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RECONSIDERING A COMMUNITY-BASED JUDICIAL SYSTEM FOR SOUTH AFRICAN COURTS BASED ON THE COMMON LAW JURY SYSTEM

RECONSIDERING A COMMUNITY-BASED JUDICIAL SYSTEM FOR SOUTH AFRICAN COURTS BASED ON THE COMMON LAW JURY SYSTEM

Dissertation

by

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“What has it to do with you, Sir?”

- Ntabaka’s question, *The Native Commissioner*[1] -

[1] Johnson S *The Native Commissioner: A Novel* (2006).
The novel is a fictionalised account of the life of the author’s father who was a Native Commissioner in South Africa during apartheid. George, the Native Commissioner, although troubled by the morality and requirements of his work, finds himself unable to break free from it. Ntabaka, a young man who finds himself in George’s courtroom, sends George on a downward spiral when he questions George on what a matter dealing with African culture, norms and traditions has to do with a European Native Commissioner.

SUMMARY

The Oscar Pistorius Trial awakened everyday citizens to the reality of what transpires in South African courtrooms on a daily basis; thereby stirring them from their slumber created by the absence of engagement and involvement in South Africa's judicial system and the administration of justice as a whole; and propelling them into an environment which invites and facilitates engagement and debate on the functioning and judgments of South African courts.

Since the abolition of the jury system in South Africa in 1969, lay participation in South Africa's formal judicial system and more broadly in the administration of justice, has been practically non-existent save for instances where a lay person is called as a witness, expert witness or as an assessor in a trial. This lack of public participation in the administration of justice results in multiple concerns relating to legitimacy and the public's disconnect from judicial processes and procedures.

In order to address the growing need for public participation in the administration of justice, options of a judicial system providing for such involvement must be considered. This study contemplates whether a community-based judicial system is a viable consideration for South African courts, and explores options whereby South Africa's judiciary can make a shift to a system which encourages and facilitates lay participation by drawing from the common law jury system and its functions; which are underpinned by the direct involvement of the community. Furthermore, the study assesses whether links can be drawn between the common law jury system (Western approach) and traditional (indigenous) justice and conflict resolution processes (African approach) in respect of community participation in the administration of justice.

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I wish to express my sincere appreciation to my supervisor, Professor Willem Gravett, whose exceptional knowledge, experience and ability to get his passion across to his students has inspired me since the beginning of my undergraduate studies and now into my postgraduate studies. Thank you, Prof Gravett, for your enthusiasm for my topic, your valued suggestions, and your meticulous editing of my work. It would not have been possible for me to complete this study in a year under anyone else's supervision.

I am eternally appreciative of my parents who have always displayed an unwavering belief in my ability to achieve great things and fulfil my purpose in life. Thank you, both, for making it possible for me to fulfil my dreams. Mom, thank you for being the calm and the safe place amidst the storm, and for your perfectly timed words of wisdom. Dad, thank you for being a well of encouragement and inspiration which I could draw from during times that I could not draw it from myself. Without the unconditional love and support both of you have shown me, none of my achievements would have been possible.

Above all, I am grateful to my Heavenly Father, the author and source of all knowledge, for His unmerited favour, super abounding grace, and steadfast love.

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CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

It was a cold, rainy March in 2014 when a group of law students, all at different levels of seniority, found themselves huddled together in a small law faculty kiosk[2] on the University of Pretoria main campus, glued to an old grey television screen, when the idea of this study originated. Students pulled on scarves, gloves and boots in an attempt to keep out the cold. Lina, the kiosk sales assistant, tried in vain to keep up with the growing orders for piping hot coffee as the kiosk grew more and more cramped with each student dragging in another chair from outside, eager to join the atmosphere of engagement and debate inside. The rest of the faculty grounds were empty, class attendance dwindling as students gathered to witness arguably the leading case of our time: the Oscar Pistorius Trial.[3]

The Pistorius Trial awakened everyday citizens to the reality of what transpires in South African courtrooms on a daily basis; thereby stirring them from their slumber created by the absence of engagement and involvement in South Africa's judicial system and the administration of justice as a whole; and propelling them into an environment which invites

[2] A kiosk is locally known as a small shop or café with open seating.
[3] *S v Pistorius* 2014 JDR 2127 (GP) for the judgment.
S v Pistorius 2014 JDR 2468 (GP) for the sentence.
Hereinafter referred to as the 'Pistorius Trial'.

and facilitates engagement and debate on the functioning and judgments of South African courts. The Pistorius Trial ushered in a breakthrough in media coverage of trials in South African courts. For the first time in South African history the entirety of a criminal trial, save for select testimony and evidence, was broadcast live.[4] A television channel was created and dedicated solely to the trial for broadcasting purposes, as well as to provide discussion on each argument raised, and each piece of evidence presented. South Africa, and arguably the world, had not seen such media and public engagement and attention since the O.J. Simpson Trial.[5]

Since the abolition of the jury system in South Africa in 1969[6] lay participation in South Africa's formal judicial system and more broadly in the administration of justice has been practically non-existent save for instances where a lay person is called as a witness, expert witness or as an assessor in a trial.[7] Following the abolition of the jury system, the use of assessors, who are lay people with the requisite judicial expertise or experience in the subject matter before the court, was formally incorporated into criminal procedure legislation to ensure at least some form of lay participation.[8] However, the involvement of assessors in a trial remains within the discretion of the presiding judge.[9]

A lack of public or lay participation in the administration of justice results in two interrelated concerns. Firstly, it leads to the public having no robust or effective engagement with judicial processes and procedures, leading the public to believe that they stand on the outside of a

[4] *Multichoice (Proprietary) Limited and Others v National Prosecuting Authority and Another, In Re: S v Pistorius, In Re: Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others* (10193/2014) [2014] ZAGPPHC 37; [2014] 2 All SA 446 (GP); 2014 (1) SACR 589 (GP) (25 February 2014).
[5] *The People of the State of California v Orenthal James Simpson* (1995) Los Angeles County Superior Court.
Hereinafter referred to as the 'O.J. Simpson Trial'.
[6] The Abolition of Juries Act 34 of 1969.
[7] Dugard J "Lay Participation in the Administration of Justice" (1972) *Crime, Punishment and Correction* 55.
[8] The Criminal Procedure Act 51 of 1977, as amended, specifically section 145 which deals with assessors. Hereinafter referred to as the 'CPA'.
[9] Section 145(2) of the CPA (note 8 above).

system that directly affects them. They regard issues of judicial administration as matters for the legal practitioners and experts only; thereby distancing themselves from crime control and prevention, restorative justice and rehabilitation of offenders, the functioning of the judiciary, punitive measures, and law reform.[10] Secondly, this alienation from the judicial system leads to a lack of legitimacy in the operation of the judicial system, and specifically the functioning and judgment of the courts. As Hoexter emphasises, in order for the judiciary to effectively fulfil its functions, "it must have the confidence of the public."[11]

Public participation in the administration of justice was not exclusive to the jury system during its application in South Africa; nor had it dissipated completely with the abolition of the jury system. The indigenous people of South Africa have consistently applied traditional (indigenous) justice through community and chiefs' courts, thereby creating legal pluralism through their application of indigenous conflict resolution processes. This traditional justice system, albeit to Western thinking an informal system, has existed parallel to South Africa's formal court system; and has had as its priority restorative justice and community involvement.[12] Therefore, in the process of considering a community-based judicial system, indigenous application of community participation to the administration of justice must be considered in order to ensure an encompassing study of such community-based system for South African courts.

In order to address the growing need for public participation in the administration of justice, options of a judicial system providing for such involvement must be considered. This study aims to explore options whereby South Africa's judiciary can make a shift to a system which

[10] Dugard (note 7 above) 56.
[11] Hoexter M & Olivier M (eds) *The Judiciary in South Africa* (2014) xxvii.
[12] Skelton A "Tapping indigenous knowledge: traditional conflict resolution, restorative justice and the denunciation of crime in South Africa" (2007) *Acta Juridica* 230.

encourages and facilitates lay participation by drawing from the common law jury system and its functions; which are underpinned by the direct involvement of the community.

Furthermore, the study aims to assess whether links can be drawn between the common law jury system and traditional (indigenous) justice with regard to community participation in the administration of justice; in order that the recommendations of this study may encompass both Western and African concepts and reasoning. As Skelton emphasises, "A willingness to learn from indigenous knowledge systems is based on a recognition that such systems have something to teach, things which are unknown or have been forgotten by Western civilisation."[13]

1.2 SIGNIFICANCE OF THIS STUDY

Rood submitted in a 1990 article on the return of the jury system that, "it is the repeal of repressive legislation, a democratic constitution, and the Rule of Law which will restore the legitimacy of the legal system."[14] This study suggests that there may be a fourth requirement for the achievement of legitimacy of a legal system – effective public participation in the administration of justice.

A country's judicial system underpins its laws by becoming the law in action. The judicial system affects every citizen, whether directly or indirectly, by regulating how crime, unlawful behaviour, dishonesty and unfair practice are dealt with. Therefore, the judicial system, and the manner in which it functions, have a direct bearing on the standard of living, safety and security of the public.

[13] Skelton (note 12 above) 229.
[14] Rood LG "A return to the jury system?" (1990) *De Rebus* 754.

