the adoption of the new Constitution, underpinned by its value-laden ideal of law and its role in the new state-making project (the “constitutional project”), an uncomfortable professional commitment to legalism remained. As the rest of this thesis demonstrates, this produced enduring tensions for lawyers seeking to achieve both progressive ends and the transformation of legal culture, highlighting once again the ambiguous place of legalism.

In the next section I trace the historical significance of South Africa’s PIL sector in democratic South Africa, highlighting its impact on the development of this legal field.

PIL After Democracy: From Pushing at an “Open Door” to Increased “Suspicion”

Beyond their influence on the Constitution that was adopted in 1997, anti-apartheid PILOs undoubtedly contributed to the transformation of dominant understandings of law and its role in society in the early years of democracy. This section traces these dynamics. It highlights the transformation of the judiciary, the migration of former anti-apartheid PIL lawyers to positions within the newly elected government, and the later expansion of South Africa’s ATJ field in response to changing PIL-state relations. Each of these sub-sections speaks to the post-1994 chronology of South Africa’s ATJ field following the advent of democracy indicating the significance of anti-apartheid PILOs in shaping professional understandings and practices of law.

A New Apex Court

As part of the constitutional negotiations, it was decided that in the newly democratic South Africa, the apartheid system of parliamentary supremacy would be replaced by constitutional supremacy. All governmental acts and subordinate legislation would be subject to judicial review by a newly formed Constitutional Court.

Leading this court as the inaugural Chief Justice was Arthur Chaskalson, appointed by President Nelson Mandela. Describing the composition of the inaugural Constitutional Court (CC), Roux writes that “[t]he most obvious common denominator between the judges... was a profound commitment to the value of human rights and constitutionalism” (2013: 23). Indeed, all the newly elected justices had either worked in PILOs or pro bono legal clinics, defended political activists, or were “liberal” judges during apartheid who attempted to uphold human rights (Roux, 2013: 230). The inclusion of members of the human rights legal fraternity in South Africa’s apex court points to the growing significance of this group and

their view of law, and indeed the place of law in South Africa's new state-making project at the time of transition.

In a review of the judgements produced by the CC in its inaugural year, Cockrell writes: "one word resonates like a leitmotiv throughout the judgments of the Constitutional Court in the past year: 'values'" (1996: 1). He argues that the Court's preoccupation with values is evidence of its (attempted) shift from a "formal vision of law" that characterised apartheid jurisprudence, to a "substantive vision of law", invited by the new Bill of Rights which necessarily requires moral, value-laden reasoning (1996: 10). A survey of the judgements issued by this inaugural court (not just in the first year), reveals that judges were grappling with how to incorporate the Constitution's explicit moral values into their legal decisions. The law, as expressed in the Constitution, was clearly understood as both an evocation of ideals about the future of South Africa, and the means to realise them. A version of transformative constitutionalism, if not framed in such terms, was entering legal discourses at the highest levels.

And yet, Cockrell also argues – reflecting later jurisprudential criticisms (see Dugard and Wilson, 2014; Hoexter, 2008; Bilchitz, 2008) – that despite this shift, the CC faltered to develop a coherent jurisprudence that embraced a "substantive vision of law" in which substantive "moral, economic, political, institutional" reasons were used to make legal decisions (1996: 5). Instead, he suggests that the CC maintained, implicitly, the distinction between "rules" and "values" (Cockrell, 1996: 13). In so doing, the court failed to abandon the "wedge" between "legal reasoning" and "moral and political" reasoning: the former typical of a "formal vision of law" and the latter of a "substantive vision of law" (1996: 13). As such, some areas of law – particularly constitutional adjudication – were considered worthy of moral and political reasoning, while others required the formal application of rules. Cockrell points to an early judgement, *State v. Mhlungu*, in which Sachs writes:

The introduction of fundamental rights and constitutionalism in South Africa represented more than merely entrenching and extending existing common law rights, such as might happen if Britain adopted a Bill of Rights. The Constitution introduces democracy and equality for the first time in South Africa. It acknowledges a past of intense suffering and injustice, and promises a future of reconciliation and reconstruction... It is a momentous document, intensely value-laden. To treat it with the dispassionate attention one might give to a tax law would be to violate its spirit as set out in unmistakably plain language.¹⁰⁰

This passage both highlights the ways in which the law became morally and symbolically weighted through official judicial decisions and became normatively fractured – evidenced by the distinction drawn between constitutional adjudication and tax law. Echoing Cockrell’s critique, Davis and Klare write that in its second judgment in *State v Makwanyane*, despite the Constitutional Court Justices writing “eloquent passages [that] spoke of a break with the past... the judgments showed little engagement with the new Constitution’s demands to problematise and interrogate the traditional canons and repertoires of legal reasoning” (2024: 519).¹⁰¹

This critique illustrates the core tension that permeates the rest of this thesis. Cockrell’s critique, echoed by many others in the decades since, highlights how a legal field committed to human rights, substantive equality, socioeconomic transformation, and embracing a deeply symbolic view of South African law and its purpose, nonetheless maintained an understanding of law as a set of rules requiring formal application, and a commitment to past forms of law. The understandings of law were multiple and were fractured in relation to how different parts of the law came to be morally valued differently.

From one perspective, the legal cultural commitment to legalism alongside the normative ideals of the Constitution is not surprising. As legal scholars and legal anthropologists have shown, legalism is precisely what makes legal thinking, legal (Schauer, 2009; Pirie, 2013; Dresch and Scheele, 2015). But the South African case highlights how in

¹⁰⁰ *State v Mhlungu and Others* (CCT25/94) [1995], para 111.

¹⁰¹ *State v Makwanyane and Another* (CCT3/94) [1995].

contexts transition, in which legalism was central to the apparatus of an oppressive state in the past, new legal ideals produce a suspicion of rule-based thinking. The commitment to the ideals of law is steadfast, but the commitment to rules is fraught.

The rest of the thesis shows how these distinct normative commitments to law as ideals and law as rules are continually reproduced, shaping practices of law within South Africa's ATJ legal field, which is self-consciously oriented to advancing the constitutional project and operating in the vein of its anti-apartheid predecessors. The chapters that follow demonstrate that these multiple understandings in a legal landscape that is normatively fractured, continue to articulate the tension between forms of law rooted in the past, and ideals of law oriented to the future.

Early PIL Post-1994: The “transition from within”

Former PIL lawyers were not only a key feature of the Constitutional Court, but also of the early democratic government and the lower branches of the judiciary. For example, Geoffrey Budlender became the Director General (DG) of the Department of Land Affairs, Nicholas Haysom became President Nelson Mandela's Legal Advisor, and Charles Nupen established a new legal institution to deal with labour disputes (the Commission for Conciliation, Mediation and Arbitration [CCMA] – see more in Chapter 4). In addition to these prominent members of the anti-apartheid PIL sector, numerous other lawyers who had spent time within this field during the 1980s also went on to occupy positions within the judiciary, as well as enter government departments (see Budlender et al., 2014; Cote and van Garderen, 2011; Brickhill and Finn, 2018).¹⁰²

In relation to the judiciary, Brickhill and Finn note that “[i]n the initial period after 1994, a career as a public interest lawyer was favourably considered by the Judicial Service Commission and a large number of judges were appointed from the ranks of the PIL sector”

¹⁰² See generally LRCHOHP for the career trajectories of PIL lawyers after apartheid.

(2018: 100).¹⁰³ Regarding government departments, Jackie Dugard (John Dugard's daughter), a former CALS lawyer and a legal scholar, notes, "a lot of progressive lawyers were partnering with the government to try and make change. And government was seen, to greater or lesser extent as an ally in social change".¹⁰⁴ Similarly, Cote and van Garderen, former lawyers for LHR, write that the influx of PIL lawyers into the new government "formed part of the transition from within" (2011: 168).¹⁰⁵ Describing the nature of this "transition from within" Budlender gives an account of his own experience as DG:

The building in which I work was with the Office of the Department of Bantu Administration, later called Cooperation and Development, which was the department that ran the pass laws and carried out the forced removals. I used to go to that building with my clients to try to negotiate, to prevent them from being removed... Some of the claimants who [now] come to us and say, "We want you, the government, to give back the land that was taken from us by the old government," are former clients of mine.¹⁰⁶

The nature of the transition and its basis in law, in conjunction with a government and judiciary that were populated both by former PIL lawyers and anti-apartheid activists, altered the basis on which PILOs operated in the early years of democracy. During this period, Cote and Garderen write that "[i]t seemed initially inappropriate to invoke the old confrontational attitude, particularly where one was dealing with long-time friends and former colleagues" (2011: 168-169; see also Brickhill and Finn, 2018: 97; Heywood, 2003: 300). His view is echoed by Judge Clive Plasket, the former Director of the Grahamstown (now Makhanda) Office of the LRC, from 1991 until 1997. He reflects that after 1994 there was "unease" at the LRC about litigating against the government.¹⁰⁷ According to him, the prevailing view at the LRC was that collaboration and co-operation with the government should be sought instead of litigation, an approach "...born of the idea that we know people in government, we know

¹⁰³ The Judicial Services Commission is the body that appoints members of the judiciary.

¹⁰⁴ Interview with Jackie Dugard, 2 November 2022.

¹⁰⁵ LRCOHP interview with Geoffrey Budlender, 25.

¹⁰⁶ CaCOHP interview with Geoffrey Budlender, 27.

¹⁰⁷ LRCOHP interview with Clive Plaskett, 17.

ministers and we know DGs [director generals] and so on and so forth, so we can talk to them”.¹⁰⁸

These accounts indicate the significance of shared histories among PIL lawyers and members of the government in both the struggle against apartheid and in the processes of transition to democracy, creating an implicit understanding of being engaged in a common project of constitutional transformation driven by common values. Chaskalson describes the distinction between PIL during apartheid and PIL following the adoption of the Constitution:

[T]he situation is different in the sense that the government as government is, I think, committed to addressing fundamental issues of poverty and change, exploitation, a whole bundle of legislation put in place towards that end. And what the LRC is concerned with is poverty and the legacies of apartheid and good government and democracy in the sense that decisions should be taken properly. And so, the situation's quite different in the sense that the goals of the LRC would be similar to the goals of government, whereas before there was a sharp conflict.¹⁰⁹

Echoing Chaskalson, and describing the continuity and rupture of his own experiences of PIL lawyering following his return to the LRC after four years in government, Budlender recalls:

In fact, the truth is that as far as the LRC is concerned... the clients didn't really change. They were people who didn't have a home, didn't have pension, kids couldn't get a decent education, didn't have food, didn't have land, they were the same people. *The continuity was astonishing*. What was different of course was that they had the Constitution on their side. Now, the law was for them, not against them. And that changed the whole name of the game. Particularly in the early years, the early post '94 [years]. The government was filled with former activists, and when you pushed at the door with a human rights case, it opened very quickly. You know, the land minister... he wanted to get people their land. The education minister wanted to get people into decent schools etc. etc. etc. (emphasis added)¹¹⁰

In the accounts of former lawyers, the 1990s and early 2000s are framed as an odd period, in which the “aggressive” 1980s lawyering that challenged laws, government, and bureaucratic process, had abated somewhat.

¹⁰⁸ LRCHOHP interview with Clive Plaskett, 18.

¹⁰⁹ LRCHOHP interview with Arthur Chaskalson, 17.

¹¹⁰ Interview with Geoffrey Budlender, 9 September 2022.

But this was not to last. Within the first decade of democracy, the relationship between PILOs and the government began to fray, becoming increasingly antagonistic (see Brickhill and Finn, 2018). As Jackie Dugard recalls, by 2004, the year that she joined CALS:

[I]t was just starting to become apparent that the government wasn't necessarily the ally that we had hoped it would be, certainly not to the full extent. Certainly, the first socioeconomic rights cases had been litigated and we'd had *Soobramoney*, we'd had *Grootboom*, and you know there was a sense that, oh, gosh, the government is going to be opposing these cases.¹¹¹

This sentiment is reiterated by Budlender: “[T]he work became...less and less pushing at an open door. And there came a time when the government became really irritated [with PILOs]”.¹¹² This is further evidenced in the growing government criticism of the judiciary during this period (le Roux and Davis, 2019; Budlender et al., 2014).

Undoubtedly, part of the government's irritation was that post-1994 PIL largely sought to give content to socio-economic rights and thus implicitly and explicitly challenged the government and their policies. In addition to cases on the rights to housing¹¹³ and healthcare¹¹⁴, PILOs also litigated government policies concerning the provision of anti-retroviral medication to HIV positive pregnant women¹¹⁵ and its pensions scheme.¹¹⁶ What thus began to emerge, particularly after the first decade of democracy when members of the government and PIL lawyers did not “have old friendships from struggle days”, was an increasingly hostile, and as Budlender puts it, “suspicious” relationship.¹¹⁷ Reflecting this suspicion in its contemporary manifestation, one of my interlocutors, Tim, a long-time PIL lawyer, noted the following during an interview:

¹¹¹ Interview with Jackie Dugard, 2 November 2022.

¹¹² Interview with Geoffrey Budlender, 9 September 2022.

¹¹³ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000].

¹¹⁴ *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997].

¹¹⁵ *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002].

¹¹⁶ See LRCOHP interview with Clive Plasket for details.

¹¹⁷ Interview with Geoffrey Budlender, 9 September 2022.

I think what we run up against again and again is what I would call anti-poor positions, which I think are rooted in a neoliberal ideology that regards, that tends to criminalise and pathologize poor people... who aren't in a position to pay for property or services, rather than seeing those people as bearers of constitutional rights who should be the first priority for government. There's a kind of reluctant acceptance I think on the part of many pockets of the state, that yes, the Constitution does protect against eviction, protect against disconnection of electricity and water without notice.

As later chapters demonstrate, in many instances this suspicion has transformed into frustration and outright antagonism. Underlying this dynamic are apparently divergent ideas about the constitutional obligations of the state to the most vulnerable, and the role of law and the courts in remedying social ills (see also Heywood, 2021). In addition, Budlender notes that “as government has become more difficult, more constrained by financial restraints, more constrained by lack of skills in government, more constrained by corruption, so the tension has grown”.¹¹⁸

As the capacity of the state has weakened over time, and as key government actors have become embroiled in corruptions scandals, ATJ lawyers no longer assume that the government is engaged in a *shared* project of transformation rooted in a shared reverence for the Constitution and its values (Southall, 2007). This is reflected both in the substance of public interest litigation and in the growing expectation amongst PIL lawyers that the government will not comply with court orders (see McConnachie and Brener, 2018; Budlender et al., 2014; Section 27, 2024). Such resistance is evidenced in Chapter 5, which discusses how contemporary PIL is largely concerned with forcing different state actors to comply with their constitutional developmental obligations to realise entrenched socio-economic rights. It is also illustrated in the changing approaches PILOs take when litigating against the state. As will be discussed further in Chapter 6, structural interdicts, which are intended to enable litigating parties and courts to retain some control and oversight over the implementation of orders have become increasingly popular amongst PILOs (Jephson and

¹¹⁸ Interview with Geoffrey Budlender, 9 September 2022.

Mngomezulu, 2018; Brickhill and Finn, 2018). Against the backdrop of deepening poverty, widening inequality, and a government that is perceived by many ATJ lawyers as largely unresponsive to the needs of the most vulnerable, the law has once again become a key site of struggle and activism. Highlighting this, Budlender, a PIL lawyer who has remained a central figure in this field during apartheid and after its demise, sums up the situation:

The clients are the same people...The techniques which are available to help them are now broader because there's now a political process, which is, to some extent more open. The legal tools are fundamentally different of course, because we've got the Constitution. But at its heart it's the same thing. It's the same thing about how do you get government to be responsive to the needs of poor people? How do you create a government which is responsive? ...and what is the role of the courts in that?¹¹⁹

A New Generation of PILOs and a Wider ATJ Field

In part a consequence of this increasing hostility, in conjunction with the relative dearth of socio-economic development, was the emergence of a new generation of PILOs and ATJ organisations beginning around 2008 that sought to take advantage of the new legal “tools” to advance social transformation through the provision of pro bono legal assistance. From only four “generalist” PILOs during apartheid, the PIL sector has grown to include ten organisations that have specific areas of legal expertise and focus, such as land, education, urban housing, healthcare, and basic services, to name a few (Brickhill, 2023: 12). An ethos of attempting to align legal rules, moral values, and substantively fair outcomes for poor people, continues to anchor this legal field. But notwithstanding this, like their predecessors, these organisations are animated by distinct practices, political ideologies, and understandings of the place of law in South Africa's socioeconomic and socio-political context.

Significantly, PILOs are no longer dominated by mostly white, male lawyers. Today, most of these organisations are staffed by a majority of young, black lawyers who

¹¹⁹ LRCHOHP interview with Geoffrey Budlender, 30.

share with their potential clients' personal experiences of racialised socio-economic marginality. Understanding their roles as legal professionals in terms of a form of social activism, many join PILOs with the desire to realise the Constitution's aspirations to improve the lives of people like those in the communities in which they grew up (see more Chapter 2). The tether tying this new generation of lawyers to this field is thus highly personal.

In addition to PILOs, many organisations provide pro bono assistance to poor and marginalised people: university law clinics, specialist legal clinics, clearing house organisations which link up indigent clients and private attorneys, community advice organisations (CAOs), and pro bono departments of private firms. Together they form a wide network of ATJ organisations that, while concentrated in cities like Johannesburg and Cape Town, work across South Africa to enable poor people to use of the law to improve their lives. Throughout this thesis I term this network of organisations South Africa's ATJ legal field. As discussed in the Introduction, this thesis focuses primarily on PILOs, specialist legal clinics, and clearing house organisations.

Within the ATJ field, PILOs continue to prioritise litigation that uses the law "positively" to effect structural transformation, either by transforming apartheid-era law to make it constitutionally compliant, or by giving content to socio-economic rights provisions (see more Chapter 6). Underpinning this work is the ideal and discourse of *advancing* the constitutional project by holding state and private actors to their constitutional obligations. As will be seen in the chapters that follow, lawyers who join these organisations frame their professional pursuits in terms of this project, shaped by an understanding of law anchored in the Constitution, as both a set of rules and injunctions that govern relationships, and a repository of ideals regarding a future vision of South Africa. A fundamental through-line that links the work of contemporary PILOs to their forebears is the use of law to change society in progressive directions. But as the rest of the thesis shows, these efforts themselves refract the

tension between using rules instrumentally to achieve just ends and attempting to harness law's moral ideals in pursuit of both justice and legal cultural transformation. As discussed earlier, an iteration of this tension was also central to anti-apartheid PIL lawyering.

Another feature of contemporary PILOs is the use of “advocacy” and “research” as part of their arsenal of strategies to advance social change. Like CALS during apartheid, many PILOs have dedicated research departments that use their research to guide public interest litigation, draw public attention to the nature and impact of government failures regarding their constitutional obligations, and serve as the basis of their engagement with government actors. Research is also used as a tool in advocacy efforts aimed at educating poor and marginalised communities about their newly acquired rights, responding to public calls for submissions on draft policy or legislation, and mobilising and building organisational networks within civil society. Linked to this, PILOs in the vein of CTH during apartheid, increasingly partner with support social movements, labour unions, and other loosely organised civil society groups, in their attempts to realise the constitutional rights of their constituents. While traceable to anti-apartheid lawyering, this approach also represents a slight shift in post-apartheid PIL practices informed by the history of the *Treatment Action Campaign (TAC)*. Here, civil society's pressure on the government to implement a Constitutional Court judgement was viewed as integral to the material realisation of the order, and is often contrasted with the more limited material impact associated with *Grootboom* in which no widespread social mobilisation was organised (see Heywood, 2003; Langford and Dugard, 2011; Marcus and Budlender, 2008). Unfortunately, a limitation of this thesis is its inability to reflect further on changing PIL practices within the post-apartheid period in response to changing political, economic, and social conditions. Like investigation of changing PIL practices during the final decades of apartheid, exploration of this would be further enlightening. Nonetheless, the breadth of work done by PILOs reflects a multi-

pronged approach to advancing the constitutional project – all of which can be traced to different practices adopted by apartheid-era PILOs. It evidences a field of legal professionals who are by no means deluded by a “myth of rights” (Scheingold, 2004 [1974]) but rather understand litigation as one tool among many to advance social change.

In contrast to PILOs, legal clinics are primarily concerned with enabling poor people in South Africa to make use of existing legal rules and navigate legal-bureaucratic processes. Although the organisations are run by full-time staff, consultations are often conducted by lawyers from private firms who volunteer their time to fulfil their *pro bono* hour requirements as set out by the Legal Practices Council (LPC). Depending on the area of legal focus of the clinic, these lawyers assist poor people in their attempts to settle deceased estates, obtain identification documents (IDs), settle labour disputes, review contracts, draft wills, and obtain divorces. Clinical legal assistance therefore targets enforcing existing rights and entitlements and defending individuals’ rights violations. It is often referred to as “defensive” work (see Chapter 5). But in contrast to the apartheid-era version of this work which reflected the ruthless efficiency of the apartheid bureaucratic state, today this work highlights the increasing collapse of South Africa’s legal-bureaucratic infrastructure (see also Liebenberg, 2022). The distinction between positive and defensive ATJ practices, and their distribution between PILOs and legal clinics, endures, but what it means has changed in relation to a new legal system and changed legal-bureaucratic dynamics. Moreover, as the chapters that follow will demonstrate, the normative tensions between these distinct kinds of legal practice also remain.

As during apartheid, South Africa’s contemporary ATJ legal field is constituted by a range of organisations that engage in distinct practices. But as indicated, what underlies all these efforts is a common view that law is a tool that can, and should, be used to achieve justice. These ideas are traceable to the efforts of anti-apartheid lawyering.

Conclusion

This chapter provides a history of the formation of South Africa's first public interest litigation organisations during the final decades of apartheid. In contrast to existing accounts of the legal battle against apartheid, this chapter foregrounds the emic perspectives of prominent anti-apartheid lawyers, using this as a window onto this social-professional field. Doing so enables novel contributions to this history.

First, it highlights that, while often aggregated under the banner of anti-apartheid legal activism, the PIL sector that emerged in the late 1970s was heterogenous. Despite sharing fundamental understandings of law as imbued with normative values and a tool with which to advance social justice, organisations engaged in a range of practices and did so from distinct positions within the legal professional field. At times, these distinctions reflected overt professional tensions that centred on the role of lawyers and the legal profession in the fight against apartheid.

Second, this approach to telling this history reveals that, in addition to attempting to make a legal impact in the struggle against apartheid, a fundamental imperative driving ATJ work was an attempt to transform dominant legal cultural understandings through legal practice. This is not dissimilar to the work of contemporary PIL lawyers, who explicitly attempt to entrench legal cultural attitudes that reflect the discourse and practice of TC.

Finally, and significantly, this chapter's analysis of the approaches to PIL taken by different organisations, based on their readings of where the "space" in the legal system lay, throws into relief the peculiar and morally ambiguous positioning of formalism in South Africa. From one perspective, PIL lawyers use of law during apartheid reflects the observations made by legal anthropologists writing on legalism about the tension between rules and justice that characterise law. The South African case shows how rules and the ideals

they invoke may at once be powerful resources through which claims to justice can be articulated, and a means by which powerful actors can launder their exercise of violence (Pirie and Scheele, 2014; Comaroff and Comaroff, 2006). But importantly, the history this chapter traces also shows that one consequence of the apartheid government using manifestly immoral rules to enforce its racist political project, was to engender a deep suspicion of legal rules amongst lawyers, even as they remained committed to using them. Thus, while legal anthropologists have used the analytical concept of legalism to identify law's distinct character, in South Africa, an adherence to rule-following as expressed in formalistic legal culture, has taken on a much more normative inflection. The centrality of formalism and legal culture in South African socio-legal debates must thus be understood in terms of this longer history.

Indeed, as the rest of this ethnography will demonstrate, the range of normative and professional tensions that my interlocutors experience continues to reflect the tension between the ideals attached to social justice lawyering and the rules by which they are able to get things done. In the chapter that follows, I examine the professional understandings of law that underpins this tension.

Chapter 2

“Like me”: The Stakes of Being an ATJ Lawyer

As detailed in the previous chapter, public interest litigation organisations (PILOs) and the wider access to justice (ATJ) field emerged in South Africa from a particular set of historical, socioeconomic, and political circumstances that firmly rooted this legal field within what Budlender calls South Africa’s “human rights industry” (Budlender, 1995: X). Today, ATJ organisations define their work in terms of using the law to advance social transformation, through strategic litigation aimed at “structural” transformation, and by providing free legal assistance to individuals. In so doing, like their anti-apartheid predecessors, they attract lawyers who are committed to wider struggles for social justice. Drawing on formal interviews and casual discussions that occurred over the course of my fieldwork, this chapter introduces some of the lawyers who feature throughout this thesis, analysing how they narrate their professional trajectories, and what this reveals about their understandings of law and lawyering. In so doing, this chapter sheds light on some of the “enduring political and ethical commitments (that) influence professional discourse...” and thus shape South Africa’s professional legal culture (Klare, 1998: 167).

South Africa’s ATJ field has gone through a significant demographic transformation in the past ten years (Brickhill, 2023). As recorded by Brickhill in a 2023 report on “Public Interest Law Organisations”, over the last decade PILOs have responded to the “urgent calls from staff of PILOs, academics, and donors for sector leadership to be racially representative” (2023: 35).¹²⁰ As of this 2023 report, of the ten PILOs Brickhill includes in his study, five were headed by black African women, one was headed by a coloured woman, two

¹²⁰ Brickhill’s report includes almost all organisation’s I spent significant time at during fieldwork and broadly covers the same time period in which I did my fieldwork.

were headed by black African men, and one was headed by a South African Indian man (2023: 36). Beyond leadership, his report records that eighty two percent of PILO staff are black, and seventy eight percent are women.¹²¹ Across the six key ATJ organisations I shadowed, PILOs A, B, C, and D – which were included in Brickhill’s study – all had over seventy percent black staff. Thus, no longer is the ATJ field, and PILOs in particular, dominated by white, male lawyers who come from middle-class backgrounds, and the world of “English-speaking university campuses” (Gibbs, 2019: 1136; see also LRCOHP). Indeed, most of the lawyers I spent significant time with during fieldwork were young, black lawyers who came from rural villages and urban townships, and had experienced similar kinds of racialised socio-economic marginalisation as the clients they represent.

This chapter illustrates how my interlocutors frame these experiences, which were central to shaping their decisions to study law and pursue a career in South Africa’s ATJ field, and their understandings of law and legal practice more generally. In this regard, this chapter echoes the work of scholars who explore the intersection between personal backgrounds and professional trajectories of African lawyers by similarly demonstrating that, for South African ATJ lawyers, “personal and professional lives...[are] all too often interwoven with the political, social, economic and intellectual trajectories of the communities they served and lived in” (Sibanda, 2021: 929; see also Karekwaivanane, 2016, 2018; Ngcukaitobi, 2018).

Analysing how my interlocutors narrate their professional lives provides a view of the myriad meanings that they project onto law and lawyering. In so doing, it opens a window onto the place of legalism within South Africa’s contemporary ATJ field. As the Introduction notes, ATJ lawyers understand South African law as system of rules and abstract categories. Following the rules is understood as part of what it means to be a good lawyer, tied to

¹²¹ There is limited demographic data on the rest of the ATJ legal field beyond PILOs. Importantly, Brickhill’s category of “staff” includes: “management staff; attorneys; candidate attorneys; paralegals; advocates; researchers; finance, HR and other management; communications; reception/secretarial; cleaning; security”.

understandings of professional duty.¹²² But this chapter shows that in this field, an orientation to rules is but one set of normative meanings projected onto law and lawyering. It reveals that lawyers' commitments to broader ideals of access to justice are inseparable from their personal contexts. Lawyering in South Africa's ATJ field is bound to ideas of class mobility and professionalism, motivated by a commitment to improve the lives of one's family. Beyond one's immediate family, being an ATJ lawyer is understood as contributing to one's wider community, a group of people whose hardships ATJ lawyers identify with. Beyond that, ATJ lawyers understand their professional roles as a "duty" to advance the constitutional project and realise its ideal vision for the future of South Africa. What it means to do good – across multiple axes – is bound up with what it means to be an ATJ lawyer.

Considered in these terms, I suggest that ATJ lawyering for many of my interlocutors be understood as an expression of an ongoing project of ethical self-making (see Cook, 2023; Laidlaw, 2013; Heywood, 2023). I thus suggest that in ATJ lawyers' everyday practice of law, *this* project is at stake. As the later chapters of this thesis will demonstrate, holding this project in view in an analysis of ATJ legal practice enables an explanation of why ATJ lawyering might produce such profound professional and normative quandaries.

The second half of this chapter examines how ATJ lawyers from a range of ideological and political positions understand law and lawyering. Here I show how legalism is attached to wider ideals that centre on the possibilities law offers for individual and societal improvement. Even in cases where the ideals themselves are not linked straightforwardly to South African constitutionalism, this part of the chapter shows that ATJ lawyers nonetheless recognise the efficacy of legalism to improve peoples' lives and contribute to wider social change. Taken together, this chapter demonstrates that lawyerly commitment to legalism

¹²² This will be explored in greater depth in the next chapter.

within South Africa's ATJ field cannot be understood without accounting for the ideals, and their historical underpinnings, that law evokes.

The chapter is organised into two sections. The first explores the personal backgrounds of some of my key interlocutors, in particular their motivations for pursuing studies in law and a career in the ATJ field. The analysis highlights how their experiences of socio-economic marginality produced personal ambitions linked to both the accumulation of economic and symbolic capital, and the desire to "help" people *like themselves*. By paying close attention to how these histories are narrated, this part of the chapter demonstrates that both projects must be considered in relation to a broader project of ethical self-making. The second section of the chapter provides an account of the ideals of law and lawyering that my interlocutors espouse, and what these reveal about their commitment to legalism.

Personal Narratives and Motivations to Become an ATJ Lawyer: ATJ Lawyering as an Ethical Project

The legal profession in South Africa, as elsewhere, has historically been an exclusive one (Klaaren, 2020; Massoud, 2019; Greenbaum, 2015/16; Karekwaivanane, 2016; Gibbs, 2020). In South Africa, the exclusivity was, and continues to be, mediated by race and class (Ngcukaitobi, 2018; Gibbs, 2020; Broun, 2000). But while the barriers to entry are high – including a minimum four-year university degree, and often poorly paid articles of clerkship (attorney practice qualifications) – working in this profession offers the possibility of both economic upward mobility and prestige (Bolt, 2022). Below I present the personal histories of the legal professionals I followed during fieldwork, mostly candidate attorneys (CAs) and attorneys within the first few years of being admitted to the Legal Practitioners Council (LPC). These attest to the difficulty and uncertainty of entering this profession for many black South Africans (see Greenbaum, 2015/16).

Most of them were born and raised in urban townships or rural villages, grew up in economically precarious homes, and were often the first in their family to go to university. In their accounts of how they came to practise law in South Africa's ATJ field, it is these experiences of structural racialised socio-economic inequality that they emphasise. These experiences are framed as fundamental not only to drawing them to law, but to shaping their understandings of law, and what it means to be a lawyer. As I show, in these narratives ideals of lawyering become intertwined with desires to improve the lives of both one's family and those of the community one comes from. I thus suggest that the practices of ATJ lawyering which the following chapters ethnographically examine, be usefully understood in terms of what anthropologists of ethics have termed "self-cultivation" (Cook, 2023; Laidlaw, 2013; Heywood, 2023).

Inspired by the late work of Michel Foucault, the "ethical turn" in anthropology has largely moved away from exploring questions of ethics and morality in terms of legalistic moral codes, instead examining techniques for the cultivation of virtuous selves (Cook, 2023; Laidlaw, 2002). The concept of self-cultivation has thus emerged as a key mode with which to engage with how people attempt to live well. As Cook notes, "[E]thnographies of self-cultivation reveal the efforts that people make to shape themselves and the worlds in which they find themselves" (2023: 412). Key to self-cultivation is a process of critical self-reflection in which actors exhibit self-awareness conceptualised as the ability to objectify some aspect of the self, such as behaviour, attitude, habit, "in order that it might be 'problematized': brought into view, reflected on, and worked on" (Cook, 2023: 416; see also Laidlaw, 2013). For Foucault, the capacity to engage in this kind of evaluative self-reflective practice "constitutes the human being as an ethical subject" (Foucault in Cook, 2023: 416).

In the following pages I present a series of narratives in which ATJ lawyers engage in a process of critical self-reflection. These reflections are not only plainly ethically concerned,

but they are also evaluative: they regard what is good, and how best to live for oneself and for a wider community of people. For many of them, ATJ lawyering is the means to do so. This work is explicitly tied to ideals of shaping their immediate and wider worlds for the better, which dovetails with the moral normativity of the constitutional project itself (see also Clarke, 2012).

Importantly, however, I treat the interviews that form the empirical basis of this chapter not as windows onto pre-existing truths, but as an interactional space in which performances and social constructions occur (Briggs, 1986; Rapley, 2001; Holstein and Gubrium, 2004; Kvale and Brinkmann, 2009). In the context of this chapter these performances are shaped by my positionality as an elite researcher holding broadly similar political and ethical positions as my interlocutors, and by broader normative discourses of law and lawyering in South Africa. The reflections offered in these interviews about how my interlocutors came to practise and understand law and its wider significance, must thus be read in relation to these dynamics.

As such, the narratives presented in this chapter may at once capture how ATJ lawyers are engaged in a project of ethical self-making through their work, and simultaneously how they are engaged in a project of ethical self-making within the interview itself. But the latter is nonetheless analytically significant. The potentially performative nature of their representations of their lives and professional trajectories reveal their own assumptions about the nature of ATJ legal professionalism and therefore the ideas and ideals that animate this legal culture. To read ATJ lawyers as engaged in a project of ethical self-cultivation is thus to recognise their own self-perceptions as people who ‘do good’ by ‘helping people’, and how this is tied to their projected ideals of what it means to an ATJ lawyer. Seen methodologically, the interview itself reveals how the ATJ legal field’s moral ideals are socially produced.

In the chapters that follow, appreciating this, helps to elucidate that this project of self-making is often also at stake in everyday legal practice, and thus why the normative and professional tensions that ATJ lawyers experience can be so deeply distressing. Understanding ATJ lawyering in these terms highlights the imbrication of legalism in it. This allows analytic space to view lawyerly attachment to legal rules as not only a consequence of training, but as related to wider ethical ideals. This part of the chapter thus shows how ATJ lawyers, to varying degrees, make themselves through their legalism.

“Money” and “Dignity”

Many of the young black lawyers interviewed and shadowed for this thesis noted that their decision to study law and to become a lawyer was initially informed by their desire to advance their own (and their family’s) socio-economic position materially. This is unsurprising given their backgrounds and considering South Africa’s wider history of racialised oppression and its socioeconomic effects. Indeed, many of my interlocutors were quite honest about their desire to earn a relatively high and stable income and accumulate generational wealth for their family. This was expressed by Zach, a first-year candidate attorney (CA)¹²³ at PILO A, when describing why he chose to pursue a law degree in his final years of high school:

At the time, it just looked cool. And when you’d browse the internet, you’d see all these people, all of these fancy things. So I guess for me, law was about that initially as well. Because when you come up in a township, it’s about money. It’s about having a career and a job that is going to change your family’s life. And law was that for me.

A number of the other lawyers interviewed also echoed this view which was informed both by popular media – in particular the television series *Suits* – and observations of the lawyers in and around the townships where they lived. Sipho, an attorney who has worked at PILO D

¹²³ All professional positions cited in the thesis refer to the positions my interlocutors occupied at the time of research. In many PILOs, qualified attorneys are given the title “attorney”, with no differentiation in title between “senior” and “junior” attorneys.

since 2016 when he joined the organisation as an intern, and who grew up in a mid-size Eastern Cape town, recalls:

Fancy, fancy car, fancy life, fancy whatever. For me, that's what lawyers are. These fancy guys who drive nice cars, who wear nice clothes, yeah, for me that was the characterisation of what lawyers are.

Becoming a lawyer for many of my interlocutors was thus initially bound up with ideas about accumulating economic and symbolic capital, informed by exemplars who displayed this class status, rather than lofty ideals about contributing to South Africa's constitutional project. As noted by James, an attorney who has worked at PILO C for three years and was raised on the "farms" of the North West Province, "when you have the background that I have, it's not passion that drives you to a specific sector".

But importantly, given their socio-economic backgrounds, their ideals of becoming lawyers were also intimately linked to wider generational pressures. Speaking to the pressure young black university students face in pursuing careers that have the potential to create generational wealth, Buhle, also a first-year CA at PILO A, said laughingly: "you are either an accountant, a lawyer, a doctor, or a disgrace". This sentiment was further echoed by Arthur, an attorney who has worked at PILO A for four years, when he described how he came to study law at university. In contrast to Zach and Buhle, who applied to study law, Arthur applied to study geology. But a clerical error resulted in his registration in an LLB programme. When asked why he stuck with law instead of transferring back to geology, he said:

You know, as a black person, where I come from [the rural Eastern Cape Province], you've got like five career options. It's law, medicine, nursing, teaching, and anything else that will give the family some dignity. So, when I got admitted for law, my mom sat me down and convinced me that this was good for the family.

Both Buhle's and Arthur's accounts reflect how pressure to enter professional occupations is born not only from material financial concerns, but the dynamic relationship between

economic and symbolic capital in relation to professional careers (Bourdieu, 2010). For young lawyers who have experienced poverty, a career as a legal professional is self-consciously and explicitly understood as a class project oriented to secure middle-class status. As Bolt notes, “[l]egal training produces prestige” (2022: 425).

As observed by many scholars, defining the middle-class in Africa is conceptually fraught. According to Ndlovu, “the heterogeneity of income levels, occupations, and fluid self-categorisations have made such attempts difficult” (2020: 570; see also Lentz, 2017; Bolt, 2022; Hull, 2020). Or as Bolt writes, given “post-apartheid South Africa’s extreme inequality and enduring spatial segregation, the term ‘middle class’ is applied across a broad spectrum – from those who are positively wealthy to those who are simply not-destitute” (2022: 421). But most agree that professionalism remains indexed to this status, reflecting the accumulation both of wealth and status recognition. Indeed, it is notable that many of the careers Arthur mentions are not particularly well-paid in South Africa, and yet as professions, they are associated with “dignity”. The relationship between professional status and dignity resonates in South Africa since a “hallmark of apartheid-era social engineering” was “racialised exclusion from professional work” (Hull, 2020: 549). The attainment of professional status, regardless of remuneration, thus became, and continues to be, a mark of distinction and prestige amongst black South Africans (Hull, 2020; Bolt, 2022).¹²⁴

In highlighting the pressures young black people face, my interlocutors’ stories implicitly frame the desire to earn money and give their family “dignity” within the wider context of the racialised effects of apartheid on the accumulation of generational wealth (see Mangoma and Wilson-Prangley, 2019). Indeed, in many interviews which began with an open-ended question about what brought them to a career in the ATJ field, lawyers responded

¹²⁴ Famous historical examples of this of course include Nelson Mandela and Winnie Madikizela-Mandela (Steinberg, 2023).

by locating their professional trajectory in terms of their upbringings in relatively impoverished communities. Take for example my interview with James:

Leila: Okay, so to start off, would you mind just telling me a little bit about yourself and what brought you to the law?

James: First things first. I'm from the North West Province. I ended up in Gauteng, and personally, that's some kind of an achievement if you are [from the North West]...you'll hear why.

Or my interview with Khanya, an attorney who joined PILO A as an CA in 2015:

Leila: So, to start, could we begin with how you came to this work and how your personal background fed into your professional life?

Khanya: I never know how to answer these questions [laughs]... I wasn't born there, but as early as the age of two I was living there with my parents, in X. It's an informal settlement in the South of Jo'burg [Johannesburg]... I spent most of my life there until I went to university...at the time when I was growing up, the settlement was starting up. So the services issue, the electricity issue, those were issues that I grew up with. I remember when, I think I was around ten [years old] that I had a tap in the yard. Luckily enough, we had electricity for longer than that and there was the issue of trying to get tarred roads, streetlights – because it gets really dark at night – and then get housing as most people lived in shacks, and have toilets – running toilets, I spent most of adult life without a running toilet. So I feel like the work found me...