Faith in a country's judicial system is essential to its legitimacy; and legitimacy is best achieved through involvement. As highlighted in the introduction to this study, public participation in the administration of justice is paramount to achieving legitimacy. Therefore, the need for legitimacy must be met with a study of the common law jury system, as well as traditional (indigenous) justice and community and chiefs' courts, in order to consider a judicial system which incorporates, and perhaps has as its foundation, the involvement and participation of the public in the administration of justice. The South African Law Reform Commission is of the view that, "a legal system will not acquire legitimacy unless it reflects social reality."[15] It is an aim of this study to explore the link between legitimacy and lay participation in the administration of justice.

Critics of the jury system frequently refer to the breakdown of the jury system in the past as an argument against its reconsideration today and for the future. However, it is important to consider the factual reason for the abolition of the jury system in 1969. Although conflicting race relations, bias, prejudice and the predominant white male domination of the juries contributed heavily to the phasing out of the jury system, these aspects were not the direct and factual reason for the abolition of the jury system. The jury system fell into disuse and was done away with. Notwithstanding the grave and prejudicial treatment of black accused, which the jury system facilitated, the factual reason for the abolition of juries remains disuse, and it is with this fact in mind that one must reconsider such a system.

A further consequence stemming from the abovementioned dysfunction of the jury system in South Africa, is that critics of a community-based judicial system argue that lay people distinguished along racial lines cannot possibly engage effectively and reach reasonable conclusions based on logical and judicial reasoning. As Huebner states, "[t]he fear that the

[15] The South African Law Reform Commission "Simplification of Criminal Procedure (Access to the criminal justice system)" 1997 *Issue Paper 6 Project 73* 15.

jury system would perpetuate group divisions and enmities is probably the system's critics' strongest reservation."[16] However, the truth remains that because of the jury system originally dictating that only white males would occupy seats (unless an all-female jury was requested by a female or minor accused), effective engagement across racial lines has not been tested in a jury setting in South Africa. Majority of assessments of the viability of a jury system in South Africa has been based on how it played out under colonial and apartheid rule. There has been little consideration of what a community-based judicial system could accomplish in the post-apartheid democratic era. Huebner reinforces this point by stating: [17]

> The jury's nefarious history in South Africa, however, demonstrates that in certain circumstances juries can terribly pervert justice. This history probably also accounts for the near-consensus among legal thinkers that the system should not be reintroduced.

The South African Law Reform Commission has a more optimistic comment that arguments have been made that South Africa's "*mores* have advanced to such an extent that it is unthinkable that juries representing all South Africans could not be appointed."[18]

A further aspect to be considered in this study is the firm belief of commentators that the current system of judges ensures the fair, accurate and unbiased application of the law in South African courts. However, South Africa's Judicial Service Commission (JSC), the body responsible for making recommendations to the President on the appointment of judges to South Africa's High Courts, Supreme Court of Appeal and Constitutional Court, is under scrutiny for the procedure (or lack thereof) followed with regard to selecting candidates for recommendation.[19] Many of the arguments levelled against a community-based judicial

[16] Huebner MS "Who decides? Restructuring Criminal Justice for a Democratic South Africa" (1993:102) *The Yale Law Journal* 974.
[17] Huebner (note 16 above) 970.
[18] The South African Law Reform Commission (note 15 above) 18.
[19] Gravett WH "Towards an algorithmic model of judicial appointment: The necessity for radical revision of the Judicial Service Commission's interview procedures" (2017:80) *THRHR* 267-286.

system shares the thread that lay people are simply not in the position to carry out the functions expected of judges, as they are not educated in the law, nor are they skilled in judicial decision making. Furthermore, arguments are made that because of the education and training required of judges for their appointment, they have acquired the ability or learned the skills necessary to make judicial decisions and judge matters with little to no personal bias nor prejudice. Arguments such as these aim to assert that judges are superior in knowledge and impartiality, and therefore more equipped for the role of adjudication. However, concern is raised when the process of recommending judges for appointment is not carried out in line with stringent and consistent criteria.[20] The JSC is further plagued by the notion that recommendations on appointments are made on political grounds rather than on skill, experience and an impeccable track record.[21] Therefore, it calls into question whether one can still accept that the judge on the bench is in fact superior in reasoning and more skilful in impartiality compared to that of the lay person; when the grounds on which such judge was recommended for appointment are questionable.

This study proceeds from the point that arguments against change, although possibly valid at the time they were made, cannot simply be carried forward indefinitely without proper analysis of whether the arguments are still valid, applicable and accurate in the context in which the topic is now considered. This study aims to unpack the jury system and explore possible connections between the system and indigenous realisation of justice in order to consider a judicial system which has the public's involvement and legitimacy as a priority.

[20] Gravett (note 19 above) 275.
[21] Gravett (note 19 above) 268-269.

1.3 RESEARCH QUESTIONS & LIMITATIONS

This study aims to assess and contemplate the following research questions:

1. Would a community-based judicial system based on the common law jury system be a viable consideration for South African courts?
2. Is there common ground between the common law jury system (Western approach) and traditional (indigenous) justice and conflict resolution processes (African approach) in respect of the focus on community involvement in the administration of justice?

At the outset of this study it is important to delineate its scope and concede certain limitations.

One supposition, shared by most authors on the topic of the jury system, limits the scope of this study. The supposition is that from a practical and logistical viewpoint the jury system or any other community-based judicial system cannot be implemented in South African courts at this time. The administrative burden which such system would place on the judiciary is clearly marked as a challenge to a community-based judicial system, and therefore frequently used as a definitive rejection of any reconsideration on the topic. At the outset of the study it is conceded that suggestions on the implementation of such a system in South Africa's already overburdened and strained judiciary would be impractical and unreasonable. Therefore, this study aims simply to assess the reconsideration of a community-based judicial system and not to assess the viability of its implementation.

1.4 OUTLINE OF PROPOSED STRUCTURE & RESEARCH METHODOLOGY

CHAPTER 1: INTRODUCTION (RESEARCH PROPOSAL)

CHAPTER 2: THE HISTORY, DEVELOPMENT AND ABOLITION OF THE JURY SYSTEM IN SOUTH AFRICA

CHAPTER 3: THE RELATIONSHIP BETWEEN PUBLIC PARTICIPATION AND LEGITIMACY IN THE JUDICIAL SYSTEM

CHAPTER 4: THE BENEFITS AND LIMITATIONS OF THE CURRENT CRIMINAL JUSTICE SYSTEM AND STRUCTURE OF THE COURTS

CHAPTER 5: THE BENEFITS AND CHALLENGES OF A COMMUNITY-BASED JUDICIAL SYSTEM BASED ON THE JURY SYSTEM

CHAPTER 6: TRADITIONAL (INDIGENOUS) JUSTICE AND CONFLICT RESOLUTION PROCESSES – A POSSIBLE LINK BETWEEN WORLDS

CHAPTER 7: CONCLUSION

The chapters of this study have different approaches based on the purpose that each chapter serves. Chapter 2 covers the history, development and abolition of the jury system in South Africa. Therefore, the approach to the chapter will be straightforward and factual, leaving no room for commentary or assessment. In contrast, chapters 3 to 6 require a different approach that, while also requiring factual content, allows for and at times demands analysis, assessment and considerations of a philosophical nature. Chapter 7 requires an approach that condenses and consolidates the study neatly while also allowing for recommendations.

This study makes use of an array of resources in order to gain a wider perspective on the topics in and around this study and to narrow in on key concepts and considerations. Primary sources of law involved in the study include the Constitution; the common law, that

will be heavily relied on as it is from the common law that the jury system originated; legislation as it pertains to judicial procedures; and, where relevant, case law is used to provide practical authority. Customary law is consulted in as far as it pertains to the study of traditional justice, indigenous conflict resolution processes, and community courts and chiefs' courts.

As secondary sources academic books as well as textbooks are used to explore the history and development of the jury system, and to shed light on its application in the United States in order to make a comparison with South Africa. Furthermore, journal articles are used to shed light on specific arguments in favour of and against the jury system. Such articles are drawn on in considering narrower and specific questions relating to the study.

CHAPTER 2

THE HISTORY, DEVELOPMENT AND ABOLITION OF THE JURY SYSTEM IN SOUTH AFRICA

2.1 INTRODUCTION

The introduction of the jury system to South African procedural law took place incrementally during the 1800s, together with the reception and implementation of English laws of evidence and criminal procedure into the procedural law of each of the former provinces which made up South Africa; namely, the Cape of Good Hope, Natal, the Orange Free State, and the Transvaal.

As is shown throughout this chapter, the jury system did not experience longevity in South African procedural law; and was found to be problematic in various respects early on. The fundamental flaws in the application and functioning of the jury system during a turbulent time in South Africa's history resulted in the jury system being phased out just as incrementally as it had been introduced; eventually leading to its abolition.