Lawyers' own experiences of racialised socio-economic marginality are not only used to explain their professional trajectory, but also implicitly justifies the class project associated with it. Writing about the legal profession across different national contexts, Fathi-Massoud observes that it is typically, and unflatteringly, associated with “self-serving materialism” (2019: 314). Elaborating on this framing of professions more generally, he writes:

[P]rofessions also enable selected persons to gain a monopoly over problem solving and routinized tasks in a specialized area. Ultimately, this monopoly helps members of a profession to maximize material gain, including economic wealth, political power, or social prestige. (Fathi-Massoud, 2019: 316; Bourdieu, 1987)

This class perspective of legal professionalism certainly captures one dimension of South Africa's ATJ field, evidenced by informal discussions with my interlocutors during fieldwork about their aspirations of renting or buying property, upgrading their cell phones, or buying

new clothing and cars. But it does not fully capture the range of motivations that drove them to study and then practise law (see Fathi-Massoud, 2019). Indeed, their pursuit of a professional career is driven not only by individual, materialistic ambitions, but also by ideals and ethical obligations related to what it means to be a good child, grandchild, and in some cases, parent.¹²⁵ What it means to be a lawyer is thus revealed as immediately taking on a double set of normative significations: individual distinction and giving one's family "dignity".

But, as indicated by Khanya above, who recalls being drawn to PIL work because of her upbringing in an informal settlement, for many ATJ lawyers, the pursuit of legal professionalism is also rooted in personal ethical concerns for the wider communities to which lawyers belong(ed) (see also Karekwaivanane, 2016). Their entry into the ATJ field is described as a means of helping people *like them*, thereby embedding their own lives in the greater project of their work: the constitutional project.

"Making a Difference"

Despite the higher earning potential of working in corporate law firms, most of my interlocutors who grew up in rural villages or urban townships have only *ever* worked in South Africa's ATJ legal field. Experiences of racialised poverty and marginality have not prompted the desire to earn as much money as possible; many instead cited these experiences as motivation for pursuing a career in the ATJ field. In their telling, being "poor" shaped how they came to understand the law and perceive its significance in South Africa once they began their legal studies.

¹²⁵ I believe that some of these aspirations to support family are indeed being played out. Because of my proximity to some of my interlocutors, I gleaned anecdotally in casual conversation and off-the-cuff comments the ways, and degrees, to which they financially supported their families. But this was beyond the purview of what my interlocutors thought they were saying to me, and so for ethical reasons I cannot elaborate.

Many of my interlocutors recall that learning about the law formally led to their realisation of the significant role that law played in shaping the course of their and their family's lives. They came to understand the Constitution as an embodiment of moral ideals, and ATJ lawyering as the means to achieve them. Experiences of the legacies of apartheid and legal education informs PIL lawyers' commitment to law in highly normative terms that mirror the moral normativity that dominate discourses of much of post-apartheid law (Klare, 1998; Chaskalson, 1989, 2003; Langa, 2006; Roux, 2013; Brickhill and Leever, 2015). Thus, instead of joining corporate firms to "make money", they instead sought out legal work that would enable them to make a difference, not only to their family's lives, but to the lives of people in the communities like the ones they were raised in.

Zach is one such example. When I first met him in February 2022, he had only recently started work at PILO A as a first-year CA. Articles of clerkship (henceforth articles) are a mandatory practical training period required to register as an attorney. During their articles, law graduates work as candidate attorneys under the supervision of registered attorneys. Most PILOs in South Africa offer between two and four CA positions per year per office, against an application pool of more than 300. Indeed, Zach's successful application at PILO A was his second attempt at the organisation, and third in the ATJ field (he had also applied unsuccessfully to PILO C). As in other countries, despite the lower earning potential, the ATJ field remains highly competitive and relatively exclusive (see also Shdaimah, 2016). In South Africa, the prestige of the ATJ field remains tied to its legacy in the anti-apartheid struggle, and the prominent positions held by former PIL lawyers in the judiciary. Upon completing his articles at the end of 2023, Zach was offered a clerkship at the Constitutional Court – another professional accomplishment associated with prestige but not a high income.

Until he was ten years old, Zach was raised in an informal settlement in KwaZulu Natal by his single mother who worked as a cleaner in a general trading store in a nearby city.

At eight years old he left school so that he could stay home to care for his two younger sisters while his mother was at work. Zach recalls this early period:

That period of my life when I was staying with my mom was what made me realise how unfair and unjust the world could be. But at a very tender age I did not understand what justice is, or what a good life is, or what rights are, but there was a discomfort that I constantly lived in about my situation and those around me...

At ten, after two years of caring for his sisters, Zach's mother sent him to live with his father's family in the rural Eastern Cape so that he could resume his education. Despite the gap in his early years of schooling, he managed to do well throughout most of high school, having a relatively successful debating career and becoming a high school prefect. It was in these later school years that the idea of becoming a lawyer began to take root. He noted the influence of his debating activities during this period, mentioning that the "topics were very political and very legal at times", and that his "mentors and our trainers at the time were law students... we looked up to them". So, when he entered "matric" (the final year of school in South Africa), Zach recalled that he knew that he "just wanted to be a lawyer".

But, during his final year, his then-girlfriend became pregnant with his child. Under the pressure of looming fatherhood and the recent death of his mother, Zach passed his school leaving exams, but not well enough to gain entry to university. To support his new-born daughter, Zach began working as a waiter at a restaurant in a nearby town. He described this period as "rock bottom". But he also said that it was this experience of being a source of cheap, expendable, black labour that crystalised his desire to follow his "dream" to study law. He recalled:

I became so frustrated with the environment, how unfairly we were treated as workers, how little we were being paid, how no consideration was being paid to the rights that we had, or that we were even human. We were expected to be these machines that made this money for this person, we were at his mercy. We needed this job, but he didn't need us because he could replace us any other day. There was just like, no freedom, no rights... So then I started becoming very frustrated at work, very unhappy and I decided that I was going to try and pursue my dream of

becoming a lawyer, my long dream of becoming a lawyer, and making a difference in this world, and I went back to high school.

With this new motivation, Zach returned to high school, re-did his matric year, and secured a place in an undergraduate LLB program at an historically white university, funded by the South African government's National Student Financial Aid Scheme (NSFAS).¹²⁶ But Zach's experience of work and his upbringing had not only crystalised his "dream" to become a lawyer. In his telling, these experiences also impacted on his understanding of the law and its wider significance in South Africa, shaping his desire to be the kind of lawyer who uses the law to address the inequalities and injustices he and the community he had come from had endured. As noted, his "dream" was not just to be a "lawyer", but one that makes a "difference in this world".

Zach located a "shift" in his thinking about becoming a lawyer when he began to learn about law formally during his first years of university. Rather than considering a legal career only as enabling socio-economic upward mobility, he began to think of it as a means to fight "injustices". Describing his "shift" in thinking about the law, he recalled:

I start(ed) to understand the Constitution and why we have a constitution, the history of it: to give effect to these rights, to achieve this society which is just... And what the Constitution means is: we are coming from a very unjust society where the laws of that time oppressed certain people and certain individuals, black people, women, and the majority of the citizens of this country. So, when you start thinking about those ideas and why the Constitution is there, you then tap into...I actually *lived* through these injustices, and this is exactly what I was looking for. How can I use this [law and a career in law] now, not only for myself, but for those people like me in the shacks, people in the township?... I don't believe [that it's] me, sitting in a corner office in Sandton protecting a bank's interest or a company's interest... especially understanding, having worked for a company like [restaurant name], understanding the people on the ground, the workers who earn wages, how they benefit so little from this thing. The people that serve, that make money for these owners, how much their lives are still miserable, how much they are underpaid and overworked. And so, I was just like there's a greater purpose to law as discipline than me just being able to make money. (original emphasis)

¹²⁶ Established in 1991, NSFAS is the South African government's student loan scheme designed to enable disadvantaged students to fund their university degrees.

Continuing, he drew a distinction between his understanding of the law and that of other students in his LLB cohort, underlining how his life experiences were a key differentiating factor that uniquely positioned him to understand the gravity and power of law in shaping peoples' lives:

[B]ecause I had spent time in an informal settlement, because my whole life I was poor, because I'd worked as a labourer at [restaurant name]... my understanding of the role that law could play in society was very different from other kids [in my LLB program]... For most of the law students it was about the big five law firms, it was about a corner office in Sandton, it was about a luxury car, a luxury life.¹²⁷ For me it became about what can we use this instrument [for], that is so powerful, that plays such an important role in society? How can we use the law to better life for people like me, who come from informal settlements, who come from townships, who are poor? What is the obligation of the government in relation to those people? What is the obligation of the law to those people?... So, for me, it became about that and then I discovered that there is something called public interest law...

Zach's narration exemplifies three threads that ATJ lawyers would routinely weave together during our interviews and informal discussions: stories of personal hardship understood in terms of historical and structural socio-economic dynamics; professional understandings of law; and a commitment to the constitutional project. Together they convey the relationship between personal experiences, an understanding of the law, and an understanding of self *in relation* to the law (see Merry, 1990, 2003; Ewick and Silbey, 1998).

This set of relationships is set against the backdrop of a wider national history in which law was principally used to enforce and justify the oppression of the majority. Zach thus locates his moral commitment to legal practice in terms of his personal identification with the kinds of people who should be the beneficiaries of South Africa's transformed legal system. Like Khanya, Zach's commitment to the ideals of ATJ lawyering – oriented towards advancing progressive social change – are framed as deeply personal. This was relatively widespread in the ATJ sector. Many of the lawyers interviewed who grew up in circumstances

¹²⁷ Sandton is a suburb of Johannesburg that is notable for being the city's financial and corporate hub in which five of South Africa's largest corporate law firms, the "big five", are located.

comparable to Zach's have *only* worked within the ATJ field, expressing a lack of interest in working for corporate law firms, despite the higher earning potential. An empathetic identification with the hardships that many people in South Africa continue to endure, and a reading of the Constitution as the means to address them, appear to tether lawyers to this field.

Zach's personal narrative also highlights the significance of a formal legal education in shaping understandings of law in relation to personal circumstances, underlining to lawyers the "power" of law in society. This was a common feature of my interviews with lawyers when describing how their understandings of law and legal practice developed. Despite the variation in how lawyers came to study law, they share the view that their formal legal education revealed the centrality of law in their family's lives. Lawyers linked the past history of "wicked" law that preceded the Constitution to their and their family's experience of racist oppression, contrasting it with the Constitution's emphasis on social justice that foregrounds the moral content of law. This understanding of the law sowed the seed that a legal career could be pursued not only for personal material gain, but to advance the lives of people *like* them.

This connection of the professional to the personal, and the individual to the societal, is further evidenced by the story of James, another PIL lawyer who has only worked for PILOs. He was raised by his grandfather who worked as a labourer on "the farms" in rural North West Province. He never anticipated a professional career. As he put it, "it's difficult to imagine things you don't see". When he finished high school – itself a process fraught with difficulty due to family disputes – he left "the farms" to work in construction in Gauteng Province. After four years of construction work, James returned home. A chance encounter with a childhood friend made him aware that he was eligible for NSFAS funding, and so,

after paying what he recalled as the R150 (~£6) application fee, he applied to university. “R150 when you stay in a shack in informal settlements is a lot of money”, he said.

Unlike Zach, he initially applied to study a Bachelor of Arts (BA) degree, but under pressure from a university advisor to pursue a professional degree instead, he transferred to law. Like Zach, his personal history echoes the uncertainties of what it takes to make it to university as a poor, black South African. And he also remembers how through studying law, he came to realise how his life had always been mediated by law, often to his disadvantage:

Whether when race was being used against me, or labour relations stuff...the labour relations law had been violated in my interaction with the employer at that time. And just witnessing people around me, their encounters with the law... when you look back, you realise you've always been in this space [of law]. You know, human rights stuff. Either being denied those human rights or just witnessing people being denied human rights.

More than making him realise the extent to which he had interacted with the law, James emphasised that his legal education was central to enabling him to link his personal experiences to structural forces like law, coming to understand the law in those terms. It was a conceptualisation of law as a structure that motivated his growing desire to utilise his legal education not only to advance his interests, but the interests of people like himself:

[T]he more knowledge you get about your work, the more your outlook and your concern for others broadens. At first it was just me and my family, and then my relatives. The circle becomes bigger the more you become aware of how your suffering is actually linked to things like the legal system and is actually not different to what other people are experiencing in other parts of the country or in other parts of Africa. Then you become concerned about changing the status quo.

Similarly, Terrence, a first-year CA who grew up in urban townships in Gauteng, and whose parents were exiled during apartheid for their activism, noted:

[T]he more I learned about the law, the more I realised its impact... I realised how closely the trajectory of my family's life and my life were impacted by the laws and that made me kind of want to understand it more and get more involved in it, because then I could be in a position to also influence people's lives for the better through public interest litigation.

Terrence echoed Zach and James in how he linked his affinity for constitutional litigation and administrative law courses at university – the bedrock of much of PIL – to his personal background. In his case, he noted that learning about these two areas of law allowed him to “draw a connection between those courses and what I had known growing up, what I had seen in the township”. As he put it, “constitutional law, that was real for me”.

While not all ATJ lawyers share this kind of background, the above accounts are particularly stark examples of how lawyers would link their personal circumstances to their professional pursuits. In the case of many black lawyers, a discussion about a career choice would often be rooted in personal accounts of their upbringing, and how experiences of being at the mercy of law shaped what the law means to them, and thus what being a lawyer means. Underlying these accounts is an understanding of law, an outgrowth of their legal education, as a structure that allocates resources and power. The law in these narratives is not arbitrary or distant, but fundamental to how they understand their own positions and the wider (hi)story of their family’s lives. The discourse of transformative constitutionalism – resting on the distinction between old, morally bad law and new, morally good law – is therefore partly sustained by lawyers’ understandings of their and their family’s socio-economic marginalisation as a consequence of the past’s “wicked” legal structures. ATJ lawyers’ personal narratives and conceptualisations of law illustrate the ways in which they personalise the constitutional project, adding to its significance.

Key to this is how they express a familiarity with the life worlds of their clients – South Africa’s poor. Of course, this varies depending on the lawyer, but nonetheless, many who work within this field identify and empathise with their clients in ways unlike many of their predecessors (Abel, 1995; Ellmann, 1998; Brickhill, 2022; for other contexts see Kinghan, 2021). As demonstrated, this identification anchors lawyerly commitment to being not just a legal professional, but one who attempts to “influence people’s lives for the better”

through the provision of pro bono assistance. Lawyers adopt an ethic of responsibility not limited to their own interests as individuals but in terms of actions performed on behalf of others, and in defence of a wider morally inflected ideal: the constitutional project. We thus see the imbrication of the constitutional project with ATJ lawyers' personal project of self-making. This echoes Karekwaivanane's observation of Zimbabwean lawyers during the anti-colonial struggle whose "participation in the social and political struggles of the period was informed by a set of personal and professional ethics that were grounded in concerns about the welfare of the wider communities to which they belonged" (2016: 60).

By illustrating the ways in which ATJ lawyers draw a connection between their biography and their desire to advance societal transformation, this chapter highlights a further dynamic that permeates South Africa's ATJ field and the rest of this thesis. That is, the relationship between social justice as individual change, and social justice as societal change. As demonstrated, many of my interlocutors enter the ATJ field informed by their individual experiences of racialised socio-economic marginalisation, and the desire to use their legal expertise to help people whose life experiences echo their own. But in their reflections, they link this kind of individual legal assistance to wider ideals of the constitutional project as societal transformation. As indicated, these lawyers forged this idealisation by locating their own experiences within a longer historical narrative of which law is a key part. This biographical view demonstrates how wider ideals of law, and its possibilities, are attached to everyday legal assistance and thus why this work is so normatively loaded.

In the second half of this chapter, I examine how my interlocutors attach legalism to wider ideals of social change through an analysis of their understanding of law and lawyering.

Understandings of Law: Linking the Real and Ideal

As indicated above, many ATJ lawyers state explicitly that they joined this legal field to help poor and marginalised people in South Africa: people with whom they personally identify with. This part of the chapter illustrates that underlying this commitment are particular ideals of law and what it can do. For some, the ideals of law are tied to a moral understanding of South African law based on the values espoused by, and ideals evoked in, the Constitution's preamble. For those who do not share this view of the Constitution and criticise its perceived failure adequately to address past injustices, legal rules are still idealised as efficacious tools that can be used to improve people's lives and facilitate progressive social change. Across the ideological and political spectrum of my interlocutors, lawyering then, is framed in terms of a "struggle" or "fight" to advance "social justice", echoing the discourse of TC. While later chapters of this thesis reveal the fraught nature of ATJ lawyers' commitment to legalism, this part of the chapter illustrates that part of what sustains this commitment is the ideal of law as offering possibilities for positive change. Pirie notes that this is a feature of law more generally:

Laws suggest transcendent values, then, but they also promise links between the real and the ideal for a community of people, the sense of a path that would bring them closer to, if never right up to, the ideal. This is why laws can be invested with meaning, why they can be the repository of aspirations, even if they are, in form, designed to regulate practical interpersonal relations, sometimes barely abstracted from actual cases. (Pirie, 2024: 415; see also Bilchitz, 2013: 41)

Indeed, this part of the chapter demonstrates the ways in which legalism connects the real and the ideal, and why ATJ lawyers' commitment to legalistic practice must be understood in relation to ideals of law.

Lawyering as "struggle"

Since the emergence of the ATJ field proper in the late 1970s, lawyers within it have framed this legal practice as advancing the struggle for "social justice". As discussed in the previous

chapter, during apartheid, social justice-minded lawyers sought ways to use their legal expertise in “oppositional” ways to destabilise apartheid’s legal infrastructure (Roux, 2013: 191; see also Abel, 1995; Dyzenhaus, 2010; Ellmann, 1992). As previously indicated, most ATJ lawyers currently understand their work similar terms: to “influence people’s lives for the better”, as Terrence put it; “change the status quo”, as framed by James; or “better life for people...who come from informal settlements, who come from townships, who are poor”, as Zach said. Underlying their commitment to legal professionalism is a moral understanding of lawyering, itself underpinned by their understanding of the law and its potential. In discussions about “the law” with my interlocutors, terms like “transformation”, “social justice”, “equality”, and “making a difference” were frequently used to refer to what law can and should do. Across the ideological spectrum, many of them identified law as a tool with which to achieve progressive social change that comprised part of the transformation of South Africa more broadly. As Budlender points out, the fundamental difference between ATJ lawyering during apartheid and ATJ lawyering today, is that “the law [is] for them [the poor and oppressed], not against them”.¹²⁸

Like many TC scholars, most of my interlocutors traced this view of law to the Constitution and Bill of Rights. These documents did not simply present a new rule-based framework for a post-apartheid South Africa but were the embodiment of symbolic ideals for a future society. While it is not unique for a constitution to contain ideals, a significant feature of South Africa’s is its emphasis on justiciable socio-economic rights, thereby centring “economic distributive justice” (Bilchitz, 2013: 47; see also Cooper-Knock, 2021). Its ideals of equality and freedom are based on an explicitly moral vision of material transformation which itself is tied to “social justice”. In other words, the “ideals” of the South African Constitution are explicitly and concretely tied to a vision of the “real”.

¹²⁸ Interview with Geoffrey Budlender, 9 September 2022.

Typically, these ideals are referred to as the “spirit” of the Constitution, which Terrence for example, called the “moral code” behind law. While this spirit may not be explicitly codified in all legislation, he and others nonetheless argued that these values ought to underpin all law.¹²⁹ Giving the example of the relationship between landlords and lessees, Terrence said:

...While there’s no statute that says...that every landlord must be fair and must practise with the values of ubuntu, there’s no law that says that, but the values of our Constitution say that that is how we should treat one another as South African people.¹³⁰

He described law more generally as:

...an aspirational goal. It’s [the law is] an ideal. It’s the norms, it’s the guidelines for our society... What we need to critically think and talk about is, what are people actually doing to meet that...I think we need to do more to live up to those goals.

These sentiments were echoed by Buhle, a CA at PILO A, when describing her work there:

It’s about giving life to the content of socioeconomic rights in our context. The rights are there... Because what we’re saying [in legal arguments] has to have some kind of basis in law. It’s why it’s quite interesting that our Constitution is not just a series of textual injunctions upon the individual and the state, but a particular sort of spirit that must inform everything that is done. If you can’t find it [what might be claimed in litigation] in the letter, it’s probably in the spirit.

Both Terrence and Buhle affirm the ideals of law, illustrating that, for many ATJ lawyers, the law cannot be reduced to codified rules. They highlight the primacy of ideals in shaping what codified laws ought to be and how they ought to be in service of building a more just society. In so doing, they explicitly link the real and ideal elements of law, arguing that in South

¹²⁹ As noted in the Prologue, all laws remained intact at the time of transition. While many ATJ lawyers believe that all law is, or should be, underpinned by the Constitution’s “spirit”, much legislation in fact precedes the Constitution and its “spirit”.

¹³⁰ Describing the concept of ubuntu, Justice Langa wrote in *S v Makwanyane* (para 224): “It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of”. Ubuntu is understood as encapsulating the Constitution’s values, or spirit.

Africa lawyer have a duty to maintain this link. Jason Brickhill, a public interest lawyer and legal academic, echoed this view during a speech given at the Pro Bono Bar Awards:

Access to justice serves as a vital bridge between the promises of the Constitution and people's everyday lives... It is the quiet, unglorious [sic] task of providing legal assistance to an individual who could not otherwise afford it that creates the possibility for the Constitution to be made real in that one person's life. (2025: 59-60)

Zach echoed this view in drawing a connection between the Constitution – both its text and spirit – and the normative burden it places on lawyers:

[T]he Bill of Rights for me, is really powerful. And I believe that as lawyers we have a duty to the Constitution to give meaning to these rights, to make sure people experience them, people achieve them, and to force the government to make sure that these rights are achieved.

For lawyers like Terrence, Zach, and Buhle, the law is an expression of a wider, though imprecise, vision of South African society in which the language to express this vision is found in the Constitution itself (see also Bilchitz, 2013; Klare, 1998; Wilson, 2021; Wilson and Dugard, 2013). The realisation of the Constitution's aspirations is expressed as a moral imperative that drives ATJ lawyers who frame the law as a tool to advance social justice. The correlative of law being a tool, is that it must be used by those with the expertise to do so. This was further expressed by Khanya. As noted, Khanya grew up in an informal settlement in Gauteng and was drawn to the ATJ field because she wanted to extend the reach of the Constitution and its enshrined rights to poor communities like the one she grew up in. Describing her view of South African law, she said:

I'd be more inclined to agree with those ones who say that law is there to be used or can be used as a tool for transformation. But it depends where you are. In South Africa, yes, definitely, we're one of the fortunate countries where we've got this beautiful Bill of Rights where any law that is constitutionally suspect, we can go and litigate and say, "but it shouldn't exist, because it does not align with the Bill of Rights". But the problem with that, is that in order to be able to do that, you need to have access to the courts. And that's the biggest problem... It's only a selected few who are able to access that right to access the courts as a tool. I mean a tool is only as useful as your ability to use it. If you can't use it, then it's useless. And part of the reason why, even at a younger age, I had an interest with Human

Rights, one of the things you will hear growing up in an informal settlement is, “what good is...” you know, because in the early 2000s...always pamphlets, like little Constitutions being given around. But people on the ground, their perspective is, “what good is this book if I don’t have running water right now?”

For Zach, Terrence, Buhle, and Khanya the constitutional framework provides a means to improve the lives of those most adversely affected by apartheid. The law is at once an idealised reflection of the future of South African society, and the means to achieve it (Pirie, 2013). Their account of law and legal practice expresses the discourse of “transformative constitutionalism” that frames them as a project oriented towards “transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction” (Klare, 1998: 150; see also Langa, 2006; Brickhill and Leever, 2015). The moral-political commitment to achieving the vision of the Constitution imposes a burden on ATJ lawyers to ensure that this vision is materialised. This burden is sharpened by a growing consensus among them that different branches of the South African government are no longer similarly committed to this vision (see Chapters 5 and 6).

For this reason, ATJ legal practice was often referred to as being part of a wider “fight” or “struggle” to compel other branches of the state, and private actors, to comply with both the letter and the spirit of the law. As Zach noted, “you come across injustice all the time. Every consultation that you get, every case that you work on, you’re just trying to make things right. You’re trying to fight”. Professional identities within this field not only centre around ideas of legal expertise or prestige – the subject of the next chapter – but also activism, and social justice, achieved through their legal practice.

To elaborate on the idea of law as a tool and arena of social struggle, it is worth reflecting on Tim’s view. He is the Head of Litigation at PILO A, with almost two decades of experience in South Africa’s PIL sector. Although Tim is white and comes from a middle-class background, his parents were both exiled anti-apartheid activists. Thus, like Zach,

Terrence, Khanya, and many others, he locates his commitment to his work and understanding of the law in this personal history. He frames his work and the law as the “struggle approach to human rights”, revealing its historical legacy:

I do see continuities between the freedom struggle and the Constitution, and for me, the Constitution is the embodiment of many struggles that were fought for, the Constitution as a whole, but specifically for the rights that are protected in the Bill of Rights. So, each of those rights, the right to protest, equality, socioeconomic rights, can be traced to political struggles over the preceding century or more, embodied in the Freedom Charter and so on, crystalised there, but really part of *lived* struggles of oppressed communities. So, I see the Constitution as the embodiment of those struggles, but an unfinished embodiment... It [law] provides a space, a site of struggle, and tools to continue to try to build a more just society, the society that the Constitution envisages. (original emphasis)

He echoes the ways in which ATJ lawyers link the ideals of the Constitution to more instrumental understandings of how the law can and should be used. ATJ lawyers’ readings of the Constitution constantly invoke the relationship between the real and the ideal elements of law. And, as indicated by Tim and other interlocutors, ATJ lawyers carry the burden and capacity to forge and maintain this link.

Lawyering as Struggle Even While Questioning the Constitution

The centrality of the idea of ATJ lawyering as a form of social activism and the attachment to legal ideals, is further revealed by accounts of ATJ lawyers who are less convinced by the progressiveness of the Constitution and its moral normativity. While most of my interlocutors read the Constitution as an embodiment of ideals and a vision for a future South Africa that is normatively desirable, a few were more critical. The nature of criticisms varied but were most piercing amongst lawyers who self-identified as Pan-Africanists or Marxists or who had attended university during the #FeesMustFall and #RhodesMustFall protests from 2015 onwards.¹³¹ Their criticism often centred on three key issues. The first is

¹³¹ The #RhodesMustFall and #FeesMustFall movements emerged in 2015 on South African university campuses. #RMF called for the decolonisation of South African universities, framed in terms of epistemology and institutional culture. #FMF called on universities and the South African state to address the rising costs of university tuition, and the financial exclusions this precipitated. These movements were arguably central to mainstreaming the discourse of “transformation” and “decolonisation” in a range of South African institutions.

the view that the private property clause of the Constitution (Section 25) entrenched racialised patterns of poverty and dispossession. The second is that the formalism of South African legal processes “alienate” poor people from the law so that they cannot use it to their benefit, as put by Sanele, a lawyer at PILO B. The third is the view that the Constitution is ultimately a liberal edifice of coloniality (see Maldonado-Torres, 2007). Their criticisms echo key arguments made in critical constitutional literature that directly responds to the triumphalist discourse of transformative constitutionalism (see Madlingozi, 2017; Modiri, 2018; Sibanda, 2011). But despite their criticisms, many of these lawyers with whom I spoke conceded that the constitutional framework provided the space to pursue a vision of social justice that could materially improve the lives of the poor and marginalised. In other words, they *practised* law based on the ideal of law as a potentially ameliorative and efficacious tool.

This view was expressed by Sanele, the Head of Litigation at PILO C and one of the fiercest critics of South Africa’s legal system amongst my interlocutors. She too grew up in an urban township in Gauteng, although she did not emphasise her upbringing to the same extent as other interlocutors. Instead, she located her motivation to join the ATJ field in her undergraduate degree, a Bachelor of Commerce (BComm) in Politics, Philosophy and Economics with a particular interest in development economics. She describes her entry to studying law:

[I]n the middle [of the degree] I wanted to change to law already...because I was starting to realise that I think the education was never geared towards or slanted towards development economics... But further than that, I didn’t see how that line of work, even though I was convinced I wanted to be somewhere in policy making, I didn’t see how that line of work was actually going to help people at the end of the day [soft laugh]. So, yeah, at the end of my degree, I did the post-grad law degree with the specific intention of helping people.

As such, she never explored a career in the private sector, because her interest in law was rooted in an ideal of legal practice as the means to:

reverse how law was being used as a tool to protect the rich, but also as a blunt instrument that oppresses those who don't have resources or access. I was convinced that fundamentally, through law reform, through proper infusion of the constitutional project, through all of these interventions, the law will...the *use* of law will be inverted in that sense and actually help... (emphasis added)

Like many of the ATJ lawyers cited in this chapter, the idea that law is a powerful tool or “instrument” for allocating resources and power is central to her conceptualisations of the law. Despite criticising South African law and the limited nature of legal transformation, describing it “as not fit for purpose [for transformation]”, she nonetheless endorses a view of the constitutional project as using the law to substantively transform society to benefit the poor and marginalised, thus invoking the legal imaginary of TC. Like her colleagues who endorse the vision of the Constitution, lawyering is framed as a moral commitment to “help people”. Legalism is imbricated in this commitment since despite all its flaws, legal rules, and the Constitutional framework of which they are a part, are recognised as an effective tool to get progressive things done.

Arthur is another example of this kind of ATJ lawyer. He is a self-described Pan Africanist who became prominent in student politics at university. In contrast to Zach and Tim, his colleagues at PILO A, who endorse the Constitutional framework and its idealistic vision, Arthur views the Constitution as “very liberal” and “colonial”.¹³² In his view, the entrenchment of the private property clause in the Constitution and the failure to address black land dispossession, “sweeps under the carpet” many of the structures that perpetuate racialised inequality. But despite these criticisms, and highlighting the capaciousness of TC as an idea, he notes that he was drawn to the ATJ field because he saw it, and continues to see it, as an extension of his university activism. Describing why he chose to enter this legal

¹³² In South Africa, the term “liberal” is often used as a pejorative term, especially by those aligned with Black Consciousness or Pan Africanism. It invokes the history of typically white anti-apartheid activists who failed to engage with a political critique of apartheid founded on the recognition of racialised power and economic relations in society. A further critique levelled against liberals during apartheid was that, although they proposed racial integration, what was in fact being proposed was assimilation: “black people should adopt white (liberal) values and attitudes” (Budlender, 1991: 228).

field, what he termed “human rights” work, he stated: “I thought...because when you are a political activist, human rights is the most relatable thing, because human rights are the reason that you are fighting for other people”. Continuing to describe his commitment to his work despite his criticisms of the Constitution he said:

[E]ven as colonial as it [the Constitution] is, there’s so many opportunities to use that colonial system to benefit our [black South African] people...I mean the entire NGO sector, to a certain extent, use the law to advance the interests of the poor, and the dejected people and those are black people... So, for me, that was a kind of solace. You know, no matter how messed up the system is, you can always use that system to benefit you.

Similarly, Sanele noted that in her early years in the ATJ field she found purpose in her work because, despite its limitations, legal rules and the constitutional framework enabled her to make a tangible difference to the lives of the poor people she encountered. She said:

And remember, my thing was to invert the use of law, because I understood it to be a mechanism for political gain, power, protection etc... But I think, luckily for me, the resonance [between my politics and professional demands] would come in where it was constitutionally mandated for, especially...socio-economic rights... the fact that it was in the Constitution... That I guess would give us leeway to do things we needed to do for material gain, for material change.

Crucially, while Sanele and Arthur view the law as inadequately addressing the historical basis of present inequalities, they nonetheless recognise that the new legal system is better able to achieve just outcomes than untransformed law unanchored to a value-laden Constitution. Sticking closely to the new rules can yield progressive ends. ATJ *lawyering*, as the practice of applying abstract rules and categories to the problems poor people face, is deemed a worthy pursuit that may facilitate some degree of social change and justice. Arthur expressed this in response to my question about his experience of what he called the “contradiction” between his politics as a Pan Africanist, and the liberal institutional framework of the Constitution:

You know on most occasions you just have to observe what the law says. The law says that if... there is vacant land and it’s privately owned, people move where they come from and they build structures on this land and they live on this land...

You can't just bring in a private security company to destroy structures and leave, or the police. You have to go to court, apply to evict them, even if the court agrees that this is your land... the municipality must come in to provide alternative accommodation for these people. And if the municipality can't provide alternative accommodation for these people, then it means that these people are going to be here until the municipality can provide alternative accommodation. So in that way, it's most convenient way to use the system against itself. Because you are saying, "you can't remove these people from this land even though you own this land". We won't question you about *how* you got to own this land, but what we are saying is: if you are going to remove these people, they must go somewhere else and they can't do that on their own, so somebody needs to come here and play that role, and that person is the state. So, in a way, we are kind of revolutionising land occupation and people having tenure... (original emphasis)

Arthur's and Sanele's understandings and evaluations of the law and Constitution clearly differ from those expressed by Tim, Zach, Khanya, James, and others. But introducing them in this chapter illustrates that even when normative evaluations of the Constitution diverge amongst lawyers, a commitment to its legalism remains because of the ideals that law evokes. Legal rules and categories are still recognised as an efficacious tool with which to achieve progressive ends that chime with lawyers' wider normative commitments and ideological positions. Arthur's and Sanele's reflections starkly illustrate that the commitment to legalism is sustained precisely because of how it connects the real and the ideal, even if that ideal is not straightforwardly linked to South African constitutionalism. Moreover, their commitment to law-based social change, along with their political and ideological positions, reflects breadth and malleability of TC as a legal imaginary.

Echoing Pirie above, the analysis in this chapter emphasises that the ideals of law cannot be extricated from its legalism in South Africa's ATJ field.

Conclusion

In this chapter I have introduced some of the lawyers who will be encountered in the following chapters. The purpose is to provide a sketch of the kinds of lawyers who constitute South Africa's ATJ legal field and to explore their understandings of law and commitment to lawyering. By doing so through their own narratives about how they came to study law, and

then practise law in South Africa's ATJ field, this chapter has suggested that what it means to be a lawyer is tethered to an ongoing project of ethical self-cultivation. For many ATJ lawyers who experienced similar levels of socio-economic marginality as the clients they now assist, being a lawyer is linked to ideals of professional distinction and economic mobility. But significantly, in the context of South Africa's history of racialised oppression, it is a project pursued not only for oneself, but also to fulfil obligations and duties to both their families and other impoverished communities with whom they identify. The significations of law and lawyering in South Africa's ATJ field are thus multiple. In the following chapters which ethnographically examine ATJ legal practice, keeping this ethical project in view enables an understanding of why this work is experienced as so normatively and professionally fraught.

A biographical account also offers a distinct vantage point from which to analyse the place of legalism within South Africa's ATJ legal field. While discussions of formalism in South Africa centre on the sometime crude application of legal rules and categories to relevant legal facts, this chapter has shown that within this field, legal rules cannot be divorced from the ideals they evoke. For some, these ideals are traced directly to the Constitution, viewed as an embodiment of moral ideals and vision for the future of South Africa. Lawyering is understood as the means to realise this vision. For lawyers less convinced by the progressiveness or moral normativity of the Constitution, legal rules are still recognised as an effective tool to achieve some semblance of social justice for the poor. Lawyering is thus still understood as a practice that reflects these lawyers' political and ideological commitments.

Across the ideological spectrum, the endurance of a commitment to legalism within South Africa's ATJ field must therefore be understood in terms of the character of law itself, which as legal anthropologists have argued, links the real with the ideal. While the precise contours of the ideal may vary from lawyer to lawyer, this chapter clarifies that they are

united by a view of law as capable of materially improving poor peoples' lives, and that this view is itself imbricated in lawyers' personal contexts.

In the next chapter I examine how the ideals of law and lawyering expressed in this chapter are reflected in everyday ATJ legal practice, and what this reveals about lawyerly attitudes to rules.

Chapter 3

“Creatures of Rules”: Translation in Access to Justice

Legal Practice

The previous chapter examined the personal biographies of some of my key interlocutors, demonstrating their distinct views onto the place of legalism within South Africa’s ATJ field. The chapter underscored the ideals attached to law that are part of the normative weight they carry as legal professionals. The concept of legalism, which elucidates how law links the real with the ideal, helps us see that. As such, I argued that a commitment to legal rules must be analysed in terms of the ideals that law evokes. As argued throughout this thesis, this analytical framing enables a new perspective on the so-called “paradox” that characterises South African professional legal culture.

In this chapter I extend the analytical examination of legalism. But whereas the previous chapter focuses on legalism in relation to ideals, this one focuses more squarely on legalism as a professional adherence to rules. As argued at the outset of this thesis, ATJ lawyers understand law in terms of rules and abstract categories. This chapter demonstrates this through an extended ethnographic account of the experiences of one candidate attorney (CA) whom we met in the previous chapter: Zach, who works at PILO A. It details a consultation with a client for whom Zach was unable (or unwilling) to provide legal representation because, in his professional opinion, the client’s “case” did not have “merits” and therefore had no “prospects of success” in court. I argue that the engagement between Zach and this potential client illustrates that the commitment to rules-based thinking in South Africa’s ATJ field is also anchored to how lawyers are trained to be, and who they think they

are as professionals, and crucially, that their authority rests on their capacity to engage in legalistic problem solving.

In making this argument, this chapter draws on existing socio-legal perspectives that theorise the legal professional performance of expertise (Bourdieu, 1987). But I suggest that understanding what this performance means in the context of legal assistance, also requires introducing another seminal socio-legal and legal anthropological perspective: the lawyer as professional translator (Merry, 2006; Englund, 2004; Karekwaivanane, 2016; Cunningham, 1992; Fuller, 1994). In the ethnographic example below, I detail how Zach “translates” a prospective client’s wide-ranging morally inflected story through a prism of general rules and abstract categories. Using translation as an analytical framework lays bare the lawyerly adherence to rules in everyday legal practice, revealing how performing this adherence marks professional distinction.

But central to what this chapter shows is that practicing the professional commitment to rules can be normatively fraught, leading to the disappointment of lawyers and their prospective clients. Given their backgrounds and the ideals ATJ lawyers attach to law, including viewing it as an effective tool to get progressive things done, this is not surprising. ATJ lawyers present translation as the *practice* that enables the realisation of their ideals. On this basis, I argue that translation as an analytical concept but also a key feature of legal practice, offers a distinct perspective onto the multiple commitments that ATJ lawyers hold and their refraction in the working of a professional field. This chapter demonstrates ethnographically that the tension between lawyerly adherence to rules and the normative commitment to legal ideals underpins the professional quandaries ATJ lawyers experience in the course of their work. This is a central argument in this thesis.

In highlighting this tension and showing how it emerges and plays out during ATJ practice, this chapter offers a useful entry point to analyse the concrete dynamics of ATJ

practice and its effects. Indeed, this chapter's analysis challenges the view typically advanced in South African ATJ accounts that the distance between poor people's expressions of suffering and their lay understanding of the law, and the capacity of courts to "hear" these expressions, is fundamental to the ATJ gap (Dugard, 2013a; Dugard and Wilson, 2011; Bilchitz, 2013). Rather, the chapter ethnographically shows that the distance – the "gap" – often exists earlier than in court, at the pivotal point of "access": consultation with a lawyer.

The chapter proceeds as follows. It begins by sketching the theoretical framing of this chapter through a discussion of Bourdieu's concept of the juridical field and the legal anthropological perspective of the lawyer as professional translator. The chapter then proceeds to the ethnography which describes the process of consultations at PILO A. This is followed by a detailed example of a consultation between Zach and client X, which draws attention to the dynamics of translation. The section provides a fuller analysis of the ethnography, highlighting the tension between ATJ lawyers' professional commitment to rules, and their ideals of law and what it can and should do.

Translation, Legalism, and Professionalism

In the previous chapter I showed that part of what motivated many of my interlocutors to become lawyers were the ideals of the legal profession itself, and the symbolic capital it afforded, conferring status and recognition (see Bourdieu, 1986: 245). This was especially true for young, black lawyers, who tied their professional pursuit to the attainment of "dignity" for themselves and their family. In this chapter, I take this analysis further by foregrounding what is often under-emphasised in South African socio-legal literature: that South Africa's ATJ field, like other professional legal fields, is a "juridical field" (Bourdieu, 1987). I do so to elucidate that the attachment to legal rules amongst ATJ lawyers is also borne from the imbrication of rule-based thinking in performances of legal professionalism.

In theorising the juridical field, Bourdieu (1987) reminds one that like other fields of power, the juridical field is a social space in which actors jockey for symbolic capital, in this case: the recognised capacity to speak and act in the name of the law and have that speech and action accepted as legitimate. Entry into the juridical field requires complying with “the rules and convention of the field itself” (1987: 831). Central to these is the redefinition of “ordinary experience” in line with accepted professional legal discourses and practices that “transforms prejuridical interests into legal cases” (1987: 834). The license to perform these practices is itself dependent on forms of cultural capital: educational and professional qualifications that shape the habitus of the juridical field (1987: 834-835, 842). Competition for juridical capital thus rests on struggles between professionals who draw on their often-unequal sources of social and cultural capital rooted in social networks, technical skills and professional backgrounds to claim authority over “the law”. Bourdieu argues that the nature of competition within this field, and how it is shaped by the habitus of legal professionals, informs the interpretation and production of law (1987: 827).

Beyond these internal dynamics, Bourdieu also underlines how this field is structured by the maintenance of distinctions from those outside it (1987: 828). Indeed, central to professionalism as a source of symbolic capital within the juridical field is its “monopoly of the tools necessary for legal construction” (1987: 835). He describes the juridical field as marked by a “social division between lay people and professionals” (1987: 817). This division is sustained by separating professionals who make “judgements based on the law” and the “naïve intuitions of fairness” held by lay people (1987: 817).

Bourdieu emphasises the significance of a professional project in shaping the practice and production of law. While not the central focus of his theory of the juridical field, he nonetheless highlights that “translating” problems expressed in “ordinary language...into the language of the law” is a key practice in this project (Bourdieu, 1987: 834). Translation is

thus a means by which lawyers perform their expertise for their peers and distinguish themselves from their clients. Moreover, as legal anthropologists have shown, translation is also a fundamental feature of legal assistance. I discuss this scholarship below to elaborate on the idea of the lawyer as professional translator.

Anthropologists of law have long been concerned with the distinctions and relationship between lay and professional legal discourses and their impact on lay persons' encounters with state legal fora (Merry, 1990; Conley and O'Barr, 1990; Sarat and Felstiner, 1995; Bertenthal, 2016; Good, 2007). This research emerged from what Merry termed the "new legal pluralism" (1988: 872-874) in which anthropologists, rejecting the "ideology of legal centralism" (Griffiths in Merry, 1988: 874), explored the multiple normative orders in countries of the global North and their coexistence with official state law (Engel, 1980; Greenhouse, 1982; Merry, 1986; 1979; Moore, 1973). Exploring the range of normative orders, scholars highlight the distinction between professional legal discourse that is legalistic, based on rule-based categories, and the ways in which ordinary people express their problems or "stories" in a relational or moral discourse (Schauer, 2009; Fuller, 1994; Conley and O'Barr, 1990; Merry, 1990; Sarat and Felstiner, 1995; Bertenthal, 2016, 2017; Englund, 2004; Good, 2007). As legal scholar, Schauer notes: "[L]aw may not be all about rules, but it is certainly a lot about rules" (2009: 13). Furthermore, anthropologist Fuller notes that ethnographies of legal discourse have shown that during legal processes, "[h]ow we normally discuss our affairs – broadly in terms of relationships among people – is... converted into a specialized discourse of rules" (1994: 11).

Given the diversity of normative orders illustrated in "new legal pluralism" studies, the forms of "classic legal pluralism" extant in former colonies in which state law coexists with customary law, and the rise of transnational human rights discourses, scholars began to frame lawyers and other intermediaries as "translators" performing the kind of conversion

that Fuller refers to above (see Karekwaivanane, 2016; McDermont, 2013; Merry, 2006; Englund, 2006, 2004; Cunningham, 1992; Forbess and James, 2014; Kirwan, 2016; Gilkerson, 1991). Describing these actors, Merry observes that human rights translators hold a “double consciousness, combining both transnational human rights concepts and local ways of thinking about grievances” (2006: 42). Similarly, Karekwaivanane’s study of African lawyers in colonial Zimbabwe describes these actors as “cross-cultural brokers” (2016: 61). He argues they were “constantly involved in a two-way translation”: on the one hand translating the “concepts and stipulations of state law for their African client”, while on the other translating “their clients’ grievances into the language of the law” (2016: 61).

These scholars highlight the often-fraught positioning of translators who operate between normative orders and the ambivalence of translation. In some instances, when rights are “vernacularised” (Merry, 2006), new understandings of a problem can emerge, enabling new self-understandings and the transformation of subjectivities. Alternatively, the adoption of a rights discourse may be used strategically to resist coercive power as well as make rights-based claims (Karekwaivanane, 2016; Merry, 2006; Canfield, 2023). But in other circumstances, scholars have shown how the translation of a client’s relational problem into a rule-based claim establishes an asymmetrical power relation between clients and their lawyers in which the latter have the power to “reify the boundaries of legal relevance, legitimating some parts of human experience and denying the relevance of others” (Sarat and Felstiner, 1995: 147; see also Englund, 2004; Conley and O’Barr, 1990; Shdaimah, 2016). In this way translation can deprive legal discourses of the “voices” (Conley and O’Barr, 1990: 168) of ordinary people, undermining the law’s “democratizing potential” (Englund, 2004: 47-69; see also Cunningham, 1992; Sarat and Felstiner, 1995).

Thus, in contrast to Bourdieu who posits translation as a key component of a professional project, legal anthropologists analysing the lawyer as professional translator

instead emphasise the ambivalence of translation in legal assistance. In this chapter's analysis I bring these two approaches together. I do so by explicitly framing the "language of the law" into which ATJ lawyers translate their client's problems as being at least partly constituted by "general rules and abstract categories", or legalism, and show how this kind of legalistic translation is tied to a professional project, but cannot be reduced to it (Pirie, 2022: 318). The chapter is central within the thesis, establishing a key perspective for the ethnographic chapters that follow.

The relationship between translation in legal practice and legalism is captured by legal scholar Honoré who writes:

The law is concerned with the relations between human beings and between them and animate or inanimate objects viewed from a special point of vantage. To attain this point of vantage requires the transformation of the data of ordinary life into those of a special drama with its own personages, costumes and conventions, not to mention the invention of new personages and relationships not found in the state of nature. To set the stage for this drama the law categorizes actions, events, personalities, and conditions in a special way and then, from their subsumption into the appropriate categories, draws conclusions as to the legal position of the *dramatis personae* and *res*, their possibilities of acting and suffering, and their mutual relations. (1977: 112)

Hence, Schauer (2009) famously writes that "thinking like a lawyer" is to think legalistically. In the following ethnographic example Zach translates his prospective client's relational story using a framework of abstract rules and general categories, transforming it into a "case". The capacity to do this work is central to his professional identity as an ATJ lawyer, self-consciously a class project underpinned by his own personal experiences of socio-economic marginality. For many ATJ lawyers the desire to acquire economic and symbolic capital is an explicit motivation for becoming a lawyer. Translation thus not only enables legal assistance (another fundamental motivation) but also underpins authoritative claims of knowing "the law" amongst fellow professionals, reinforcing the exclusivity of this field (see Englund, 2004: 539; 2006: 142).

But as argued in the previous chapter, professional identity within the ATJ field also rests on ATJ lawyers' self-conceptions as professionals who "help people", itself tied to a wider ideals of law. By introducing the concept of legalism into an analysis of translation in legal assistance and conceptualising South Africa's ATJ field as a juridical field, this chapter thus affords a new perspective on the ambivalence of this process of translation: as borne in part from the tension between a professional commitment to legal rules expressed through the practice of translation, and deeply held ideals of law as offering possibilities for progressive social change.

The combination of professional performance and commitment to legal ideals is most sharply evident during consultations – my focus in what follows. Here, ATJ lawyers attempt to assist clients while also maintaining authority over "the law". Translation is key to helping people through legalism, part of an attempt to "bridge the gap between people and the law" (Hodgson, 2015); and to the "boundary work" that distinguishes ATJ lawyers as members of a professional class (Bourdieu, 1987; Lamont and Molnár, 2002).

I demonstrate this below through an ethnographic analysis of a consultation I observed at PILO A.

Trying "so hard": Translation in ATJ Legal Practice

Consultation Procedures at PILO A

I began my fieldwork at PILO A in late February 2022. By then, South Africa had only recently been taken off foreign governments' "red lists", and COVID-19 restrictions were still mandated within South Africa. This had a significant impact on how legal clinics and PILOs operated in practice, with many resorting to some form of hybrid consultation. This was the case at PILO A where in place of a walk-in clinic, potential clients would call

the main office to request a consultation, after which a candidate attorney (CA) would call them back and conduct an initial consultation over the phone.

A second impact of the pandemic was that while many advocates, attorneys, researchers, and CAs returned to working in their offices, many did not, preferring to work from home. On any given day, it was unpredictable who would be in the office. But the one person I could always count on to be there was Zach. Unless he had been called into court, I could reliably anticipate him sitting behind his desk drinking a Red Bull when I arrived in the morning.

Zach's eagerness to be in the office every day, wearing a suit and tie, was central to his performance of professionalism. Running around the office printing papers, getting signatures, and consulting his superiors he would jokingly say, "what am I doing Leila? I am *practising* law". The practice of law touched all aspects of Zach's professional and personal life. As detailed in the previous chapter, being a lawyer had been his dream since he was a teenager. His embodiment of legal professionalism was key to the identity he was attempting to forge not just as a lawyer, but as a lawyer who used his expertise to advance the constitutional project and "help" people like those from the community he had grown up in.

Consultations at PILO A occur in (at least) two stages. During the first stage, CAs call back clients who requested a consultation. During this stage, CAs "gather the facts" of a potential client's case, recording them either electronically using a laptop, or in Zach's case in handwritten notes. These notes are crucial in the second stage of the consultation process. During this stage, CAs present the client's "facts" to their supervisor (an admitted attorney), who using the Socratic method, guide their junior to the client's legal options. A range of issues is considered before a client is taken on by PILO A: whether the client's case falls within the organisation's focus areas; whether the client qualifies for pro bono representation; how many people are being affected; if the case would be precedent-setting; and, importantly

for CAs, if the case's jurisdiction would enable them to appear in court.¹³³ But before these considerations are made, the most important evaluation must be discerned: whether the client's case has "merits", and thus "prospects of success" in court. This is a *sine qua non* in a legal field with scarce financial and human resources, and where courts of all levels are backlogged for years. It is therefore only if a case is deemed to have "merits" that PILO A entertains the idea of taking it on. If it is determined that a client's case does not have merits, clients will be refused legal representation.

As Khanya, a senior attorney at PILO A, conveyed to me, if a client is denied representation, CAs are instructed still to provide the client with "legal advice which will enlighten" them. This instruction is given on the view that most potential clients have what Khanya called a "lack of knowledge" about why their problem cannot be solved using legal mechanisms. Young lawyers thus adopt a didactic register during consultations, performing their expertise and emerging professional identity.

Zach would often take this performance a step further by insisting on using PILO A's boardroom to conduct his consultations. Despite having a perfectly good phone at his desk in the CA bullpen, as well as PILO A having two other designated "consultation rooms", Zach insisted on using the boardroom, even if it meant waiting until it was unoccupied by other staff. While he claimed to use the space for technological reasons (the speaker phone), he evidently enjoyed the formality of the space which manifested the kind of professional status he was trying to inhabit.

Like most PILOs, PILO A is funded predominantly by donations from charitable organisations. As such PILO A's boardroom is not extravagant, but it does have an aura of grandeur. It is located towards the back of the office and has large windows that flood the room with light in all seasons. It also has better quality furniture than the rest of the office: a

¹³³ Across ATJ organisations shadowed for this thesis, similar criteria for taking on a client were used.

solid wood conference table surrounded by leather chairs and large wooden bookcases filled with leather-bound volumes of legislative texts. The officialdom of the space is further reflected by its use by attorneys and advocates when they argue in virtual court, the bookcases forming the backdrop. It is a space where legal professionals at PILO A self-consciously practise law.

Translation: getting to the “nub” of the issue

On most days Zach did his consultations in the afternoons. He preferred to catch up on paperwork and do legal research for ongoing cases in the morning. Usually by 14h00, he would get up from his desk, which was beside mine, get his second Red Bull of the day, and on his return, say, “let’s go do some consults”. After collecting his laptop and his A4 hardcover exercise book where he kept consultation notes, he walked toward the boardroom with me following. On the day in early July 2022 that I describe below, this is exactly what happened.

After setting down his things, Zach opened Microsoft Teams (henceforth Teams). Teams is the programme that Khanya uses to distribute the incoming consultations amongst CAs. The programme creates a “to do” list for each CA. It lists people who requested a consultation; their contact details; and the date the client was assigned to the CA. Much angst is bound up with “consults”, as Zach referred to them. He and other CAs were often exasperated at how “behind” they were on consults. In Zach’s case, often a couple of weeks would pass between the client’s first call and his calling them back. The delay was partly because people’s need for assistance outweighed the human resources available, what ATJ lawyers call a lack of “capacity”. It was exacerbated by the institutional pressures of “urgent cases”.

In PILO A’s case, CAs are often drawn away from incoming consultations by “urgent cases”. While many clients characterise their predicament as requiring “urgent” assistance,

“urgent” in this instance is a legal category that cannot be claimed by all. Urgent cases are those in which the parties cannot afford to wait to seek relief from the courts. These cases require immediate action in the form of drafting papers, getting statements, delivering notices, and appearance in urgent court. The time between when an urgent case arrives at PILO A and when it is heard in court is often a matter of hours or days. Because of this compressed timeframe many organisations in the ATJ sector refuse to take urgent cases. It is a point of pride at PILO A that they are responsive to the urgent cases brought by both established clients and walk-ins. But the intensity of these cases often means that all other responsibilities of a CA and their supervisor are suspended until the urgent case has been resolved. Moreover, their appearance does not stem the tide of incoming non-urgent cases. After working non-stop, often over weekends to assist on an urgent case, Zach would nonetheless be met by a “to do” list on Teams that had grown since he had last checked it.

On the day in question, after surveying his to-do list, Zach prepared his notebook by writing the date and name of the client at the top of the page. He then punched the number at the top of his list into the phone and turned on the conference call speakerphone. After four rings we heard a “hello”. As with all his consultations, Zach introduced himself, clarified whom he was talking to and asked, “how may I help you today sir?” The client (henceforth ‘client X’) responded that he was calling on behalf of his pensioner mother, noting that “the matter is a very long one that has spanned over five years”. But the immediate problem he faced was that his mother had received a notice of motion to execute her immovable property – her home – and the court date for the execution was soon approaching. Clarifying, Zach asked, “so you’ve received papers?” The client confirmed, noting that he and his mother had the intention to file opposing papers, but had been unable to secure legal representation to assist them. I looked at Zach. He was writing furiously. With furrowed brows he began directing the client with specific questions. “What is this case about?” he asked. The client

responded that his elderly mother was a “pensioner”, and her “socioeconomic” and “constitutional rights” were being violated by the applicant in the case. When the client took a short breath, Zach managed to intervene, asking “but what is *this* case about? What is the *nub* of it?” (original emphasis). The client responded, “they want to evict my mother”.

Having located a legal category (eviction), Zach’s next question followed the professional script. It was the question that always followed when a client had received an eviction notice or a motion to execute immovable property: “does she have a bond?” “She owns it outright; she has a title deed,” said the client. Zach then asked for the address of the property, and once received, entered it into an online proxy for the Deeds Office as a means of verifying the claim. As I had observed during many consultations with Zach and other lawyers, more than verifying the various claims clients make, these questions also enable lawyers to control the consultation, leading the client where they think the client’s story needs to go.

Noting that he had verified the client’s mother’s ownership, Zach mentioned that it was part of a sectional title scheme. At the mention of the sectional title scheme, the client insisted that he needed to give Zach the “history” behind the case and could not simply begin with the eviction. After initially attempting to narrow the client’s story to fit into an existing legal framework, Zach relented, allowing the client to widen his story into a *history*.

The client explained that the case dated back to 1998, when his parents had first bought the land on which the sectional title structure in question was built. On this land they had built their family home. In 2009 his parents were approached by a property developer who sought to develop a sectional title scheme on their land in exchange for a unit in the new scheme. This unit became the family home and was valued at R200 000 (~£8700). Upon development, the body corporate of the scheme employed two principal managers. The owners and renters in the scheme paid their levies to the managers who then ostensibly paid

the municipality on their behalf. The client's parents paid roughly R600 (~£26) in rates and levies per month. But according to the client his father became ill and was hospitalised, putting a strain on family finances as his father was the sole breadwinner. The couple defaulted on their payments for some months, but the father soon recovered, and the couple were able to settle their debt. The client told Zach that his father had then subsequently passed away, but that his mother continued with the monthly payments to the principal managers. Zach checked this, "so she was still paying?" "She was still paying", confirmed the client.

Continuing his story, the client mentioned that one of the managers died, leaving the second one to manage the scheme alone. Around the time of the manager's death in early 2015, a few of the renters, including his mother, started defaulting on their payments. The reason for his mother's non-payment was that she was "suspicious" because the account details to which rates and levies were due "suddenly changed" without any consultation with the body corporate. An inquiry into the changed bank account revealed that the remaining principal manager had pocketed the owners' and renters' rates instead of paying the municipality. Legal proceedings were initiated, and the remaining manager was consequently charged and found guilty of fraud. But a consequence of the principal manager's fraud was that the scheme had accrued a debt with the municipality upwards of R100 000 (~£4300). According to the client, in 2016, the municipality "served a notice" to the body corporate demanding the debt be settled. In response, the body corporate hired an "administrator" to settle the debt and sort out the scheme's financial difficulties.

Then, before the client could continue, the phone line suddenly dropped, and the lights went out. Without saying anything, Zach and I both knew that loadshedding had begun.¹³⁴ It was 16h00, which meant that the electricity was likely to return at around 18h00,

¹³⁴ Load-shedding refers to scheduled outages to balance the demand for electricity.

so Zach resolved to resume the consultation in the morning. He noted that this would give him time to read over the client's documents, since he was still unsure what the "nub" of the problem was. The narrative web cast by the client had at this stage undermined Zach's attempt to establish the client's problem as a "case". As we left the boardroom, we saw most of the staff who had come in that day were leaving. We followed their lead and packed up for the day.

The next day, armed with his notebook and laptop, Zach wasted no time in calling the client once the boardroom was available. He was determined to get "all the facts" so he could take the case to his supervisor. Zach dialled the client's number into the phone. In an attempt to recast the client's history into linear legal claim, he began by telling the client what he had learned from his documents.¹³⁵ He said that the applicant – the administrator – was bringing an application to declare the mother's house executable to satisfy her debt with the body corporate, which if granted, would likely lead to her eviction. He noted that this application stemmed from a 2017 default judgement against the client's mother verifying her debt of R80 000 (~£3500). Zooming in on this aspect of the story, Zach asked, "when these proceedings were brought that led to the default judgement, did she participate in the proceedings? What happened?"

The client responded that his mother was "overwhelmed" when she received the summons. But instead of specifying what this meant, he launched into an attack on the administrator: a "white man" who was a "bully" and "rude". He alleged that the administrator was colluding with another resident in the sectional title scheme because they wanted to liquidate the scheme for profit, noting, without evidence, that the administrator had experience in "dealings like this". The client's speech gained momentum: "there were bullish types of antics that were supported by the law and the courts...there wasn't enough judicial

¹³⁵ When client's make an appointment, they are asked to send (if possible) scanned versions of any "relevant" legal documents for the consulting attorney to look over.

oversight...” Barely taking a breath he then stated that despite his mother being a pensioner earning R1500 (~£65) per month and supporting her daughter and grandchild on this amount, she was served with a court-approved “special levy” of R5000 (~£217). “How can she pay that?” he asked angrily. Zach’s attempt to narrow the story was again thwarted by the client’s insistence on widening it. The dynamic of narrative narrowing and widening that typified this consultation and many others continued.

I saw that Zach had stopped writing. Although he did not have the heart (or the ability) to stop the client from telling his wide-ranging story, he nonetheless appeared to be exerting his professional expertise by *not* recording the client’s allegations, and not considering them “material” to the legal issues he had identified when going over the client’s documents the night before: the default judgement that stemmed from a violated contract. As noted by Bourdieu:

In reality, the institution of a “judicial space” implies the establishment of a borderline between actors...The establishment of properly professional competence, the technical mastery of a sophisticated body of knowledge that often runs contrary to the simple counsels of common sense, entails the disqualification of the non-specialists’ sense of fairness, and the revocation of their naive understanding of the facts, of their “view of the case.” (1987: 828)

Thus, Zach’s refusal to include the client’s “view of the case” in his official notes was a can subtle way in which he drew the borderline between himself as a professional and his client.

Attempting to regain control, Zach responded to the client by asking: “but what do you want PILO A to do in this situation?” Sighing, the client said that he was looking for someone with “knowledge” to look over the case in detail. Linking PILO A’s work to a wider moral discourse of law in post-apartheid South Africa, the client said PILO A’s work is “about protecting people’s socioeconomic rights”. And in his case, “people’s socioeconomic rights were overlooked”. A solemn look came over Zach’s face. The client’s framing of his problem

appeared to have resonated with Zach's own ideals of law and ATJ professionalism – to realising these normative ideals.

Despite this, Zach's response indicated his commitment to the professional script and a much narrower conception of law as rules. He stuck to the "facts" of the case, bypassing the client's normative entreaty as well as his racially charged allegations against the applicant. Zach responded that the main issue was the standing default judgement against the client's mother that had established her debt. As he explained: "*in law*, unless a judgement is rescinded, it stands" (original emphasis). Moreover, in his opinion, "we wouldn't be successful in court in trying to rescind the default judgement" as the client's mother did not have an "acceptable defence" for her non-participation in proceedings or for her defaulted payments. "But I still need to discuss it with my supervisor", he added hastily. Zach undermined his own professional authority to keep alive the possibility that a legal solution could be found that met the ideal of law insisted on by the client.

In response, the client mentioned that he had a detailed paper trail that would defend his mother's actions, again alluding to the administrator's "dealings". Once again, Zach did not pursue this. Attempting to conclude the consultation, he told the client that he would consult his supervisor and would call him back within the next few days. Before Zach had the chance to hang up, the client said one last thing: "You know, there's a constitutional aspect of the case: how is this okay that a senior citizen is made to pay almost four times her pension?" Unable to come up with a substantive response, Zach offered platitudes instead. He ended the call and shook his head. Turning to face me he said in a disheartened tone, "the difficulty with clients like this is they think they have a case". Looking at his watch, he said he was off to get a Red Bull and that we would call the next client in fifteen minutes.

“The law is failing us”

As it turned out, between the second call and Zach’s final call to client X, an urgent case came to PILO A: the eviction matter described in the Prologue. As indicated, this case required immediate action, and so Zach and his supervisor worked non-stop on the case for five days. In the interim, all “non-urgent” matters fell to the wayside.

Once the urgent case had been settled, Zach returned to his consults. Feeling guilty about not getting back to client X in good time, he mentioned that despite being unconvinced that the client’s case had any merits, he wanted to seek advice and do research to try to find some avenue that could provide the client and his mother with relief. For in addition to a professional commitment to rules, central to Zach’s professional identity was his self-conception as a lawyer who “better(s) life for people...who are poor”.¹³⁶ He spent days diligently consulting with all senior lawyers at PILO A, and reading the client’s documents and relevant case law – to no avail. His superiors confirmed his initial evaluation: that the client’s case did not have any merits on which to challenge the current application to declare his mother’s home executable. On this basis Zach could not offer the client legal representation.

It was time to call the client and deliver the news. But before we did, I asked Zach why the client’s case had no merits. He sighed, and then began his explanation saying: “*my job is to discern the legal issues* because clients will tell attorneys all kinds of stories” (emphasis added). He then explained that the default judgement had established in law that the mother owed money, and that without an “answer” to that claim, or the rescission of this order, there was no defence against the current application to declare the property executable. Moreover, no steps could be taken to rescind the default judgement because there was no evidence of improper management; nor had the client’s mother responded to the question of

¹³⁶ This quote is taken from Chapter 2.

how much money she owed and how she planned to pay it. These were the legal issues. By examining the client's documents and consulting with fellow legal professionals, Zach had translated the client's far-ranging story through a prism of rules and abstract categories, into a set of narrow facts with unambiguous implications about what legal steps could and could not be taken.

We headed to the boardroom where Zach called the client. He apologised for the delay, explaining that an urgent matter had taken him away. He then adopted a didactic tone and provided the client with the same explanation he had given me, underlining that the client's mother had no "defence" against the claim in the default judgement. Before Zach could finish his explanation, the client responded immediately that the defence was that they were suspicious of the manager, that this was linked to their earlier experience of defrauding, and that, when the original summons was issued in 2017, neither he nor his mother had the wherewithal to deal with the matter. They were "overwhelmed" by the entire situation and did not know how to proceed. He then raised the issue of the increased levies, noting that there was "recklessness" in that the changed levies "put debts" on the owners of units in the scheme. Imploringly, the client reiterated that his mother was a pensioner supporting her daughter and grandchild and that she could not afford the new levies.

Finding an opening, Zach responded that he understood all of this and was sympathetic to the client's predicament. But drawing a distinction between the client's relational and moral framing of his problem, and his professional rule-based framing, Zach informed the client that everything the client mentioned did not constitute a "legal defence" that would justify the rescission of the default judgement – the basis for the current application. Moreover, despite the client's suspicions about the administrator, this person had been appointed by the body corporate, of which the client was a member. If the client's mother had suspicions, she should have made use of internal processes to have him removed.

In further underlining his position as a legal expert, Zach stated that this would be raised by any judge presiding over the matter. Evident in Zach's explanation was that the fee of the levies, the pensioner status of the client's mother, the interpersonal disputes, and the allegation that the applicant was engaged in a systematic plan to evict occupiers of the property, had no place in the client's "case".

The client refused to accept Zach's evaluation and a back and forth ensued between the two. Zach was now clutching his head, his eyes closed. Attempting to convince Zach to take the case, the client said that what had happened to his mother was "morally wrong". He mentioned that he had many more documents relating to the case, noting: "[I could be] sitting on a goldmine of knowledge without even knowing it because of my layman approach. But then people of the law keep asking *us* if we have a defence" (original emphasis). He suggested that a defence could be found by a legal professional who knew what to look for. As he put it, "while I may not have a defence, it does not mean that there is none". In his entreaty to Zach, the client invoked an ideal of law as flexible, moral, and sensitive to individual circumstance, but that simultaneously requires legal expertise. In so doing, he invoked an ideal of ATJ lawyering as a means for his and his mother's story to be "effectively heard" by the courts.

At this moment, the boardroom door opened, and Arthur walked in.¹³⁷ Seeing Zach and me, Arthur immediately recognised we were in the middle of a consultation. But, upon hearing the angry client's voice bellow through the speaker, his eyes widened, and instead of turning around and leaving the room, he closed the door behind him and waited to hear Zach's response. Zach's audience was no longer just the client and me. While it may not have been his intention, Arthur's presence overlayed Zach's engagement with the client with a sense of evaluation.

¹³⁷ As noted in Chapter 2, Arthur is an admitted attorney with multiple years of experience at PILO A.

Zach made eye contact with Arthur as if to indicate the difficulty he was having and then shaking his head, he responded. He once again adopted a didactic tone, taking care to speak slowly but authoritatively, and repeated his view on the matter, explaining why the case had no merits, and therefore that there was nothing “*in law*” (original emphasis) that he could do to assist the client. The client responded:

The law is failing us. The narrowness of the concept of law is failing ordinary people. We have a white man who saw an opportunity to exploit black people and is using the law to do so. From day one, the law has failed us.

Zach muted the speakerphone. Arthur’s face looked shocked. His eyes were wide, his eyebrows were raised, and his mouth now hung slightly agape. Somewhat rhetorically, and in his acerbic, ironic, tone, Arthur said to Zach, “hayi, client is telling *you* the law?” (original emphasis). Zach’s authority was clearly slipping. Arthur is technically his senior, however the two maintain a friendly relationship. So in this moment, Zach, clearly frustrated by how the consultation had devolved, shushed and waved him away. Arthur raised both his hands as if to gesture, “don’t shoot”. But, seemingly recognising the difficulty of Zach’s position, he turned to leave the room.

The consultation had spiralled out of Zach’s control, and cracks in his professional armour began to emerge. The firm and slightly removed toned he had maintained thus far collapsed into a mixture of exasperation and irritation. “Mr X, I have tried *so hard* to assist” (original emphasis) he said. He questioned how the client’s comment about the law failing ordinary people “is meant to make me feel”. Gesturing to the client that his work as a lawyer was tied to wider ideals, instead of the narrow concept of law the client had asserted, Zach noted that his work at PILO A is about “fighting for the poor, for the indigent, for the elderly”, and that he “*cares*” (original emphasis). But then his next move was to assert his distinction through the invocation of a legalistic discourse, saying: “at the end of the day, we can’t answer the claim unless we have a defence”.

The client refused to relent and so another back and forth ensued. After a further ten minutes of going over the same explanation, with the client refusing to yield, Zach tried a different approach. He adopted the same kind of Socratic method his supervisor employs with him and began asking the client questions that he “knows the courts will ask” in an attempt to lead the client to the conclusion that he and all other legal professionals at PILO A had reached. But throughout, there was a misalignment between the client’s evaluation of the relevant elements of his “case” and Zach’s. For Zach, the legal issue was the executability of the client’s family home, and the default judgement from which it stems. At base, the case concerned a violated contract. But central to the client’s construction of his “case” was that the property in question was a “family home”, built on land that had originally belonged to his parents; that his mother was a pensioner who subsisted on a government grant that supported her, her daughter, and grandchild; that the manager of the property had acted beyond his mandated responsibilities by increasing the levies; that this action was part of a systematic attempt to evict owners of the units; and finally, that this was part of a broader history of racialised oppression and land dispossession. His narrative was not just about a breached contract; it was not just about rules, but relationships (Conley and O’Barr, 1990). On his account, the law *should* be able to assist him and his mother.

Part of the hostility that emerged between the client and Zach was thus a product of the client’s resistance to having his story reduced to a set of rules that govern the relations between creditors and debtors. But Zach was keen to underline that legal rules were not divorced from his ideals, which he saw as aligned with his client’s. That insistence underlay his emotional response to the client, in which he felt the need to defend himself and his practice of law. When the client asserted that “the law has failed us”, he implicitly asserted that Zach’s translation of his story into a legal claim had severed the link between concretely practised law and ideals attached to it. At stake in this translation was Zach’s own ideal of

what it meant to be an ATJ lawyer in post-apartheid South Africa: this comprised both an authoritative command of legal rules, and the ability to use those rules to improve poor peoples' lives.

After another half an hour of back-and-forth, Zach stopped the consultation and did his best to “start being legal” (Latour, 2010: 261), telling the client: “[a]t the end of the day we need to have merits to answer the claim”. Realising he was not going to be able to convince Zach, the client at last relented. He mumbled something that sounded like “thank you” and put down the phone. I looked over and saw that once again Zach was clutching his head.

Being a lawyer

Described in detail above is a particularly dramatic example of the tensions that I observed during consultations in ATJ organisations throughout my fieldwork between lawyers and their potential clients. In this section of the chapter, I slow down the analysis of translation drawing on the perspectives of a wider set of interlocutors and empirical examples observed during fieldwork. I do so both because translation is an integral part of the working of everyday ATJ legal assistance that has been largely underexamined, and because this practice elucidates the multiple understandings of, and commitments to, law that permeate South Africa's ATJ field and thus legal culture.

“Zooming in” and “Filtering”

Like Zach, most lawyers I shadowed begin by explaining who they are in terms of their professional title and organisational affiliation, and then ask how they can “help”, or alternatively ask the client to tell her/him their “story”. In response, clients launch into a story which often began years earlier, includes a range of actors and events, and typically culminates in a crisis which moves them to seek legal assistance. Regardless of whether it is

the first or fifth consultation, what inevitably becomes central is the client's desire to narrate their entire history, not just the "nub" requested by the lawyer. What clients present to their potential lawyer is a complex personal, social, and economic history, which is linked to their sense of a fundamental injustice or unfairness, irreducible to a single legal category (see Conley and O'Barr, 1990: 58-59). In presenting their problem to their potential lawyer clients express an expectation that "the law" should not be a formalistic and oppressive instrument. Rather, in a constitutional era it should be responsive to the history and legacy of the apartheid order and protective of the vulnerable. But as seen above, this expansive casting of law, in which what counts as "legal" is diffuse, moralistic and anchored to relationships, meets resistance in lawyers whose professional training demands legalistic reasoning that links "facts" to rules and processes (Conley and O'Barr, 1990: 59; see also Davis and Klare, 2010; Schauer, 2009).

This pattern echoes the descriptions of client-lawyer encounters described elsewhere, in which potential litigants present wide-ranging narratives, often framed relationally and morally (Conley and O'Barr, 1990; Englund, 2004; Bertenthal, 2016; Felstiner and Sarat, 1995). For example, in his study of human rights NGOs in Malawi, Englund notes a client's narrative is "almost invariably richer in detail than the legal expert can accommodate within the confines of Malawian rights talk" (2004: 532). Or as Bertenthal notes in her study of American self-help legal clinics, "litigants offered lengthy narratives in which they attempted, in one way or another, to contest the linear—and often narrow—framework of help to legal self-help" (2016: 271; see also Conley and O'Barr, 1990: 60). Echoing these views, an attorney with over two decades' experience working in PILOs and ATJ clinics in South Africa responded in an interview in 2022, "clients bring their whole lives into a consultation".

A central feature of consultations is therefore the dynamic of narrative widening and narrowing. As illustrated above, throughout consultations, clients attempt to widen,

incorporating increasing numbers of actors and events into their stories, while attorneys attempt to narrow them down (Conley and O'Barr, 1990; Englund, 2004). Zach made this explicit when he described his approach to consultations:

So, *as a legal practitioner* you listen to the story, and then you locate it in the huge legal field, in all the laws that are there. You locate – you say this story is about crime, so it's criminal law. Or this story is about an eviction so PIE [Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998], the Constitution. Or this story is about administrative justice. You look at the story, but you then go deeper into the story. You zoom in on the story...And in the story, all the facts, usually many, many, many things are said there which... are not material, and then you find the essence and say, "this is the issue". (emphasis added)

Terrence, a CA at PILO C, echoed a similar sentiment when describing how he conducted his consultations, also pointing to the dynamic of narrative widening and narrowing. While Zach referred to "zooming in", Terrence described this dynamic as "filtering":

Look, it's [consultations] mainly about gathering the facts, as much [sic] of the facts as you can and then trying to identify...what the legal issue is exactly and to what extent it is relevant to the work that we [the PILO] do...you have to take in as much information as you can, but simultaneously filter out the irrelevant information and note down the relevant information just so that you can get a clear picture of what the actual issue is, to get to the crux of it.

When I asked, Terrence expanded on how he discerned "relevant information" from irrelevant information:

[O]bviously, *you're a lawyer right*. So, as a lawyer your *main job* is to provide the legal advice or legal assistance or remove the legal bar...because not only are you a lawyer, but you're a lawyer in a PIL/pro bono firm, so your main role is to provide access to justice or remove a legal barrier. So, in sifting the relevant from the irrelevant information...what are the facts, or what in the client's story... is pointing towards a legal issue or legal barrier that the client is facing? So, in a consultation when a client comes and tells a story, they'll tell you a lot. They'll tell the whole story... "This person is asking me to leave in a week's time. Last week they came to my house, they sat down, we had a couple of drinks, it was the first time I spent time with the landlord. The landlord was nice to me. The landlord even said they'd give me enough time to pay". All that information about their meeting up and having drinks, that's all irrelevant. The real relevance is, 'do you have a lease agreement? What does the lease agreement say? How much do you owe the landlord? When did you say you were going to pay the landlord?' Stuff like that. So, those facts, or that information that is relevant to the reasons for why this person is being evicted... But all the other information, that they got into a tiff, the landlord then came and kicked down their door at 1am and started shouting at

them. Although it's bad, and it's illegal, and it's unlawful... But all of that is not relevant insofar as the eviction itself is concerned. (emphasis added)

As these statements make clear, the function and purpose of a consultation for lawyers is organised around the principle of “sifting the relevant from the irrelevant information” to translate the client’s historical account into a defined legal problem that corresponds to existing legal categories and rules (Karekwaivanane, 2016: 67). In Terrence’s example, the client’s story about an interpersonal dispute is, legally speaking, a story about eviction. The facts to be investigated must relate only to this legal category. They are reduced to taken-for-granted assumptions about the rights and obligations that characterise relations between landlords and tenants. Or in Zach’s example, while the client’s story encompasses a complex family history which the client links to South Africa’s history of racialised dispossession of land, the legal issue for Zach is the default judgement and the necessity of a legal defence to rescind it. These are the only parts of the client’s history that are mobilised in Zach’s translation to become the basis of his determination of the case’s merits. Translation is the process through which complex lives and problems are transformed through a prism of abstract rules and categories: it is legalism in practice.

What is further revealing about both Zach’s and Terrence’s descriptions of how they conduct consultations, and central to this chapter’s argument, is that both frame their rule- and category-based approach to translation in terms of the demands of the legal profession. And significantly, they contrast this with how clients approach their problems. The ability to practise translation and engage in rules-based thinking is key to what constitutes a legal professional from their perspective. This is evident in the ethnographic account of Zach’s consultation described above: in Zach’s attempt to categorise that story into a narrow legal claim and to guide (somewhat unsuccessfully) the client’s narrative to include only facts that had purchase on the rules applicable to that category; in his didactic tone; and his responses to the client that centred on legal rules and categories, not the relational story the client had

told nor the ideals of law he invoked. These practices are foundational to practices of translation, observed throughout my fieldwork in a range of ATJ settings. But as indicated above, and as observed by scholars, translation is not just a feature of legal praxis, it is a process by which lawyers claim authoritative knowledge of “the law”, drawing the boundary between themselves, as professionals with specialist knowledge, and their clients, who lack this expertise. As illustrated by Bolt in his ethnographic study of the South African Master’s Office, another legal-bureaucratic setting, “expertise and the training that produced it...are the basis for asserting and performing distinction” (2022: 422).¹³⁸ An adherence to legalism as rules in the process of translation can thus be read as an adherence to the terms of lawyerly expertise (Bourdieu, 1987).

This insight helps to explain why a commitment to legalism persists in a legal field that both has a history of an uneasy relation to formalism, and today is saturated with young lawyers who understand their work as a form of social activism. As discussed in Chapter 1, from its inception in the 1970s, South Africa’s ATJ field was populated by highly respected members of South Africa’s legal profession, many of whom went on to play key roles in drafting the 1997 Constitution, and who became members of South Africa’s democratic judiciary.¹³⁹ In other words, membership of the ATJ legal field was prestigious (Ellmann, 1992). Now, as discussed at length in Chapter 2, this field is largely populated by young, black legal professionals, many of whom have experienced the kinds of racialised socio-economic marginality that marks the lives of their potential clients. Their dedication to their work as an ATJ lawyer is therefore anchored in both a commitment to improving the lives of

¹³⁸ A Master’s Office is attached to each branch of the South African High Court. The Master’s Office “is there to serve the public in respect of Deceased Estates, Liquidations (Insolvent Estates), Registration of Trusts, Tutors and Curators, as well as Administration of the Guardian’s Fund (minors and mentally challenged persons)” (RSA, n.d. available from: [https://www.justice.gov.za/master/#:~:text=The%20Master's%20Branch%20is%20there,minors%20and%20mentally%20challenged%20persons\).](https://www.justice.gov.za/master/#:~:text=The%20Master's%20Branch%20is%20there,minors%20and%20mentally%20challenged%20persons).))

¹³⁹ See Legal Resources Centre Oral History Project (LRCOHP), archived in the Historical Papers Research Archive of the University of Witwatersrand (Wits). Available from: <http://historicalpapers-atom.wits.ac.za/>

communities like the ones they grew up in, and to an ideal of legal professionalism that is self-consciously an expression of a racialised class project. Expertise in “the law”, as seen in this chapter’s ethnographic example, must be understood in these terms. In short, explaining a commitment to formalism (as rule application) as a constitutive part of legal culture requires situating that culture within a professional field, subject to its own internal and external power relations.