2.2 BRIEF HISTORY OF THE JURY SYSTEM

The jury system developed because of the demands faced at various times in history. As with most laws and procedures, it was a response to a particular time with particular issues, and was an answer to the need for legal structure and order. The detailed history of the jury system remains relatively unclear; however, history has reflected the demands to which the jury system was seen as an answer.[22]

The jury system originated during the rule of Henry II as King of England, during which time the country was in turmoil. Henry II, although a young king, restored law and order to his country, and during his reign he made a significant contribution to the development of the common law.[23] Upon the commencement of his reign, Henry II prioritised restoration and peace; therefore, in order to commence the process of instilling order he needed to garner information about the situation in England regarding crime, dispossession, and which local and traditional customs the people prescribed to.[24] The way to go about obtaining such information at the time was through what was termed a Norman inquest, a right within the discretion of Frankish kings.[25] The Norman inquest was conducted through the King or someone designated by him by summoning a group of men from the relevant community to provide answers regarding the affairs of that community, under oath. These men were described as, "the best and most trustworthy."[26] The Norman inquest developed with time and became an important step in the process of inquiring into and deliberating on legal disputes or criminal matters. In due course, Henry II appointed travelling judges who would dispense justice across territories under his reign. These judges assumed the King's place

[22] This study relies heavily on the work of WLR De Vos in De Vos WLR "The jury trial: English and French connections" (2008:2) *Tydskrif vir die Suid Afrikaanse Reg* 196-202 which led to the following sources on the topic.
[23] Baker JH *An introduction to English legal history* (1990) 15.
[24] Pollock F and Maitland FW *The history of English law before the time of Edward I* ((1989) 139.
[25] Pollock and Maitland (note 24 above) 140.
[26] Pollock and Maitland (note 24 above) 141.

in calling upon a group of twelve men from the relevant community to tell the truth and answer questions under oath.[27]

The jury system as it had developed under the rule of Henry II underwent significant developments and changes after Henry II's reign. The system as it had become known underwent a shift away from that which originally created its identity. White describes it as follows: [28]

> As population increased and everyday activities grew more complex, it developed that neighbours knew little or nothing of the facts in dispute. It was then that witnesses who did know some facts were called in to supply the requisite information... [T]he jury laid aside its old character... The very thing... [ie personal knowledge]... that qualified a man for jury service in the olden times, at a much later date disqualified him.

By the end of the jury system's transformation in England, the role of the jury had changed drastically in that it was then held that it is a witness who testifies as to what he may have seen or heard, whereas the man on the jury, "swears to what he can infer and conclude from the testimony of such witnesses...."[29]

The jury system did not remain exclusive to English soil for long as the revolutionaries in France identified in the jury system the valued involvement of the community in judicial process. Therefore, they introduced the jury system to their legal system.[30] When Napoleon assumed the position of emperor of France in 1804, he chose to keep the jury system, which he regarded as a way to restrict the judiciary, as he believed that, "a judge with jurisdiction to determine both matters of fact and law would be too powerful."[31]

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[27] Pollock and Maitland (note 24 above) 154-156.
[28] White R "Origin and development of trial by jury" (1961) *Tennessee LR* 8 15 as found in Schwikkard PJ and Van der Merwe SE *Principles of evidence* (2009) 3rd edition 4.
[29] ***Bushell's Case*** 1670 124 ER 1006 1009 as found in Schwikkard and Van der Merwe (note 28 above) 4.
[30] Munday R "Jury trial continental style" (1993) *Legal studies* 206.
[31] Quoted by Munday (note 30 above) 208.

The jury system as followed in France – similar to the English approach – applied a strict division and distinction between matters of law and matters of fact, which dictated the roles of the judge and jury respectively.[32] This led to the concept of a two-tier trial approach, whereby a presiding judge as well as a jury were present. It had been common practice at trial for the presiding judge to offer a summing up to the jury; however, in 1881 the French legislature removed this step because of misuse by judges.[33] Not long thereafter, in 1908, France passed a law which provided the jury with the option of including the presiding judge in their deliberations in order to answer any questions which may have arisen, because of the fact that the jury had not had the fortune of being given a summing up by the judge.[34] It was this development that led to further laws dictating that judges were to retire with the jury for deliberations on both decisions of verdict and sentencing.[35]

Over the decades that followed, the jury system continued to develop and be moulded according to the demands placed on it by the territories into which it was accepted. In the 1979 work of Baldwin and McConville they sum up the view of the jury at that time in the United States and England:[36]

> Twelve individuals, often with no prior contact with the courts, are chosen at random to listen to evidence (sometimes of a highly technical nature) and to decide upon matters affecting the reputation and liberty of those charged with criminal offences. They are given no training for this task, they deliberate in secret, they return a verdict without giving reasons, and they are responsible to their own conscience but to no one else. After the trial they melt away into the community from which they are drawn.

[32] Munday (note 30 above) 210.
[33] Munday (note 30 above) 211.
[34] note 33 above.
[35] Munday (note 30 above) 212.
[36] Baldwin J and McConville M *Jury trials* (1979) 1.

Presently, the role of a jury can be stated succinctly in the words of Schwikkard and Van der Merwe: [37]

> ...jurors are lay people and sole finders of fact. They listen to the evidence and hear arguments, and they receive a summing-up and instructions from the presiding judicial officer. They are then called upon in their capacity as sole finders of fact to consider and reach their verdict in the absence of the presiding judicial officer. And they are not required to advance reasons in support of their verdict.

The emphasis on the jury's role as finders of fact is important in the distinction between the roles in a two-tier system of a presiding judge and the jury. The distinction is made at trial between matters of fact which must be decided upon by the jury, and matters of law which fall within the ambit of the judge's authority in the courtroom. This structure creates somewhat of a separation of powers whereby the community, through the jury, are involved in deciding on the facts of the case, and the judge as a legally trained officer of the court has the authority to apply the law to the case at hand.

2.3 LEGAL FRAMEWORK FOR THE JURY SYSTEM IN SOUTH AFRICA

During the Dutch administration of the Cape of Good Hope starting in 1652, a Council of Justice operated as a superior court, of which the members and magistrates were predominantly laymen with no formal training or education in the law.[38] In the early 1820s justices of the peace were established, closely followed by the formation of a Supreme Court, which paved the way for English laws of evidence and criminal procedure to be more readily received and applied as part of the procedural law followed in the Cape.[39] 1831 saw the integration of the jury system in criminal trials before the superior court,[40] and in 1854 juries in civil trials were introduced in action proceedings at trial in the Supreme Court.[41]

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[37] Schwikkard PJ and Van der Merwe SE *Principles of evidence* (2009) 3rd edition 13.
[38] Hahlo HR & Kahn E *The Union of South Africa: The development of its laws and constitution* (1960) 200.
[39] Strauss SA "The Jury in South Africa" (1973: 11) *Western Australia Law Review* 133.
[40] Hahlo & Kahn (note 38 above) 364.
[41] Hahlo & Kahn (note 38 above) 214.

Following the commencement of the Great Trek,[42] and the subsequent establishment of the Voortrekker[43] territories of the Republic of Natal and later the Republic of Transvaal and the Orange Free State; procedural law similar to that applied in the Cape of Good Hope was recognised by these early Voortrekker communities.[44] The jury system was introduced in the superior courts of these territories, under British rule, for criminal as well as civil trials during the 1850s.[45]

In 1910 the Union of South Africa was founded, consisting of the Cape of Good Hope and the former Boer republics. The integration of the jury system in civil trials was done away with completely in 1927 after relatively short periods of application throughout the Union, which were riddled with challenges.[46] However, the involvement of juries in criminal trials endured much longer; yet its application was frequently and consistently under fire for the manner in which it functioned. Generally, only white male jurors could serve on the juries, which expectedly, resulted in severe prejudice and bias, considering the complex race relations and multi-cultural backdrop against which these criminal trials were held. These fundamental challenges with the jury system are further explored below.

Trial by jury in criminal matters was predominantly regulated by the Criminal Procedure and Evidence Act 31 of 1917, which contained extensive provisions regulating the selection and qualification of jurors. This Act also provided *inter alia* that criminal trials taking place in higher courts would be heard before one or more judges, as well as a jury made up of nine

[42] The Great Trek refers to the period during which the Boers (the term, although presently colloquially used interchangeably to describe the cultural group of Afrikaners, initially denoted the predominantly Dutch settlers at the Cape of Good Hope) left the Cape of Good Hope British colony to escape British domination.
[43] The term 'Voortrekker' refers to the first group of Boers who initiated the Great Trek, i.e. the migration or 'trek' from the Cape of Good Hope to the interior of southern Africa.
[44] Strauss (note 39 above) 134.
[45] Hahlo & Kahn (note 38 above) 220-229.
[46] Hahlo & Kahn (note 38 above) 257.

men, of which seven would decide on the verdict in the matter. This structure ushered in the two-tier system in South Africa, whereby the court consisted of a presiding judge who directed the trial, and the jury responsible for the verdict.

The all-white, all-male composition of juries was preserved throughout most of the history of trial by jury in South Africa. It was only in 1931 that provision was made for a female or minor accused person to request an all-female jury.[47] Needless to say, juries remained dominated by the European race.

Despite the jury system's infancy in South African procedural law, cracks started to show early on in its implementation; and once the unravelling started, it spiralled. In 1914, before the enactment of the Criminal Procedure and Evidence Act 31 of 1917, provision had already been made for the exclusion of juries from cases of a political nature tried before special courts.[48]

The Criminal Procedure and Evidence Act 31 of 1917 provided crucial reform of the jury system, by providing that any person due to stand trial before a local or provincial division of the Supreme Court was enabled to determine for herself to exclude the jury from the trial. Furthermore, in 1935 the Minister of Justice was given the authority to intervene and elect to exclude juries in trials of certain matters.[49] This authority of the Minister of Justice expanded from 1948 onwards, allowing the Minister to make an increasing number of orders for a trial without a jury over the years.

Because of the steady decline in the confidence and use of a trial by jury, an amendment to South Africa's criminal procedural law was made in 1954, which provided *inter alia* that the

[47] Strauss (note 39 above) 137.
[48] Strauss SA "The development of the law of criminal procedure since Union" (1960) *Acta Juridica* 164.
[49] Strauss (note 39 above) 136.

burden to demand a trial by jury was placed on the accused, as trial by judge became the norm.[50] 1955 saw the adoption of South Africa's Criminal Procedure Act 56 of 1955 in which all legislation regarding the jury system was consolidated. The 1931 provision allowing for female juries was notably excluded from the new Act.