Bolt’s (2022) analysis of the Master’s Office highlights another dynamic relevant to this chapter’s analysis. He notes that as many of the legal bureaucrats in his study are members of the previously oppressed majority, their “professional roles contend with assumptions that they will identify and empathise with recently enfranchised members of the public” (Bolt, 2022: 421). Indeed, this dynamic is similarly apparent in South Africa’s ATJ field. As we saw in Zach’s case, contending with clients’ assumptions that lawyers will empathise with them, and then clients’ disappointment when expectations are not met, weighs heavily on ATJ lawyers.

Through further consideration of the weight of this disappointment, I suggest that it be read as the tension between lawyerly adherence to rules and commitment to legal ideals.

The “pain” of ATJ lawyering

The discussion thus far seeks to show that translation in ATJ legal practice, in which lawyers evidence a commitment to rules-based thinking, is anchored in their legal training and socialisation as professionals. From one perspective, this commitment and its manifestation in the kind of translation described above appears formulaic, as a reproduction of the kind of formalism that legal scholars argue undermines the project of transformative constitutionalism (see Mnisi-Weeks, 2021; Davis and Klare, 2010, 2024). But in this final section of the chapter, I suggest that these readings obscure an equally significant element of what this process symbolises to ATJ lawyers, and thus the meanings of law that translation

refracts. An analysis of translation thus offers a novel window onto the multiple understandings of, and commitments to, law and lawyering that ATJ lawyers hold, highlighting the tension between them.

As discussed in the previous chapter, “Zoom(ing) in” in ATJ settings is premised on the belief that the law in post-1994 South Africa provides protections and possibilities of advancement for the poor. The role of organisations like PILO A in this changed politico-legal context is to ensure that these possibilities are realised: to link the real and the ideal. This was articulated in Zach’s description of the purpose of “zooming in”. Using the example of an eviction, he said:

It’s like you’ve been evicted, there was a court order...was this court order just and equitable, what are your options from now on? Or you could just find that it wasn’t lawful. In the last urgent application that we did there was a court order, but it was *so bad* that it had to be challenged...Because the purpose [of eviction law] is to prevent homelessness, and homelessness in our law is so important, it has developed so vastly and so deeply, that it is a lawful defence. Courts have said, “an eviction that leads to homelessness is arbitrary” ...So, it’s not allowed. So, what does this do? It puts obligations on judicial officers, before they make these orders, they must look at the circumstances to guard against homelessness...So, that’s how you go about it. (original emphasis)

While Zach’s example is an area of law that has transformed significantly to reflect the values and idealistic vision for the future of South Africa the Constitution espouses, it nonetheless evokes his (and many other ATJ lawyers’) more general idealistic understanding of law as morally inflected and historically conscious, evidenced in the previous chapter. In this context, his duty as an ATJ lawyer is to advance *this* conception of law by ensuring that the law is applied in practice reflects these ideals. Law is posited as a matrix of formal rules, but ones anchored in normative values and ideals. Together, they enable the poor not only to avoid the kind of formalistic legal persecution that existed under apartheid, but also potentially to improve their lives. In this way, Zach’s description of translation throws into relief that legalistic translation can be an effective way of getting progressive things done. It is also about attempting to enact the kinds of ideals of law discussed in the previous chapter.

The weight of the ideals ATJ lawyers attach to law is further evidenced by their often-crushing disappointment and sense of disillusionment when their legal practice is unable to assist their poor clients. For example, in the days following the consultation described above, Zach appeared to be carrying the weight of the world on his shoulders, clearly affected by the client's anger and disappointment. He went so far as to describe the consultation and how it ended as an exemplar of how "painful" his work as an ATJ lawyer was. Somewhat jokingly, he even said, "I mean our job is very emotionally taxing...that's why I need to go back to therapy". Expressing some regret at how the consultation devolved, he said, "I wish I had chosen other words. I wish I had been less emotional. It's sensitive issues, but you have to be less emotional, control your emotions as the person who is consulting". Zach wished he had been less emotional, but he was unable to do otherwise, precisely because of his commitment to the ideal of law "to achieve a just world".

In trying to make sense of what happened during that consultation and the tension that arose between himself and the client, Zach explained during an interview that:

[E]veryone [clients] who comes has the belief that...because there's a certain consequence that they don't like, then there must be something in law that can be done to help them, right?... *because clients don't know law and they're not professional legal practitioners*, it's easy for them to just come to the conclusion that my case has merits and that there could be something that these people can do for me on the face of it. But every issue in law has elements, in terms of the law that applies, and you look at all of those elements, you apply the law to the facts, and it leads you to a conclusion. But the clients don't have that. They don't look at the law and apply the law to their situation and get a conclusion. No. They look at their situation and they think about what their desired outcome would be. And they try and achieve that desired outcome because for them it's about solving the issue that they face... He [the client] just did not understand because he was just like, there should be something that could help me save my mother's house. (emphasis added)

Zach's reflection highlights his awareness that ATJ lawyers and clients approach clients' problems differently, applying different logics, leading to different appraisals of the "merits" of the case. As he indicates, these two approaches are borne from lawyers' legal training, enabling them to work effectively with legal rules in contrast to clients who lack this

expertise and enter consultations only with ideals of law as a tool to achieve a fair outcome. This distinction echoes Conley and O'Barr who note "the striking divergence between the approaches of lay people and legal professionals to the resolution of everyday problems" (1990: ix). In their study of "informal courts" in the United States they argue that legal professionals routinely write off the logic of lay persons because their logic is "so different from the law's" that it is "largely imperceptible to those in whom the tradition of legal analysis is deeply ingrained" (Conley and O'Barr, 1990: 60).

However, I suggest that Zach's comment reflects the opposite. A client's logic is clearly evident to ATJ lawyers, because although lawyers and clients may not share a legalistic understanding of rules, they do share broad ideals of law as a means of individual and societal improvement. Like Zach, the lawyers shadowed throughout my fieldwork often shared in the disappointment and frustration expressed by the people with whom they consulted, rooted in the seeming incompatibility between the ideals of law that both actors bring to the consultation, and the legal problem lawyers identify. In these instances, the rules that lawyers identify as requiring application are ill-suited to achieve any semblance of relief for often desperate clients.

For some lawyers, this tension between the ideals of law as a value-laden tool and as abstract rules is understood as part of the irony of their work. This was expressed by Sanele, another ATJ lawyer who has become "disillusioned" with her work in the ATJ field (see more in Chapters 5 and 6). She noted that when consulting with clients whose problems have no legal merits, but are expressed in highly moralistic terms, "we tell them, that's a moral assessment, and you know, the law doesn't work on morality". Pointing explicitly to the irony of such a statement, she continued: "although the law determines a society's morality..."

Foregrounding the disappointment that lawyers themselves experience when unable to use legal rules to realise legal ideals, lays bare not only the multiple understandings of, and

commitments to law that ATJ lawyers hold, but also the fraught relationship between them. But moreover, that they are experienced as fraught precisely because of lawyers' perception of their roles as lawyers: experts who not only command authority over the law, but also as professionals who "help people". These two understandings of what it means to be a lawyer map onto the core tension of legalism: between rules and ideals that together constitute law. This was encapsulated by Zach when reflecting on the consultation above in the weeks that followed:

...I said things that I had no business saying, but I said them because I felt them, and they were true... I felt the need to explain why I joined the law, why I became a lawyer, which is to help vulnerable people, to help and try to justify myself and the organisation in hopes of making him understand. You know, this is what we do, we help people that need help, especially poor people, to try and achieve a just world...

Shortly after he added:

But then again, the world that we live in has rules, laws that determine how we relate to stuff, how we do things...Unfortunately, we are creatures of law, we are creatures of rules.

These two statements throw into relief that underlying the normative and professional quandaries that ATJ lawyers experience in the course of their work is the tension between lawyerly adherence to rules, at least partly anchored in past frameworks; and the normative commitment to new legal ideals, oriented to remaking South Africa's future. This tension is fundamental to ATJ legal culture, and as this chapter has shown, how lawyers navigate it through the process of translation is fundamental to the concrete dynamics of ATJ work.

Conclusion

This chapter provides an account of what daily ATJ lawyering entails and the normative tensions it produces. It draws attention to a key form of legal practice: translation of clients' wide-ranging stories into defined legal cases. By detailing this practice through an extended ethnographic account, this chapter has demonstrated that alongside the ideals of law

discussed in the previous chapter, what anchors commitment within the ATJ field is a professional commitment to the adherence of rules. Drawing on Bourdieu's (1987) conceptualisation of the juridical field, I have argued that rules-based thinking, manifest in the practice of translation, is central to the performances of professionalism within the ATJ field. As my interlocutors noted, the ability to perform this process is fundamental to what it means to be a legal professional. I suggest that translation thus be understood as a means by which lawyers perform their expertise and demonstrate their authority over "the law", and functions as part of the boundary work that marks their distinction as members of a professional class. The practice of legalistic application of rules to "relevant facts" underlines that South Africa's ATJ field, like other legal fields, is marked by its own power dynamics that shape the provision of assistance, and therefore production of law in practice.

Significantly, this chapter also demonstrates that translation is normatively fraught for lawyers committed to law-based social change. Indeed, legal assistance through the application of rules and categories to the unwieldy stories that desperate clients tell does not always enable "access to justice". Rather, it often leads to the crushing disappointment of prospective clients and the lawyers with whom they consult. Drawing on the previous chapter's argument, part of lawyers' disappointment can be understood in terms of the wider stakes of ATJ lawyering which is intimately tied to the ideals of law and what it can do. Indeed, from their perspective, translation is the practice by which they can realise their ideal to "try and achieve a just world" as Zach said. I thus suggest that although the attachment to formalism may at first glance appear uncompromising, reinforcing the TC-formalism binary, in practice, the distinction between the two is not so clear precisely because legalism itself refracts wider ideals and understandings of law. The tensions and disappointment Zach experienced are evidence that these ideals remain alive in everyday legal practice.

Translation thus reveals the composite meanings that ATJ lawyers project onto law and lawyering. This chapter demonstrates a key argument of this thesis: that the normative and professional tensions that ATJ lawyers experience reflect the tension between lawyerly adherence to rules, at least partly anchored in the past; and the normative commitment to new legal ideals, oriented to remaking South Africa's future. As this chapter has shown, this tension and how it is experienced by ATJ lawyers has profound implications for the capacity of poor people to be "effectively heard" in state legal fora, and thus how one understands the place of the ATJ "gap".

I further explore this "gap" and its reproduction in the following chapter.

Chapter 4

"The Road to the Constitutional Court": Rights, Rules, Ideals, and Processes

Lining the top of the desk behind Connie, the receptionist at PILO A, sat, were at least five colour-printed brochures concisely designed to inform potential clients about their rights regarding housing, employment, and political freedoms. Similarly, at Clinic A, on the dividers that separate the employee "bull pen" from the waiting area, were multiple posters informing potential clients about what to do in the case of an eviction or unfair dismissal. In addition to these written resources, ATJ organisations increasingly engage in some kind of "advocacy" work in which they host workshops in deprived "communities" – typically urban townships – to inform individuals about areas of law (Brickhill, 2023; see also Bolt, 2022). As Buhle, a CA at PILO A, noted, these efforts are "geared to the public to inform them of their rights...because if you don't know what's due to you, you won't ask for it". An attempt to raise the "rights consciousness" of the poor in South Africa is clearly central to the work of

contemporary ATJ organisations. These efforts are based on the assumption that, for law to be a vehicle for social transformation, ordinary people need to know their rights so that they may be claimed. But as I show in this chapter, when poor people do turn to legal clinics to try claim their rights, they are often advised by lawyers not to. This chapter, which examines the work of a legal clinic in central Johannesburg, examines why.

As previously discussed, while legal clinics and PILOs operate within the same professional field, they differ in their legal practices. While PILOs engage in both clinical legal assistance and strategic litigation, legal clinics only provide the former. At legal clinics, clients and their problems are not usually treated as exemplars of – and means of addressing – wider structural deficiencies in South African law and society.¹⁴⁰ Instead, they are seen primarily as individuals with individual problems. Like “advisers” in other contexts (see James and Koch, 2022; Forbess, 2022; Forbess and James, 2014; Wilde, 2022), in South Africa, the role of legal professionals in this kind of ATJ setting is to provide expertise to help people navigate the legal system to their benefit.

Legal clinics grapple with the politico-legal consequences of the transition from apartheid to democracy that enfranchised black South Africans. Their new status as citizens has enabled people to stake a claim to rights they once did not have, widening their access to South African state bureaucracies and services. As observed during fieldwork, people approach state institutions for a wide range of reasons, including to settle labour disputes, transfer property, settle deceased estates, get identity documents (IDs), and receive social grants and basic services. A range of state institutions is now available to advance citizens’ interests. But as will be illustrated in this chapter, unfamiliarity with, and the complexity of, these institutions’ procedures often undermine poor people’s ability to use them and benefit

¹⁴⁰ This is not always the case. Some legal clinics identify a recurrent problem that poor people encounter in a particular area of law and pass it on to PILOs or even pro bono departments of private firms. The latter may launch a strategic case that attempts to deal with that problem.

from the laws that govern them. The cases that enter legal clinics thus often centre around the aftermath of this institutional engagement. These types of cases and the legal assistance offered by legal clinics will be the focus of this chapter.

In each of the consultations described below, a client has a sense that the law should be able to assist them. As in Chapter 3, these clients tell their story and express their sense of what is “fair” or “just”, and lawyers attempt to translate them through a framework of rules and categories. Rights are invoked by clients both as a defence against what is “not right” or “unfair”, and as a claim of positive entitlement about what the constitutional dispensation *should* provide. This chapter therefore takes a different view from existing scholarship that posits a paucity of rights or legal consciousness in South Africa (Hodgson, 2015; Mubangizi, 2005, 2004; Heywood and Hassim, 2008). Instead, it demonstrates that poor people *do* engage with law and legal institutions to resolve the problems they face, and they do so informed by a distinct rights consciousness. But what clients do lack, is an understanding of how to work effectively with legal rules.

This is evidenced in this chapter’s ethnographic examples which highlight a central feature of the consultations I observed over the course of fieldwork: the lawyer’s assessment that the (mis)steps taken by clients prior to their arrival at the clinic have *rendered* their case as *no longer* having merits. This demonstrates that it is precisely through a client’s attempt to access/assert their rights by engaging with the law that they end up producing accounts that are incompatible with the law. This is a central facet of what ATJ lawyers must confront. Key to what this chapter shows is how ATJ lawyers are positioned between the rights consciousness expressed by their prospective clients who expect the law to work for them, and their own knowledge that to get things done in a legal bureaucratic system requires adhering to that system’s rigid rules and processes. As I show in this chapter, analysing this

fraught position reveals that the “gap between people and the law” is produced by engagement with the law, not disengagement (Hodgson, 2015).

This chapter’s analysis also extends the account of lawyerly adherence to rules offered in Chapter 3, demonstrating that this commitment is also produced by the positioning of ATJ lawyers within a wider legal-bureaucratic field (see more Chapters 5 and 6). The chapter reveals that lawyers often operate based on their understanding of the strict formalism of legal bureaucracies and judicial bodies, informed by their experiences of engaging with them. In organisations whose mandate is to assist poor people in navigating South Africa’s legal system, lawyers are mindful of the minutiae of process and procedure. When ATJ lawyers deny legal assistance or advise clients to cease seeking legal relief because of their previous procedural missteps, they do so to prevent people from “wasting” time and money by pursuing a case that, in their opinion, is doomed to fail because of the stringency of legal bureaucratic institutions. The chapter thus demonstrates how a rigid form of legalism as rule-following is produced by the relationship between ATJ lawyers and legal bureaucracies – including lawyers’ expectations of what bureaucracies will do. This highlights that explaining the commitment to rules, and the reproduction of what appears as a formalistic legal culture, requires accounting for wider legal-bureaucratic dynamics and the positioning of ATJ lawyers within them (see Chanock, 2001; Forbess and James, 2014).

The chapter proceeds as follows. It begins by outlining existing academic debates regarding the extent of rights consciousness in South Africa, delineating how this chapter contributes to them. The next section provides an ethnographic account of three consultations observed at a labour law clinic in central Johannesburg. The final part of the chapter provides an analysis of the ethnographic vignettes and introduces further empirical data. It shows the ambiguity of what “rights consciousness” means in the context of South Africa, where law is idealised as emblematic of a post-apartheid project, and it is also a raft of rule-based

injunctions. That ambiguity helps explain how an ATJ “gap” emerges from engagement, not disengagement. Clients often undermine the merits their cases once had, through common-sense mistakes. It is often people’s concerted efforts to resolve their problems in legal fora, driven by the hopes they have placed in the law, that undermine their ability to do so.

Rights Consciousness: Rules or Values?

This chapter intervenes in debates about rights consciousness among the poor in South Africa and its implications regarding the achievement of the Constitution’s vision of a just South African society. In contrast to existing accounts, its ethnographic perspective draws attention to the distinction and interrelationship between rights as rules and processes, and an ideal of “rights” as an evocation of constitutional ideals (see James, 2007). Each is refracted in ATJ clinical assistance.

Evident in socio-legal literature and expressed among legal professionals working in PILOs and ATJ clinics, is the belief that people need to know their rights for the Constitution to be a vehicle for social transformation (Mubangizi, 2005, 2004; Hodgson, 2015; Heywood and Hassim, 2008). The dictum is that people’s knowledge of their rights enables them to be vindicated and claimed. But there is some debate about the level of rights consciousness in South Africa – how much or little – and, crucially in relation to my argument, what rights consciousness denotes.

For example, quantitative socio-legal studies that measure South Africans’ awareness of the Bill of Rights and the 1996 Constitution repeatedly assert the dearth of rights consciousness in South Africa (Hodgson, 2015; Mubangizi, 2005, 2004; Heywood and Hassim, 2008).¹⁴¹ In these studies rights consciousness is not typically defined but can be

¹⁴¹ Court judgements have also expressed this: *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* (CCT 25/12) [2012], para 39, citing *Kruger v President of the Republic of South Africa and Others* (CCT 57/07) [2008], para 23.

understood as people's awareness of their legal entitlements and their basis in the Bill of Rights and Constitution. These scholars emphasise the "gap between people and law" and how this gap undermines the constitutional project (Hodgson, 2015). Underpinning Mubangizi's argument that "[o]ne cannot enjoy or enforce rights that one is not aware of" is the implicit belief that South African law has the capacity to advance social justice if the rights held within the Constitution are made "real" (2005: 62-63; see also Heywood and Hassim, 2008: 267). From this perspective, in addition to arguing for the need to improve levels of rights consciousness or constitutional literacy, this scholarship argues for widening access to legal representation to poor and marginalised people as a means of improving access to justice. Rights consciousness raising and access to legal representation are thus coupled as integral components of achieving ATJ more broadly (Heywood and Hassim, 2008: 270).

Another argument running through this literature is that bringing people closer to the law – through improved legal literacy and access to legal institutions – will facilitate the dissemination of the *values* of human rights, the rule of law, and dignity amongst South Africans. Expressing this strand of the argument, Hodgson writes:

The Constitution envisions not only a body of law and a legal system based on human rights and constitutionalism, but a '*society based on democratic values, social justice and fundamental human rights*'. In this society imagined by the Constitution, law cannot be the exclusive preoccupation of lawyers, and the legal profession cannot have the monopoly on legal knowledge...the constitutional vision requires that a culture of human rights and constitutionalism pervades both legal institutions and society at large. (2015: 192; original emphasis)

Implicit, therefore, is the connection between rights awareness, a progressive legal culture, and social transformation.

In contrast to these arguments asserting a paucity of rights consciousness amongst the majority of South Africans, others claim that there is a "heightened awareness about rights among those who were historically denied citizenship", precisely because of South Africa's

history of constitutional transition (Miraftab and Wills, 2005: 207; see also Robins, 2008). For example, South African research on struggles for substantive citizenship highlights how a discourse of rights is mobilised for collective action either through protest action or litigation (Miraftab and Wills, 2005; Brown, 2015). Furthermore, anthropological and sociological studies, especially in rural South Africa, examining the relation between customary law and state law, further undermine the picture of a dearth of rights consciousness by illustrating everyday constitutional thinking. For example, scholars studying the law and popular norms relating to succession show that constitutional values have been absorbed and mobilised by communities despite a lack of explicit reference to the Constitution or legal rules (Himonga and Moore, 2015; Bolt, 2021a; Mnisi Weeks, 2015; see also James, 2007).

While diverse, this latter body of scholarship challenges the view that South Africans lack constitutional literacy or rights consciousness, illustrating the subtle ways in which constitutional thinking has been absorbed and expressed by marginalised citizens. These studies show that, despite people's unfamiliarity with black letter law, rights and constitutionalism as an animating political force, and a set of normative moral values exist relatively widely within South Africa.

This chapter contributes to this literature by drawing out one key implication: "rights" take on both a legalistic and a moral value dimension. Appreciating this distinction raises the question of what rights consciousness means, which in turn shapes how successfully people can claim rights. The chapter's empirical examples show that a rights-based register for engaging with problems is clearly present in South Africa. If Heywood and Hassim are correct in claiming that the "demand for legal services will be heavily influenced by the level of knowledge amongst the population of their constitutional rights", then the sheer volume of people approaching ATJ organisations is testament to a growing rights consciousness (2008: 278). But as my study shows, what is invoked in ATJ settings is an idea of rights as a set of

values and ideals, rather than set of rules with corresponding procedures. I thus suggest that the clients ATJ lawyers routinely encounter be understood as not lacking a rights consciousness, *but a legalistic consciousness*: an understanding of how legal rules work in practice.

As will be described, clients go to great lengths to have their problem addressed in a legal forum, based on a sense that the law in South Africa should facilitate “fairness” (see also Bourdieu, 1987). However, it is often in the process of this attempt that they undermine whatever “merits” their case once had. If lawyers are meant to be translators, a core feature of their work is confronting matters that are simply untranslatable, because they have already interfaced with the legal system in a way that makes them incompatible with that system. ATJ lawyers are thus caught between the rights consciousness expressed by their prospective clients, accompanied by expectations of the law; and their own legalistic consciousness of the rules, levers, and avenues, with corresponding entailments, that legal institutions operate by. Appreciating this dynamic at an ATJ clinic highlights that it is not a lack of rights consciousness or lawyers that alienates people from the law. Rather, the ATJ “gap” discussed in the thesis’s opening (Klaaren, 2019) is produced in legal encounters (see Bolt, 2021a).

In highlighting the ways in which people are alienated from law in the course of their engagement with it, this chapter builds on anthropological scholarship that explores how people attempt to use the law to get relief for the problems they face. For example, scholarship on “legal consciousness”, conceptualised as “the ways in which people understand and use the law” (Merry, 1990: 5), analyses how people frame their interpersonal “problems” as “cases” to try and gain some form of help from the courts (Merry, 1990; Ewick and Silbey, 1998; Silbey, 2005). Empirically, much of this scholarship analyses disputes in American lower courts that do not require formal legal representation. Importantly however, many of the would-be litigants in these studies, like the clients described in this chapter, are

often unable to identify the precise legal category their problem falls into or even know what the law can offer as relief. How ordinary people think about law is revealed as deeply integrated in personal experiences and social relationships, rarely reflecting legal rules and categories. This chapter shows a similar dynamic, but with implications for how we consider South Africa's ATJ "gap", noted above.

In scholarly accounts of legal consciousness, peoples' lack of familiarity with legal rules and processes can have a significant impact on their ability to acquire the help they seek. As Merry's (1990) seminal ethnography of the lower courts in the US shows, when people enter legal institutions, their understandings of their problem and its relationship to "law" is either valorised or undermined by legal officials. Some litigants may successfully transform their "problem" into a "case", and on that basis have it adjudicated in court (Merry, 1990: 88). Alternatively, the "case interpretation can lose its salience" and remain a "problem" in the eyes of court officials (Merry, 1990: 99; see also Conley and O'Barr, 1990). When the latter occurs, these officials divert the problems to a mediation forum, considering "them out of place in the court" (Merry, 1990: 1).

In this chapter, I do not attempt to produce a thick account of poor people's "legal consciousness" in South Africa. Indeed, that is beyond the scope of what this ethnography can reveal. But, like Merry's ethnography, this chapter shows that poor people who attempt to use legal fora to gain relief are constantly advised not to. While Merry and other scholars concerned with how and why people use legal fora (Silbey, 2005; Ewick and Silbey, 1995; Cooper-Knock et al., 2022; Verheul, 2016) examine this dynamic from the perspective of clients, I do so from the perspective of lawyers. The lawyer described below, Eileen, like "advisors" described elsewhere, are charged with helping poor people navigate legal bureaucratic systems to enable them to "access justice" (Forbess and James, 2014; Forbess, 2022; Wilde, 2022). But in practice, they play a key "gatekeeping" role "aimed at helping

people stay *out of court*” (Forbess and James, 2014: 83; original emphasis). I argue that understanding why this is so in the case of South Africa’s ATJ legal field, elucidates the distinction between rights consciousness and legalistic consciousness. Appreciating this distinction highlights both the fraught relationship between rules, ideals, and the achievement of “justice” in legal assistance work, and the place of lawyers in negotiating it. In turn, this approach offers a novel perspective on the nature of South Africa’s ATJ gap and the role of lawyers in mediating it.

Rights are ideals and also constituted by rule-bound process – the two are deeply intertwined, yet the question of how rights are claimed requires that they be distinguished ethnographically. I do so below.

The Labour Law Clinic

One of the legal clinics that I regularly shadowed was a pro bono labour law clinic (henceforth LL clinic) housed at the Johannesburg Labour Court. Sarah, the paralegal who oversees the day-to-day functioning of the clinic, described the LL clinic’s mission as providing “access to justice” by providing pro bono legal advice and representation to clients who would otherwise be unable to afford legal services. Like most legal clinics I observed, the LL clinic operates at two levels. It is a place where indigent clients can bring their problem and receive immediate legal advice, including assistance in drafting court documents and instructions on how to serve them. At another level, once the client has received a court date, the LL clinic operates as a clearing house, connecting clients to private attorneys and advocates. This model attempts both to address the demand for pro bono legal assistance, and to enable private firms to fulfil their pro bono obligations. But as with almost all the clinics and PILOs I observed, the offering of advice and connecting clients to a legal representative only happens when a client’s case has “merits”, and therefore “prospects of success”. As

Sarah noted, “strong matters...seldom come through”. In cases where the consulting attorney at the clinic believes the client’s case has no merits, they are even hesitant to provide the client with advice about how to pursue their matter independently.

The LL clinic is staffed full-time by two women, Eileen and Sarah, with assistance from private attorneys. Sarah, a paralegal with an LLB degree, runs the Johannesburg office. Eileen is an attorney who not only staffs the LL clinic but also runs her own practice in a nearby town.

The LL clinic operates in the following way. Clients are seen on a first come, first serve basis. Although the clinic only opens at 09h00, by the time I arrived at 08h30 there were often at least five people already in line. The client’s first port of call is Sarah. Clinics like this use a pro forma “intake sheet” to discern whether the client meets the income threshold to qualify for pro bono services, to gather the client’s details, and to ascertain roughly what their “matter” is about. This stage can take anywhere from five to fifteen minutes. Although it is not the consultation, clients nonetheless use this opportunity to furnish Sarah with their entire history, rarely missing a detail. When they are finished, Sarah selects one of the labour law categories reflected in a list of tick-boxes to represent the client’s “matter”: unfair dismissal, unfair retrenchment, Review of a decision by the Commission for Conciliation, Mediation, and Arbitration (CCMA), enforcement of CCMA ruling.¹⁴² Sarah’s ticking of the box marks the first stage in which the client’s sometimes wide-ranging story is distilled into a concise legal category. At the end of the intake stage, clients are told to collect their Labour Court file (if they have one) from the court’s registrar and then wait in the lobby until it is their turn to consult with either Eileen or the private attorney staffing the clinic.

¹⁴² The Commission for Conciliation, Mediation and Arbitration (CCMA) is a dispute resolution forum for labour-related issues that replaced the Industrial Court. See further below.

The clinic is a longish, narrow room located in the building housing the Johannesburg Labour Court, metres away from the registrar's desk and the physical court roll. At the time of fieldwork, reminders of the COVID-19 pandemic were all around: a hand-sanitiser dispenser at the entrance to one's left, and straight ahead Sarah's desk protected by clear Perspex. The rest of the room was furnished functionally: a printer/photocopier, and four round desks, each with four chairs, divided along the diameter by Perspex. The reason for the Perspex was that the LL clinic had just begun doing its consultations in person. At the height of the pandemic, consultations took place either over the phone, or via email. In this set-up clients came into the LL clinic's office, and with Sarah's help furnished the attorney with their story and court file. The consulting attorney often took a few days to review the client's file and then informed Sarah about their determination of merits and next steps. It thus fell to Sarah to inform the client about whether their case was being taken on. Sarah noted in passing that she far preferred the in-person clinics since it relieved her of having to deliver bad news to clients and face either their wrath or disappointment.

On the day in question, a cold Tuesday in May, I arrived at the Labour Court at 08h30. No one was in the LL clinic office, so I waited in the Labour Court lobby. At about 09h15, Eileen emerged from the security line just outside the elevator that takes one up to the clinic's office. Once Eileen had made her way to me, she told me that Sarah was staying home to care for her sick daughter. Moreover, as Sarah had been unable to secure any other attorneys to staff the clinic, it would just be Eileen doing consultations that day. I followed her into the office where she set herself up at Sarah's desk. She found the client sign-up sheet, a stack of intake sheets, and went outside to the waiting room to pass them around. A couple of minutes later she returned and seated herself at Sarah's desk with the sign-up sheet. After about ten minutes of small talk, she called in the client at the top of the list and the clinic began.

An Attempt to “Bounce Back”

The second client we saw that day was a black man of about fifty. As he entered the office, he handed Eileen his Labour Court file and then sat down. Eileen’s approach to consultations is brusque. She is a white Afrikaans woman in her forties and has been practising law for over fifteen years. Unlike Zach, her professional habitus is shaped by a career in private practice – not PIL work – and the socioeconomic privileges that come with being a white Afrikaans woman in South Africa. Consultations with her are relatively formulaic and without many pleasantries. She generally prefers to get straight into the “nub” of the issue and is adamant about sticking to the “facts” and not being led by clients’ histories. Partly for this reason, and not unlike ATJ lawyers in other settings (see Berthenthal, 2016: 270), she often begins consultations not by asking client’s what their story is, or something equivalent, but by reading their court file.

In this instance, after the client handed Eileen their file, she flicked from section to section, and after about six or seven minutes, she broke the silence: “why are you in this court?” Her abruptness was striking. In contrast to other lawyers I had observed, she immediately displaced herself as a source of assistance, instead centring the Labour Court and the law it presides over. In response, the client proceeded to tell Eileen that when the pandemic began, he signed a “voluntary retrenchment” agreement at his work. He was quick to note that he signed retrenchment documents because he was “under pressure, under duress” from his employers. Without enquiring into the “duress”, Eileen asked for the form he had signed. He rifled through the small rucksack he had brought in and presented Eileen with an A4 piece of paper. She took it and read it over. After about two minutes she asked what happened after he had signed the papers. The client again rifled through his bag. He produced another set of documents which he handed to Eileen, telling her that they contained the terms of his severance package. As she read them over, the client alleged that he was not

being paid what he was “owed”. Without enquiring into the nature of what he meant or what happened, Eileen asked him to hand back the retrenchment agreement that he had signed. As she re-read it, she asked when he was retrenched. “In 2020, with COVID”. “When in 2020?” The client gave a date in May but quickly noted that he signed “under duress”.

Eileen’s next question sidestepped the allegations of duress, turning to whether he had gone to the CCMA. In labour-related issues, as part of the reform of South African labour law, institutions like the CCMA and other bargaining councils are the first port of call. These councils are “mandated to promote social justice and fairness in the workplace by delivering ethical, qualitative, innovative and cost-effective dispute resolution services”, mediating disputes between employers and employees (see also Klerck, 1998; RSA, 1995).¹⁴³ In theory, these institutions are designed to be accessible to the most economically marginalised since they do not require, and often prohibit, the assistance of legal professionals. But key to understanding the influx of cases to ATJ organisations is that institutions like these often produce a morass of procedures and requirements, undermining their effectiveness for the poor (see also Bolt, 2021a). The irony is that people’s attempts to engage with ostensibly accessible legal institutions is what produces their need for legal assistance.

Responding to Eileen’s question, the client said that he had approached the CCMA, but they had “referred” him to the Labour Court.¹⁴⁴ Once again, he delved into his bag to retrieve another document and handed it to Eileen. From my vantage point I saw the CCMA’s logo on the front of the document. Eileen read it over and asked, “but why did you withdraw the matter?” The client answered: “the commissioner put it as a withdrawal because we couldn’t get to an agreement”. Eileen followed up: “did the commissioner give you a referral

¹⁴³ See Department of Employment and Labour website: <https://www.labour.gov.za/About-Us/Pages/CCMA1.aspx>

¹⁴⁴ The Labour Court and the CCMA are two interlinked institutions in South Africa’s labour dispute resolution system. The Labour Court is a specialised superior court in South Africa. When matters cannot be resolved at the CCMA, CCMA commissioners may “refer” them to the Labour Court. In instances where a party is dissatisfied with a CCMA outcome, the Labour Court also has the power to “review” the decisions.

to this court?” Initially the client answered “yes”, but after clarification from Eileen about what a referral is, he realised that the answer should be “no”.

This kind of misunderstanding emerged in numerous consultations. Lawyers would ask what they thought was a straightforward question, typically using a term that had legal significance, and the client would respond based on their common-sense understanding of the term. As in this case, “yes” would repeatedly turn into “no”, and “no” into “yes”. The implications of such confusion were significant in shaping the course of the consultation. In this instance, Eileen sighed and said: “the problem is that you signed the agreement, consenting to this amount. You have not set out your matter properly, and you are also two years late”.¹⁴⁵

With a slightly confused look and an air of exasperation, the client again mentioned that the CCMA was closed during 2020 because of the pandemic. He added that he had also been hospitalised during that time, which was why he was only bringing the case now. Eileen simply asked when he was “incapacitated” and if he had a doctor’s note. The client gave a rough estimate of the month, but nothing specific, and no doctor’s note. Eileen noted that the CCMA resumed its work in 2020 after an initial shut down. On that basis, the client’s “excuses for the late application are not valid” and would not be accepted in a court.

The client took this in and then took a deep breath. He said that he felt as if his employer had “ripped [him] off”. Using a metaphor of a tennis ball, he said, “you know when you throw a tennis ball against a wall it bounces back? I am now bouncing back”. Part of his bouncing back was “asking for the full amount of what I am owed” (original emphasis). The client was about to continue, but Eileen found a gap to interrupt: “but you can’t because you signed for it [the lesser amount]”. Expressing frustration, the client said that if he had not signed for the lesser amount that had been offered, “then I would’ve got nothing!”

¹⁴⁵ In most areas of South African law there are strict time periods within which applications may be made.

Eileen responded: “I understand, but you should have gone to the CCMA for unfair retrenchment process. Instead, you signed, took the money, went on with your life, and then two years later you brought it”. Almost immediately the client responded, “but there was COVID!” Eileen calmly acknowledged that there was a pandemic which interrupted the process but stressed that this was not a “valid excuse” for condonation – the first step if the case were taken to the Labour Court.¹⁴⁶ She explained that the client was claiming damages in the region of R2 million and duress, and so really, he should take his matter to the High Court. “This court is not going to give you the relief you are seeking...This court does not know what you want. This court is not going to rescind your retrenchment”. She reiterated that there was “nothing” in the client’s “papers” that specified why the damages the client was claiming amounted to R2 million. She also noted that the respondents had filed papers requesting such specification.

In response to Eileen, the client argued that his employer’s response was also “a duress”. Exasperated, Eileen, responded, “we can’t assist you because you don’t have any prospects of success. That’s what I’m trying to explain to you”. The client reiterated “the duress” and that he had worked for his employer for many years and “deserved” more than he had received in his retrenchment package. He added, “what they’re doing is not right”. “I hear what you’re saying”, responded Eileen, but I don’t think you’re hearing me. You need to set out why you are seeking this money and why this court has jurisdiction, because you’re seeking damages”. With wide, glazed-over eyes, the client spoke: “I want to continue, can you give me advice?” Eileen repeated her position: the client had signed the retrenchment agreement for a specified amount which he had received, and ultimately the Labour Court did

¹⁴⁶ Condonation from a court is required when a legal application is instituted outside of stipulated timeframe. In essence, the court is asked to condone the late application. Only after condonation is granted can the substantive legal application be instituted.

not have jurisdiction over his matter because he was seeking damages. Her advice was to cease pursuing the matter.

As if to draw a line under the consultation, Eileen took out an A4 sheet of paper with a list of the names, locations, and contact details of four other pro bono legal clinics in Johannesburg. She concluded the consultation: “try them, maybe they’ll have a different opinion”. The client took the paper and collected the rest of his documents. Although he looked downcast, he left the office saying, “thank you for giving me time to discuss this matter”.

“Skelm” legal tactics

A little while later, there was a knock on the door. The clients were two black men who both looked in their fifties, though one of them looked more robust and younger than the other. Eileen greeted them and asked if they had brought the documents she had asked for. From this I gathered this was not their first meeting. The younger looking client nodded, and like the clients before him, rifled through his backpack. After a moment, he found what he was looking for and handed the documents to Eileen. Again, I saw the CCMA logo. The room went quiet as Eileen read over the documents.

After about ten minutes’ silence, Eileen looked up from the CCMA award and asked the clients, “did you sign the document?” Looking slightly confused, the younger one answered hesitantly that he thought so but was not certain. Unsatisfied, Eileen asked again, “did you sign the contract?” For some reason, this formulation of the question seemed clearer to the client, and he responded in the affirmative, now seeming surer of his answer and more confident in it. Eileen sighed. From her tone, this was clearly not the answer she had hoped to hear. She said plainly, “but then technically, your employer *did* comply with the order, so he’s not in contempt” (original emphasis). She explained that since the clients had signed the fixed-term contract – the document she had asked them to bring to the clinic – their employer

had complied with the CCMA ruling, and reinstated the clients, but not on a permanent basis as they had been before. Both men furrowed their brows, looking confused.

Through Eileen's explanation to them, I came to understand their case. They had been employed on a permanent basis but were dismissed. They subsequently took their matter to the CCMA and were successful. The commissioner ruled it an "unfair dismissal" and ordered their reinstatement. Consequently, their employer reinstated the clients but did so on a two-week fixed-term contract. The clients had signed this contract, evidently having not read through the details, and assuming incorrectly that the contract mirrored their previous, permanent one. Through this process, their employer had effectively reinstated them, just not in the way the clients had expected or understood. He had thus technically complied with the CCMA award. The two-week contract had recently come to an end, and their employer had not extended it or given them a new contract, rendering the clients unemployed once again. Based on their common-sense understanding of what had happened, they concluded that their employer had not complied with the CCMA commissioner's decision and consequently sought legal assistance to pursue a contempt application at the Labour Court. This was when they first approached Eileen who had asked them to return to the clinic with the employment contract they had signed.

With the clients sitting before her once again, Eileen explained that based on the two-week contract they had signed, and because they had returned to work, she could no longer assist them in pursuing a contempt application. As she put it, the employer had "technically" complied with the CCMA ruling. Moreover, she explained that she could not assist with an unfair dismissal application because the clients had not been dismissed: the contract simply came to an end.

The clients remained silent in response, the look of confusion growing. After a few minutes' silence, Eileen asked, "do you understand?" The younger client responded quietly,

“yes, but it’s tough”. “I know it’s tough, but now we can’t do a contempt application. Basically, your matter is dealt with. You must look for other work”. In framing it as such, Eileen cordoned off their legal problem from its wider implications: their ability to support themselves and their families, and the indignity they conveyed. Her words were met with further silence. Then, for the first time during the consultation, the older client spoke, “[b]ut we were recalled on a permanent basis”.