2.4 MAIN CONCERNS AND ABOLITION

The jury system's application in South Africa was beset with racial injustice, prejudice and bias, in many cases so severe that it may have scarred the collective conscience of the country to the point of avoiding all talk of reconsidering such a system. Morice, speaking from his own experience with cases involving a victim and accused of different races, highlighted cases in which white accused who had severely assaulted an African man were found not guilty, and a similar case in which a white accused had been found not guilty of assaulting an African child. He continued: [51]

> It is painful to think that this state of things has been going on for a century, ever since the English jury system was introduced to South Africa. With a people more vindictive than the coloured population of South Africa justice would have been secured by extrajudicial measures.

Morice further made significant remarks regarding the composition of juries in South Africa:[52]

> I am no supporter of the jury system in South Africa. When one considers that the native population is more than five times as large as the white population, and probably the proportion of natives that come before the courts is very much greater, while a considerable number of the crimes are committed by members of one race against those of the other, the jury in its present form appears as a grotesque anomaly. The natural results of such one-sided institution is [sic] injustice under the forms of justice.

[50] Hahlo & Kahn (note 38 above) 259.
[51] Morice GT "The administration of criminal law in South Africa" (1920:37) *South African Law Journal* 131-139.
[52] Morice (note 51 above) 136.

As a response to the growing outcry against the injustices taking place in court where the victim and the accused were of different races, the Government passed a Bill which empowered the Minster of Justice to order that an accused stand trial before a judge, without a jury, where the accused was white and allegedly committed an offence against a non-white person; and where the accused was non-white and allegedly committed an offence against a white person.[53] This power of the Minister of Justice is referred to earlier as having been granted in 1935. A condition of this provision was added that where there was to be a trial by a judge without a jury, assessors must have been summoned to sit alongside the judge. This provision was optional in less serious cases, but where there was a non-jury trial for treason, murder, rape, or sedition, or the attempt at any of these crimes; as well as cases in which the Minister of Justice had exercised his power to order a trial without a jury in interracial cases, it was a requirement for a judge to summon assessors. However, in time, a Bill was passed allowing for judges to have discretion as to whether assessors would be summoned.[54]

In 1961 the Union gained its independence and became the Republic of South Africa. Because fewer and fewer accused persons were demanding a trial by jury, as well as the frequently exercised power of the Minister of Justice to order trials by judge, by the end of the 1960s the involvement of juries in trials was rare. [55] By the end of this decade, because of the impracticality of providing for a system so seldom used, the jury system was formally abolished by the Abolition of Juries Act 34 of 1969.

[53] The General Law Amendment Act 46 of 1935.
[54] The Criminal Law Further Amendment Act 75 of 1959.
[55] Strauss (note 39 above) 137.

It would seem logical to link the phasing out and abolition of the jury system with political developments taking place in South Africa at the time, and perhaps the political climate of the newly independent South Africa played its part; however, as Strauss points out: [56]

> Gradual elimination of the jury at first, and then its complete abolition ultimately, were steps designed to achieve a better standard of administration of justice in a country which on account of its historical development and the complexity of its social structures are beset with problems that are often not properly understood by outsiders.

However, although the phasing out of the jury system may have had the aim of more effective administration of justice, this aim did not necessarily extend to all races, cultures, or classes of people.

2.5 CONCLUSION

The jury system's history in South Africa is relatively short in comparison to its longevity in countries such as England and the United States of America; and its impact, although enough to deter most legal minds from reconsidering its application in South Africa, has drifted from the minds of the public, with most lay people even being unaware that the country once applied the jury system.

The jury system's application in South Africa generally had as its structure an all-white, all-male demographic, which arguably set it up for failure in a country that now thrives on diversity. It is unfortunate that the functioning of the jury system in South Africa only played out in this setting, as the bias and prejudice displayed in its application cast a very dark shadow over the jury system's true function, which is to involve the community in the administration of justice.

[56] Strauss (note 39 above) 138.

CHAPTER 3

THE RELATIONSHIP BETWEEN PUBLIC PARTICIPATION AND LEGITIMACY OF THE JUDICIAL SYSTEM

3.1 INTRODUCTION

Legitimacy is a concept seldom accurately understood, as part of its achievement is found in subjective features of belief, faith and confidence in a country's judicial system. It is thus neither an exact science nor an achievement which can be precisely calculated or formulated. However, it is an essential part of an accepted legal system and effective judiciary. As is shown in this chapter, legitimacy is very much dependent on the public; and as South Africa's history illustrates, where the legal system is out of touch with the public and society's *mores*, a legitimacy crisis is bound to ensue.

3.2 SOUTH AFRICA'S LEGITIMACY CRISIS IN THE PAST

South Africa is no stranger to a crisis of legitimacy of its legal system and judiciary. As discussed above, prior to 1994, the country was a colony and had its legal system and judiciary grounded in colonial principles and practices which were not representative of the people of South Africa. In 1948 the National Party came into power. With its main political

policy of racial classification and segregation, apartheid facilitated the reign of a minority racial group over a multitude of citizens of different races; and it did so through the legal system and judiciary. The National Party's policy of racial segregation and severe racial discrimination was enshrined in legislation and enforced by the courts.[57] This dark time in South Africa's history saw large scale forceful displacement of people from their land, the establishment of group areas, the reservation of public amenities according to race, prohibition of interracial marriages, an inferior black education system, and various other forms of racial discrimination and oppression.[58] Therefore, the law, which is universally believed to have the purpose of establishing order and protecting citizens, was used as an instrument of oppression of the majority.

South Africa's law is not codified, meaning it is not contained in one comprehensive piece of legislation. Rather the law is found in various sources, and continually develops. Kleyn and Viljoen explain that the apartheid regime was created through legislation, one source of law, and is to be distinguished from South Africa's common law which is founded in Roman-Dutch law, and influenced by English law; which legal systems are, "known for their principles of justness, fairness and equality." [59] However, the apartheid legislation "stigmatised our legal system as a whole and created a legitimacy crisis."[60] Therefore, irrespective of whether South Africa's common law is grounded in concepts of justness, fairness and equality; the apartheid regime as legislated and as enforced by the courts overshadowed the entire legal system because its effects were what the public experienced at grassroots level. The public did not distinguish between legislation, the judgments of the courts, or common law; it viewed the law as it experienced it – as a single system.[61]

[57] Kleyn D and Viljoen F "Beginner's guide for law students" (2010) 4th edition 34.
[58] note 57 above.
[59] note 57 above.
[60] note 57 above.
[61] note 57 above.

Since 1994 significant steps have been taken in restoring legitimacy to the country through the rule of law, democracy, constitutionalism and representation of all. Arguably the greatest shift South Africa made in attaining legitimacy was the shift from parliamentary sovereignty to Constitutional sovereignty, which allowed for the overhaul of oppressive legislation by providing that all laws had to measure up to the standards and values of the Constitution.

3.3 THE CONCEPT OF LEGITIMACY

The Oxford dictionary defines legitimacy as firstly, "conformity to laws or rules"; and secondly, as the "ability to be defended with logic or justification; validity".[62]

The basic premise of any understanding of legitimacy is that it requires that something must be in line with the law. However, such a definition proves insufficient when considering a legal system or judiciary. Mere alignment with the law has never granted a legal system legitimacy. South Africa is a prime example – its legal system and judiciary under apartheid was in line with and facilitated by the law, yet it is widely agreed that the legal system and judiciary lacked legitimacy.[63]

Carpenter explains that legitimacy consists of two factors which are essential to its achievement. These are, (i) formal authority which is derived from the rule of law, constitutionalism and democracy; and (ii) moral authority which is derived from the people.[64] It makes sense then that the very first line in the Constitution, the highest law of the land, is, "We, the people of South Africa..."[65] For moral authority to be recognised and obtained, the

[62] Oxford dictionary accessed online at Lexico powered by Oxford https://www.lexico.com/en/definition/legitimacy (last accessed 9 October 2019).
[63] Carpenter G "Public opinion, the judiciary and legitimacy" (1996:11) *SAPR/PL* 110.
[64] note 63 above.
[65] The Preamble of the Constitution.

people must believe that the country's laws and its application thereof through the courts conforms to its formal authority. Only then will the people accept, respect and value the legal system and judiciary to which they are subject.[66]

3.4 LINK BETWEEN PUBLIC PARTICIPATION AND LEGITIMACY IN AN EFFECTIVE JUDICIARY

In the 1982 case of *Dudgeon v United Kingdom*, Walsh J of the European Court of Human Rights held that in a democracy, the law cannot afford to ignore the moral consensus of the community.[67] A distinction must be drawn between public opinion on the one hand, and public participation on the other, when it comes to the role of each in the legal system and judiciary. In the case of *S v Makwanyane and Another*,[68] Mahomed J clarified the difference between political decisions made by the legislature and judicial decision-making by the judiciary. Legislative processes undertaken by the legislature take cognisance of public opinion and the state of the country's *mores*. Therefore, when it comes to making the law, public opinion plays a vital role. However, when it comes to judicial decision-making, the focus shifts away from public opinion and onto consideration and application of the law from all its sources,[69] *i.e.* the Constitution, the common law, legislation and case law. Therefore, the judiciary clearly delineates where the input of public opinion begins and ends.

However, public participation on the other hand has for centuries held some place in judicial decision-making processes around the world. It is argued that public participation is perhaps the most active form of public opinion; therefore, regardless of the delineation, when the public is involved in judicial decision-making, public opinion naturally has its part to play.

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[66] Carpenter (note 63 above) 111.
[67] *Dudgeon v United Kingdom* 1982 4 EHRR 149, as found in Carpenter (note 63 above) 112.
[68] *S v Makwanyane and Another* 1995 6 BCLR 665 (CC).
Hereinafter referred to as the '*Makwanyane* case'.
[69] At para 759 F-I.

The citizenry must believe that the state has its interests and its protection as a priority. Public perception of whether the state conforms to its formal authority, as discussed above, may affect the legitimacy of the legal system and judiciary.[70] This public belief in the system, which constitutes the required moral authority for legitimacy, is largely formed by outcomes and results, rather than by "argument based on process."[71]

Here a link can be drawn to the concepts of formal justice and substantive justice. Formal justice is attained through the law as it is on paper – the laws, procedures, processes which have been legislated in order to provide for the rights and protection of citizens. However, what the public actually experience (or do not experience) from this formal law is what constitutes substantive law. Substantive law is only achieved when the ink on the pages of formal law has trickled down from the legislature, to the judiciary, and finally to the people at grassroots level, so that those rights and forms of protection on paper may be experienced by every person. In the same way, true legitimacy is only achieved when both formal and moral authority are attained.

Skelton explains that, "[c]ommunity involvement is highly desirable because it provides opportunities for participation by parties themselves and creates space for civil society to strengthen democracy."[72] This view accords with Schwikkard who explains that legitimacy requires of everyone affected by a trial – the accused, the victim, and the public to believe that the trial "is a sincere attempt to ascertain the historical truth."[73] Once again, moral authority in the form of confidence and belief in the system by the public is essential to

[70] Carpenter (note 63 above) 113.
[71] note 63 above.
[72] Skelton (note 12 above) 243.
[73] Schwikkard PJ "Does cross-examination enhance accurate fact-finding?" (2019) *South African Law Journal* 27 31.

achieving legitimacy, and such moral authority can only be attained through an effective connection between the law and "core societal values."[74]

A legitimacy crisis of the legal and judicial system undermines any attempt at law and order and an effective judiciary. When the people do not have faith in their country's legal system and judiciary, disregard, apathy, disorder, and insecurity ensues and places the country's stability at risk. In the *Makwanyane* case, the court emphasised at paragraph 168 the priority that the public must be protected by the state:

> If the State fails to discharge this duty adequately, there is a danger that individuals might feel justified in using self-help to protect their rights.

Once again, the public's perspective on whether this duty to protect the public's rights is discharged is based on outcomes, results and experiences. Therefore, where the people feel aggrieved and perceive a failure on behalf of the state to act in line with its formal authority, then they may resort to self-help measures, and the threat of a legitimacy crisis looms once again.

3.5 CONCLUSION

The application of the law and the pursuit of truth through a country's legal system and judiciary may always remain imperfect, especially in a democracy. However, for it to attain and maintain legitimacy it must have moral authority from the public alongside its formal authority. Moral authority is neither static nor stagnant, and, as it is outcomes based, it may be lost just as easily as it is attained. Although moral authority through faith by the public is built and earned over time, it must continue to be earned, and it must continue to reflect changing societal norms and developments in knowledge.

[74] Schwikkard (note 73 above) 39.

By distancing the public from a legal system that directly affects it, South African courts run the risk of losing touch with the *mores* of the public; thereby remaining focused on imposing the law from an elevated distance, rather than contemplating restoration and rehabilitation which fundamentally require the involvement of the public.

CHAPTER 4

THE BENEFITS AND LIMITATIONS OF THE CURRENT CRIMINAL JUSTICE SYSTEM AND STRUCTURE OF THE COURTS

4.1 INTRODUCTION

A study in reconsidering a community-based judicial system naturally requires an assessment of the current system – what works and what needs improvement. Therefore, this chapter delves into history to identify where South Africa's current system of criminal justice came from and how it developed into the system the country recognises today.

As is shown throughout this chapter, the current criminal justice system has been plagued in the past by accusations and claims of a lack of legitimacy[75] – so much so, that it is believed by some that the jury system or something similar would assist in the restoration of legitimacy to the legal system. Such considerations are discussed in the next chapter which is dedicated to reconsidering the jury system.

[75] The South African Law Reform Commission (note 15 above) 18.

As discussed above, racial prejudice feeding into the administration of justice was prevalent under the jury system, with the norm of all-white juries, and continued into the advent of the trial by judge. South Africa's judiciary has only recently been able to shake free from what has been termed the white, male monopoly of the judiciary. Ensuring the composition of the judiciary is more balanced along racial lines is a positive leap towards legitimacy of the legal system.

The current criminal justice system – with its foundation in common law which was heavily influenced by English law relating to procedure and specifically evidence – has in essence been tried and tested throughout history. Over the centuries, certain rights and safeguards have developed in favour of the state, the victim and the accused at trial. However, along with these developments there has been a gradual lessening of public or lay participation in judicial decision-making and involvement in criminal proceedings. Whether the current criminal justice system functions well with the little public participation it provides for, and whether the strengths of the system outweigh the ideal of greater public involvement; is what this chapter seeks to consider.

4.2 CURRENT CRIMINAL JUSTICE SYSTEM AND COURT STRUCTURE

The criminal justice system of any country forms part of the country's procedural law, and gives effect to and enforces the country's criminal law. In order to understand the criminal justice system it is important to consider where it has come from and how it has developed over time.

4.2.1 History and influence of English law

In order to delve into the history of the criminal justice system, the study must look back even further in time than the history discussed in Chapter 2, to a time before the establishment of the jury system.

Van der Merwe explains that the progression of English procedural law, especially law of evidence, can be condensed into three successive stages of development; namely, the religious (primitive) stage, the formal stage, and the rational stage.[76]

During the religious (primitive) stage divinity was heavily relied upon in the judgement of alleged wrongdoers, as it was believed that men should not act as judges over one another.[77] This stage in the progression of English procedural law may in today's time seem absurd. However, during the periods of its application, it was believed that the divine powers above would intervene in a trial of an alleged wrongdoer and indicate guilt or innocence; as it would only be God who could know the truth. During this stage 'trial by ordeal' was a common practice, which took on different forms. One such form of trial by ordeal was the trial by 'ordeal of the accursed morsel'[78] which required the accused to swallow a dry piece of bread, together with a prayer that should he be guilty of the crime, he should choke on the morsel. Trial by battle was another example of trial by ordeal, whereby a trial could be finalised by way of a duel; as it was believed that the Divine would ensure the victory of the one who is true in character.[79]

[76] Van der Merwe SE "An introduction to the history and theory of the law of evidence" in Schwikkard and Van der Merwe (note 37 above) 2. This chapter by Van der Merwe was heavily relied upon for the history of the criminal justice system.
[77] note 76 above.
[78] Also referred to as *corsnaed*.
[79] Van der Merwe (note 76 above) 3.

The formal stage saw the development of the oath as a trusted aspect in the truth-seeking mission of procedural law, which, even today is an integral part of legal proceedings. This stage saw the repositioning of men in judgment over each other. Langbein explains that during this stage the attempt, "to make God the fact finder for human disputes was being abandoned. Henceforth, humans were going to replace God in deciding guilt or innocence...."[80]

With this shift of involving the community in the judgment of disputes, came the introduction of the use of oath-helpers or compurgators who, in essence, vouched for the credibility of one of the parties to the dispute. The party with the most compurgators making oath and vouching in his or her favour was successful in the matter.[81]

Lastly was the rational stage. This stage saw the development of the jury system as it was during this time that it was established that the compurgators could contribute more to the matters than merely vouching for the parties. The compurgators, as people from the community who had personal knowledge of the matter at hand, were to an increasing degree expected to take on the role of judge. From this point onward the formal jury system developed as explained above.[82]

4.2.2 Features of the current criminal justice system

Generally, there are two procedural and evidentiary systems which are followed in fulfilling the truth-seeking mission of the court. On the one hand is the Anglo-American system, also known as the strict or common law system, which has as its foundation the English system of adversarial or accusatorial trails and which employs a strict system of evidence. On the

[80] Langbein JH *Torture and the Law of Proof* (1977) 6 as found in Van der Merwe (note 76 above).
[81] Van der Merwe (note 76 above) 4.
[82] note 81 above.

other hand is the Continental system which is inquisitorial in nature and employs a free system of evidence.[83] South Africa follows the Anglo-American system.

The two systems are primarily distinguished from one another on the basis of the roles which each party plays at trial; *i.e.* the prosecution (the state), defence (the accused), and the victim. The accusatorial system, with its roots in the earlier practice of trial by battle, involves trials being carried out in a manner similar to that of a sporting match. In a sporting match there are two teams battling it out in order to achieve their goal. One impartial umpire directs the match, ensures parties play according to the rules of the game, and resolves disputes that may arise during the game which require objective decision-making – such as whether a goal was indeed scored, or whether a certain form of game play is allowed within the boundaries and rules of the game. At the end of the match, the umpire announces the winning team by reason of points scored or goals made.

In this very same way, at trial, the accusatorial system has two parties, each with their own goal for the trial; and an impartial judge who presides over the trial. The parties are responsible for playing their own game – they must present their cases to the best of their ability and maximise their resources, as it is their opportunity to place their version of events and arguments before the court. The judge does not get involved in the dispute between the two parties, but rather directs the trial by keeping the parties in line, and making judgement calls on aspects relevant to the trial, for example, the admissibility of evidence. At the end of the trial, the impartial judge weighs up all the evidence and arguments presented and applies the law accordingly; thereby making a judgment on the matter based on the standard of proof of beyond a reasonable doubt (in criminal cases).