Although she had been through the CCMA award already, Eileen dutifully returned to it, flicking through it and pausing once she found the page she was looking for. Looking up, she told them that the award did not specify what type of contract must be offered to them, and therefore the employer was technically entitled to offer them a fixed-term rather than permanent contract. She said, “what your employer did was legal, but it was *skelm*”. *Skelm* is an Afrikaans word that has made its way into colloquial South African English, and roughly translates as “sly”, “underhanded”, or “crooked”, carrying with it an implication of deviousness, but also smarts. Eileen used this word to characterise their employer’s success in finding a way to abide by the rules formalistically, while managing to undermine the ends those rules were meant to achieve: the permanent employment of the clients, protected by the Labour Relations Act (LRA), the key legislation regulating labour relations in South Africa. Indeed, what further marked the employer’s actions as *skelm* was that he had managed to leave his former employees without further legal recourse. As Eileen stated, the clients’ “matter” had been “dealt with”. The link between rules and ideals of justice was plainly broken in this instance.

We sat in silence, the clients seemingly unable to come up with a response. Breaking the ice, Eileen offered them the same A4 document with the names of other ATJ organisations and asked whether they wanted to get a second opinion. In a hushed tone, the younger client said, “yes”, but noted that only Eileen could help them because they could not afford lawyers’

fees. He noted that he feared they would get similar advice at the other law clinics and so trying to find other legal representation would be a waste of time and money. Nonetheless he took the document from Eileen and then both slowly got up to leave.

Once they had left the room, Eileen and I saw that the A4 document had been left on one of their chairs.

After a few moments' silence, Eileen expressed sympathy for the clients given how "shocked" they were, with the consultation clearly not going the way they had expected. But she held fast to her legal opinion that the clients no longer had any merits on which to pursue a case against their employer since the CCMA award did not stipulate what kind of contract the clients be offered. She noted that her sympathy stemmed from the fact that the clients had not been dismissed, but had been retrenched and offered a compensation package by their employer. Instead of taking the package, they took their employer to the CCMA for unfair retrenchment, which found in the clients' favour. It was on the basis of this decision that their employer offered them the fixed-term, two-week contract which they signed, unwittingly assuming it resumed their previous employment status. So rather than being retrenched with at least some compensation, the clients' signing of the contract rendered them unemployed without access to further income or legal protection. The harsh nature of legal arrangements was laid bare.

After this short exchange, Eileen got up to make herself an instant coffee in the office's kitchenette, a kettle on a desk, noting we would resume in five minutes.

"Maybe there's something you can do to help me?"

Soon after Eileen returned, there was a soft knock on the door. A younger black man, perhaps in his thirties, entered. He was more casually dressed than the previous clients, wearing ripped jeans and a hoodie. He, too, like almost all clients that come into this clinic,

was carrying a backpack that appeared weighed down by documents. He took a seat in front of Eileen and waited. She acknowledged the client but took the next five to ten minutes to make calls, answer text-messages, and check her emails. The client sat patiently in silence. After a few minutes, Eileen put her cell phone down, picked up the client's "intake sheet" – which, in Sarah's absence, the client had filled in – and gave it a once over. I glanced at it. Other than the client's name, little else had been filled in. On days when the clinic was particularly busy, clients were often asked to fill in their intake sheet themselves. But they were rarely able to do so without requesting some clarification from Sarah about what each section required. Their inability to navigate this form independently was often revealed in consultations as indicative of their difficulty in navigating other state bureaucracies and their forms.

Today, after looking through the mostly empty form, Eileen looked up and asked the client, "why are you here today?" "I went to the bargaining council, but they said they don't do it. I think it's an unfair dismissal" he responded. In response to this client's suggestion that he may have been unfairly dismissed, Eileen asked the client for his "papers" as if to evaluate this assessment of the problem. Like the client before him, he rummaged through his bag and presented Eileen with a small stack of documents. She began leafing through them. While doing so, the client began to speak, telling Eileen his story, clearly searching for the "right combination" of legal and relational terms that would get Eileen to assist him (Merry, 1990: 9).

He began by stating that his employer had "dismissed me during lockdown". According to the client, his employer had told him and other employees to "stay home". Over time, as lockdown measures eased, his co-workers were "called back", but he was not. He told Eileen that he managed to gather some money so that he could buy airtime to call his company's "HR manager" to ask why he had not been called back to work. He was told that

“the company does not have any money”. Upon hearing this the client called his labour union to tell them what had happened and ask for assistance, but after this initial call to them he heard nothing further. His impression was that they were handling the matter.

While the client was speaking, Eileen had not lifted her head from his documents. At this point the client paused and asked, “maybe there’s something you can do to help me?” Eileen did not address any part of the story the client had told her. Instead, she simply asked, “what do you want this court to help you with?” Once again, she foregrounded the institution that the client would ultimately be engaging with. In response, instead of mobilising the legal category of “unfair dismissal” as he had previously, the client returned to his story. He raised his voice in exasperation and said to Eileen, “my company didn’t even call me!”

But before he could continue, Eileen interjected, telling him what his papers – a CCMA award – revealed to her. She said, “the version you put to the CCMA makes it seem like you absconded”. She explained that the way that he had filled in his CCMA application presented a scenario in which he simply stopped showing up to work, not that he had been dismissed or retrenched. As such, his employer was not obligated to compensate him, nor could the employer’s conduct be evaluated in terms of what was procedurally and substantively fair to the client according to the LRA. Upon hearing this, the client immediately responded, “but I’m not happy with the commissioner...” Before he could continue Eileen interjected again, maintaining control of the consultation, not allowing the client to widen the scope of his story: “the commissioner dismissed the case because you didn’t *prove* that you were dismissed” (original emphasis). She continued, “you basically fired yourself”. A look of disbelief came over client’s face.

After a few moments’ silence, he again returned to his story, telling Eileen that his employer had told him to “stay home”; that he had not been called back to work when others were; that he had made multiple attempts to contact his employer’s human resources (HR)

manager; and that he had tried to get support from his union. He emphasised the difficulty in achieving even those attempts at contact with both his union and HR manager, since without work during the lockdown, he could neither afford to buy airtime, nor travel to work. Upon hearing this, Eileen returned to the documents, again leafing through them as if to corroborate the client's story with what was recorded in his "papers". She looked up from the file and told the client that this information would have helped his application because it was "relevant". In so doing she suggested that the applicable rules of law were expansive enough to accommodate the contextually specific difficulties faced by the poor in South Africa. The ideals of law which arguably moved the client to seek legal assistance in the first place, were therefore reaffirmed by Eileen in this moment.

But Eileen then told the client that because he had failed to include this information in his initial application to the CCMA, it could not be introduced at this later stage of proceedings. She explained that the information the commissioner relied on was a "version" in which the client stopped showing up to work, not that he was dismissed. On that basis, the commissioner could not make a ruling on the fairness of the dismissal, since according to the "facts" there was no dismissal. For *this* reason, the "prospects of success" of a Review Application that sought either reinstatement or compensation – what would have been the next legal step in response to an unfavourable outcome at the CCMA – were slim.

As Sarah had previously explained to me, a Review Application is distinct from an Appeal. A Review involves a Labour Court judge going over the CCMA proceedings, including audio transcripts and written submissions to understand how the commissioner had made their decision, and to assess that decision-making process. It interrogates the procedure of the CCMA commissioner in relation to the facts presented to them (RSA, 1995). As put by another lawyer at a different legal clinic, "a review speaks more to the proceedings rather than the facts". Hence Eileen explained to this client, that central to a Review Application is

making the case that no “reasonable” commissioner would have made that decision given the evidence before them.

The nature of a Review Application is also partly why lawyers in this clinic pay such close attention to their potential client’s file, rather than their “story”. As lawyer’s see it, in the case of a Review Application, the only facts that are relevant to the client’s “case” are those that have already been presented to the CCMA or other bargaining council and that are recorded in their file. This mirrors Bertenthal’s ethnographic analysis of an American Appellate Legal Self-Help Clinic, where she describes how lawyers remain “disengaged” while clients relay their stories (2017: 963). In her study, lawyers’ disengagement is because the “only facts that matter in a legal appeal are those that have already been presented to the trial court and recorded in its files” (2017: 963, 964). These examples illustrate that the nature of legal procedures, and the bureaucracies within which they operate are central to determining the scope of relevance, and therefore access to potential relief. At issue is not the person’s experience that is the basis of a claim, but the procedure they followed to make the claim.

Eileen began explaining to the client the implications and the difficulty that his exclusion of supporting evidence from his original application posed. As she explained, in a Review Application one is not allowed to “bring new facts”. The information that had been brought to the consultation that day effectively had nowhere to go legally. It was to remain part of the client’s personal history, but it could not become part of his legal claim. Significantly, this was not because his story did not have substantive “merits”, but because the claims that were the basis of his merits had not been included in the original procedure. As such, these claims *became* irrelevant through their exclusion from “judgement compatible” documents (Latour, 2010: 75).

By this stage in the consultation, the client's face had fallen. He had evidently misunderstood what had been expected of him at the CCMA, and more significantly, he had misread the implications of his own actions. With his head bowed, he said quietly: "I'm here for help. Maybe you can tell me what I can do?" Eileen responded: "there's nothing I can do. Our offices can't help if there are no prospects of success. But I will give you a list of other organisations".

Despondent, the client said, "I don't have any money". He said that he had been unable to access his Unemployment Insurance Fund (UIF) because he did not have the correct documents and was unable to request them from his employer because he was "scared" of him. Assuming the client meant he could not afford the legal assistance of the organisations she would suggest, Eileen responded that the other organisations would help for free, and that they may be of a different opinion to her. She also advised the client to go to the Department of Labour since that is the institution that should be able to assist him to get the necessary documents to access his UIF payments. Looking downcast, he said quietly, "I must continue because I have no money". Acknowledging this, Eileen explained that pursuing a Review Application would be costly since it requires the audio recordings from the original CCMA hearing to be transcribed, which is expensive. She emphasised the client's poor prospects of success and attempted to discourage him from spending what remaining money he had. The client nodded as if he understood. Nonetheless, he took the A4 document with the names of other ATJ legal clinics and put it in his backpack. He thanked Eileen and left.

"The road that leads to the Constitutional Court"

What "rights consciousness" means

As evidenced above, poor people in South Africa *do* in fact attempt to access the law and its institutions. Typically, they do so based on a sense of what is "right", "fair", "not

right”, or “unfair” with respect to their situation. In the examples above, each client had the idea, or the “consciousness”, however tentative, that the law should be a site of relief for their problem (Merry, 1990: 37). Indeed, in all three examples, clients use explicitly legal language in an attempt to categorise their problem: “voluntary retrenchment”, “duress”, “unfair dismissal”.

This illustrates that clients at this clinic and others do not *only* use the language of “social relationships” to describe their problems; they couple this language with the language of the law. Yet they do so without a sufficient grasp of what implications this language carries, and the logic of the law that it denotes (Merry, 1990: 37; see also Conley and O’Barr, 1990). As Merry notes, and as reflected in this chapter, “there is a good deal of...flailing around for the right combination of concepts and explanations which the third party [the legal professional] and the other side will accept” (1990: 9). Indeed, clients’ attempts to squeeze their problems into a legal category, however unsuccessfully, can be read as their attempt to formulate these problems in a language that may be heard. As Pirie notes, the abstractness of legal categories is what “lifts legal claims beyond the particular context, projecting them onto a larger plane in which statements and principles—about justice, rights, equality, or gender—may have general recognition” (2022: 323). It is arguably in pursuit of these principles, or ideals, that people approach lawyers and legal institutions. While clients may not be able to cite relevant legislation or articulate the right which they are invoking, they are nonetheless making an appeal to the law because it is considered a medium through which a just outcome can be reached.

I thus argue that clients who enter ATJ legal clinics express a rights consciousness and ideas about themselves in relation to law that resembles the kind of constitutional thinking Hodgson describes, namely the law as a “source of power for people in their daily lives” (2015: 190). They therefore challenge the idea that the distance between the law and ordinary

people is because of a lack an awareness of rights (Heywood and Hassim, 2008; Mubangizi, 2004, 2005; Hodgson, 2015). Instead, they suggest that the meaning of “law” and “rights” in South Africa is twofold: an in-principle entitlement related to moral ideals, and a delineated framework of rules and remedies. The space of a consultation brings these two meanings into sharp relief, highlighting the distinction between a *rights consciousness* held by many clients, moving them to seek legal relief; and a *legalistic consciousness* possessed by lawyers that underpins their advice to clients.

Such a rights consciousness was evidenced throughout my fieldwork in how clients who approached ATJ organisations would often tie themselves in knots as they attempt to access their rights. They would travel long distances, spend significant amounts of money, and engage many state and private institutions to have their story heard in a legal forum (see also Bolt, 2021a). This was evident in the stacks of documents that clients brought to consultations, and also the stories they told about going from “pillar to post” to have their story heard by a legal institution. People’s efforts were further highlighted when I asked Sarah and Eileen what the most common kind of case was that came to the LL clinic. Both responded that it was CCMA Review Applications. Clients had already gone to the CCMA in their attempt to access their rights, but they emerged with unsatisfactory outcomes. Their presence at the LL clinic is thus part of a further attempt to have their rights vindicated by the law – despite the financial and time costs associated with pursuing legal action. Typically, the reason they gave for seeking a Review Application was that what had happened, both before and during the CCMA hearing, was “not right” or “not fair”.

For ATJ lawyers and legal professionals who are attuned to the rigidities of legal bureaucracies, prospective clients’ rights consciousness (but lack of legalistic consciousness) produces a key difficulty of their job. This was expressed by Sarah in an interview following

the day described above. She explained the difficulty of engaging with clients who, in her view, felt as if they were “entitled” to a legal solution to their problem. She said:

We have entitled people that come through and think like, “I’m entitled to it, I found you guys, so work miracles.” And when you tell them, that legally, there’s nothing we can do, they scream.

Reiterating the rights awareness that she has experienced at the clinic, she noted:

I had a client saying, “take us to the Constitutional Court”. And I’m thinking they know all these things [rights etc.], but do they *know* them? They don’t. They know I can fight for my rights at the Constitutional Court, but do they know the road that leads to the Constitutional Court? They don’t...People think they know, but they don’t know... So when it comes down to reality, what do they know? And it turns out to be the wrong stuff. (original emphasis)

Sarah’s remark not only highlights the presence of a rights consciousness amongst clients she encounters, but how this is often divorced from any sense of how to work effectively with legal rules. Hence, in her view, they know “the wrong stuff”. A similar sentiment was expressed by Arthur, the attorney from PILO A whom we encountered in the previous chapter:

...with the kind of work that we do, we represent people who don’t even know what the law is. They hear the Constitution on the news, but they don’t know what it looks like.

While Sarah may consider many of the clients she encounters as entitled, I suggest this be read as a form of rights consciousness, but where rights stand in as ideals of law that prompt action (see Mubanginzi, 2005; Hodgson, 2015). Indeed, both her remarks and Arthur’s highlight that some form of constitutional thinking has been absorbed by their clients – at least a broad expectation that relief is available. But additionally, they draw attention to the interconnected, yet simultaneously distinct nature of the relationship between rights as ideals, rights as rules, and rights as legal processes. Clients routinely invoke their rights in legal clinics and at PILOs, often through the language of “fairness”, claiming an ideal of law that should protect them from arbitrary power and secure their entitlements. Some clients take this

a step further and will use explicitly legal language to express this ideal, showing some familiarity with specific principles and categories. But as evidenced, legal processes remain alien and indeed alienating to many of these clients. The stories they told in their consultations, and the assumptions they made about how the law related to those stories, did not reflect how the law worked in practice according to the consulting lawyer.

This chapter demonstrates that not only is a rights consciousness apparent in South Africa's ATJ legal field, but that it is distinct from a legalistic consciousness. This distinction matters ethnographically because many peoples' rights consciousness is precisely what prompts them to engage with law and legal bureaucracies, but in ways that undermine not only their ability to claim their rights independently, but also a lawyer's ability to assist them in doing so at a later stage. Negotiating *this* dynamic is key to ATJ lawyers' work and is central to elucidating the complexity of the so-called gap between ordinary people and the law.

I advance this argument below by focusing on a key feature of the ethnographic examples above, and many other consultations I observed over the course of fieldwork: namely, clients' production of demerits.

The Production of Demerits

As evidenced above, when ATJ lawyers declare that a client's case lacks merits, it is not only because a client's story lacks legal relevance. Rather, it is often because clients lack "evidence" to transform their assertions into legal facts (see Latour, 2010: 75-76). Clients' failure to produce evidence was one of the most common ways in which they undermined the merits of their case. Sarah echoed this, reflecting on why so many clients are turned away from the clinic and advised to cease pursuing legal action:

I think for most clients it's sad because they think that just by stating it, it's enough. But they don't supply the evidence... But stating it and substantiating

what you said is two different things. Because we deal with evidence. *Courts* deal with evidence. (original emphasis)

Sarah's remarks echo Bertenthal, who notes that "[w]hatever "reality" exists in law is limited to that which can be found in law's files" (2017: 964; see also Forbess and James, 2014). This further echoes Latour's insights in his ethnography of a French apex court, the Conseil d'État (2010). Latour (2010) usefully identifies the centrality of documents to the production of legal realities, arguing that they play a key role in constituting legality as they are one mode in which the social, the economic, the political, the historical are stitched together, to produce law. In illustrating this feature of law, Latour provides an example of a case involving the father of a young man who was killed on ski slopes because the local town had not provided sufficient notice to the public of the dangerous weather conditions. Illustrating the role of documents in constituting the father's predicament legally, Latour writes:

If through some cruel thought experiment, we were eliminating all these institutions and the services of the police, meteorological institutes, hospitals and insurance companies, the continuous vigilance of passers-by, practitioners and elected officials, there is nothing, absolutely nothing with which the [legal] file could have been composed. We would be left with nothing more than the pain of a father who was absent at the death of his son and who, from the lofty words and second-hand accounts, has shed tears in failing to understand who killed his son. (2010: 76)

In other words, without documents that constitute "evidence", the stuff that "courts deal with", clients' stories cannot be transformed into "cases" with "merits".

Beyond indicating that many clients fail to produce evidence, thereby producing the demerits of their case, Sarah's statement also reveals the fraught positioning of ATJ lawyers and paralegals in the kinds of ATJ encounters described above. While ATJ lawyers and paralegals are in theory positioned to enable people to access and navigate legal institutions successfully, to do so they must draw on assumptions about what "courts deal with" (see also Forbess and James, 2014). They thus stand between the rights consciousness of their clients and their own acute awareness of what is required to work in and through legal bureaucratic

institutions. Hence legal professionals' preoccupation with what is in a potential client's file. As a lawyer (or paralegal) delimits a client's experience to what is in their file, they are in part occupying the role of the fictitious judge or legal bureaucrat, assuming the stringency of these actors and the institutions they work for. Buhle, the CA at PILO A mentioned in this chapter's introduction, made this explicit, noting that central to a consultation is "learning how to elicit the kinds of answers that create the kinds of papers that courts will agree with". And indeed, in the previous chapter Zach repeatedly asked his client questions he "knows the courts will ask". A similar dynamic is described by Forbess and James in their analysis of legal "advisors" in Britain:

[T]he adviser's job, as Robert [the advisor] put it, is to provide perspective, to "refocus them [the client] on what the tribunal will actually do, because their [clients] ideas are often based on complete misconceptions. [The judge] will want to know very specific things..." (2014: 83)

As clients produce the demerits of their own cases, then, lawyers and paralegals often assess their circumstances by assuming what judges or bureaucrats will make of them. The result sharpens lawyers' inclinations to deny legal representation. Hence Forbess and James write: "providing advice is also a gatekeeping practice" (2014: 83). The misstep by the first client was his signing a retrenchment agreement, thereby relinquishing his right to pursue further legal action and receive the pay-out he believed he "deserved". But the client did so because he needed the money and felt pressured by his employer to sign, not knowing that this relinquished his right to pursue what he believed was "fair" or "right" at a later stage. In the second case, the clients signed a document without reading the details, assuming the party from whom they had received the document was acting according to the law and in good faith. The law and good faith were assumed to be commensurable, reflected in the clients' looks of surprise at hearing that the actions of their former employer could at once be both legal and "skelm". And finally, the last client's misstep was his omission of evidence in his CCMA application (something not explicitly requested on the CCMA application form), and

his failure to realise that he needed to *prove* to the commissioner that he had been dismissed – something which seemed so obvious to him. He stated his facts, which according to Eileen were legally relevant, but failed to construct these facts as “evidence” in his CCMA application because he did not know he had to do so.

The nature of South African labour law, with its strict time limits, reflects the tension between the idea of rights, their specification as rules, and the frameworks through which they are protected, in particularly stark terms. From the perspective of ATJ lawyers, failing to abide by procedures undermines one’s rights (as delineated in rules). The irony of this is that after the advent of democracy, labour law was one area that was deliberately overhauled to address the “extreme inequality and discrimination that characterised the apartheid labour market” (Clarke, 2004: 558). The effort was spearheaded, among others, by prominent anti-apartheid public interest lawyers (Klerck, 1998). Labour law in democratic South Africa was ostensibly designed to be fairer to employees, giving greater rights and protections to workers and organised labour (Klerck, 1998; Devereux, 2020). Indeed, Klerck argues that labour law is distinct from other democratic-era legislation in that, “[u]nlike the bulk of the laws passed by the new government, the Labour Relations Act (LRA) is not geared primarily towards the provision of ‘things’ but rather concerns the transformation of power relations” (1998: 86). A key “purpose” of this Act is to “advance economic development, social justice, labour, peace and the democratisation of the workplace” to give effect to Section 27 of the Constitution which includes the rights to food, water, healthcare, and social security (RSA, 1995, Section 1 (a)). This legislation, as well as others that fall under the remit of labour law, arguably reflects a sensitivity to both South African history and the capacity of law to structure power in society. As argued previously, this sensitivity is present in a range of other areas of law and is central in the opening pages of South Africa’s Constitution.

In its text(s), this area of law arguably evokes the kinds of rights-thinking that poor clients appear to invoke, in which law is not only a system of de-contextualised, uncompromising rules, but also values and principles directed towards achieving fairness in society. When attorneys ask potential clients for their reasons for missing deadlines or following procedures incorrectly, clients routinely cite financial difficulties, personal circumstances, and honest misunderstandings. Implicitly, these factors constitute the kinds of reasons that clients think *should* be accepted as valid in a court or legal forum. And yet, in legal practice these reasons were often dismissed by attorneys because, in their opinion, they would not be “accepted” by the relevant legal or legal-bureaucratic institution.

It is thus unsurprising that scholars writing on access to justice in South Africa often note poor people’s legal illiteracy as justifying why they require legal assistance when they bring a case to court or to a legal forum (Budlender, 2004; Heywood and Hassim, 2008; Dugard, 2008; Brickhill, 2005). Legal assistance in this formulation facilitates ATJ as it enables people unfamiliar with the language of the law and the strictures of legal process to be “effectively heard” by state legal institutions (Dugard, 2008: 216). But this chapter’s ethnographic accounts illustrate that even when clients manage to make inroads into ATJ by finding and then making their way to institutions that should facilitate their claim to their rights, often at great difficulty and expense, they are often turned away by ATJ lawyers because they have done something wrong. Law, in a broad sense as rights and part of a wider constitutional project of “transformation”, retreats from view in this engagement, and is replaced by legal institutions that are rigidly rule-bound and uncompromising.

This chapter therefore challenges the argument that it is both a dearth of rights awareness and a lack of pro bono legal assistance that undermines the project of transformative constitutionalism and access to justice. Instead, it shows that there is some “vertical” absorption of rights consciousness in South Africa that manifests through the

“horizontal” attempts of ordinary people to claim their sense of what is right (Engel, 2012; McCann, 2012). What people often do lack, and which is a necessary accompaniment to rights consciousness, is an understanding of how to work with legal rules in practice. This explains why the categories of legal insider and legal outsider are hardened by people’s very attempts to transcend this distinction.

Conclusion

This chapter has ethnographically explored the nature of “rights consciousness” in South Africa and its implications for conceptualising the ATJ “gap”. In contrast to scholarship that posits a paucity of “rights consciousness” this chapter has shown that in the ATJ field in Johannesburg, clients often enter legal clinics with a clear sense that what happened to them is “not fair”, “not right”, or “wrong”. In so doing they invoke an ideal of post-apartheid law as a means through which relatively powerless citizens can claim entitlements and resist being taken advantage of by more powerful actors. Rights in these instances relate to wider post-apartheid ideals of an equal and just society. In many cases, clients try to actualise these rights by approaching legal and legal bureaucratic institutions for relief, thereby demonstrating their rights consciousness. But what they come up against, conveyed to them by an ATJ lawyer, is the weight of legal bureaucratic procedure. Small, common-sense mistakes are enough to undermine whatever “merits” a client’s case once had, and therefore the legal protections they had been entitled to.

The chapter demonstrates that rights are both ideals and constituted by rule-bound process. As illustrated, appreciating this distinction ethnographically allows one to see another: the distinction between rights consciousness and legalistic consciousness. I have argued that while many ATJ clients possess the former, they often lack the latter. ATJ lawyers are positioned between the two. They are routinely approached by poor people who have

expectations of the law as a site of relief and a means of achieving “fairness”, but as lawyers they remain critically aware that to help clients effectively claim entitlements in a legal bureaucratic system requires adhering to that system’s legalistic rigidity. This is fundamental to ATJ work and helps to explain why, through peoples’ very attempts to claim their rights and act on them, they are cast outside of the law and its protections. This chapter, like the rest of the thesis, again demonstrates that appreciating analytically that law is constituted by both rules and ideals opens a vista on the onto the practices of ATJ work and its concrete effects.

Chapter 5

Making the System Work: “Defensive” Access to Justice in Practice

Thus far this thesis has used the lens of “legalism” to examine the work of lawyers in Johannesburg’s ATJ field: the commitments that underpin their work, the ideals they attach to it, and how these shape the concrete practice of legal assistance. In the final two chapters I take a step back to examine the wider political and legal-bureaucratic context within which contemporary ATJ work takes place. I do so through the emic binary of “positive” and “defensive” ATJ work in public interest litigation organisations (PILOs). As the final chapters will demonstrate, examining this binary opens a window onto the frustrations and difficulties ATJ lawyers face against in their efforts to advance social change. These frustrations themselves help to elucidate the ideals and commitments that shape ATJ lawyering – its legal culture – and their concrete effects, demonstrating how they are produced by the very conditions of legal practice. This chapter examines “defensive” ATJ work.

Tim, a senior lawyer at PILO A, described the work he imagined he might do as a public interest lawyer:

Public interest work is about two things: it’s about individual people and making a difference in their lives fairly immediately; and then at a broader structural, systemic level, contributing to broader efforts to transform society. And I was hopeful that I would be doing some of both of those.

As he notes, and as discussed in Chapter 1, while contained under the banner of ATJ or public interest work, there are distinct forms of ATJ legal practice. The previous chapters show that a key form of ATJ practice is providing legal help to individuals to achieve immediate legal relief. Typically, this requires formally applying existing laws to claim legal entitlements or is

a defensive response to a rights violation. The underlying rationale of this ATJ work is that “[a]nyone seeking to improve the legal status of the poor must, at some level, deal with the individual, microlevel legal problems of poor clients” (Kilwein, 1998: 184). It “is viewed as a means of alleviating immediate suffering and is sensitive to individual clients” (Shdaimah, 2016: 58). Another key form of ATJ legal practice is *strategic litigation* that seeks to transform or, as public interest lawyers put it, “advance” the law, and in so doing facilitate structural transformation in society.¹⁴⁷ This form of legal practice in South Africa responds to an ideal of transformative constitutionalism (TC) that aspires to push the boundaries of accepted legal arguments and materials to realise the Constitution’s aspirational vision. ATJ lawyers typically consider these two kinds of access to justice problems in terms of the binary between “positive” and “defensive” ATJ work.¹⁴⁸

Both positive and defensive ATJ are recognised by ATJ lawyers as integral to facilitating the constitutional ideal of law as a means of advancing both individual and societal improvement. Yet most ATJ organisations typically prioritise one form over the other. While legal clinics like the one described in the previous chapter are often tasked with providing defensive ATJ, PILOs generally dedicate most of their resources, or what ATJ lawyers call “capacity”, to positive ATJ. Their priority, as they put it (see Chapter 6), is to create systemic change through strategic litigation. As this prioritisation indicates, and as I elaborate below, within PILOs defensive ATJ work is simultaneously recognised as important and is explicitly and implicitly undervalued. In this chapter, I examine how and why. Doing so both engages with the morally fraught nature of ATJ lawyering, and reveals how defensive work has itself changed over time in South Africa.

¹⁴⁷ I use the terms strategic litigation and public interest litigation (PIL) interchangeably in this chapter.

¹⁴⁸ As noted in Chapter 1, the terms of this binary have roots in the anti-apartheid legal struggle. Elsewhere, lawyering for social change has also been organised by the binary between clinical legal assistance and strategic litigation (see Feldman, 1995).

In its examination of how defensive work is understood and valued by ATJ lawyers working in PILOs, this chapter takes “capacity” – a key concept used in ATJ organisations – as its opening focus. Amidst what is experienced by ATJ lawyers as an unrelenting tide of clients seeking assistance to defend their rights, capacity is used as a rubric to make and justify morally fraught decisions about who should receive legal assistance. Examining the contestations that “capacity” elicits builds on the previous chapters, highlighting the multiple commitments ATJ lawyers hold: to professional prestige, to “helping people”, and to the ideals of post-apartheid law capable of widespread social change. This chapter shows that defensive ATJ is undervalued in broader debates about law and social change, partly because of how it is positioned in relation to positive ATJ. The latter is framed as advancing “social change”, while the former amounts to “putting a plaster on a wound”, as Tim remarked.

I further examine how defensive ATJ work is devalued by analysing the *nature* of this work. As will be discussed, most defensive cases that overwhelm ATJ organisations are those that concern the enforcement of existing rules and legal bureaucratic procedures. Formalistically applying the rules can yield progressive outcomes immediately, and formalism has become an essential part of what constitutes progressive lawyering. But I argue that much defensive work has shifted from the legal assistance that even practitioners in Johannesburg’s legal clinics expect to undertake. Instead, government institutions appear to depend on this work as a basic condition for fulfilling citizen entitlements. ATJ organisations have been successful in driving both strategic litigation that has broadened and deepened citizens’ socio-economic rights entitlements from the state (the focus of the next chapter), and in defensive litigation that has demanded these entitlements. Both have changed bureaucratic procedure itself, weaving legal assistance into its very operation.

I suggest, therefore, that defensive ATJ be understood as having become part of South Africa’s wider legal-bureaucratic “infrastructure”. Social scientists and science and

technology studies (STS) scholars have shown that a key feature of infrastructures is that they are often “invisible”, despite being significant and powerful structures enabling the operation of other systems (Larkin, 2013: 336; see also Star, 1999). Building on this insight, I argue that one way to understand how defensive ATJ is devalued, is by its being taken for granted in its systematisation. In other words, both the state and ATJ lawyers take it for granted that defensive ATJ is necessary for getting things done in a (legal) system. This is key to the frustrations that many PIL lawyers experience. Many ATJ organisations are overwhelmed with clients requiring legal-bureaucratic assistance, affirming the significance of this work. Yet, even as ATJ lawyers acknowledge its importance, defensive ATJ is undervalued through its de-prioritisation by organisations: it is viewed as necessary part of keeping a system running, rather than work that transforms the system in ways that *advance* wider societal goals. In this way, the concept of legal infrastructure enables a better understanding of a key pillar of ATJ work, and how it is experienced by ATJ lawyers.

The chapter proceeds as follows. The first two parts of the chapter explore the unevenness of how defensive ATJ is valued in PILOs. The first part examines how defensive ATJ work is understood and valued in PILOs, through analysis of “capacity” and the contestations it elicits in PILOs. Here I show that while some ATJ lawyers use capacity to justify the prioritisation of positive ATJ, others assert that defensive ATJ should be central to the work of public interest lawyers. In the second part of the chapter, I extend this analysis using an ethnographic vignette that illustrates the formulaic nature of defensive ATJ. Here I show how the formal application of rules can yield progressive outcomes, and thus why defensive ATJ work can be experienced by ATJ lawyers as both professionally “boring” and yet “personally rewarding”. Building on this, the final part of the chapter takes a closer look at the nature of ATJ lawyering and examines the wider legal-bureaucratic dynamics that underpin the kinds of defensive cases that PILOs are often asked to take on. The onslaught of

these cases highlights how legal intervention is increasingly required simply to make a system of rules work in practice. Defensive ATJ lawyering has thus become a significant feature of the connective tissue that sustains coherence in South Africa's legal system.

This chapter thus provides a wider view of the legal-bureaucratic context in which ATJ lawyering occurs, and which shapes its very nature.

Prioritising Positive over Defensive ATJ: “Capacity” and its Contestations

In Defence of Positive ATJ: Achieving “Societal Change”

As will be discussed in the next chapter, the ideal type of public interest litigation (PIL) uses litigation to “produce a legal decision which will affect the conditions or circumstances of a whole class or group” (Budlender, 1988: 322). As Carly, an attorney working at PILO C, put it: “we don’t want individual change, we want societal change”. While some PILOs in South Africa employ a combination of positive and defensive ATJ practices, many remain resolute in their identity as *public interest litigation* organisations and the ideal type of ATJ lawyering associated with it.

Lawyers in PILOs that prioritise positive ATJ take consultations with walk-in or increasingly “email-in” or “call-in” clients, offer legal advice, and occasionally write lawyers’ letters or refer clients to legal clinics.¹⁴⁹ But, despite conducting these consultations, these organisations rarely take on individuals with defensive matters as clients unless their case offers a pathway to strategic litigation. This was made explicit by Laura, a senior attorney at PILO C: “if winning the case will not allow me a strategic angle then I would rather not do the case”. Senior lawyers like Laura acknowledge the importance of providing what they

¹⁴⁹ During fieldwork many PILOs used “remote” consultation practices in accordance with pandemic-related guidelines.

term “clinic work”, but they also emphasise that organisations simply do not have the “capacity” to do both clinic and strategic work (see Brickhill, 2023).

Brickhill notes in his 2023 report of the public interest sector that PILOs have found it increasingly difficult in recent years to secure funding for walk-in legal/defensive services (2023: 16). Tim describes this trend and his experience of dealing with it:

[Walk-in services are] the most difficult to fundraise for because it’s not headline grabbing, it doesn’t involve some national flagship social movement, so it’s not sexy in that way. It may not even result in a case, it’s just helping one person, and it’s difficult to count, it’s difficult to report on, and the [PIL] sector is not always very good at counting and reporting. Again, because of capacity, because you need people to do that.

As indicated, when used in South Africa’s ATJ field, “capacity” can be understood as the combination of financial and human resources that enable the provision of legal assistance. In organisations where funders implicitly prioritise “sexy” cases that have the potential to transform the law and thus conduce to structural change in society, and where (senior) lawyers recognise their skillset as being rooted in their ability to be innovative and strategic, defensive matters are considered best left to legal clinics. As Charlie, an attorney who formerly worked at PILO B, said: “[i]n the sector, it’s always going to be a bit of a capacity question...you can’t have the front of house also doing all of the creative, strategic thinking”. This perspective was elaborated by Tim, when recalling the argument a former colleague made for denying defensive legal assistance to individuals regarding urban evictions. He described his colleague’s view on the role of PILOs in South Africa’s ATJ field:

[He] was then a very experienced attorney... and one of the country’s leading housing lawyers... His view was we [PILO C] don’t have the capacity to take all of those individual, urgent evictions. If we do take them, we’re just going to drown in them, we’re not going to have the space to think about the bigger strategic interventions. And in any event, an entity like Legal Aid South Africa [LASA] should be doing those cases. The law is clear now, there is no reason why PILO C, with its limited resources, needed to be playing the role of LASA and taking every eviction in all the big cities.

The above reflections highlight that beyond indicating concrete resource constraints, capacity also provides a discursive rubric for making constrained decisions in the ATJ field. Key to the calculus is a consideration of the substantively different kinds of legal practice that constitute positive and defensive ATJ. But as also indicated, woven into this calculus is a framing of positive ATJ as requiring a particular kind of *specialised* legal expertise that involves creative and innovative legal arguments that reach beyond the formalistic application of rules, and is implicitly part of the work of transforming the professional legal culture more broadly (see also Shdaimah, 2016: 59). In the accounts above, PILOs and PIL lawyers are positioned to do *this* work. In contrast, when the law is “clear”, legal clinics should be tasked with applying, and thereby enforcing, the new rules. Implicit in the above reflections is the assertion of professional prestige associated with PIL as well as the view that the kind of “change” defensive ATJ produces is not quite enough when “bigger picture strategic interventions” are possible. The latter was made explicit by Terrence, a candidate attorney (CA) when describing the rationale of strategic litigation:

Ideally you want to do all of it, but you can't, it's just not possible. As a lawyer you can only do so much. And because you're doing pro bono work, you're getting an influx of a lot of people needing help. And that's kind of the underlying rationale for having a strategic firm – because you have law clinics already that do their thing. But you also have strategic litigation firms because the point is to create systematic change. You don't want to keep playing whack-a-mole because you can help one hundred clients with their legal issues, but it's not going to stop the legal issues from coming. So why not try and work towards having systematic change so that the influx of legal issues is dramatically decreased... The strategic approach... is to try and actually change the system itself, to change the laws, or change the way the departments work and stuff like that so that you don't have those problems coming up all the time... The reality is you can't do everything. So I think every organisation has its role to play.

Like Charlie and Tim, in the face of capacity constraints, Terrence points to the organisation of the ATJ field as justifying his organisation's denial of clinical legal assistance to poor people. But his account also emphasises the core principles of PIL, and that by locating the immediate needs people face within wider structural dynamics and dysfunctions,

the prioritisation of longer-term goals at the expense of providing immediate assistance can be justified. In other words, in explaining the rationale of positive ATJ in the form of strategic litigation, Terrence invokes a moral justification for turning away needy clients. As indicated, central to making this moral argument is devaluing defensive ATJ in relation to positive ATJ, by contrasting the kind of “change” each can produce. While defensive ATJ is reduced to playing “whack-a-mole”, positive ATJ is framed as facilitating “systemic change”.

But I suggest that the apparent need to make this moral justification is itself significant. It indicates that despite ultimately devaluing defensive ATJ, lawyers like Terrence nonetheless recognises its necessity and importance. I explore this below.

When Capacity is Not Enough

For some lawyers, the justifications for prioritising positive ATJ to the neglect of defensive legal assistance do not entirely hold. This is especially true when they are routinely confronted with indigent clients who seek their assistance for matters that affect the basic conditions of their lives: their employment, homes, immigration status, and access to basic services and social welfare. As Terrence notes:

There’s too much pressure on the PIL sector. Every single PIL firm and law clinic is literally up to the top of their teeth with being inundated with cases. There’s a lack of capacity and there’s just not enough legal professionals in the sector in the country to alleviate the legal problems that are coming to our doors.

As observed throughout fieldwork, ATJ organisations face a constant stream of potential clients who do not distinguish between different kinds of access to justice projects, and thus ATJ organisations. They simply approach organisations whom they know provide free legal assistance with the idea that the “unfairness” they have experienced might be addressed using legal mechanisms (see Chapter 4). For lawyers who explicitly chose to enter the ATJ field because of their ethical commitment to “helping” poor people, and who hold the view that post-1994 law in South Africa can be used to improve their lives (see Chapter 2), turning

needy clients away because of a lack of capacity is ethically fraught. This was expressed by Terrence during an interview when asked about how he experienced his organisation's prioritisation of positive ATJ work. Although he noted that his "preference would be to focus on strategic litigation" because of the value of generating "systematic long-term impact", he also commented:

But at the same time, you can't neglect people that have issues now. I mean, at the end of the day, people do deserve justice, and people do need access to that justice, so you can't just abandon them because you have this strategic grand plan.

Echoing Terrence, Tim, who has litigated numerous Constitutional Court cases, noted that a reason to continue providing walk-in services stems from "the ethical value of providing excellent legal services to indigent people, quite apart from their membership in flashy movements or unions or organisations".

In part because of the recognition of this ethical value, ATJ lawyers sometimes experience the inability to provide defensive legal assistance to the indigent on account of capacity as disillusioning. This view was expressed by Sanele, a senior PIL lawyer who has worked in a few PILOs and has also litigated in the Constitutional Court. As discussed in Chapter 2, Sanele joined PILO C directly after graduating from university with "the specific intention of helping people". She locates the origins of her "disillusionment" about the PIL sector in her experience as a CA there. She recalls that when she began working at PILO C, she was part of a cohort of CAs who "just wanted to take everything on, to the annoyance of our director [of the PILO]". Indicating the different priorities that junior members of staff have to senior members, Sanele notes that the desire to "take everything on" was "because we [CAs] weren't thinking about things like resources and people's time. We just wanted to help people". But she also notes that part of the inclination to take on all the walk-in cases with merits was because she and her fellow CAs were "at the coalface, because you are the one who will first consult, *you* are the person people are meeting" (original emphasis). Zach

echoed this sentiment, offering the following when asked how he was finding his first year working within the ATJ field:

Consultations have been very challenging for me. They've been challenging because, you know, when you start this job... you want to help everyone. You don't realise that you can't actually help everyone, and that there is only so much that you can do to help, and that's when you refer someone somewhere else to where they can get help, when you can't offer them help. So that's been the biggest difficulty, telling my heart that I can't assist this person and convincing them that I can't assist them...

If not quite disillusionment, his account expresses a kind of disappointment at not achieving the ideal of helping people in desperate need that motivated his and other ATJ lawyers' entry into the ATJ field. Saying that he must "convince" both himself and his potential clients that he cannot help them, highlights the ongoing work of justification that PIL lawyers engage in, and the moral ambiguities they face. Capacity is constantly invoked as the framework that helps them morally justify difficult and constrained decisions. Yet what Zach's, Sanele's, and Terrence's accounts highlight is that their justification for non-assistance is constantly undermined by their encounters with clients who require "help" in defensive matters that have little strategic value. A view of the ethical importance of defensive ATJ work amongst many ATJ lawyers is thus buttressed precisely because of its apparent necessity.

Evidencing this, Sanele recalls how she went "rogue" as a CA, after months of being told by her superiors that their organisation did not have "capacity" to take on any of the walk-in clients with whom she was consulting. After consulting with a group of people who had been "thrown out [evicted] at like 4am" and being told by her superiors, "no capacity, not interested, blah, blah, blah", she decided to take on the case without getting approval from her supervising attorney or following any other organisational procedures. In so doing she potentially risked her employment. She explained her decision, "I was just fed up because at that point I felt like we weren't taking any more cases, and the constant *excuse* was capacity" (original emphasis).

Sanele's desire to use the law in the ways she had expected to when she entered the ATJ field underpinned her decision to violate her organisation's rules. Her commitment to helping poor people in desperate situations chafed against her professional obligations, itself underpinned by her organisation's devaluing of defensive ATJ work. But she also recognises that the tension between positive and defensive work that she experienced as a CA, and later as a senior attorney, is one dating back to the field's inception in the late 1970s. Sanele noted that this tension was personified in the figures of George Bizos and Arthur Chaskalson – legal legends in South Africa – and their different approaches to pursuing social change through law. Describing how she understood the tension and evidencing the professional lore that exists within the ATJ field she said:

I know that the LRC (Legal Resources Centre) is like one of the major strategic litigation joints [organisation] but internally there had been this ongoing debate. Apparently, it began from the time of Chaskalson and George Bizos when they started the LRC.¹⁵⁰ There was always a debate between the two. Chaskalson was convinced that impact would best be achieved at a strategic litigation level. So, broader impact etc. Whereas George Bizos just wanted to help everyone that walked through the door. And I don't think that tension ever subsided really, despite the subsequent generations that would go through the LRC's door. I think that tension remains. Even in other organisations, there's a recognition for immediate need and immediate assistance at an individual level, whereas there's the more strategic, more sustainable, more long-term [approach]... should we get this type of precedent, larger numbers of communities would be assisted.¹⁵¹

According to Sanele, the implication of pursuing only strategic litigation is that “our [PIL lawyers'] only duty in seeing people is to look for that test case”. Consulting with clients is thus a means to an end rather than an end in itself. Sanele expressed discomfort with this approach since it requires instrumentalising vulnerable people. She articulates the how the practices of positive ATJ, even if justified by a lack of capacity and a particular theory of law-based social change, can be experienced as morally and politically fraught.

¹⁵⁰ George Bizos was not a founder of the LRC, but he was counsel in many of the cases the organisation litigated both during apartheid and after its demise.

¹⁵¹ Further pointing to the lore within this field, in an interview with Tim, he too used George Bizos's and Arthur Chaskalson's different approaches to ATJ to illustrate the tension between doing positive and defensive ATJ.

The discussion thus far shows that the concept of capacity refracts how lawyers place different value on various forms of ATJ work, and how these differences are a source of moral and professional debate within the field. Below, I provide an ethnographic account that further illustrates this.

“What does capacity actually mean?”

Although often used by lawyers during fieldwork, the precise meaning of “capacity” was rarely explicated. Instead, it was used to indicate that organisations were unable to take on a client or commit to seeing a case – even a simple defensive one – through to completion, because of broadly-defined resource constraints. When capacity was invoked by lawyers in this way, it was generally not challenged by their colleagues. There appeared to be a tacit agreement amongst ATJ lawyers that capacity was a legitimate justification for the denial of legal representation to often desperate people. In rare moments, this agreement fell apart. One such occasion was at a meeting I attended in August 2022 at PILO B, where Sanele now works.

The structure of PILO B is divided into four projects, each of which is staffed by a mixture of legal professionals, advocacy experts, community organisers, and researchers. The composition of the teams running the projects reflects the changing nature of post-apartheid PILOs, whose emphasis is no longer solely on pursuing legal action to advance the constitutional project. Instead, they are also concerned with significant advocacy, research, and social movement-building efforts to enable vulnerable communities to defend themselves against rights violations without requiring a legal professional. This structure reflects an awareness of the lack of capacity of many legal clinics and PILOs and that political pressure by social movements is essential to ensure that legal victories are translated into tangible change. Echoing the insights of law and social change scholars (see McCann, 1994;

Scheingold, 2004 [1974]; Rosenberg, 2008 [1991]), Sanele aptly noted, “the law alone is not enough”.

PILO B is part of the new generation of post-1994 PILOs. Its offices are mostly open plan, with only the Director’s and the legal team’s offices, the boardroom, the small kitchenette, and bathroom closed off from the main space. This main space is separated into distinct zones by floor to ceiling plywood bookcases filled with South African histories, socio-legal texts, and “advocacy” resources. On one side of the divide are rows of desks shared by colleagues. On the other are a set of couches where both formal and informal meetings take place. The material arrangement of the space expresses an informality and low-key ambience that marked PILO B as distinct from the other PILOs and legal clinics I accessed, which conveyed a more conventional legal professionalism. The collegial relationships at PILO B further distinguished it from other organisations I shadowed. Marked by a casualness and honesty they seemed to transcend the professional, suggesting intimacy and deep friendship, rooted in a shared sense of organisational mission. But as I came to learn, these relationships belied deep disagreements about the relationship between the practices of the organisation and its fundamental commitments.

The meeting at PILO B I attended was for one of its projects, “resisting evictions and displacement” (RED). The meeting began with a jubilant tone. It was a warm spring day, and the conference room was flooded with late afternoon sun. Members of PILO B sat around the plywood conference table drinking coffee and sharing Jelly Tots, Smarties, and other sweets from the nearby shop. As Sheila, a senior attorney, explained to me earlier, up until the meeting in question, a central pillar of the RED project was the walk-in legal clinic staffed by attorneys and a paralegal, Claire. A key agenda item to be discussed was the future of the clinic. When this agenda item was reached, Claire, took charge. In her address she noted that prior to the meeting it had been resolved that the organisation would no longer take on new

clients. She noted that the legal department's rationale was a lack of "capacity". But rather than accept capacity as a sufficient explanation and justification, Claire took the opportunity to probe what precisely was meant when her colleagues invoked this term to justify not taking on new clients.

As the person in the front line of the clinic, and charged with turning potential clients away, Claire's frustration was palpable. Expressing her frustration, she posed this question to the lawyers in the room: "what do you actually do if you are not taking cases? What does capacity *actually* mean? And what are *we* [the organisation] doing if we are not able to take on walk-ins?" (original emphasis). Her final question highlighted a key tension between the expressed goal of this project – resisting eviction and displacement – and the means of achieving it, given that legal assistance in the form of representation was no longer offered to individual clients. The question also arguably sought to highlight that the work of the organisation was meant to be driven by political and ethical commitments that transcended professional ambitions of litigating cases in the Constitutional Court (which PILO B has now done twice). A commitment to helping people in immediate need, as well as fighting institutional and systemic injustices, were *both* meant to be core to the organisation's work. When Claire finished, silence befell the room. The three lawyers present were visibly taken aback by both her line of questioning and its implications.

The initial responses varied. One lawyer uncomfortably joked that he had "nothing to do". Sheila offered to detail how she spent the hours of her workday, which was hastily turned down by her colleagues. And the third, Sanele, sat stone-faced. Attempting to cool rising tensions, the Director suggested that the question about the future of the legal clinic should be tabled for a separate meeting.¹⁵² But months after this meeting Sanele confirmed during an interview that the organisation had made the decision to close the clinic to focus its

¹⁵² By the time this meeting was held I had left the field.

legal department entirely on strategic litigation and supporting wider advocacy efforts. She viewed the claims of a lack of capacity by her colleagues as “a cop out”. She expressed her wider frustration:

I hear the capacity issue, but for me, capacity is a choice, because there comes a point where, ultimately, it's asked of the individual whether you can foreseeably take this thing on, and that's based on your own assessment of your capabilities, but it's not just capabilities or time, it's preference. And what I've seen expressed a lot by some colleagues – and again, here's the power play, the power dynamics about race, class, and how long you've been there as well, it's not spoken about at PILO B – but some colleagues are comfortable to outrightly express their preference to not do certain types of matters... they'll be busy, but also, it's not a thing. So, for me, that's the part that's not being interrogated and sometimes I feel like the capacity thing is a cop out. And because I feel that way, I've taken on housing clinic cases, because no one else is going to do it. I think I was the only one to do a matter last year – *the whole year, the whole year we did one eviction case*. So I appeared at the RHT [Rental Housing Tribunal]. So RHT, so two matters at the RHT and then one eviction at the Mag [Magistrate's] Court. Whole year, whole year. So, ask yourself. (original emphasis)

Sanele's remarks do not simply illustrate the power relations and professional ambitions that run through PILOs. Rather, as in the vignette above, she indicates how the term “capacity” does significant discursive work to paper over the tensions between professional ambitions, the moral weight of ATJ work, and individual motivations for joining the field – which as discussed in the previous chapters, all intersect to render this work normatively fraught.

As the first parts of this chapter show, in some moments, capacity is successfully deployed as a shared language to justify why desperate people are not helped by those who could provide it. But as evidenced above, when frustrations and disappointments boil over, capacity becomes a focal point of competing commitments that converge in ATJ practice. It becomes a lightning rod for the frustrations, tensions, and even contradictions that ATJ lawyering elicits, precisely because of the ideals and personal stakes attached to law and legal practice (see Chapter 2).

In Claire's call for the meaning of capacity to be made explicit she drew attention to the preferences and questions of willingness involved in whether to allocate time to routine,

defensive cases which have no impact beyond the individual(s) involved. Claire's pointed questions to her colleagues brought to the fore simmering organisational and interpersonal tensions centred on the relationship between the organisation's mandate, its practice, and its underlying ethical values. Her questions can thus be understood as an attempt to challenge the devaluation of defensive legal assistance within her organisation. The scene described above lays bare how different legal professionals, even within the same organisation, value defensive ATJ work differently. For some in this meeting, capacity was not accepted as a justification but regarded as an excuse.

The following ethnographic account of defensive ATJ work in practice further probes the uneven ways in which defensive work is experienced and valued amongst ATJ lawyers in PILOs.

Defensive ATJ in PILOs: "Boring" but "Personally Rewarding"

While the discussion above indicates that most PILOs remain committed to positive ATJ, there are some that continue to provide defensive assistance. PILO A is one such organisation. Within the ATJ field, this organisation is renowned for litigating several "landmark" strategic cases that have transformed numerous areas of South African law in progressive, pro-poor directions.¹⁵³ When I began fieldwork there in February 2022 I expected to observe "the groundwork", as lawyers put it, that results in these kinds of groundbreaking cases that transform South African law. But while I was able to observe the everyday practices that constitute ATJ work in PILO A, they were not for "landmark cases". Rather, most of the cases that I observed involved a client (including groups of clients) approaching the organisation with a relatively simple legal problem, but one that required the assistance of a legal professional. Often, this problem involved the violation of a client's

¹⁵³ To ensure that my interlocutors and the organisations that I shadowed remain anonymous I will not specify these cases.

rights by private or government actors. The role of legal professionals in such cases is not to “advance” the law but enforce already-transformed law through the formalistic application of relevant rules.

The defensive nature of much of PILO A’s work was confirmed by Tim, the organisation’s Head of Litigation. Although he noted that the litigation team under his leadership attempts to pursue three or four strategic cases per year, he estimated that “seventy to eighty percent” of their current work is “defensive”. For some lawyers who work at this organisation, that PILO A bridges the divide between strategic litigation and clinic work is a source of pride. For example, although Khanya, a senior attorney at PILO A, recalled being drawn to PIL because of the “landmark” cases she learned about at university, she also said:

...[T]he one thing I love about PILO A, we do strategic litigation, but I don’t think we just take on the sexy cases. We will do your good old eviction that will not develop the law in any way and is just one person.

Khanya’s reflection demonstrates the ethical commitment most PIL lawyers have to “help people” or “make a difference” in the lives of poor South Africans. This commitment was demonstrated throughout fieldwork when I encountered exhausted attorneys and candidate attorneys (CAs) who had spent their evenings drafting court documents and frantically preparing for urgent appearances in the Magistrate’s Court. Often, they would lament half-jokingly about how exhausting their work was, warning me never to become a lawyer. After finishing their lamentation, I would ask what kept them at the organisation and in the ATJ field given these challenges. In almost all cases they replied with some variation of “a passion for social justice” or “passion for human rights”. Given the immediacy of the issues faced by their clients, social justice invoked in these moments referred to the ability of poor, powerless people to have their rights and dignity vindicated, and not to be taken advantage of by more resourced opponents. The enforcement, not transformation, of rules enabled social justice.

But as I learned, assisting individuals in defensive matters is not only an expression of ethical commitment to ATJ; for many, it is what *sustains* their commitment to the longer-term project of transformative constitutionalism. As Khanya said:

So on Monday, I had a meeting with the committee of the community that we [PILO A] relocated after two urgents [sic]...they were like, “we want to thank you for assisting us...We now feel like we’re living in Jo’burg [Johannesburg], because where we were, we lived there because there was shelter. But now we have a flushing toilet. We don’t have to use one toilet as a whole community”. It’s those moments out of the one thousand other frustrating moments that make this work really nice, and seeing the tangible change in real life, not the fancy landmark case that sets precedent.

Illustrating this sentiment more widely within the ATJ field, Charlie said:

...[S]ome of that front line lawyering [clinic work] is what kept me going...Being able to respond rapidly, immediately to something, to *someone*, and their circumstances, for me on a personal level, kept the fire going. To be able to say, “hey, those people are still in their home because of my intervention”, or “this person was able to have an alternative plan made because of my intervention”. You see that intervention being meaningful rather than hopefully in the future [it will become meaningful] ... (original emphasis)

Both Khanya and Charlie highlight that the significance of defensive ATJ work is the material difference it makes to the lives of the poor. While not requiring innovative legal arguments that push the boundaries of accepted legal form, defensive ATJ work nonetheless conduces to the TC ideal of law as a tool to achieve an increasingly, if incrementally, more just South Africa. It is the ability to achieve this kind of material change that sustains their commitment to their work because it demonstrates its “tangible” impact. As in “advice” and ATJ settings elsewhere (see Forbess and James, 2014; James and Kock, 2022; Wilde, 2022; Kirwan, 2016; Shdaimah, 2016), lawyers like Charlie and Khanya are attuned to the fact these efforts are not going to “change the system” as Terrence put it. But these defensive interventions nonetheless make real the ideal of law as a tool to improve lives, albeit in small ways.

The commitment to helping people by taking on legally straightforward and defensive matters within public interest organisations is not without its tensions and disappointments.

As noted in Chapter 2 and as indicated above, many PILOs continue to be associated with prestige because they are often on the forefront of constitutional legal transformation. For many ambitious lawyers there is a tacit expectation that they might be involved in litigating “landmark” cases that reach the Constitutional Court (see more Chapter 6). For this reason, practising routine, defensive legal assistance is often experienced as disappointing in relation to their professional ambitions.

This was expressed by Arthur, an attorney at PILO A, about a month into my fieldwork, during a car journey to a consultation with clients. The case itself was not likely to be a legally “landmark case”, but it was politically noteworthy.¹⁵⁴ During the drive to the consultation, Arthur and I began getting to know each other, discussing Arthur’s work at PILO A, his prominent career in student politics, and how he had been drawn to Pan Africanism and Marxism as political ideologies. As we took an off ramp onto the highway that would take us from Gauteng into the North West Province, Arthur said something that took me by surprise: “and you know, this work is kind of boring”. I was sure I had misheard him given the reputation of strategic litigation as highly complex and innovative (Brickhill, 2021, 2014; Marcus and Budlender, 2008). But Arthur confirmed that his experience of practising “human rights law” at PILO A was “boring”. Intrigued, I asked why. Attempting to clarify, he said that he found his work “personally rewarding” because it enabled him to help poor people who would not otherwise benefit from the law. But he said that during his time working at PILO A he routinely worked on “the same cases”. As he put it, “you get a case [client], a right has been violated, and as PILO A your job is to intervene and defend that right. Legally, there’s nothing complicated in that”. In other words, Arthur was describing the routine, formulaic, and defensive nature of much of his work and the tension this produced relative to his professional expectations of doing “landmark cases”. Given this kind of

¹⁵⁴ The specifics of the case and the consultation will not be discussed as they are not relevant to the argument advanced here.

disappointment, as well as his criticisms of the 1996 Constitution and the “compromises” he thought it was premised on (see Chapter 2), I asked what his motivation was for remaining in the sector. “Passion for social justice”, he said simply.

While Arthur was the only one of my interlocutors who was bold enough to call their work “boring”, both the sentiment of professional frustration he expressed, and the dynamic of defensive cases he described, were more widely expressed by my interlocutors. Although the extent of this sentiment varies, some PIL lawyers have increasingly come to view their work as ensuring that existing laws are not violated, and that basic bureaucratic processes are followed in accordance with the law. But as indicated by Arthur, Charlie, and Khanya, this kind of legal assistance does often yield positive material change for individuals, and is thus valued.

A few weeks after my North West trip with Arthur I accompanied him on another to the Western Cape winelands. In a case that he tellingly described as “a straightforward eviction”, I observed a consultation that illustrated exactly the kind of uncomplicated legal assistance he had told me about. The object of the trip was to consult with members of a small labour union with which PILO A partners. These kinds of partnerships are relatively common amongst PILOs. Like during apartheid, when the Black Sash offices throughout the country would filter their clients to the LRC, PILOs today often partner with community advice offices (CAOs), labour unions, and other advocacy groups. As Tim put it, these relationships enable PILOs to be responsive to “issues on the ground” by being accessible to ordinary people who come to legal NGOs through their social, political, and work-based networks.¹⁵⁵

¹⁵⁵ PILOs are often affiliated with “partner organisations” including social movements, civic organisations, human rights NGOs, and trade unions that funnel their members to PILOs (Brickhill, 2022). In theory, this structure enables PILOs to support, but not co-opt, grass-roots organisations that broadly share their ideological and political outlook.

The client with whom Arthur had come to consult was an ex-farmworker who was facing an eviction from a property that had been tied to his previous employment. As we drove to the client's home along dry, dusty, Western Cape roads, Arthur briefly described the "facts" as set out in the founding affidavit filed by the applicant. The client was a coloured man in his fifties who resided on a piece of land with his mother, wife, and young daughter.¹⁵⁶ The property had been owned by his previous employer. The client's employer sold the property and apparently offered the client an opportunity to move to another property closer to the client's work site. Despite signing an agreement to this effect, on the day the client was set to leave his home he refused to move, citing that he had never signed such an agreement.¹⁵⁷ He was subsequently dismissed from work and was facing an eviction by the new owner of the property (the applicant in the case). At the behest of the client's labour union, Arthur had come to consult with the client to determine whether the eviction could be defended.

On the day of the consultation, after about an hour of driving through the Western Cape winelands, we arrived at the property in question. It was a small, rectangular stretch of land located on the outskirts of a small town in what appeared to be the edges of its industrial area. There were two structures on the property made from a mixture of brick and corrugated metal. Arthur and I stepped out of the rental car into the dry Western Cape heat and were greeted warmly by the client and his mother. The union representative joined us five minutes later. Given the size of the group, the smallness of the dwellings, and the warm weather, Arthur opted to conduct the consultation outside under the shade of a mature tree. After initial greetings Arthur explained that he was there to get the client's "side of the story". The client

¹⁵⁶ The term "coloured" is a racial category specific to South Africa that refers to people with a mixed racial background. It is distinct from the category "African" in the apartheid racial schema. In post-apartheid South Africa, the racial category of "coloured" is distinct from the category "black".

¹⁵⁷ In the course of the consultation, it emerged that the client did not understand that his signature indicated his consent to move out of his home.

and his mother both nodded in understanding. Arthur took out a small file containing all the legal documents submitted thus far. He turned to the founding affidavit. Like most legal documents, every paragraph was numbered. While occasionally looking down at the affidavit, Arthur began asking the client questions about the sequence of events that preceded the eviction. Despite relatively pointed and tightly defined questions, the client's responses were often wide-ranging, incorporating non-sequiturs of his life and professional history. Like the dynamics described in Chapters 3 and 4, very rarely did the client's answers address the crux of Arthur's questions. Consequently, Arthur rephrased most questions multiple times to draw out the information he needed. After half an hour of unsuccessful questioning, Arthur became more direct: "who is X?", "when did X give you this?", "how long did you work for X?", "what happened on Y day?". Even then, the client's answers did not provide Arthur with the information he sought.

After a further half hour, and growing visibly and audibly irritated, Arthur changed tactics. Holding up the founding affidavit, he explained that what he held was the applicant's "story". He was going to read each numbered paragraph aloud and wanted the client to tell him if each claim was "true" or "not true". The client nodded in understanding, and so for the next hour Arthur proceeded to read each paragraph of the affidavit, asking if each statement was true or not. When the client agreed with the claim, Arthur ticked in the right-hand margin of the document. Where the client disagreed, Arthur wrote an X and then probed further to establish what about the claim was "not true". Again, this proved difficult. But eventually, with assistance from the union representative and contributions from the client's mother, Arthur was able to piece together an alternative account of "the facts". I glanced at the affidavit as Arthur consulted with the client and was struck by how this document manifested the way in which the consultation had literally been transformed into a check list exercise.

Arthur's markings of an X or a tick was an especially stark example of the routinised process that is often only implicit during consultations.

Arthur identified four technical and procedural grounds on which the eviction could be defended, and which would enable the client to remain on the property until provided with "temporary alternative accommodation". These grounds were first, that the eviction order had not been delivered by a Sheriff, thereby violating a procedural rule. Second, the client and the owner of the property had not had "meaningful engagement" regarding the client's eviction. Third, the client did not have "alternative accommodation" and so any eviction order would have to be tied to his ability to be accommodated elsewhere. Fourth, the local municipality had not been joined to the application. According to Arthur, these constituted grounds to defend the eviction. Satisfied that he knew how to proceed legally, Arthur ended the consultation.

Much could be said about the details of the case and the impact of socio-economic inequalities, particularly levels of basic education, on the ability of poor people both to defend their rights independently, and consult efficiently and effectively with their legal representatives, but that is not the focus of this chapter. Rather, I seek to draw attention to the logic and dynamic that often underlie, but rarely surface in, consultations for defensive cases. That is, lawyers guide a client's testimony to identify a violated right and then they apply established law and case law to defend that right. As in the case above, this often requires enforcing existing law by identifying the failure of the parties involved to adhere to established technical rules and procedures.

In other consultations, with fewer language and educational barriers, once the lawyer has legalistically defined the client's problem (an eviction, dismissal etc.), identifying these failures in rule-adherence takes the form of lawyers drawing on a set repertoire of questions related to those rules. The repetitious nature of these questions across the consultations I

observed suggests that certain kinds of rights violations are frequently experienced by the poor in urban and peri-urban South Africa. More significantly, they illustrate that there are well-worn legal routes, often established by previous PIL, to defending these rights. Achieving a just outcome for poor clients thus requires following these routes to identify rules, often technical and procedural, that have been broken by powerful actors. A commitment to formally applying legal rules, and therefore to defensive ATJ, is therefore partly necessitated by how much of ATJ practice, even in PILOs, centres on enforcing an existing system of rules to ensure that poor peoples' established rights are not violated (see more Chapter 6).

Thus far, I have traced the unevenness of how public interest lawyers value defensive ATJ. On the one hand, many ATJ lawyers devalue defensive ATJ in relation to the kind of "change" it is possible of achieving: individual change, rather than societal change. Using the language of "capacity", PIL lawyers justify the denial of legal assistance to individuals because they prioritise greater change. On the other hand, I have also highlighted that for many ATJ lawyers, defensive ATJ is viewed as very important, even if sometimes "boring". This view is underpinned by the experience of ATJ lawyers whose work often achieves immediate, tangible relief to the poor in contrast to the more ambiguous impact of strategic litigation (see Brickhill, 2021); and the perceived necessity of defensive ATJ work, itself evident to lawyers by the sheer numbers of clients that approach them for help. This chapter's analysis so far builds on this thesis's ethnography by further demonstrating the range of normative and professional commitments and ideals that converge in ATJ lawyering to make this work normatively fraught. Through its analysis of these commitments, this chapter has shown that within South Africa's PILOs, defensive ATJ is both undervalued and considered vitally important. In the final section of this chapter, I seek to explain why. I do so through a closer examination of the nature of defensive ATJ work.

The Unintended Consequences of NGOs Having Done a “Good Job”

The Effects of “Dysfunction”

As I observed during fieldwork, many of the walk-in clients who approach PILOs (and legal clinics) do so after attempting to resolve their issue independently at a state institution such as their local municipality, the Department of Home Affairs (DHA), the Department of Labour (DL), the Master’s Office, the Commission for Conciliation, Mediation, and Arbitration (CCMA), the Rental Housing Tribunal (RTH), and the Department of Social Development (DSD). Numerous clients sought assistance in dealing with their local municipality after being debited inaccurate, exorbitant amounts for basic services, or having their income level classified inaccurately with implications for their ability to access welfare assistance. Others required assistance in getting their services reconnected following a municipal disconnection that did not follow municipal by-laws. In these cases, it was both non-paying and paying clients who required this assistance. Many others faced illegal evictions that occurred without the applicants, magistrates or the municipality following proper procedure (see also SERI, 2022). There were also countless evictions from “family homes” where not only had the legislated procedures not been followed, but the clients were at a loss about how or why they could be evicted in the first place, because they were unable get information about the property in question from their local municipality or the Master’s Office (see Bolt, 2021a).¹⁵⁸

In theory, most of these issues (and others) should not require the intervention of an admitted attorney. Rather, they should broadly operate according to bureaucratic and legal processes that are outlined in relevant legislation, and which is also informed by case law.

¹⁵⁸ “Family homes’... is a term used to describe a hybrid system of tenure that is based in freehold title but also contains a more African, familial notion of property” (SERI, 2024: 5).

But as evidenced throughout fieldwork, and as noted by Bolt, “formal coherence of legal rules disguises the opacity and inchoateness of the institutional landscape” (2021a: 224). A combination of legal-bureaucratic opacity, complexity, resource constraints, and perhaps incoherence (see von Holdt, 2011, 2010; Bolt, 2021a; Greffrath and Van der Walldt, 2016; MISTRA, 2025), as well as non-response from institutions, appears to necessitate a client seeking a lawyer to help them navigate the institutional landscape. In many instances I observed clients approach ATJ organisations as a last resort to resolve their problem, or at the very least, gain a semblance of clarity about the nature of their problem and its possible solutions. The number of clients who approach ATJ organisations must therefore be understood in relation to wider structural socio-economic and governmental dynamics (see Dugard, 2013a; McConnachie and Brener, 2018). This was reiterated by Tim reflecting on his own experiences:

[I]t’s certainly true that part of the demand [for legal assistance] is those sorts of administrative or bureaucratic matters that shouldn’t ideally require the intervention of lawyers...[and] I would also say that a lot of the demand are issues that are then, that do become litigious and are competent to litigate, but really, if we had healthy, functioning institutions, strongly performing institutions, it wouldn’t be necessary to litigate them.

Tim expresses the view, widely held amongst my interlocutors that the institutional weakness of many state bureaucracies results in them both wittingly and unwittingly ignoring law and procedure (see Section 27, 2023). Not only does this often lead to rights violations, but it also leaves poor people without a clear idea of the parameters of their problem and its possible solutions, necessitating the intervention of lawyers. In assisting their clients, lawyers’ authority appears to be increasingly relied on to ensure that both state/bureaucratic processes comply with the law, and to explain to their clients about what their predicament means and how they got there in the first place.

Because of the prevalence of bureaucratic defensive cases, Khanya, who allocates walk-in clients to CAs at PILO A, clarified her instruction to junior lawyers:

But whatever it is, whether we're taking the case or not, at the very least, we need to be able to give some light to the person that has come before us. We can't just say, "we've got no capacity". Hear what their case is, give them legal advice. You'd be amazed how much that would help in most cases.

Historically, legal clinics and community advice offices (CAOs) staffed by paralegals have provided this kind of bureaucratic and procedural assistance (Dugard and Drage, 2018). But, like PILOs, these ATJ organisations are also faced with capacity constraints leading to the "weakening and even collapse of large parts of the paralegal and advice office network across the country" (Brickhill, 2023: 16). Clients who once accessed assistance at clinics and CAOs now seek these services at PILOs. Thus despite being highly trained professionals with aspirations to litigate at the Constitutional Court, many PIL lawyers end up performing work not dissimilar to that of "advisors" elsewhere, becoming "the last call for help for their clients/dependents who find themselves increasingly at the mercy of local authorities, immigration regimes, landlords, banks and debt collection agencies" (James and Koch, 2022: 2). Like these advisors, the value in achieving tangible change for an individual keeps many PIL lawyers tethered to their work.

Reflecting on his experiences, Terrence noted that a large proportion of the "influx" of clients that he receives concern immigration queries from foreign nationals. Although he works for a PILO that is strict about pursuing only strategic litigation, and which does not have immigration law as one of its focus areas, he noted that he felt obliged to provide at least some assistance to incoming clients because of the sheer number of cases he receives, and the lack of capacity at other ATJ organisations. He noted:

So we get a lot of clients that bring matters that we can't deal with. Mainly how we assess that is if it falls within our focus areas or not. If it doesn't then we can't because we don't have the capacity, and we usually refer them to an institution [other PILOs and legal clinics] that does do that type of work. But lately... the

clients get sent back to us because those institutions say they don't have capacity, so we try and do what we can. So, for example this year, I've been doing a lot of immigration matters. And PILO C doesn't do immigration matters; we're not paid to do immigration matters.¹⁵⁹ It's just not within our mandate. So technically, I'd get into a lot of trouble for working on those cases, but... other institutions that [do] deal with immigration matters, they don't have capacity. They've been getting so many immigration matters, and there are so many. So they haven't been able to...they can't keep up, which means you sometimes try and assist where you can, where you can provide capacity, maybe you'll just add a couple more hours to your day, but when it gets to the point where you actually can't, then you just have to kindly decline and say, "we can't help".

In theory, most immigration processes should be handled by the Department of Home Affairs.

But as Terrence put it:

Home Affairs [DHA] is pretty much dysfunctional and on top of that we get an influx of people coming into the country. So, there's literally no movement, it's even difficult for South African citizens who have never left the country to get something done. Now imagine people who aren't from South Africa. That's going to give people in PIL who work in immigration law work for the rest of their lives.

Terrence's reflections are enlightening in three respects. First, his account indicates the pull many PIL lawyers experience to provide legal assistance even when it contravenes the specified rules of their organisation and how this relates to their capacity. Although noting that he risks getting into "a lot of trouble" with his superiors for doing clinic work, he was resolute in using his expertise to help people in need. This indicates both the significance of this normative commitment and his cognisance of the importance of this work. Second, he indicates the flexibility of "capacity" when considered in relation to the provision of non-litigious legal assistance, and therefore why capacity is such a fraught term. Although the financial resources to litigate – including advocates' fees, specialist research and Sheriff's fees – concretely constrain what kind of legal work may be provided to walk-in clients, the most significant resource in terms of non-litigious matters, or straightforward litigation at a lower court, is a lawyer's time. As Terrence notes, by giving of one's time and expertise – and working longer hours if necessary – one creates capacity. Third, and most relevant for this

¹⁵⁹ All PILOs are funded by third-party organisations that have their own priorities in terms of areas of law and kinds of activities they fund. For more information on the nature of the PILO funding landscape see the Raith Foundation report on Public Interest Litigation Organisations in South Africa (Brickhill, 2023).

part of the chapter, as Terrence (and others before him) indicates, defensive work is often needed because in their view, “dysfunctional” state institutions generate the demand for legal assistance to move along what lawyers consider relatively straightforward, bureaucratic processes (see Amit, 2011; Greffrath and Van der Walddt, 2016; MISTRA, 2025; Southall, 2007). Echoing this, Buhle, a CA at PILO A, said: “PIL centres would have a lot less work if things were just done”.

In South Africa, the precarity of poor people’s lives, and therefore the degree to which their most basic interests hinge on the operation of government institutions mean that bureaucratic opacity can have devastating effects. It is the recognition of these effects that prompts PIL lawyers either to take on defensive matters, or to guide a client, as far as possible, through their matter and how to resolve them. The material and moral implications of *not* providing assistance are significant in shaping ATJ lawyers’ everyday decision-making. As James, Terrence’s supervisor, noted:

And it’s not necessarily their [government] failures that make us do the work that we do, it’s the impact of those failures on our clients. If they were failing and that failure had no negative impact on our clients, we wouldn’t even have... we don’t want a situation where people are negatively impacted by government’s failure to do its work. And the Constitution anticipated something like that, hence it established Chapter 9 institutions, [like the] Public Protector’s office, South African Human Rights Commission. But they are not enough. There are a lot of problems, it’s not enough.¹⁶⁰

While this thesis cannot explain precisely why government “failures” occur, the reflections of the lawyers cited above as well as the nature of defensive cases described illustrate that much wider institutional dynamics – potentially government incapacity, dysfunction, or intransigence – underpin the deluge of defensive cases PILOs encounter.¹⁶¹

¹⁶⁰ Chapter 9 of the South African Constitution establishes and sets the guidelines for “state institutions supporting constitutional democracy”. These institutions are “independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice” (RSA, 1997, Section 181 (2)).

¹⁶¹ While this thesis is primarily concerned with the experiences and perspectives of ATJ lawyers, there is robust scholarship which explores the workings of different South African state institutions and state capacity (see Bolt, 2021a; Greffrath and Van der Walddt, 2016; von Holdt, 2010, 2011; Ndlovu, 2016; Hoag, 2014; Laubscher,

They also indicate that a key feature of defensive ATJ is making a legal-bureaucratic system of rules work. In short, these lawyers' reflections and the nature of their legal practices suggest that defensive ATJ work has been woven into the very fabric of legal-bureaucratic procedures, becoming a part of South Africa's legal "infrastructure".¹⁶² As observed by social science and science and technology studies (STS) scholars, a key feature of "infrastructures" is their invisible quality: they are often "taken for granted" (Larkin, 2013: 336) and only "become visible on breakdown" (Star, 1999: 380). As Harvey et al. write, "this invisibility is central to the infra-structural quality of a system" (2017: 3). Drawing on this key insight, I suggest that understanding defensive ATJ through the lens of "infrastructure" helps to explain how work so significant, might become so devalued. Put simply, the significance of defensive ATJ has become invisible by virtue of its systematisation. I illustrate this below.

Being Counted In and On

The kind of defensive work described above appears as legal assistance akin to what one might find at a university legal clinic or even CAO. But as will be seen below, the stream of defensive cases received by ATJ organisations indicates that potentially wider changes in South Africa's legal-bureaucratic field that increasingly counts *in* and counts *on* the intervention of legal professionals, accentuating the infrastructural nature of defensive ATJ.

For example, according to Khanya, in eviction law and processes related to access to basic services, some state institutions explicitly count on PILOs to issue demands for their clients *before* facilitating the institutional and bureaucratic processes associated with that demand. Khanya's work focuses on assisting "unlawful occupiers" and "reclaimers" in

2012; Southall, 2007).

¹⁶² I will further elaborate on this concept in the following chapter.

Johannesburg and involves dealing with the Department of Human Settlements (DHS) and the City of Johannesburg (CoJ).¹⁶³ She described her dealings with these state institutions:

I think to some extent, the existence of the NGO sector has made the state just not want to do anything. They're [the state] like, "go to PILO A, let them force us [the state] to give people a house. *Then* we'll give you a house." Like you have no idea how many people have come to PILO A to consult and seek assistance [and say] "we've come from the City [of Johannesburg]; we are [coming] from the Department of Human Settlements, and they send us to you. They said they can't give us a house if it's not in a court order and *you* can help us with a court order". (original emphasis)

In other words, in some areas of law, from the perspective of my interlocutors and based on their experiences of dealing with the state, having a lawyer demand an entitlement has in many instances become the condition for that entitlement. As the legal principles associated with much of this work are well settled in case law, the legal work associated with it is relatively simple. As with Arthur's work described above, it often requires mobilising a legal category and ascertaining whether the rules that apply to that category have been followed. When they have not been followed, a formulaic legal claim is required to enforce those rules. As Khanya indicates, ATJ lawyers believe that these claims should not require professional legal assistance or resort to court, as they should be built into bureaucratic procedures informed by legislation and legal principles established by previous litigation. In other words, they should be a part of the legal infrastructure. But as indicated here, defensive ATJ appears necessary to render this infrastructure, infrastructural.

Khanya elaborated, using a different example, further showing how she has experienced government departments outsourcing their responsibilities to PILOs and counting on them to act:

In fact, I think it was in April this year [2022], I got a call from the head of the Human Settlements Provincial Department, and he's like, "there's a court order for...it's not an informal settlement, but it's one of those areas where people just come in and they've been there for five years, the owner is now evicting". He –

¹⁶³ DHS is the government department charged with generating and implementing policy related to urban housing.

province, [Department of] Human Settlements – was referring this to *us* [PILO A] to deal with. So, the ability to litigate, and the NGOs having done a good job at doing that has made the state just not do what they are supposed to do. (original emphasis)

Later in the interview she gave yet another example, even as she also indicated the variability of approaches and commitments within the state:

I’ve had conversations with people in the City, in the Province, where they are like, “I understand what PILO A is doing, but no one else does. Even if I [the hypothetical government official] say we have an obligation to give this person a house, why don’t we do it?” They’ll [their colleague] be like, “no, let them take us to court”.

Khanya’s frustrating experience is echoed by Roni Amit, a former lawyer at the PILO, Lawyers for Human Rights (LHR). Reflecting on her experience litigating against DHA she writes:

In justifying their [DHA] failure to comply with the law due to administrative shortcomings, government lawyers have even sought to shift the burden to public interest lawyers themselves, arguing that it is their responsibility to ensure that the government act lawfully. In the case just described, state counsel justified his opposition to a declaratory order by placing the onus on LHR, suggesting that the organisation go on a fundraising drive to increase its capacity so that it could act on behalf of every individual being unlawfully detained instead of launching what he deemed inappropriate challenges to policy or to the general functioning of the system.¹⁶⁴ (2011: 33)

Both Amit and Khanya demonstrate that “the existence of the NGO sector”, and its persistence in creating and demanding entitlements on behalf of poor people, has shifted the nature of the legal-bureaucratic field in unanticipated ways. Their dealings with government departments and officials indicate that (some) state institutions explicitly count in legal intervention as a stage in state processes. This thesis is unable to provide an empirically grounded account for why clients get sent to PILOs and ATJ legal clinics by state officials. But as wider scholarship indicates, the reasons may range from governmental incapacity, budgetary constraints, or intransigence (Ndlovu, 2016; MISTRA, 2025; Laubscher, 2012). Nonetheless as highlighted by the accounts above, at least from the perspective of many of

¹⁶⁴ *Zimbabwe Exiles Forum v Minister of Home Affairs* [2011] ZAGPPHV 29.

my interlocutors, an effect of this dynamic is that a formalised legal claim has become the condition for an entitlement. The numbers of defensive cases received by PILOs can thus not only be considered a consequence of state incapacity or “dysfunction” (see Southall, 2007), but of wider institutional shifts in which some institutions explicitly incorporate litigation as part of their internal processes. In other words, legal intervention has become a part of the legal infrastructure itself, necessary to facilitate connections between individuals and the state, and enable effective claim making.