[83] Van der Merwe (note 76 above) 6.

In line with its symbolic roots in trial by battle, the accusatorial system revolves around the two parties "battling it out" face to face by orally putting their versions before the court and allowing the opposing party to challenge it. Therefore, there is great emphasis on "orality". Whether it is the party herself or witnesses called on her behalf, it is seen as a cornerstone of the adversarial system that the party is allowed to put forth his version and arguments, but also that it may be challenged by the opposition through cross-examination. [84]

Cross examination of oral evidence presented is what essentially makes the trial a "battle" or a "duel". In sporting terms it would be the team's defence against the opposition. It may be argued that without the right to cross examine and challenge the oral evidence of the opposition; without this crucial element of defence, what is intended to be a process akin to a sporting match involving attack and defence, becomes parties taking part in individual sporting codes such as athletics where the individual's own performance is the only determining factor in the fight for the top spot.

It is the right of cross-examination by both parties at trial which enables the presiding judge in adversarial proceedings to remain relatively passive in the dispute between the parties.[85] A potential downfall of the passive role of the presiding judge in accusatorial proceedings at trial is the risk of partial presentation of evidence. It is an ethical requirement of legal practitioners to present all evidence in relation to their cases to the court – whether it be in their favour or not. However, in practice, legal practitioners may use their discretion in the presentation of their cases – what arguments to include, how much detail to divulge, the order of arguments and the timing of the calling of particular witnesses. This discretion along with the impartial, passive role of the presiding officer (except in the limited circumstances in which she is permitted to call witnesses of her own volition) exposes the process to

[84] Van der Merwe (note 76 above) 9.
[85] note 83 above.

potential abuse. This may lead to the situation where, "the 'procedural' or 'formal truth' can be promoted at the expense of the 'material truth'."[86]

The Continental or inquisitorial system involves the presiding judge taking on the role of "master of proceedings". Even before the trial, during the investigation phase of the case, the assigned judge is actively involved as the accused is primarily questioned by the investigating judge, and not the police.[87] Furthermore, during the trial, the presiding judge acts as *dominus litis*[88] as she is directly involved in the truth-seeking mission of the trial by leading the questioning of witnesses and the accused.[89]

In complete contrast, the accusatorial system functions on a separation of phases and powers by having the police assigned as the primary investigative unit; the prosecution (the state) who decides whether to prosecute or not, takes on the role of *dominus litis* and decides on the appropriate charges and the appropriate court; and counsel for each party has the primary responsibility of representing their respective clients, questioning witnesses, presenting arguments and challenging opposing arguments.

South Africa's criminal justice system is accusatorial in nature. However, there are instances where inquisitorial elements are allowed. Such instances include the case of a plea of not guilty, where the presiding officer is authorised to ask the accused to make a statement indicating his defence, failing which, the presiding officer may question the accused to clarify matters and establish which allegations are in dispute.[90] With regard to a plea of guilty, the presiding officer is authorised to question the accused with regard to alleged facts of the

[86] Van der Merwe (note 76 above) 10.
[87] Van der Merwe SE "A basic introduction to criminal procedure" in JJ Joubert (ed) *Criminal Procedure Handbook* (2017) 12th edition 23.
[88] The person who brought the matter to the court – the one to whom the case belongs.
[89] Van der Merwe (note 87 above) 22-23.
[90] Section 115 of the CPA.

case in order to determine to which allegations the accused is admitting.[91] The presiding officer may further question the accused in order to clarify any matter raised in the accused's statement.[92] Where it is of necessity to the case, the presiding officer is further allowed to call witnesses of her own; or to recall a witness which had been called by one of the parties.

Chapter 8 of the Constitution deals with the courts and the administration of justice. In particular, section 165(1) provides, "The judicial authority of the Republic is vested in the courts."[93] The Constitution further provides in section 165(2) that: [94]

> The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

Strict separation of powers is created by the Constitution in order that the judiciary may remain independent. Therefore, ideally there should be no political interference in the work and functioning of the courts.

In terms of criminal justice, the courts consist of superior courts, which are made up of the Constitutional Court, the Supreme Court of Appeal, and the High Court with various seats across the provinces; and lower courts which consist of regional courts and district courts.[95] The Chief Justice of the Constitutional Court is the head of the judiciary.[96] This role and its accompanying office comes with the responsibility of overseeing all courts, and instituting and maintaining standards required for the effective exercising of judicial functions of all courts in the country.[97]

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[91] Section 112(1)(b) of the CPA.
[92] Section 112(2).
[93] Section 165(1) of the Constitution of the Republic of South Africa, 1996.
Hereinafter referred to as the 'Constitution'.
[94] Section 165(2) of the Constitution.
[95] The study relies on the work of Joubert JJ (ed) (note 87 above) as a source on the structure of the judiciary in South Africa.
[96] The Constitution Seventeenth Amendment Act of 2012; the Superior Courts Act 10 of 2013.
[97] Section 165(6) of the Constitution.

An important provision of criminal procedure legislation on the functioning of the courts is that it provides for the use of assessors at trial. Therefore, in criminal trials the presiding officer may summon one or two assessors to assist her in the finding of fact. The assessor system is further discussed below.

4.3 BENEFITS OF THE CURRENT CRIMINAL JUSTICE SYSTEM AND COURT STRUCTURE

In assessing the effectiveness of the current criminal justice system it is important to consider what currently works, and what changes have been brought about which may reap positive rewards in the future. This study is not a comprehensive assessment of the criminal justice system, nor is it a closed list of the benefits of the system, but herein specific aspects relating to the study are discussed.

4.3.1 Representation

Prior to 1991, the appointment of Mr Ismail Mahomed SC, no other non-white person had ever been appointed to the South African judiciary.[98] However, since then advancement in this regard has been made in leaps and bounds as the composition of the South African judiciary is more balanced than ever before.

Huebner in his 1993 article on restructuring criminal justice for a democratic South Africa highlighted that, at that time, the judiciary faced an "acute crisis of confidence",[99] partly as a result of the exclusion of non-white people and females from the functioning of the judicial system.[100] Now that the representation of non-white people in the judiciary has steadily increased and brought more balance, one could argue that this balance in itself has brought

[98] Mokgatle DD "The Exclusion of Blacks from the South African Judicial System" (1987:3) *South African Journal of Human Rights* 44 46.
[99] Huebner (note 16 above) 966-967.
[100] Dlamini CRM "The Appointment of Blacks as Judicial Officers" (1990) *Consultus* 31.

with it and will continue to grow the public's confidence in the judiciary, thereby restoring legitimacy to the system.

During the application of the jury system in South Africa, an all-white jury was the norm. When the jury system was abolished in 1969 and trials by judge became standard, the bench was predominantly occupied by whites; and even at the advent of a new dawn of democracy in 1994, the bench still reflected the predominantly white, male image of justice which had been painted over centuries. However, post 1994, at the realisation and belief that the judiciary must be representative of and reflect the community; slowly but surely transformation with regard to racial and gender representation on the bench began to take place. The 2018/2019 report from the Office of the Chief Justice reflects the current demographics of the courts as having transformed considerably.

The statistics for the superior courts indicate that non-white (African, Coloured and Indian) males make up 40% of the bench, while white males make up 22%; and non-white females make up 27% of the bench compared to the 11% of white females.[101]
The demographics of the magistrates' courts reflect that non-white males make up 36% of the bench while white males make up 17%; and non-white females make up 34% of the bench compared to the 13% of white females.[102]

As encouraging as the statistics are for representation on the bench, it is important to acknowledge that, although balance has been achieved statistically, the effects of these changes will take time to filter through and achieve a lasting impact on the criminal justice system.

[101] Office of the Chief Justice "The Judiciary Annual Report 2018/2019" https://www.judiciary.org.za/index.php/judiciary/judiciary-annual-report (last accessed 7 October 2019).
[102] The Judiciary Annual Report 2018/2019 (note 101 above).

4.3.2 Developments in court structure

There have been significant positive changes and developments to the South African court structure since 1994, all promoting the constitutional right of all in South Africa to have access to the courts. The Constitution provides in Section 34 of the Bill of Rights: [103]

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.

Most significant of the changes to the court structure have been the establishment of the Constitutional Court, South Africa's highest court in constitutional matters; as well as the establishment of a High Court in every one of the nine provinces. Furthermore, there has been the establishment of more specialised courts, such as the Electoral Court, Land Claims Court, the Equality Court and Divorce Court. All these developments have contributed to the current judiciary broadening the public's access to courts, as well as spreading the case load of the courts in an attempt to ensure that cases are finalised more expeditiously.

4.3.3 Assessors at trial

The criminal justice system of South Africa allows for assessors to sit with a presiding judge at trial to assist with the finding of fact. The use of assessors is regulated by the Criminal Procedure Act[104] for the superior courts, and by the Magistrates' Courts Act[105] for the lower courts.

For superior courts, section 145 of the CPA provides in subsection (2) that a presiding judge may summon two assessors to assist her at trial, in deciding on matters of fact. Section 145(1)(b) provides that an assessor is someone, who, in the opinion of the presiding judge

[103] Section 34 of the Constitution.
[104] note 8 above.
[105] Magistrates' Courts Act 32 of 1944, as amended.

who decides to call on assessors, “has experience in the administration of justice or skill in any matter which may be considered at the trial.” The assessor becomes a member of the court with the same standing as that of the presiding judge on matters of fact.[106] This, in essence, means that where two assessors are summoned to sit with one presiding judge, the assessors are in a position of being able to “out vote” the presiding judge on matters of fact. However, where one presiding judge summons only one assessor, should there be a difference of finding on fact, the presiding judge’s finding will stand.[107]

The use of assessors directly replaced the role of the common law jury as finders of fact. Therefore, in as much as the number of assessors summoned at trial is far less than the number of jurors, the public still has some level of involvement in criminal trials. However, this study argues that the main concern with the assessor system is that the use of assessors at trial is within the sole discretion of the presiding judge; which same judge, decides for herself whether the intended assessors have the required experience or skill to sit as assessors.