This dynamic was evidenced on the very first day of my fieldwork at PILO A. It was late afternoon, and I had spent most of the day getting familiar with the office space and the few lawyers who had come in that day. As I sat at my desk, Zach stormed through the empty CA bullpen to his desk, then disappeared around the corner. About ten minutes later he returned with a Red Bull in his hand and sat opposite me. He sighed loudly. Prompted, I asked how his day had been. He explained that he had spent most of his day drafting and delivering court documents for the urgent case he was working on. His clients were a group of unlawful occupiers in an inner-city building in Johannesburg whose water and electricity had been terminated without notice by the City of Johannesburg. Zach explained that, under the City’s bylaws, such action was “illegal” and did not conform to administrative justice principles established by the Protection of Administrative Justice Act (PAJA), the Water Service Act, and Electricity Act (see Dugard, 2014). Because the government failed to abide by the relevant rules, Zach and his supervising attorney were seeking a court order to have their client’s services reconnected.

Zach read the City’s behaviour as evidence of what he called the “bullying state”. In his view and based on his experience at PILO A, “the state” as he encountered it deliberately “goes after poor people”, “testing” them to see whether they know their rights and have the resources necessary to defend them. This thesis cannot attest to the motivations of “the state”

and whether they deliberately “go after” the poor. But such cases (which are common), and Zach’s response, reflect the dynamics Khanya and Amit describe. Not only should disconnection not have occurred in the first place because it was a violation of existing law, but getting clients reconnected should not have required recourse to court. Considered in light of the discussion above, the “test” Zach refers to can be understood as analogous to the principle that unless litigated, or without the application of pressure by legal professionals, certain institutional and bureaucratic procedures will simply not be followed – or will be followed in an unpredictable or unsystematic way. In an era when South Africa’s constitutional framework is believed by many PIL lawyers to enable the realisation of a transformed society rooted in the values of substantive equality and dignity (see above and Chapter 2), it is no surprise that providing legal bureaucratic assistance is so deeply frustrating and professionally “boring”. But also central to this frustration is that this kind of assistance is experienced by ATJ lawyers as having effectively been taken for granted by pockets of the state and its institutions precisely because it has been woven into the wider legal infrastructure.

The relationship between state bureaucracies and the PIL sector has thus undergone a profound shift since the end of apartheid, despite their continuing to have a generally antagonistic relationship. Defensive ATJ had been mobilised to protect poor black people from the excesses of a relatively unrestrained and viciously effective bureaucratic state. It is now used to prevent rights violations that stem from state bureaucracies not performing as expected. The demand for defensive legal assistance that PIL lawyers face is thus partly a result of their becoming essential, and taken for granted, sites of connection between poor people, (progressive) laws, institutions, and material resources.

Conclusion

This chapter explores the wider legal-bureaucratic context within which South Africa's ATJ field operates through the emic binary of positive and defensive ATJ. It probes how defensive ATJ is understood, valued, and experienced by ATJ lawyers working in PILOs, and thus why and how this form of ATJ work is often subordinated to positive ATJ, often resulting in poor people being denied legal representation.

By describing how the prioritisation of positive ATJ is justified amongst PIL lawyers, the chapter illustrates that defensive ATJ work is partly devalued because it is not considered to generate enough, or the right kind, of "change". While positive ATJ is valorised because it has the potential to advance "social change" for many people, defensive ATJ is often reduced to palliative intervention for individuals. The discourse of "capacity" is essential to making this morally fraught argument. But significantly, this chapter illustrates that capacity also becomes a flashpoint for bitter contestations regarding the range of normative and professional commitments that converge in the ATJ field. The first part of the chapter demonstrates the unevenness of how defensive ATJ is valued in the ATJ field, and thus why working in this field is so ethically fraught. The second part of the chapter shows that what makes that work so fraught is precisely because defensive ATJ often yields relatively immediate and tangible positive outcomes for clients, despite being experienced by lawyers as "boring" and formulaic. Both the importance and devaluing of defensive ATJ work is brought to the fore.

That simultaneous importance and devaluation is explained by the way defensive work is rendered invisible as a form of legal infrastructure. The final part of the chapter further explores the context in which much legal intervention is necessary to enable poor and marginalised people to benefit from existing rules and bureaucratic procedures. As this intervention appears to be increasingly counted on by government actors, it has become part

of the legal bureaucratic process itself. Demanding an entitlement, or having a lawyer demand one for you, appears to have become the condition for having an entitlement at all, demonstrating that much defensive ATJ work has been woven into the legal bureaucratic infrastructure itself. Understanding defensive ATJ as part of this infrastructure highlights how this work has become invisibilised by its very systematisation. It is partly for this reason that both ATJ lawyers, and the state, recognise its importance, and yet simultaneously devalue it.

Considered in relation to the preceding chapters, the analysis presented here further demonstrates that ATJ's adherence to legalism as rule-following within the ATJ field is mediated by its location within a wider legal bureaucratic infrastructure.

In the final chapter of this thesis, I extend this insight in an examination of positive ATJ.

Chapter 6

“Not just a book”: Expectations and Realities of “Positive” Access to Justice

“...Court orders ain’t shit.” – Sanele

“...You know, just saying ‘the law says...’ isn’t a powerful statement anymore.” –
Laura

Building on the previous chapter, this final chapter further locates South African ATJ practice within a wider legal-political landscape through an examination of “positive” ATJ. As discussed previously, while some PILOs do provide clinical, often defensive, legal assistance to individuals, most direct their efforts at strategic litigation. These organisations, and the ATJ lawyers within them, espouse the transformative constitutionalist (TC) ideal of using the law to drive structural or systemic transformation in South Africa, and in so doing realise the Constitution’s transformative aspirations of a more egalitarian and just South Africa. Concretely, public interest litigation (PIL) attempts to achieve this by using litigation to infuse legal categories and principles with constitutional norms and values, and in ways that recognise and address the effects of past racialised injustice.¹⁶⁵ Alternatively, strategic cases are litigated to give concrete content to the socio-economic rights enshrined in the Constitution. In theory, once a legal principle or right has been transformed or established, it should filter into state policy and/or bureaucratic procedure, enabling entire classes of people to benefit. Positive ATJ thus optimises the kind of structural social change that ATJ lawyers

¹⁶⁵ As in the previous chapter, I use the terms strategic litigation and public interest litigation (PIL) interchangeably.

are intent on achieving, and which many believe ought to be possible given South Africa's post-apartheid legal framework.

But as this chapter illustrates, these expectations are largely unmet. This chapter highlights how PIL, oriented towards advancing the law, legal culture, and structural social transformation more broadly, routinely slips into "defensive" legal practice, requiring the formalistic application of rules to protect individual circumstances.

Understanding this dynamic requires locating PIL within broader government-civil society dynamic. As I discuss below, from the perspective of my interlocutors, much of contemporary PIL is directed towards urging government departments to design and implement its own stated policy ideals. Stated differently, PIL is a means by which civil society actors attempt to force the government to comply with its constitutionally mandated developmental obligations (see Heywood, 2021). But the government's response to this kind of litigation typically does not yield the material outcomes PIL lawyers hope to achieve. Reasons for this vary, but from the perspective of my interlocutors, and echoing academic scholarship, imperfect compliance with a court order is often due either to governmental incapacity or intransigence, the latter often manifest in what ATJ lawyers' term "malicious compliance" (Hausman, 2012; Langford and Kahanovitz, 2017; Amit, 2011; Brickhill, 2018; Budlender et al., 2014). Consequently, PIL lawyers expend significant resources in the aftermath of a strategic case to ensure that both the letter and "spirit" of a court order are adhered to.¹⁶⁶ In addition to these short-term dynamics, there are also longer-term implications of imperfect compliance. I show that the failure of the government wittingly and unwittingly to incorporate the legal principles established by PIL into state policy and/or bureaucratic procedure often requires PIL lawyers to relitigate the same principle to ensure it

¹⁶⁶ See below for a discussion of "malicious compliance".

is complied with in practice. Alternatively, they resort to engaging in the kind of legal-bureaucratic work discussed in the previous chapter.

This chapter demonstrates that PIL lawyers spend significant time not “advancing” South Africa’s “constitutional project” but simply trying to anchor what a post-transition legal system with a sympathetic judiciary and sympathetic laws ought to reflect from their perspective: a *system* in which law is a medium for individual and societal improvement. The analysis of these dynamics further highlights the ways in which much ATJ work has become “infrastructural”: necessary to making a system operate coherently and predictably. Whereas the previous chapter deployed the concept of “legal infrastructure” to emphasise the necessary but devalued work of sustaining a system, the current chapter mobilises this concept to elucidate the limits of that system. Because public institutions often do not respond as expected or required, the notion of a coherent system with levers to act on, breaks down. Performing this infrastructural role often requires retreating into the kind of rule-adherence that focuses on protecting existing rights, rather than attempting to broaden the horizon of rights themselves and therefore the horizon of social change.

While focused on the infrastructural role that ATJ lawyers increasingly play and its concrete effects in the ATJ field, the implications of this chapter’s analysis are broader, spanning across the thesis. First, examining lawyers’ responses to what they view as a government hostile to the kind of transformation envisioned by the Constitution, reveals how and why commitment to formalism is reproduced within a legal field explicitly oriented to TC ideals. ‘Legalistic’ adherence to rules is inseparable from the commitment to new legal ideals, oriented to remaking South Africa’s future. By demonstrating how ATJ legal culture is produced within the concrete conditions of legal practice, this chapter offers a nuanced perspective on the so-called “paradox” of South Africa’s professional legal culture (Mnisi-Weeks, 2021).

Second, even lawyers engaged in positive ATJ have an infrastructural role. Appreciating this brings into focus the complex role of law in contexts of “transition”, like South Africa’s. While the history of PIL in South Africa is explicitly forward-looking, engaged in “advancement”, this chapter demonstrates that another key role of legal practice is ensuring that the kind of change that transition is meant to signify, is entrenched infrastructurally. Positive ATJ is concerned with realising a distinctly post-apartheid infrastructure in which systemic relationships between citizens, the state, the law, and material resources, operate in a progressive way that reflects the Constitution’s ideals. Consequently, the binary between positive and defensive work does not hold. This chapter, like the previous one highlights that the small, everyday work of maintaining connections within a system by using law to defend existing rights, is inseparable from wider visions of “social change” through law. The concept of “infrastructure” helps one appreciate that the former is necessary to enable the latter.

The chapter is organised as followed. It begins by outlining the ideal type of PIL from the perspective of ATJ lawyers and its relationship to the concept of “legal infrastructure”. I then discuss ATJ lawyers’ experiences of the PIL ideal faltering in practice and suggest this reflects the limits of South Africa’s legal infrastructure. Instead of PIL *advancing* the law and social change, lawyers experience their cases as devolving into a slew of defensive and formalistic work aimed at ensuring that the basic precepts of a court order are adhered to. The chapter explains this by examining the short- and long-term implications of “malicious compliance” and state incapacity when PILOs litigate against the state. Here infrastructural breakdown is laid bare. In the final part of the chapter, I highlight how lawyers’ expectations of infrastructural breakdown shape PIL legal strategies in the first place, demonstrating that attempts to render the legal system, systemic, is central to the work of positive ATJ.

The Ideal of “Positive” ATJ: Law as an Infrastructure

As discussed in the previous chapter, what distinguishes PIL from defensive ATJ work (see Chapter 5) is that the former is an attempt to address the underlying legal, and therefore social and economic, structures that give rise to poor people’s everyday suffering. As noted in Chapter 1, this conceptualisation of law-based social change has roots in South African anti-apartheid lawyering which itself was modelled on public interest litigation in the United States.¹⁶⁷ Describing this approach, and how it differs from defensive ATJ work, Geoff Budlender writes:

Poverty and powerlessness are not caused by random accidents which afflict individuals. They are caused by social structures which affect whole groups of people. It is those structures which give rise to the most pressing legal problems of poor people, and therefore the most pressing legal problems of groups of people. Any attempt to use legal services to promote social justice must recognize this, as indeed public interest law does... It may be possible to assist the pensioner to receive her pension, or the evicted tenant to recover his home. That is a major victory for those individuals, and is not to be scorned. But unless one can at the same time find a means of protecting other pensioners and tenants, who are facing or are likely to face the same problem, the victory is a very limited one in any wider quest for social justice. (1988: 325)

Although written thirty-seven years ago, this understanding of how PIL advances social justice remains central to the underlying logic of PILOs and their legal practices. Most notable is the idea that the individual legal issues that poor people face are ultimately rooted in wider and deeper social and economic structures. To advance enduring and widespread social justice requires attending to these structures. This view was echoed by Charlie, formerly the Head of Litigation at PILO B who specialises in urban housing and land reform. She stated that individual clinical assistance is a “very legitimate and important way [to] support people”, but to focus on this work is to respond to “the symptoms of the broader inequality issue”.

¹⁶⁷ Legal Resources Centre Oral History Project (LRCOHP), archived in the Historical Papers Research Archive of the University of Witwatersrand. Accessed from <http://historicalpapers-atom.wits.ac.za/>

Given this framing of PIL and against the backdrop of TC discourses, it can be understood as a form of legal practice committed to realising the Constitution's idealistic vision for the future of South Africa. Significantly, it is a kind of legal practice that, in its ideal form, attempts to establish and shape a legal infrastructure. This is implicit in the idea that strategic litigation advances *systemic* change. In this chapter, I return to the concept of legal infrastructures, focusing on how it elucidates the working of a system.

The lens of legal infrastructures builds on the “infrastructure turn” in scholarship from the social sciences and science and technology studies (STS) (Valverde, 2022: 6). In a seminal article, Larkin defines infrastructures as “built networks that facilitate the flow of goods, people, or ideas and allow for their exchange over space” (Larkin, 2013: 328). Similarly, Harvey et al. define infrastructures as “extended material assemblages that generate effects and structure social relations, either through engineered (i.e. planned and purposefully crafted) or non-engineered (i.e. unplanned and emergent) activities” (2017: 5). Importantly, as indicated by the term, infrastructure refers to structures that “other things run or depend on” to function (Kingsbury, 2023: 1).

Infrastructures are not passive material arrangements; they play an active role in shaping other objects and the wider systems of which they are a part (Byrne et al., 2024; Harvey et al., 2017; Bowker, 1995). As STS scholars and anthropologists have highlighted, this is not only because they enable a network of socio-material relations to operate systemically, but also because infrastructures often reflect and generate interests, ideals, and wider normative orders (see von Schnitzler, 2016, 2018; Anand, 2017). Infrastructures therefore often have a distributional quality, such as enabling access to goods, markets and social services to some, while denying it to others (Appel et al., 2018; Byrne et al., 2024).

On these theoretical grounds, legal infrastructures have been conceptualised as “the material-textual web of laws and statutes, legal categories and accepted forms of legal

reasoning” (Pellandini-Simányi and Vargha, 2021: 881). Byrne et al., argue that infrastructure is an apt concept with which to analyse law and its workings in part because “*infrastructural dynamics are an inherent quality of law itself*, due to law’s practically constituted socio-materiality and its distributional implications for persons, goods, and capital” (original emphasis, 2024: 1238; see also Latour, 2010). They conceptualise the “law itself” as a “form of infrastructure, with the legal comprised of interconnected legal norms, practices, and institutions” (2024: 1236).¹⁶⁸

In this chapter I take these key insights and apply them to the novel empirical setting of South Africa’s ATJ legal field. As argued, positive ATJ expresses an infrastructural vision of South African law. The ideal of positive ATJ in relation to the constitutional project is to advance a particular form of legal transformation, including legislation, legal culture, institutional reform, and underlying legal values, and is driven by a set of political-economic ideals. It is argued that, by transforming these structures, social transformation, reflected in material change in the lives of poor people, might be achieved. Implicit in this ideal of positive ATJ is the idea of a legal infrastructure that is, or becomes over time, relatively autonomous. Rather than only reflecting politics and power, Pellandini-Simányi and Vargha suggest that “laws develop into a relatively autonomous technical system which outlasts the political-economic coalitions that enacted them” (2021: 881).¹⁶⁹ This is what enables elements of legal infrastructures to participate in contests between different actors, mobilised to effect a range of different ends in different moments. This chimes with the insights from anthropological scholarship on legalism which argues that rules can become repositories of wider ideals because they stand apart from practice, from the “flux of events and

¹⁶⁸ In addition to scholarship that considers law *as* infrastructure, scholars also explore the ways in which law is shapes material and socio-material infrastructures (see Kingsbury, 2023). This approach is described as “law *of* infrastructure” (Byrne et al., 2024: 1237).

¹⁶⁹ This analysis thus differs from other anthropological examinations of material-technical infrastructures which emphasise that these seemingly taken-for granted structures are in fact imbued with politics and power (Appel et al., 2018; Anand, 2017; von Schnitzler, 2016).

personalities” (Pirie, 2022: 323; see also Dresch, 2015). In other words, new laws might be intended or understood as politically motivated – and certainly is the case in post-apartheid legal transformation. Yet the appeal of *legal* transformation is that the rules not only invoke an ideal order but contribute to a systemic change that has some autonomy from an extant political order (see Moore, 1973). The rules become part of a wider infrastructure that in theory facilitates the flow of people, things, and ideas in ways that reflect the ideal order.

But as indicated in the previous chapter, and as will be further demonstrated below, *in practice* ATJ lawyers are constantly confronted with infrastructural breakdown: disconnections between the various parts of the whole manifest when levers are pulled, they do not generate predictable outcomes. The new laws, procedures, and case law that positive ATJ creates, which are suffused with the politics and interests of those litigating, often are not integrated to produce an infrastructure that reliably facilitates poor people’s ability to improve their lives. In practice, laws, institutions, and norms do not add up to form a coherent *system* – in that sense, they do not act as infrastructure (Pellandini-Simányi and Vargha, 2021: 881; see also Bolt, 2021b).

Parallelling the argument in the previous chapter, in this chapter I similarly suggest that much of the work of positive ATJ is not to “advance” the transformation of a legal system, but to intervene to keep a set of arrangements systemic. In this way, positive ATJ often slips into defensive work. Not only does this fuel a sense of “disillusionment” amongst many ATJ lawyers, but it also has significant implications for the development of “legal culture” within the field. Lawyers are repeatedly required to engage in formally applying existing rules to maintain connections within an infrastructure. Recourse to formalistic legal arguments, instead of “nuanced” ones that push legal cultural boundaries, become part of a strategic calculation that accounts for a lack infrastructural predictability.

I begin by discussing the ways in which my interlocutors understand positive ATJ, and their disappointments in relation to it.

A “fiction at the heart of strategic litigation”?

The ideal of PIL to advance structural transformation was espoused widely by my interlocutors when asked how their work differed from other forms of pro bono legal assistance (see more in Chapter 5). It was central to their expectations about the kind of work they would be doing and its impact when they joined PILOs in the early stages of their careers. These expectations appeared to be fomented by recent legal history which saw a rush of socio-economic rights cases that expanded the terms of rights in the first decades of democracy (see Brickhill, 2018; Langford et al., 2014). As noted by one of my interlocutors, this early post-1994 period of PIL was a period of “euphoria” when “we were just creating rights”. When asked about her expectations of working in the PIL sector when she was studying law at university in the mid-2000, Khanya, a PIL attorney at PILO A who has been involved in precedent-setting cases, replied:

I was reading cases like *Blue Moonlight*, *Mazibuko*, all these good landmark cases and I was like, “yoh, the law works, the Constitution works, it’s not just a book! Yoh! It’s all peaches and cream! It’s nice. I want to be a part of it [laughs]...”¹⁷⁰

But, she indicated that this ideal was not so easily achieved in practice:

But little did I know what happened before that landmark case happens, and what happens after. Those two stages are very important. For the judgment to be granted, I think it’s fairly easy when the groundwork has been done. But it’s the enforcement, and it’s probably what will take me out of litigation.

Echoing similar sentiments, Sanele, another senior PIL lawyer at PILO B, noted that she imagined she would be working on “ground-breaking” cases when she began working in the

¹⁷⁰ *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009]; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) [2011].

PIL sector as a candidate attorney (CA). But reflecting on these expectations considering her experiences since, she said, “I wish I was less naïve”. She elaborated:

...[I]n terms of what I would actually have to do as an attorney, the downside was the paper-pushing, and the constant follow-up, and which I guess was a bit of an anti-climax to what you would anticipate in law, like always drafting ground-breaking things – not at all.

Reflections like these about the distance between the expectations and reality of working in South Africa’s PIL sector were common amongst my interlocutors both in formal interviews and in casual conversations. Most PIL lawyers mentioned their expectation of being involved in “landmark” or “ground-breaking” cases that advanced South African law to improve the lives of the poor. The draw of PIL was to advance the interests of those worst affected by apartheid and its legacies, and the desire for prestige associated with litigating at the Constitutional Court. But as indicated above, and as discussed in the previous chapter, for many of my interlocutors the realisation of these expectations has been more complex than anticipated.

Central to this complexity was how PIL operated in practice and led to “social justice”: the “after” stage Khanya referred to above. In expressing their professional frustration, lawyers often highlighted how the fundamental rationale of PIL routinely falters. Laura, a senior PIL attorney specialising in rural land and customary law at PILO C, expressed it this way:

...[I]n theory, what strategic litigation is supposed to do is establish a principle and then that means that other people won’t have to go to court. But, unfortunately, with the state as it is at the moment, that is very rarely the case. I think we [PIL lawyers] all have to admit to ourselves that there is a bit of a fiction at the heart of strategic litigation.

She explained how this “fiction” operates in practice:

For example, in the X case, which is an example to me because it was such a clear principle that we established.¹⁷¹ It was about the customary law of the community and this community was saying that “our customary law is that we elect our headman, it’s not...[hereditary]”. So, we went to court, we proved that was their customary law, the principle was established that the community can say, “we elect our headman”. Now, there are many communities like that in the Eastern Cape because in the Ciskei, many of them, traditional leadership is...not a hereditary thing, so many communities there have always elected headmen. But *no one* has been able to use that judgement and convince the Department [of Local Government and Traditional Affairs (DLGTA)] that... after that judgement – we won on appeal also – I went on a road show [laughs] through the Eastern Cape with some of the local organisations, telling everyone: “this is the judgement, now you can use it”. They’ve all tried. They’ve all come back to us years later. And we can’t litigate that case over and over again... So that is really disheartening. (original emphasis)

Echoing Laura, and expressing her own disappointments about PIL, Charlie called the underlying principle of public interest litigation, and how it facilitates the material improvement of the lives of the poor, a “lie”:

I almost think it’s [the ideal of PIL] a lie we tell ourselves. Because we know it’s going to be a long-haul thing, it’s kind of like the lie of trickle-down economics. It keeps us [PIL lawyers] going because we then get to believe in something. But I’ve seen, just in my short time working in the space [about 8 years], people who have immersed themselves in the movement, die without housing... So, when I say, “lie”, “lie” is not a nice word, but it’s just not the reality. That’s a better word.

From a slightly different perspective, Sanele expressed her own frustrations with how the rationale of PIL falters in practice. Describing her involvement as a candidate attorney (CA) in a “ground-breaking” case at PILO C, she recalled that the strategic litigation was “interesting”, expanding her own ideas about how the law could be used to advance structural transformation through the development of property rights. She gave the example of what could be considered a “landmark” case where a provincial government was ordered to expropriate land from a private owner to accommodate the unlawful occupiers of the land. Giving a sense of both how a case like this can be “interesting” and how the use of creative legal arguments in PIL reflects and fosters a transforming legal culture, Sanele said: “[T]hat [case] gave me ideas about how under-utilised parts of our law are... it showed me another

¹⁷¹ For the purpose of de-identifying my interlocutors I have also de-identified the case Laura refers to.

way we could start thinking about redistribution”. But despite experiences like this, she maintained that her overwhelming feeling having completed her articles was “disillusioned, disillusioned, disillusioned”. She explained why:

Because court orders ain’t shit. It was disillusionment because even though you’d be successful in court... nothing would change for the people [clients]. It’s more the painstaking negotiating, following up, twisting an [government] official’s arm to make a decision, or to get them to act, that bore more fruit than the whole pomp and circumstance of litigating. Files, and files, and files, and time and resources and *ridiculous* [advocate’s] fees... even the outcomes, be they successful, it doesn’t mean any material change, and that was my main frustration. That’s where I learned that the law in and of itself is not enough. (original emphasis)

These reflections capture the sense of disillusionment and frustration that many interlocutors expressed when discussing the everyday realities of practicing PIL, and how they fell short of the ideal of law-based change with which they entered the profession. Although in both South African and American socio-legal literature (Brickhill, 2018; Wilson, 2021; Scheingold, 2004 [1974]; McCann, 1994; Rosenberg, 2008 [1991]) scholars routinely observe that a judgement does not translate neatly into social transformation or material change, the disappointment expressed above nonetheless reveals that legal practitioners remain deeply committed to this ideal. Moved by their personal experiences of racialised social and economic marginalisation, they entered the ATJ field to “help people” and often expressed this in plainly material terms. The disillusionment expressed above is amplified by these self-understandings, as well as greater ideals of legal transformation.

From the perspective of these PIL lawyers, the fundamental rationale of PIL rarely holds in practice as it does not obviate the need for further follow-up, defensive litigation, or in some cases, re-litigation of the same issue. As discussed in the previous chapter, and as noted above by Laura, the practical rationale of PIL is that by advancing structural change through the transformation of the law, the demand for individual legal assistance might be mitigated. Instead, the “after” stage of a “landmark” case is often replete with defensive,

sometimes even bureaucratic, work to ensure that the legal victory is at least to some degree reflected in a material outcome. Such an insistence on following up itself reflects a professional legal culture where ambitions of professional prestige co-exist with an ethical commitment to further South Africa's constitutional project. As Tim said:

I mean, these [PIL lawyers] are deeply committed people doing this work and they're not people that just care about making law. So I don't think there are many lawyers in the sector who would be content to let it rest if they got a judgement and it's just ignored.

Carly, a lawyer at PILO C, averred:

A lot of the work for us as lawyers is making sure that the judgement isn't a hollow victory, but that you actually make sure that there is compliance, you stay on top of it, you arrest them if you have to for not complying with the order.

A common dynamic that marks contemporary PIL is that a strategic case is accompanied by a slew of defensive litigation or bureaucratic "arm twisting" to enforce the law. It is worth noting that some PIL lawyers and legal academics acknowledge that the distinction between positive PIL and defensive ATJ work is not always clear-cut in practice (SERI, 2015; see also Shdaimah, 2016). As one of my interlocutors put it, a "dialectic" exists between the two. For example, a walk-in client requiring assistance in defending their rights might present an ideal test case to transform a legal principle; or repeatedly taking on defensive cases might induce changes to bureaucratic procedure that has a wider impact beyond the interests of the represented client (SERI, 2015). While these accounts are useful in illustrating the interrelationship between the two kinds of ATJ work, they suggest that defensive work typically precedes a positive case so that defensive work might build up to become a landmark case that may facilitate systemic change. This chapter suggests something different. As I show below, PIL cases routinely collapse into defensive litigation, and as Chapter 5 argues, defensive litigation slips into bureaucratic assistance.

In terms of the focus of this chapter, I suggest that this dynamic points to the limits of South Africa's legal system, which from my interlocutors' perspective, does not often operate systemically. Rather than positive ATJ creating changes in a stable infrastructure, and in that way "advancing" the constitutional project, ATJ intervention instead is what holds basic legal arrangement together in the first place. This was reflected in the words of James, an attorney at PILO C, who said: "we litigate so things don't fall apart, not to advance anything".

Below I attend to the wider politico-legal dynamics that contribute to this infrastructural breakdown, in particular government "incapacity" the practice of "malicious compliance" by state actors.

The "children and grandchildren" of PIL: "Malicious Compliances" and its Effects

In many instances, strategic litigation can be understood as a response to the perceived failure of the state and its institutions to abide by their developmental obligations to adopt and/or implement legislation or policy that gives effect to the constitutional rights of people living in South Africa (see Brickhill et al., 2018). Sanele expressed this informally, while referring to her own work in urban land reform: "[t]hat's our [PIL sector's] whole purpose, that's why we exist: because the state hasn't delivered. The state hasn't delivered affordable housing in the inner-city and surrounds, so we're here". PIL thus often seeks to prompt government action or in some cases, become the basis of state policy (see Brickhill et al., 2018). Hence, Tim's view that in most strategic cases, "the state is at the centre". Or as Laura put it,

[L]et's be honest, the Constitution, certainly in land, but I think with everything, there was a wonderful idea of a really capable, developmental state, so there was a huge reliance on the state to realise rights. That's not going to happen.

From these assertions, PILOs can be understood as attempting to intervene in the space between the government's constitutional obligations and its apparent incapacity to fulfil them through strategic litigation that attempts to prompt government action. Many of my interlocutors viewed PIL as essential to maintaining the constitutional project in what they considered the absence of a government willing and able to do so itself. From one perspective, as during apartheid, the law is a central feature of South Africa's wider socio-political and developmental landscape (Abel, 1995).

But as indicated above, lawyers struggle to ensure that PIL achieves its stated goals, and thus PIL is often accompanied by defensive litigation that tries to enforce a potentially transformative judgement. That leaves the actual significance and authority of law increasingly in question. Laura explained:

...[T]he interesting thing about the apartheid government is that they were *completely immoral*, and you know, committed crimes against humanity on a daily basis and yet they wanted to legitimise what they do [sic] in the law. So they would always pass a law to... it's now the law to [do X]. It's awful, it's unjust, but it's the law. So, the law has always had an outsized role to play in South Africa, I think. And certainly, after the Constitutional Court...on the one hand, yes, the law – also because the courts have remained fairly independent – it has remained the strongest arm of government, so far, [and] for that reason it remains a refuge for people. On the other hand, we must accept that the rule of law is in real danger. So, in another way, the law certainly doesn't have the authority that it should have, or that the Constitution envisioned it would have. So, in that sense, it's far less important. You know, just *saying* "the law says..." isn't a powerful statement anymore. (original emphasis)

PIL lawyers' understanding of the devolution of their strategically litigated cases into defensive ATJ work is shaped by the problem of "compliance" with court orders and established law, particularly among government actors (see also, Dyzenhaus, 2011; Ellmann, 2015; McConnachie and Brener, 2014; Dugard, 2013; Roach and Budlender, 2005).¹⁷²

¹⁷² See *Vumazonke v. MEC For Social Development and Others* (ECJ 050/2004) [2004]; *Thubakgale vs. Ekurhuleni Metropolitan Municipality* (39602/2015) [2023] for particularly harsh rebukes of the state by the judiciary on the failure of the local government to comply with a court order.

In some instances, the lack of compliance is considered a product of the same government “incapacity” that prompts strategic litigation in the first place (see Ndlovu, 2016; MISTRA, 2025). Reflecting on her experience of the difficulties and disappointments of PIL when litigating against the government, Charlie commented:

Most times when you’re getting some kind of order [against the government] it’s because there’s a problem in the state. They either don’t have the capacity, the direction, the plan, whatever, the resources to do that which you’re asking for. So it almost feels like well now that we’ve got our order, we’re giving something to this broken thing [government] to take it forward. And so that state fixing, state capacity, state building, work – if that hasn’t happened or that isn’t simultaneously happening, we [PIL lawyers] would be disillusioned to think that our orders would be implemented...

Similarly, reflecting on their experiences of PIL regarding the right to basic education, McConnachie and Brener write that “a major challenge at the heart of much of the litigation... is the state’s failure to engage in proper planning” (2018: 299-300).

In addition to issues of state capacity, core to the discourse around compliance or enforcement amongst PIL lawyers is the concept of “malicious compliance”. This refers to the practice of “deliberately complying with court orders to the minimum extent possible and in a manner that prevents the true purpose of a court order being achieved” (Budlender et al., 2014: 22). It is regarded as a deliberate attempt by government officials to undermine the material realisation of a court victory.¹⁷³ Complying with the minimum requirements of an order makes getting a contempt order increasingly difficult, thereby foreclosing key enforcement mechanisms. Malicious compliance, in addition to state actors’ outright non-compliance with PIL orders, is considered a common feature of the legal landscape by public interest lawyers as well as legal academics (see Marcus and Budlender, 2008; Budlender et al., 2014; Cote and van Garderen, 2011; Langford and Kahanovitz, 2017; Hausman, 2012). As Langford and Kahanovitz note, “non-enforcement is the immediate and default position

¹⁷³ Of course, private actors can also engage in malicious compliance.

for respondents” (2017: 317). Unsurprisingly this is central to fostering suspicion and antagonism between PILOs and various sectors of the government.

The following section analyses the effects of imperfect compliance on the part of government actors – potentially a product of state incapacity, limited state resources, malicious compliance, or a combination of the three – from the perspective of ATJ lawyers using the example of *Blue Moonlight*.¹⁷⁴ The analysis sheds light on the dynamics that explain why positive ATJ routinely slips into defensive assistance and its short- and longer-term effects. In so doing, it highlights the infrastructural work that ATJ lawyers do in trying to make, what is ostensibly a system of rules, ideals, and institutions, operate reliably and predictably.

Blue Moonlight: Transformative Litigation?

As indicated by Khanya above, *Blue Moonlight* is a “landmark” case decided in 2011 by the Constitutional Court. Building on earlier precedents of strategic cases (*Grootboom*, *Modderklip*, *Port Elizabeth Municipality*, *Olivia Road*) it addressed common law property rights, firmly establishing the “overriding principle” that “evictions of unlawful occupiers should not lead to homelessness” even in cases where the evictor was a private owner (Wilson, 2018: 176; see also Wilson, 2021; Bilchitz, 2018).¹⁷⁵ The case gave concrete content to 26(3) of the Constitution, and the legislation adopted to realise this right: the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE).¹⁷⁶ Significantly, *Blue*

¹⁷⁴ *Blue Moonlight* serves as an example, rooted in a particular area of law and in relation to a particular set of government actors. Academic literature by PIL lawyers, reviewing prominent “landmark” cases that relate to a variety of socio-economic rights, reflects many of the dynamics that *Blue Moonlight* brings to the fore. See for example Brickhill (2018) and the SAJHR (2011) special issue on PIL (vol 27 issue 1).

¹⁷⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000]; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (CCT20/04) [2005]; *Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) [2004]; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008].

¹⁷⁶ Section 26 outlines the rights to “housing”. Subsection 3 states: “No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions” (RSA, 1996).

Moonlight and the case law it built on established the set of procedural mechanisms to be followed for an eviction to be considered “just and equitable” under PIE.

The case entrenched the principle that the social circumstances of those being evicted constitute legally relevant facts that must be considered by judicial officers when an eviction order is being considered. The prospect of homelessness thus became a legal defence in *all* eviction matters. In so doing, *Blue Moonlight* arguably infused black letter eviction law with an historical consciousness regarding the role of the common law of property in dispossessing and rendering the tenure of countless black South Africans insecure during apartheid.¹⁷⁷ It underlined the moral necessity of post-apartheid property law to acknowledge this history and its contemporary consequences.¹⁷⁸

According to legal scholars and former PIL lawyers like Wilson (2021), the legal significance of *Blue Moonlight* and the cases it built on is that they fundamentally unsettled the hierarchy of apartheid era common law property rights. This previous hierarchy had unquestioningly prioritised the rights of private property owners over almost all others while according no rights to unlawful occupiers of private property (Wilson, 2018, 2021). In contrast, as part of the “unpicking” of the apartheid legal regime (see Wilson, 2021), *Blue Moonlight* in combination with *Modderklip*, *Port Elizabeth Municipality*, and *Olivia Road*, emphasised that unlawful occupiers had rights that needed to be weighed against, and in relation to, the rights of common law property owners. As noted in the judgement: “[a]n owner’s right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE”.¹⁷⁹

In addition, by weighing private property rights against the right not to be arbitrarily evicted and the state’s duty to provide emergency housing, *Blue Moonlight* also established

¹⁷⁷ *Blue Moonlight*, para 35.

¹⁷⁸ *Blue Moonlight*, para 2; *PE Municipality*, para 37.

¹⁷⁹ *Blue Moonlight*, para 40.

that “the question of whether an eviction would lead to homelessness is inseparable from the question of whether the state has discharged its obligation to provide emergency shelter” (Wilson, 2021: 72). *Blue Moonlight* thus firmly established that the local government must be attached as a party to court proceedings in all eviction cases that may lead to homelessness, to ensure that the eviction is conditional on alternative accommodation being provided by the state. It reaffirmed the government’s obligation to develop and implement policy to address the housing needs of the most vulnerable and provide alternative accommodation in instances where evictions would result in homelessness (Dugard, 2013c).¹⁸⁰ Summarising the effect of PIL in developing and transforming the right to housing that culminated in *Blue Moonlight*, Tim said:

Twenty years after the Constitution, housing was the most litigated right. It was certainly the right that had the most Constitutional Court cases of all the socio-economic rights, by far. And they [PIL] gradually built up a set of strong principles to protect in the context of evictions. And the core principles, are, first of all, a set of procedural protections that the municipality has to be joined in a big eviction. The municipality has to meaningfully engage with parties and has to report to court, and it has to report to court on the availability of alternative accommodation and risk of homelessness in particular. And that solidified into a rule that if evictions will leave people homeless, the state through the local government must provide alternative accommodation. So that’s the state of law.

As the discussion indicates, *Blue Moonlight* (and the case law it built on) is significant because it developed eviction law in South Africa to reflect moral and constitutional concerns regarding the well-being of historically disadvantaged, and currently vulnerable, people. It arguably exemplifies the capacity of PIL to transform the law in politically progressive directions by advancing legal arguments that draw on the Constitution’s values and vision of the future of South Africa, linking these to South Africa’s past. *Blue Moonlight* thus reflects efforts to transform both law and legal culture. And yet, when describing her frustrations of working in the PIL sector, Khanya used *this case* as an illustrative example:

¹⁸⁰ *Blue Moonlight*, para 67.

I don't know if you know the *Blue Moonlight* case...It's the landmark case in evictions when the Constitutional Court said, "if an eviction [from private property] is going to result in homelessness, then the city must step in and provide alternative accommodation and until that alternative accommodation has been provided, then the people cannot be evicted, they have to wait until the city provides [it]". Which is a great victory because you're not going to have people being put on the side of the road because the owner wants the property, and the city couldn't care less about what happens to them... [But] when I got to PILO A, I got to meet the people behind that case, the occupiers themselves, and I can tell you even now, the situation that they live in, its bad. Because what the city has done, and I think it's the state's attitude, "We'll comply. You say we must give them accommodation, and you pressurise us, fine". But they just *dump* them there. "We [the City] won't maintain it, will do absolutely nothing", and it becomes another bad building, and they [the City] don't care and it's just bad. (original emphasis)

What Khanya describes is the local government complying with the court order by providing alternative accommodation to the evictees, but in a manner that, in her view, does not comply with the "spirit" of the order (see also Wilhelm-Solomon, 2022; Dugard, 2013c). More than this, extensive follow-up litigation in multiple courts was required to get the City of Johannesburg (CoJ) even to comply with this bare minimum of the Constitutional Court's (CC) order (Dugard, 2013c). Describing the response of the CoJ more broadly to evictions that lead to homeless in the period shortly after *Blue Moonlight*, Dugard, a public interest lawyer with extensive experience litigating the right to housing, writes:

It [the City of Johannesburg] has stalled, obfuscated...and, ultimately, done everything in its power to fail to implement subsequent and/or related orders for alternative accommodation. (2013c: 273)

Furthermore, she argues that a key feature of the responses of the CoJ was to "tender substandard accommodation that violates multiple rights" (2013c: 278). Consequently, litigants must "continually return to lower courts, and then defend new appeals, in an attempt to vindicate their rights" (Dugard, 2013c: 278). Dugard's account highlights that government responses to strategic cases necessitates follow-up litigation to ensure some short-term material relief is achieved for litigants.¹⁸¹ This thesis cannot attest to the underlying rationale

¹⁸¹ It should be noted that the focus of Dugard's argument is the Constitutional Court's jurisprudence which she describes as characterised by "judicial avoidance" and its failure to provide judicial oversight in the *Blue Moonlight* decision (2013c: 266). Dugard defines judicial avoidance as "a reticence by the Court to pronounce

of the government's actions in the aftermath of *Blue Moonlight* nor the eviction cases that followed shortly after, and thus whether the CoJ maliciously complied with these orders, or did not have the resources or institutional capacity to implement them in ways that vindicated the rights of the litigants (see Hasuman, 2012). What is clear, however, is that lawyers like Khanya and Dugard, express deep suspicion about the nature of the government's intent regarding cases that concern the well-being of poor and marginalised people. Hence, Zach's comments in the previous chapter about a "bullying state", and Tim's comments in Chapter 1, regarding governmental "ideology" that "criminalise(s) and pathologize(s) poor people".