However, a significant improvement in the assessor system over the jury system is the fact that section 146 of the CPA requires of assessors to provide reasons for their findings of fact;[108] along with the required reasons for findings of the presiding judge in both decisions of fact as well as law.[109] The assessors are further required to give reasons where their finding may be the minority finding of the court.[110]

[106] Section 145(4)(a) of the CPA.
[107] note 106 above.
[108] Section 146(b) of the CPA.
[109] Section 146(a) of the CPA.
[110] Section 146(d) of the CPA.

For the lower courts, many of the provisions relating to the summoning of assessors remain the same as in the superior courts. Section 93*ter* (1) of the Magistrates' Courts Act provides for the presiding officer's discretion in the summoning of assessors; however, the Act goes further to provide factors which the presiding officer shall consider in determining whether it would be expedient for the administration of justice to appoint assessors.[111] Some of these factors include the cultural and social environment of the accused, the accused's educational background, the nature and seriousness of the offence, and the probable extent of the punishment which may be imposed if found guilty.[112]

Similarly to the superior courts, once the oath has been administered, the assessors become members of the court in respect of findings of fact.[113] Therefore, even in the lower courts, the assessors may overrule the presiding officer on matters of fact, except in the situation where only one assessor is summoned, whereby the finding of the presiding officer stands.[114] As with the superior courts, reasons for findings of fact must be furnished by the court, including the assessors.[115]

However, the Magistrates' Courts Act takes the role of assessors in the lower courts one step further by providing in Section 93*ter* (1)(b) that the presiding officer may appoint assessors to sit with her "in considering a community-based punishment in respect of any person who has been convicted of any offence." Such community-based punishment is provided for in Section 93*ter* (2)(b)(i)-(iii) as, *inter alia*, correctional supervision as a

[111] Section 93*ter* (2)(a)(i)-(v).
[112] note 111 above.
[113] Section 93*ter* (3) of the Magistrates' Court Act.
[114] Section 93*ter* (3)(d) of the Magistrates' Courts Act.
[115] Section 93*ter* (3)(e) of the Magistrates' Courts Act.

community-based sentence,[116] and the performance of a service, without remuneration, to the benefit of the community in the promotion of the interests of the community.[117]

As a further improvement on the jury system, the assessor system requires of assessors to be under judicial guidance throughout the duration of the trial. This involves the presiding judge or magistrate and the assessors having joint deliberations in reaching their respective findings. Furthermore, the presiding officer must, during such deliberations, ensure that the assessors understand the relevant evidentiary rules which are at play during the trial.

Through the above it is clear that safeguards have been created through the assessor system which allow a lay person to act as assessor, yet at the same time ensures that the role of the assessor is reigned in and brought under judicial structure in order to ensure rational and accurate findings of fact.

4.3.4 Safeguards

Much has been learnt over the course of history regarding the effectiveness of certain procedural and evidentiary laws employed in the truth-seeking mission of the court. As pointed out above, some past practices may appear absurd and perhaps barbaric in the context of the modern understanding of what is morally correct, and perhaps more crucially, what is most effective when it comes to the establishment of the truth at trial.

Therefore, over time, particular safeguards and practices have developed that have shaped the country's criminal justice system to be more aware of the rights of an accused. Bearing in mind the careful balancing act during a trial of the rights and considerations regarding an accused, the rights and considerations of the victim, and the responsibility of the state, one

[116] Section 93*ter* (2)(b)(i) which refers to Section 1 of the CPA.
[117] Section 93*ter* (2)(b)(ii) which refers to Section 297(1)(a)(i)(cc) of the CPA.

can see that an attempt at fairness of process and caution in conviction is often met with accusations of protection of accused persons and dismissal of the impact on victims. However, history has shown that innocent individuals often get caught up in the whirlwind of criminal justice, and a system geared at finding and punishing the wrongdoer as expeditiously as possible often means that there is opportunity for discrimination and injustice.

However, particular evidentiary rules have been retained in South Africa's procedural law, and particular constitutional rights have been incorporated into the procedural law, which provide for a certain amount of protection of an accused in ensuring that the presumption of innocence is maintained. This approach is in line with the truth-seeking mission of a trial. Although the purpose of the criminal justice system may at times become clouded by calls for somebody's "head", it must be borne in mind that the purpose of the system is to bring the correct wrongdoer to account and to ensure retribution, restoration, and rehabilitation. A balance must be struck between the state, the individual accused of a crime, and the victim.[118]

Criminal procedure involves the delicate balancing of core values and societal objectives. This is achieved through the crime control model and due process model of criminal procedure. [119] The crime control model, is, as its name suggests, focussed on the suppression and inhibition of crime, while the due process model is focussed on ensuring that the conviction and sentencing of criminals is carried out in terms of rules and procedures which ensure the protection of the rights of the individuals involved.[120] The due process

[118] Van der Merwe (note 87 above) 9.
[119] note 118 above.
[120] note 118 above.

model of criminal procedure is effectively supported by the provisions of the Constitution and its Bill of Rights, which demand due process and a fair trial for accused persons.

Section 35 of the Constitution provides for an array of rights for arrested, detained and accused persons. These are, *inter alia*: the right to remain silent,[121] the right to a fair trial,[122] which includes the right to be presumed innocent,[123] and the right to appeal or review by a higher court.[124] Section 35(5) provides for a qualified exclusionary rule, whereby evidence obtained unconstitutionally must be excluded from the trial if it would render the trial unfair or be detrimental to the administration of justice.[125] The constitutional right to a fair trial comes down to ensuring that due process is followed and that every stage of a trial is conducted in line with the constitutional principles of fairness and justice.[126]

Other constitutional rights also apply to the procedures at trial. These include the right to human dignity,[127] the right to privacy[128] (which, like all rights, is subject to the limitation clause[129] where, for instance, a warrant to search property has been issued), as well as the right to life.[130] The extent of the protection of the constitutional right to life was challenged in the *Makwanyane* case[131] discussed above, which led to the abolition of the death penalty through the Constitutional Court's ruling in this 1995 case.

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[121] Section 35(1)(a) of the Constitution.
[122] Section 35(3) of the Constitution.
[123] Section 35(3(h) of the Constitution.
[124] Section 35(3)(o) of the Constitution.
[125] Section 35(5) of the Constitution.
[126] *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2006 (2) SACR 319 (CC) at para 75.
[127] Section 10 of the Constitution.
[128] Section 14 of the Constitution.
[129] Section 36 of the Constitution.
[130] Section 11 of the Constitution.
[131] note 68 above.

The importance of having safeguards in place in criminal justice is emphasised by Van der Merwe: [132]

> A system which is essentially weighted in favour of due process does not ignore the rights of the victim of crime; it merely seeks to ensure that vindication of the rights of the victim should not trigger or lead to further injustices. In pursuit of this dual purpose, difficult choices have to be made; and at times it is necessary to accept that certain measures to establish the truth and combat crime must, in the best interests of society, not be employed.

Van der Merwe continues by pointing out that it is important to recognise that the two models of criminal procedure – the crime control model and due process model – are not mutually exclusive, nor is the one the antithesis of the other. Furthermore, they are not stringent criminal justice systems, but rather models which reflect certain priorities and methods in achieving the goals of criminal justice.[133] It is possible for both these models to co-exist in one criminal justice system, where careful consideration is given to this balancing act.

4.4 LIMITATIONS OF THE CURRENT CRIMINAL JUSTICE SYSTEM AND COURT STRUCTURE

The limitations of the current criminal justice system discussed below do not necessarily render the system wholly ineffective, yet they do shed light on areas which need to be considered and improved in order to ensure that substantive criminal justice is achieved. The aspects mentioned below are by no means a closed list of challenges, but are a select few relating to the study.

[132] Van der Merwe (note 87 above) 11.
[133] note 118 above.

4.4.1 Limited role of victim in prosecution

As discussed above, South Africa follows the accusatorial system whereby the state assumes the role of prosecutor. Therefore, the state steps into the shoes of the victim in order to prove its case against the accused. The victim who has suffered as a result of the crime plays a very limited role in the trial, and is not even recorded as a party to the trial.[134] The victim's role is in principle and in practice limited to that of a witness called to testify,[135] which has become a challenge to the achievement of true justice for those who have been wronged. Tshehla points out that where crimes are committed, the conflicts and disputes are not the state's to take over and deal with in a manner completely removed from the victim; but rather that the conflicts and disputes belong to the parties involved and therefore it falls to them to resolve these disputes;[136] whether by retribution, restoration or reconciliation, or all of these approaches. However, this is not the case because the state, as prosecutor, is focussed on achieving its objectives regarding conviction and punishment, and it appears that the victim's objectives and needs in relation to the crime committed take a back seat. Van der Merwe notes that victims often "feel alienated from the process…."[137]

However, the Criminal Procedure Act does make provision for victim participation in the criminal justice process in limited circumstances:

Section 105A(1)(b)(iii) provides for consultation with the complainant (victim) in a case regarding a possible plea and sentence agreement with an accused. Where it is reasonably possible, taking into account the nature and circumstances relating to the offence, as well as considering the interests of the complainant, such complainant may be given the opportunity to consult with the prosecutor on the content of the plea and sentence

[134] Tshehla B "The restorative justice bug bites the South African criminal justice system" (2004:17) *South African Journal of Criminal Justice* 3.
[135] Van der Merwe (note 111 above) 14.
[136] Tshehla (note 134 above) 4.
[137] Van der Merwe (note 111 above) 14.

agreement, as well as on the possible provision of compensation or some benefit or service to the complainant.[138]

Section 299A(1) of the CPA provides for the right of a complainant to make representations regarding the placement of a prisoner on parole, day parole, or under correctional supervision.