But *Blue Moonlight* and its aftermath also illustrates that imperfect compliance can have longer-term effects. The case established clear constitutionally-compliant legal principles regarding what constitutes a "just and equitable" eviction in accordance with the PIE Act. Yet, as reported by lawyers and as I observed during fieldwork, these principles have not significantly changed the institutional practices of private actors, local government officials, state bureaucrats, and magistrates, who regularly violate them (SERI, 2022; Wilhelm-Solomon, 2022; Dugard, 2013a; Bilchitz, 2018). Indeed, the continued prevalence of illegal evictions is why some PILOs have entire "projects" or "focus areas" dedicated to defending against them.

Blue Moonlight was successful in advancing private property and eviction law to address South Africa's racialised history of land acquisition and its contemporary effects. But the case has not stemmed the tide of illegal evictions, frequently involving forced removals and their devastating social consequences (Wilhelm-Solomon, 2022). It has also not prompted the implementation of emergency and long-term urban housing policy that

on any issue that does not have to be decided for the purpose of deciding the case, or to play any wider or more long-term role than delivering the judgment" (2013c: 266). In this article, she argues that judicial avoidance was manifest in the Constitutional Court's "reluctance" to give "adequate content to the right of access to adequate housing" (2013c: 278). The effect of which is to require litigants to return to court to have their rights vindicated.

addresses the historical dispossession of property, rapid urbanisation, structural unemployment, widespread economic deprivation, and the housing market's misalignment with the needs of the urban poor (NU, 2023; SERI, 2023; Wilhelm-Solomon, 2020, 2022). The latter considered by PILOs a product of both the government's intransigence regarding its obligations to realise the right to housing and its incapacity.

The effects of imperfect compliance in relation to *Blue Moonlight* thus undermines the basic rationale of PIL discussed in this chapter's opening. Khanya voiced questions often raised by PIL lawyers:

The problem with the sector is we are capacity-constrained, and we mostly engage in strategic litigation, which is important. But what good is the *Blue Moonlight* judgement if the ordinary person in Orange Farm is being evicted and doesn't have access to courts to say, "*Blue Moonlight* says this, it [local government] must give me alternative accommodation?"¹⁸² Because they [the government] won't do it of their own accord.

As noted, this thesis cannot attest to why the government "won't do it of their own accord", but Khanya's reflection nonetheless indicates that, in many instances legal intervention is often necessary to make post-apartheid laws and institutions operate systemically. At stake is whether there is sufficiently predictability in legal arrangements so that poor and marginalised people can effectively access legal entitlements. This itself points to the complexity of the effects of *Blue Moonlight* and other strategic cases in the context of South African ATJ.

Because the cases culminating in *Blue Moonlight* established strong legal principles with which to defend against illegal evictions, its key effect – like that of other strategically litigated cases – has been to make the defence of poor people's rights legally more straightforward and achievable. As Tim noted, the judgements in these cases have

¹⁸² Orange Farm is a township, roughly 45km from Johannesburg where Khanya grew up.

“solidified into a rule”, the violation of which serves as the grounds for a legal defence.¹⁸³

The routine nature of defending illegal evictions was made clear to me during fieldwork when lawyers asked their clients the same sets of questions during consultations. For example: “Were you served with a court order?” “When were you served?” “Who is the owner of the property?” “Did you meet with the owner?” “Did you meet with the municipality?” And most importantly, “Do you have somewhere else to go?” As I came to learn, these questions correspond to potential legal avenues, based on the legal principles and procedure that *Blue Moonlight* partly established, and which could be pursued in defence of the eviction.

But, as discussed in Chapter 4, and as wider ATJ scholarship highlights, knowing precisely how to navigate these legal avenues and their attendant procedures is beyond the capacity of most prospective ATJ clients. This was further indicated by Tim when describing research his organisation had done on the application of PIE in eviction matters in the Johannesburg High Court. According to this research,

In the Johannesburg High Court, the only cases where people have been able to secure TEA [temporary emergency accommodation], to realise that constitutional right, were where they were represented by a public interest law centre. In every other case, the case ended with some other outcome. So eviction with no TEA, that would be the most common. And so that quite graphically illustrates the link between access to justice and other rights.¹⁸⁴

By pointing to the necessity of legal expertise to be able to defend one’s rights in South Africa, Tim, like Khanya above, highlights that despite PIL establishing clear legal principles, they have not become embedded in a “relatively autonomous technical system” (Pellandini-Simányi and Vargha, 2021: 881). Rather, ATJ intervention remains necessary to ensure connections between rules, ideals, institutions, and concrete outcomes. *Blue Moonlight* thus

¹⁸³ The rule is that evictions should not lead to homelessness, and in cases where they do, the local government is obliged to provide temporary alternative accommodation before the eviction can take place.

¹⁸⁴ Research has not yet been published.

illustrates that in the absence of compliance with a court order in the short term, and the dissemination of transformed legal principles into the institutions and bureaucracies that poor and marginalised people engage with in the long term, rather than obviating the need for people to “go to court”, strategic litigation paradoxically gives rise to further defensive ATJ work.

This dynamic is well-illustrated by Khanya’s description of her existing practice at PILO A in which her “cases have a habit of giving birth to children and grandchildren [cases]”.¹⁸⁵ Explaining this metaphor, she said:

For example, this urgent that I’m dealing with right now, it’s an eviction case... And then there was the rates issue...¹⁸⁶ And then in March, it gave birth to an urgent case for water and electricity disconnection. And in July it gave birth to a case...well the owner brought a case, separate to the eviction, wanting to have access to the building. But what in fact they were trying to do was get the eviction via the back door... So it gave birth to that urgent case because we had to oppose it because it was an eviction in disguise. And now, it has once again given birth to electricity disconnection. So I’m dealing with one set of [unlawful] occupiers in – well rates is closed, but if I were to count it – it would be rates, the urgent in June, the urgent in March, and this urgent now.¹⁸⁷ And then the eviction itself. So that is five cases for one set of occupiers.

Given the influx of cases from one set of clients, I asked Khanya how often she takes on new clients. “Seldom. Because I don’t have capacity”, she responded.

Khanya describes a repetitive slew of non-strategic cases that rely on established defences against rights violations, some of which were developed through previous PIL. But given the apparent need for her assistance, these strategic cases appear not to have changed institutional practices in ways that obviate the need for her intervention. Indeed, as argued, rather than establishing a legal infrastructure, ATJ intervention has become an integral component of the system itself.

¹⁸⁵ In most PILOs, individual attorneys have their own “practice” which refers to their ongoing cases.

¹⁸⁶ Related to the payment of water and electricity to the municipality.

¹⁸⁷ In the PIL sector, “occupiers” refer to groups of individuals – both organised and not – who move into unoccupied properties.

In addition to explicating the wider dynamics that underpin the slippage of positive ATJ into defensive legal assistance, this section also indicates that the often-vital infrastructural role of ATJ lawyers partly explains how the commitment to legalism as rule-adherence becomes embedded within the ATJ legal field and its legal culture. Enforcing anything, even in cases drawing on constitutional values and ideals, which produce orders that transform the law, and which can in theory be applied beyond the originating case, requires recourse to formalistic arguments that centre on rules and their violations. The slippage of visionary litigation into procedural formalism is the means to get progressive things done in a wider, unpredictable legal bureaucratic field. This highlights how *in practice*, the TC-formalism binary blurs. Explaining the dynamics of South Africa's legal culture thus requires analysis of the range of practices and conditions that actively shape it.

In the final section of this chapter, I demonstrate further implications of the relationship between government actors and PILOs, marred by imperfect compliance with court orders. I show that adhering to relatively straightforward legal arguments in PIL becomes a form of risk management, in anticipation of a state unwilling or unable to comply with legal orders. Simple, concrete rules are harder to circumvent than more ambitious legal requirements. This not only reveals the dynamics shaping legal cultural commitment, but also highlights that ATJ lawyers are acutely aware of the infrastructural role they increasingly play. The ways in which they approach strategic cases can thus be understood as part of an attempt to make this role easier.

Enforcing an Order or Foregrounding “Nuance”: Legal Cultural Tensions in PIL

For many of my interlocutors, the frequency of imperfect, sometimes malicious compliance, or non-compliance has rendered this kind of governmental response to PIL

somewhat predictable (see Section 27, 2023). In formal interviews and informal discussions, they expressed a mistrust of governmental departments' commitment to the project of transformation oriented towards the ideals and vision of the Constitution, doubting that they would comply with a court order. Zach captured this view when responding to a question about whether his experiences of practising law had shifted his understanding of government and legal-bureaucratic institutions. Usefully, he referenced eviction law in his response:

When you're in law school and you read the Constitution, you become very excited, and they preach the greatness of the Constitution and how powerful it is... And you get to practise, and you realise that the Constitution says all of these things, the *law* says all of these things, the government knows that the law says these things (but)...they go against all of these things on a daily basis. And for me, that was very frustrating... So an example I'm going to make is with eviction law which forms the bulk of our law at PILO A... the government knows that there is PIE, there have been judgements from the Constitutional Court about PIE involving the City of Johannesburg [CoJ], yet the CoJ does unlawful evictions *every month*. I'm exaggerating, but *very often*. We have these evictions that are carried out when they know that PIE is there. They know what the *right* thing to do is, and the most upsetting thing is that they have an obligation that the Constitution puts on them, that PIE puts on them, and it says that they are responsible for giving people access to housing, right? In eviction proceedings, even if an eviction is not carried out by them, they are still expected to be there as part of those proceedings to make sure that people are not homeless. Yet, on the other hand, I'm sure while they litigate on the other side [as evictors], whether or not they have alternative accommodation, they are evicting people to be homeless. (original emphasis)

Zach's moral anger and distrust, which was expressed widely by my interlocutors, does not only feed an increasingly hostile relationship between PILOs and government departments. In some cases, it also shapes the nature of PIL legal strategies in ways that have wider implications for the reproduction of professional legal culture, and how one considers the role of ATJ in the wider constitutional project.

An increasingly popular approach popular within the PIL sector has been for litigants to ask the courts to grant a structural interdict (Jephson and Mngomezulu, 2018; Brickhill and Finn, 2018). A structural interdict, otherwise known as a supervisory order, "is an order where the court exercises supervisory jurisdiction over the relevant organ of state to ensure its order is properly implemented" (Jephson and Mngomezulu, 2018: 150). In practice this can

mean a range of things, including a court-appointed committee or individual tasked with overseeing the implementation of an order, or mandating the government to report at specified times to the court regarding the steps it has taken to implement the order (Jephson and Mngomezulu, 2018: 150). In this way, both the litigating parties and the courts attempt to retain some level of control and oversight over the implementation of orders. A structural interdict can thus be understood as a lever that enables easier connection to another feature of South Africa's legal system: contempt applications that inflict a punitive cost on non-complying government actors.

The popularity of this legal tool amongst litigants represents a shift in both PILOs who are increasingly willing to ask for them, and the judiciary, increasingly willing to issue them. In Dugard's discussion of *Blue Moonlight* mentioned above, she critiques the Court's failure to use a structural interdict to supervise the CoJ's implementation. The Court's position rested on the judiciary's trust of the government as well as the legal cultural impulse to guard the separation of powers strictly.¹⁸⁸ But, as Brickhill and Finn note five years after the publication of Dugard's work, the increasing use of structural interdicts is "an indication of 'the times'" (2018: 101). They observe that "the courts in the Mandela and Mbeki eras were far more reticent to impose such interdicts on government, trusting the state to comply with its orders" (Brickhill and Finn, 2018: 101; see also Jephson and Mngomezulu, 2018: 150). Echoing Brickhill and Finn, my interlocutor, Carly noted: "structural interdicts... [have] become *incredibly* popular because the problem is, if you don't do that, they [government] won't do anything, they just won't do anything" (original emphasis).

A further approach, less widely remarked on in existing PIL or ATJ literature but referred to by my interlocutors, is PIL lawyers' adherence to relatively straightforward procedural arguments, rather than those that attempt to develop the law. This approach is

¹⁸⁸ *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002], para 129.

partly a response to what ATJ lawyers perceive as the retention of legal formalism amongst members of the judiciary (Dugard and Wilson, 2013; Mnisi-Weeks, 2022; Davis and Klare, 2024). Anticipating a bench that would prefer to grant an order on procedural grounds, some PIL lawyers prioritise the presentation of formalistic arguments that they believe will be more readily accepted.

But for some PIL lawyers, making these kinds of arguments is also in anticipation of what they perceive as governmental malicious compliance. This was expressed during a conversation with Laura, a lawyer whose areas of expertise are in rural land and customary law, in which she discussed the “tension” she experienced between wanting to advance “nuanced” arguments that “advance” the law, and achieving tangible change for her clients.

The bulk of Laura’s work involves her collaboration with rural “communities” around the country and her attempt to translate their customary law into a discourse that is legible and legitimate to the judiciary. She noted that she generally attempts to advance arguments that bring together black letter law and what she called “nuanced” arguments about “culture” and “rights”, using legal evidence not typically introduced in common law courts but that nonetheless reflects the understandings of the rural communities she represents. She described her approach:

I always say, “I’m not *really* a lawyer”... I’m really bored by legislation and black letter law. I always want to do something wild and what I loved about customary law is it’s unwritten, it’s a completely new frontier – also constitutionally – so it was...you can do anything... (original emphasis)

In illustrating how her approach differs from some of her colleagues, and why she’s “not really a lawyer”, she gave an example of a case that about how the rights of a rural fishing community would be affected by the government’s granting of an exploration right to a major oil company:

[W]ith the Z case, everyone else [other attorneys and advocates on the legal team] knows the *intricate* details of the environmental legislation and where they [government] went wrong here and there, and I'm like, I don't care, and I don't understand. But I can see the cultural rights and those things, I can see that that's...it all kind of not clear, but it's there, so that's where I would focus. (original emphasis)

Laura expresses a view of law as capacious enough to accommodate creative legal arguments and materials without resorting to the application of ill-fitting legal categories onto the lives and problems of the people she represents. Perhaps what she means when she says she is not “really” a lawyer, is that she is not wholly concerned with legalism. She also noted that her desire to advance “nuanced” arguments reflecting the realities of the people she represents is part of her wider commitment not to occupy the role of an “expert” in legal encounters. Illustrating this sentiment, during my time shadowing her she repeatedly said: “clients know their own lives better than anyone”. Given Laura’s overall approach, she was described by other PIL lawyers I encountered as a “visionary” within the field because, as Tim put it, her arguments attempt to “develop the law much more deeply” than formalistic, procedural approaches.

But as noted, for Laura this kind of critical legal professionalism is not without “tension”. She acknowledges that on the one hand, the arguments and the legal materials they draw on are risky because they may not be accepted by judges who are more legally culturally conservative. On the other hand, significantly, she observes that the kinds of “nuanced” arguments she tries to advance in court sometimes produce similarly “nuanced” orders by judges. And while the openness of some judges to break out of the strictures of formalism may reflect the variation in legal culture within the judiciary, Laura noted that these “nuanced” judgements are primed for malicious compliance amongst government actors. She described this dynamic in relation to a case that she was particularly “proud of”:

I must also admit that the P judgement that I am so proud of, because it was so abstract, I mean the department...I have been trading legal opinions about what the judgement means with the department for years now. They refuse to accept

it...and I can't go back to court to have the court tell them again...I can't. And so, you know, that is also a tension for me, because the more nuanced the judgement, the easier it is for the department to just...so in the sector we call it "malicious compliance"...they get an order against them, and then they would comply with the *absolute minimum*, and then it makes it very difficult to go back to court to get a contempt order, but they also...they certainly ignore the spirit of the order, and that is back-breaking, spirit-destroying. (original emphasis)

The commitment to some degree of formalism is thus entrenched by an expectation that when litigating against the government, any order that requires some degree of interpretation will be maliciously complied with. She acknowledges the tension between practising law that advances both the law and a progressive legal culture and wanting to secure both legal and tangible successes for her clients. As she noted, "[i]t must be about winning the case for the client... I'm not gambling with their fate...because your duty is to your client".

The anticipation of malicious compliance as underpinning a relatively narrow legal strategy was further highlighted by Carly when describing why her PILO chose *not* to take on a legal case. The case centred on an attempt by a grassroots social movement representing poor and unemployed people in the Eastern Cape Province to have their local municipal council dissolved because of their failure to deliver basic services. The relief the social movement sought was an order instructing the Provincial Government to dissolve the municipal council and appoint a municipal administrator to oversee the governance of the municipality. If granted, the order would be precedent-setting, establishing a new legal tool with which citizens whose rights were being violated by dysfunctional local governments would be able to hold them to account. Indeed, this was the underlying goal of the litigation, as expressed to me, by members of the social movement driving the case. One said:

I think it was important for us to say [that] politicians cannot have *carte blanche*. They cannot do as they wish without being held accountable and responsible...We felt it would be a very stern warning for those who think they can just go into these council chambers, and loot and thief, and be lazy, and stop caring about people and not put the humanity of people as a priority...So that's why we approached the courts.

Litigation was pursued not only to realise the material improvement of the town, but to disrupt citizen-state power relations.

But it was precisely because of the social movement's desire to pursue this politically impactful strategy that Carly's PILO declined to represent them. Instead, they wanted to take what she called an "incremental approach". This would have involved litigating "issue by issue", seeking narrowly defined orders in relation to specific areas of governmental weakness, rather than seeking an order that dissolved the municipal council or appointed a municipal administrator. Carly acknowledged that the latter approach would be precedent-setting and would therefore advance the law. Yet her and her colleagues view was that because of the difficulty of enforcing such an order – both a consequence of governmental dysfunction and intransigence – it would not lead to significant material improvement in the municipal district and so would not vindicate the rights of local citizens. In explaining the preference for this incremental approach, she referenced a previous case litigated against the same municipality, describing the government's response to a far-reaching order:

In that case they [the litigants] asked the court for a million things that this municipality had to do. The result was that the municipality would do five of those things and they won't do the other one hundred. Then they'll [municipality] come to court and say, "well we've done these five" and the court will be like "oh that's very nice, we're so glad you've done it. So, they [municipality] are not really in contempt because they're *trying*. Look at them *trying*". So, it makes it very hard to enforce the judgement. (original emphasis)

Carly's reflection also illustrates that accounting for imperfect compliance by government actors has become part of the calculus of legal strategy in PIL. Forgoing a potentially visionary argument that advances the law and implicitly legal culture, in favour of narrow applications with clear rules, is revealed as a form of risk management where the ends sought are ultimately progressive. In the case above, the improvement of service delivery to the poor. In short, conservative legal arguments may be part of a strategy that prioritises a progressive material outcome that in the long run will be easier (for lawyers) to enforce.

The dynamics examined here underscore the ways in which legal culture is produced within the conditions of legal practice, and that central to these conditions in South Africa's ATJ field, is the infrastructural role these lawyers increasingly play. When analysed as such, the value-laden framing of the TC-formalism binary collapses. Increasingly central to the legal strategies employed by PIL are attempts to create levers that can later be pulled to realise post-apartheid ideals of law and its relationship to social change. This chapter demonstrates that positive ATJ, ostensibly oriented to *advancing* South Africa's constitutional project, in practice becomes legal intervention that attempts to make earlier legal 'transition' hold.

Conclusion

This chapter provides an account of a major component of South Africa's ATJ legal field: public interest litigation. It outlines the ideals and aspirations on which this kind of legal practice rests, the difficulties that lawyers face in realising them, and consequently how one might consider the role of such legal practice in South Africa's project of "transformation".

The chapter foregrounds the disappointment, and in some cases disillusionment, that many of my interlocutors expressed about the potential of PIL to achieve its lofty aspirations. As shown above, this disappointment reflects the growing concern amongst PIL lawyers about how the rationale that shapes this work routinely falters. In contrast to its stated goal as expressed by PIL lawyers, strategic litigation does not obviate the need for people to "go to court" by transforming law and legal structures to make it easier for the poor to realise their newly enshrined constitutional rights. Instead, this chapter demonstrates that, in response to what PIL lawyers perceive as governmental "malicious compliance" and incapacity, a key dynamic that marks much contemporary PIL is the slippage of visionary litigation, seeking to

transform law and legal culture in progressive directions, into defensive litigation that seeks to formally enforce both old and new rules formally.

In both explaining and analysing this dynamic, the chapter mobilises the concept of “legal infrastructures”. This concept draws attention to how ideally, law operates systemically, connecting laws, policies, institutions, norms, and people. Indeed, as argued, the way in which PIL is understood by South African ATJ lawyers reflects such a view of law. Mobilising the concept here, to analyse the difficulties and frustrations PIL lawyers experience, highlights the breaks within the legal infrastructure revealing a legal system does not operate coherently or predictably. I have thus argued that even public interest lawyers, who spend most of their capacity on strategic litigation ostensibly oriented to *advancing* South Africa’s constitutional project, engage in infrastructural work. They attempt to make a set of legal and bureaucratic arrangements reliable and accountable, often through the defence of individual circumstances.

The implications of this are twofold in relation to the focus of this thesis. The first relates to the reproduction of what appears as formalism as a constituent element of ATJ legal culture. This chapter foregrounds how the adherence to legalism as rule-following is deeply shaped by the conditions in which legal practice occurs and therefore must be explained in terms of them. In the short-term, this chapter shows how in response to non- or malicious compliance in strategic cases, ATJ lawyers must engage in follow-up defensive litigation that often hinge on the relation between rules and their violation. In the long-term, because of the legal infrastructural breakdowns discussed throughout the chapter, transformed legal principles established by PIL are not successfully disseminated into the institutions and bureaucracies that poor people engage with, which similarly means that ATJ lawyers are required to enforce rules formalistically. Further, given PIL lawyers’ repeated experiences of malicious compliance, accounting for this response becomes part of the internal calculus that

shapes the nature of legal applications in the first place. The chapter demonstrates that PIL lawyers' desires to break out of the strictures of formalism, and advance visionary arguments, risks losing the ability to enforce a potentially transformative order. The positioning of PIL lawyers within a wider legal infrastructure – a set of arrangements in which legal stipulations have relatively reliable effects, particularly in public institutions – thus shapes how ATJ lawyers work with rules, and their commitments to them. An empirical analysis of legal practice is thus essential to an account of legal culture and its effects. Exploring the emic perspectives of lawyers engaged in these practices reveals that the commitment to rule-based thinking and practice is imbricated with wider ideals of law and its role in South Africa's constitutional project.

Second, foregrounding the infrastructural role PIL lawyers play, highlights the fraught nature of South Africa's "transition" and the role of ATJ in sustaining it. As discussed throughout this thesis, ATJ lawyers hold ideals about what a post-apartheid legal system should entail: opportunities to improve individual lives and advance widespread social transformation. But evidenced in this chapter's analysis of strategic litigation, which attempts to achieve this greater "transformation", central to the work of ATJ is legal practice that essentially attempts to realise the ideal of the distinctly post-apartheid legal system itself: as a set of infrastructural relationships between citizens, the state, and the law, idealised in the 1990s and expressed formally in the Constitution. It is on this basis, that the binaries between positive and defensive ATJ, and thus between TC and formalism, do not hold. Bold, TC-informed legal practice, requires simultaneously attending to the underlying legal infrastructure through doing the sometimes "boring", formalistic work of applying rules to facts.

Conclusion

For constitutionalism to survive, the Constitution itself must not only be a popular document, but it should be a living one too. But it is unable to be, because of the widening gap between the ideal world which it describes, and the expectations it promises on the one hand and the lived reality of many people – Tembeka Ngcukaitobi, 2024.

We live in an age where it is fashionable to decry that the Constitution has failed... But is the prevailing poverty and inequality in South Africa a marker that the Constitution has in fact failed? And what is our role as lawyers... – importantly, as interpreters of the Constitution, in applying it on the ground? – Jason Brickhill, 2025.

The quotations above, taken from recent speeches by prominent South African public interest lawyers, frame an enduring set of questions about constitutionalism, law, and justice in post-apartheid South Africa. As Brickhill notes, debates regarding the nature of constitutionalism and the transformative scope of South Africa's Constitution are increasingly prominent (Madlingozi, 2017; Modiri, 2018; Sibanda, 2020). And as Ngcukaitobi implies, one reason for this resurgence is the widening gulf between the ideals the Constitution evokes and the lived reality of most South Africans. But as Jackie Dugard, another public interest lawyer, recently wrote, both those who endorse the transformative potential of the Constitution, and those who criticise it, do so assuming that “the Constitution is auto-executing” (Dugard, 2021: 374). To “correct” this approach, she argues that empirical analysis is necessary to understand the relationship between law and progressive social change in South Africa (2021: 374).

This thesis shares Dugard's view. As discussed in the Introduction, existing empirical analyses of the relationship between law and social change in South Africa tend to focus on judicial decisions and their implications (see Wilson, 2021; Dugard, 2021; Brickhill, 2021; Mnisi-Weeks, 2021). In contrast, this thesis adopted an ethnographic approach to examine how access to justice (ATJ) lawyers understand their roles in narrowing the gap between “the

ideal world which [the Constitution] describes” and “the lived reality of many people,” and how they enact their roles in practice (Ngcukaitobi, 2024: 18).

The ATJ legal field plays a central role in efforts to make the Constitution real for ordinary people, both through clinical legal assistance and strategic litigation aimed at systemic change. Yet its actors, everyday practices, and understandings of law have largely evaded empirical investigation. Addressing this empirical lacuna constitutes a key contribution of this thesis.

The thesis’s empirical contribution is underpinned by its analytical framing. It draws on legal anthropological scholarship on “legalism” (Dresch and Scheele, 2015), that elucidates the relationship between rules-based thinking and the ideals which rules evoke in its analysis of ATJ “legal culture” (Chanock, 2001). Building on this scholarship this thesis has explored and explained the central place of rules and legalistic practice in the post-apartheid ATJ field and how they are related to wider understandings of transition and social change. It has done so by examining an adherence to rules within everyday legal practice itself, and it has explored the consequences of an insistence on legalism for marginalised people seeking access to justice.

In this concluding chapter I will summarise the key arguments this thesis has made, highlighting its scholarly contributions.

Formalism and Transformation

A central feature of debates about law and social change in both apartheid and post-apartheid South Africa has been the role of “legal culture” (see Chanock, 2001; Meierhenrich, 2008; Mnisi-Weeks, 2021; Klare, 1998; Lang, 2006; Davis and Klare, 2010, 2024). A key site of consensus in these debates is the assertion that for the Constitution’s transformative potential to be achieved, a transformation in legal culture is required: shedding apartheid-era

formalism and positivism that enabled the apartheid government's project of white supremacy, and embracing substantive, value-laden reasoning. The latter approach became associated with what Karl Klare famously termed, "transformative constitutionalism" (TC): a distinctly post-apartheid project of law-based social change oriented to widespread social transformation, bound to a value-laden legal culture (Klare, 1998). Within these debates, an implicit binary has emerged between rule-bound formalism, viewed as conservative, and transformative constitutionalism, oriented to progressive change.

In existing accounts of professional legal culture in South Africa, scholars contend that it remains tethered to formalism, albeit in refined form (Davis and Klare, 2010; 2024; Mnisi-Weeks, 2021). These scholars explain "the constraints on transformative constitutionalism...in terms of the conservative legal culture of South African courts" (Mnisi-Weeks, 2021: 69). As indicated, most of these analyses are confined to judicial decision-making, leaving the everyday worlds of legal practice, and the place of legal rules within it, largely unexamined. Through its ethnographic account of South Africa's ATJ legal field and its legal culture, this thesis addresses this lacuna and thus extends these scholarly debates.

Throughout this thesis, I have shown that most ATJ lawyers share a commitment to the project of TC as a motivating ideal. Yet, in practice, these lawyers, unsurprisingly, adhere to rules-based reasoning, particularly visible in their consultations with prospective clients when lawyers bracket off the wider context and history of the problem their client faces from the legal rules and categories they are working with. As seen in Chapter 3, the coexistence of a commitment to the ideal of post-apartheid law as a tool for both individual and societal improvement, and an insistence on rule-following, generates deep normative quandaries for many ATJ lawyers.

Taking these quandaries as ethnographic objects, the thesis reveals that what appears as simple rule-adherence cannot be explained solely by training or professional habitus. It is

also sustained by the ideals lawyers attach to the law. Ideals that are personal, aspirational, and moral – often shaped by personal experiences of racialised socio-economic marginality. The normative and professional quandaries these lawyers face vividly illustrate the tension between rules and ideals that anthropologists have argued constitute law (Dresch and Scheele, 2015; Pirie and Scheele, 2014). Examining this tension within its institutional and political context allows for a grounded understanding of how rules and ideals are entwined in South Africa's ATJ legal field, and how they shape efforts both to advance South Africa's constitutional project, and marginalised people's ability to use the law to improve their position.

The ethnographic chapters detailing contemporary ATJ work reveal that routine, rule-bound legal practice continues to produce incremental but meaningful justice: by facilitating bureaucratic processes, enforcing entitlements, or ensuring compliance with constitutional norms. Even in strategic litigation, lawyers' preference for formalistic arguments is shown to be grounded in pragmatic efforts to secure enforceable outcomes in the context of government incapacity and intransigence. Across the spectrum of ATJ practice, adherence to rules is reproduced not despite, but because of, lawyers' value-laden ideals of law as an instrument of progressive change.

This thesis's ethnographic approach and conceptual framing extend debates about legal culture and its relationship to social change in two main ways. First, it reframes formalism: not as a vestige of apartheid, but as a moral and political practice through which lawyers pursue transformation. Second, and as will be discussed further in the next section, by elucidating the conditions under which a commitment to formalism is reproduced, this thesis reveals that transformation itself depends on the very forms of legalism it seeks to transcend.

Making the ‘Transition’ Hold: Individual Legal Assistance and Strategic Litigation

The relationship between formalism and transformation in South Africa is further evident in how legal change is thought about and pursued in practice. To analyse this relationship this thesis distinguished between two modes of practice: *defensive* and *positive* ATJ lawyering. As discussed in Chapter 1, these are *emic* categories used by lawyers to describe different kinds of social justice work and can be traced to the emergence of South Africa’s ATJ field during the anti-apartheid struggle. Central to their distinction is the nature of the “change” each seeks to achieve. Defensive ATJ focuses on defending individual rights through existing laws, while positive ATJ – often in the form of strategic litigation – seeks systemic transformation, frequently by reshaping the law itself.

Chapters 5 and 6 situated positive and defensive ATJ practice within South Africa’s broader legal-bureaucratic and political context, mobilising the concept of legal infrastructures (Byrne et al., 2024). Chapter 5 showed that much defensive ATJ consists of helping marginalised people navigate South Africa’s legal system and legal-bureaucratic institutions. As evidenced by legal anthropologists elsewhere (Koch and James, 2022; Kirwan, 2016; Wilde, 2022; Forbess and James, 2014), this kind of work is often a central feature of legal assistance. But this thesis shows that it is also a practice in which ATJ lawyers attempt to hold in place relatively fragile regulatory arrangements: fragile because they are often not adhered to by the state.

This was evident in Chapter 5 which showed that, apart from helping poor people *navigate* systems, much defensive ATJ work consists of *pushing* basic legal-bureaucratic processes along – ensuring that existing laws and entitlements are, in fact, made operative. While being significant to those involved in the case, the kind of “change” this legal practice

produces is often limited to the matter in question. The growing necessity for such intervention suggests that, increasingly, *demanding* an entitlement through legal channels has become the precondition for having one. Defensive ATJ is thus woven into the very fabric of legal bureaucratic processes, becoming a part of the wider legal bureaucratic infrastructure itself. It is integral to maintaining predictable connections between people, institutions, rules, and resources, in ways that reflect the Constitution's ideals of a post-apartheid legal system. ATJ lawyers' work with, and insistence on adhering to, legal rules is thus partly necessitated by their position within this wider infrastructure.

Chapter 6 extended the analysis to positive ATJ. Here, I argued that lawyers' ideals of positive ATJ conceptualise law itself as an infrastructure: a relatively autonomous, systemic arrangement of rules, institutions, and relationships that ought to reflect constitutional ideals, in that way facilitating "transformation". In practice, however, even visionary, system-oriented litigation frequently collapses back into defensive work. Government incapacity, and what lawyers describe as "malicious compliance" following strategic victories, frequently necessitate further litigation simply to enforce existing orders. Strategic litigation does, of course, establish new legal principles inflected with constitutional ideals. Yet the limited dissemination of these principles into the legal bureaucracies that marginalised people engage with necessitates defensive legal intervention to insist that the new rules are followed. The slippage between visionary and routine forms of practice highlights that past improvements constantly need to be insisted on through recourse to legal rules. The result is that positive ATJ becomes bound up in maintaining, rather than transforming, the legal infrastructure.

ATJ lawyers' daily work thus involves attempts not only to enact ideals of social justice, but also to hold together the fragile set of arrangements that, from their perspective, ought to constitute the *distinctly* post-apartheid legal system itself. This highlights that a key role of ATJ legal practice is to ensure that South Africa's transition from an apartheid state to

a constitutional one, marked by its adoption of the 1996 Constitution, holds in practice. On this basis, I argue that the binary between transformative constitutionalism and formalism breaks down. Pursuing transformation requires performing the formalistic work of maintaining the system through which transformation is imagined to occur. ATJ lawyers thus occupy a fraught position within South Africa's wider legal-bureaucratic landscape: they are simultaneously vanguards of legal change, and maintainers of an earlier set of legal arrangements. The unevenness of state capacity, and the unevenness of South Africa's legal transformation, discussed in the Prologue, helps one understand why.

Mobilising the concept of legal infrastructures in the examination of law and social change constitutes a key contribution of this thesis. Bringing these two frameworks together is not only conceptually novel but also illuminates the often-overlooked relationship between transformation and maintenance in projects of law-based social change. The infrastructural work of connecting people, rules, and institutions is typically associated with the "advice" and assistance work of pro bono or clinic lawyers (Forbess and James, 2014; James and Koch, 2022) and seldom linked to the work of lawyers engaged in advancing systemic transformation. In contrast, this thesis demonstrates that the endurance of social change – achieved both directly and indirectly through forms of strategic litigation – depends on the routine, often invisible labour required to keep legal infrastructures functioning and responsive to law's ideals. Achieving *systemic* change depends not only on improvement, but the maintenance of, the system itself. By revealing the significance of these mechanisms, this thesis offers a novel conceptual framework to understand the tensions, difficulties, and practices that constitute lawyering for "social change".

But if infrastructural maintenance is central to sustaining transformation, it also shapes the forms of exclusion that arise in practice. The next section turns to this dynamic by

analysing how the insistence on legalism within everyday ATJ work produces, rather than simply bridges, South Africa's enduring "access to justice gap."

South Africa's Access to Justice "Gap"

While my interlocutors often framed their adherence to rules in terms of the realisation of post-apartheid ideals, this thesis shows that such an insistence on legalism also limits the assistance offered to marginalised people. In so doing, the thesis sheds new light on the location and nature of South Africa's ATJ "gap".

Existing South African ATJ scholarship, largely written by ATJ lawyers themselves, conceptualises the "gap" in terms of the necessity, yet financial inaccessibility, of legal assistance to the poor (Klaaren, 2019; Brickhill, 2005; Budlender, 2004; Dugard, 2008). This necessity is underpinned by the complexity of South Africa's mixed legal system alongside persistent poverty and illiteracy (Kruuse, 2022; Budlender, 2004). By "translating" (Kruuse, 2022: 329) their clients' problems into a language that can be "effectively heard and responded to" by the courts, lawyers are understood to bridge the distance between people and the law (Dugard, 2013a: 304). Other analyses attribute this distance to poor people's lack of rights consciousness (Hodgson, 2015; Mubaginzi, 2005). This thesis complicates both accounts by examining the initial encounter between lawyers and their clients, revealing that the gap is often produced *through people's engagement with law*, not exclusion from it.

Chapters 3 and 4 showed that translation is central to ATJ lawyering. Lawyers take their clients' wide-ranging and morally freighted stories and transform them through a framework of legal rules and categories into a "case". Their decision on whether to take the case depends on their assessment of its "merits". This process is both enabling and exclusionary. On the one hand, translation allows lawyers to render clients' problems legible in legal terms, potentially facilitating the attainment of relief or "justice". On the other hand, I

showed that translation is also a process of delimitation in which the broader personal and historical contexts, as well as moral concerns, that shape clients' problems are filtered out. Many clients' stories, while invoking constitutional values, are deemed to lack "merit" because they do not fit established legal categories.

In demonstrating these dynamics in South Africa's ATJ field, this thesis builds on legal anthropological and socio-legal scholarship that highlights the ambivalence of translation in legal practice in relation to marginalised people's ability to use the law to their benefit (Sarat and Felstiner, 1995; Bertenthal, 2016, 2017; Karekwaivanane, 2016; Cunningham, 1992). This thesis extends these insights by situating translation within the tension between rules and ideals that often characterise spaces of legal assistance.

Drawing on the insights from "legalism" scholarship, the ethnography further distinguishes between *rights consciousness* and *legalistic consciousness*. As seen in Chapter 4, clients often possess a distinct rights consciousness, typically expressed as a firm belief that the law should offer relief, and evidenced by their willingness to travel long distances and incur personal costs to seek help. But clients lack practical knowledge of how rules and procedures operate. The mismatch between rights consciousness (the ideal) and legalistic consciousness (the procedural and technical) often leads clients to make procedural errors before reaching the clinic, consequently compromising their cases.

When encountering such clients, ATJ lawyers often project law as a coherent system of rules and procedures that are rigidly enforced by legal bureaucracies – this is, of course, connected to lawyers' own attempts to make the law work. Consequently, the clients' missteps justify refusing them representation and advising them to abandon legal recourse. Building on scholarship on "advice" elsewhere (Koch and James, 2022; Forbess and James, 2014; Wilde, 2022), this thesis demonstrates that key to understanding the nature of legal

assistance and its effects requires analytical sensitivity to how those providing assistance are positioned in relation to legal and legal-bureaucratic institutions.

By bringing the typically disparate literatures on translation, advice, and legalism into conversation, this thesis reveals and explains the ATJ “gap” as a relational and processual phenomenon, produced through the very encounters intended to bridge it.

Returning to Formalism and Transformation

By illuminating the socio-professional world of ATJ lawyers, this thesis extends empirical understandings of post-apartheid legal culture beyond the courtroom. It shows that progressive lawyering is shaped not only by visionary ideals of transformation but by the routine practices that sustain them. In doing so, the thesis redefines the relationship between formalism and transformation: while often in tension, the two are also mutually constitutive.

Key to the work of progressive lawyers in times of transition is not only reaching toward wider horizons of change but also sustaining the infrastructures of transition itself. In South Africa, doing both reflects a moral commitment to making the promises of the Constitution real. The result is a form of legal work that is at once value-laden, pragmatic, and procedural: anchored in maintenance, yet oriented toward change. This dynamic reveals a continual negotiation between lawyerly adherence to existing rules and a normative commitment to new legal ideals. It is precisely this dynamic, lived and negotiated in everyday practice, that makes formalism both a constraint on and a condition for social transformation.

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