Section 7 of the CPA provides for the instance where the Director of Public Prosecutions decides not to prosecute an alleged offence and issues a certificate in this regard, upon which the victim of the alleged offence or someone of close relation[139] may institute a private prosecution of such alleged offence in any competent court. In addition, Section 179(5)(d) of the Constitution provides that the National Director of Public Prosecutions may review a decision not to prosecute (or to prosecute) by accepting representations from *inter alia* the complainant.[140]

In the case of sexual offences, the National Policy Guidelines for Victims of Sexual Offences provides in Chapter 10 that a pre-trial statement must be obtained from the victim before she gives evidence in court. This impact statement serves the purpose of impressing upon the court the impact that the sexual offence had on the victim's life, for example personality or physical changes, and nightmares.[141]

The state has a responsibility towards the victims of crime – to take their interests into consideration before, during and after the trial. Unfortunately it appears that not enough is

[138] Section 105A(1)(b)(iii)(aa) and (bb) of the CPA.
[139] Section 7(1)(a)-(d).
[140] Section 179(5)(d)(ii) of the Constitution.
[141] National Policy Guidelines for Victims of Sexual Offences "South African Police Service Support to Victims of Sexual Offences" Chapter 10 http://www.justice.gov.za/policy/guide_sexoff/sex-guide01.html (last accessed 21 October 2019).

done when it comes to victim support strategies to minimise the impact of the crime itself, the investigative phase and the proceedings at trial. [142]

4.4.2 State is overly conviction conscious

The general aim of the current judicial system is to incapacitate and punish offenders, and to deter the public from committing crime. These aims of the system are focussed on the past and the present, but it is very rarely focussed on what happens to both the offender and the victim, after the trial.

Prosecutors have become overly conviction-conscious and have in a sense lost track of the truth-seeking mission of criminal justice. Therefore, the priority is for the state to prove its case, secure a conviction, and have the judge impose a sentence or punishment suitable to the crime. What happens after this trial process appears in practice to be of little concern to the state. Whether the victim has experienced the justice or restoration they require is not generally a consideration after trial. Whether the convicted criminal will be effectively rehabilitated to inhibit repeat offending, does not appear to be a priority.

In support of the above, private prosecutions, as discussed earlier, is a prime example. Where the state declines to prosecute an alleged offence, a private prosecution may be instituted. However, as section 13 of the CPA provides, the state may intervene in private prosecutions by applying by motion to the relevant court to stop further proceedings in order that the state may continue the case, and the court will make such an order.[143] The impact of this provision is that where the state foresees that a private prosecution may be successful, they may on the authority of the Act, sweep in and take over the matter, which if successful, will be a conviction in the state's favour. Therefore, the goal appears to be

[142] note 118 above.
[143] Section 13 of the CPA.

high conviction rates instead of the satisfaction that justice was served (in the case of successful prosecution), regardless of whether by private prosecution or at the instance of the state.

4.4.3 Judges are fallible when it comes to prejudice and bias

There is a widely held belief that judges, as trained legal minds and judicial officers, are able to act in a neutral, unbiased manner in all cases before them. This argument is often put forward in defence of the trial by judge, as it is generally believed that through legal education and experience, judicial officers are somehow able to put aside their personal beliefs, biases and prejudices, and judge in a clinical, objective and impartial manner. Prejudice and bias is one of the leading concerns raised against the jury system, as it is commonly believed that jurors are more susceptible to their personal views and beliefs impacting their judgment than is the case with learned judges. However, in the context of the past predominantly all-white judiciary of South African courts, it is clear that the belief that judges can be entirely impartial is not only unreasonable, but also completely removed from reality. Huebner raises the fact that an all-white judiciary perverted the principles of fairness and justice because of the "malice and ignorance that accompany racism…."[144] Judicial officers were described as, [145]

> White Protestant males of conservative outlook, who support the present political/racial status quo (and often the National Party government) and who have little personal contact with members of other racial groups except at the master-servant level. Bearing this in mind, disparity in sentencing along racial lines is inevitable.

It becomes clear that personally held beliefs inevitably spill over into the adjudication of matters, regardless of one's standing, education or position on the bench. Gravett illustrates

[144] Huebner (note 16 above) 968.
[145] Dugard J *Training needs in sentencing in South Africa* 1985 De Rebus 257 as found in Huebner (note 16 above) 968 footnote 32.

that it is not only explicit and blatant prejudice which must be of concern, but "[e]qually important – and likely more pervasive and insidious – are the unexpressed, hidden biases that remain in peoples' hearts and minds."[146] When it comes to implicit prejudice and bias formed from one's personal beliefs and views, it becomes a matter not of "if" but "when". Despite efforts to act objectively and fairly, most people may "harbour implicit mental biases that might very well alter our behaviour." [147] Judges are not immune to potential manifestation of implicit prejudice or bias. It is for this reason that it is of great importance to study and seek to understand the concepts relating to implicit prejudice and bias, how it manifests itself, and how to curb it. Gravett explains that because the law is aimed at embodying the principles of justice and fairness, any evidence that these principles may be compromised as a result of "erroneous models of human behaviour", require that the legal profession take notice. [148] This mere recognition of implicit bias is already a step in the right direction, because if there is denial of the presence and impact of implicit prejudice or bias, "believing ourselves to be objective puts us at particular risk for susceptibility to implicit biases and behaving in ways that belie our self-conception."[149]

4.4.4 Appointment process of judges is flawed

As highlighted in Chapter 1 of this study, the appointment process of South Africa's judges has been under scrutiny for a number of years. The Judicial Service Commission is the body responsible for the shortlisting and interviewing of candidates for judicial positions. After the interview process, the JSC makes recommendations to the President regarding the appointment of specific candidates to specific positions. Shortlisting of candidates is done on the basis of who qualifies in terms of the constitutional standards and criteria and who

[146] Gravett WH "The myth of objectivity: implicit racial bias and the law (part 1)" (2017:20) *PER/PELJ* 2 3.
[147] Gravett WH "The myth of objectivity: implicit racial bias and the law (part 2) (2017:20) *PER/PELJ* 2 15.
[148] Gravett (note 146 above) 17.
[149] Gravett (note 147 above) 17.

stands a good chance of being selected. Alternatively it is based on which candidate's shortlisting has been urged by a member of the JSC.[150]

Allegations that there has been political manipulation of the JSC has cast a dark shadow over its integrity and functioning. These claims were fuelled in April 2009 when the interviews to fill judicial vacancies which were scheduled to take place were postponed at the request of the Minister of Justice. This re-scheduling allowed for the presidential appointees on the JSC to be replaced before it sat again and continued.[151] Acts of this nature bring into question whether favoured candidates are pushed for selection for political rather than judicial purposes.

With regard to recommendations to the President for appointment as judges of the Constitutional Court, the JSC's procedure provides that reasons must be furnished for the recommendations. However, for recommendations on all other appointments, neither the Constitution nor any legislation, nor even the JSC's procedures, provide for the requirement that reasons be given for recommendations.[152]

Former Constitutional Court Justice, Zak Yacoob, previously expressed his concern over the approach and process followed by the Judicial Service Commission (JSC) in appointing judges throughout South African courts. Yacoob discussed at a lecture at the University of the Witwatersrand in 2013 that he "doubted whether the Constitution ever intended that members of the Judicial Service Commission could vote subjectively for the candidate they prefer, regardless of any objective evaluation." The voting process employed by the JSC allows for members to vote for their preferred candidate by secret ballot. The implications of

[150] Hoexter and Olivier (note 11 above) 125.
[151] Hoexter and Olivier (note 11 above) 174.
[152] Hoexter and Olivier (note 11 above) 182.

this is that as a member, one's selection of candidates for judgeship need not be based on any objective, standard considerations, and need not be justified. [153]

The Constitution, from which the JSC obtains its powers, provides that the JSC may regulate its own procedures and processes with the support of majority of its members as commissioners.[154] As discussed earlier, a strict separation of powers is created by the Constitution in order for the judiciary to remain independent. However, allegations of political influence in the appointment of candidates to the judiciary blur these lines and raise questions as to the calibre of candidates appointed.

4.5 CONCLUSION

The assessment of the South African criminal justice system above illustrates that, over the years, improvements have been made in leaps and bounds. However, the strengths of the system may require further refinement to be more effective, or may simply require the passage of time before effective change can be experienced. The challenges with the current legal system predominantly revolve around the limited role that the victim, as well as the public, play in the administration of justice. These aspects should be of concern to the judiciary as it relates to the moral authority required in order for a legal system and judiciary to enjoy legitimacy.

In essence, the current judicial system functions well with regard to most aims of criminal justice. Arguably, the most celebrated feature of the South African criminal justice system is that it continually grows and develops – qualities which are facilitated by and ensured by the constitutional dispensation. Changes have been brought about in the criminal justice system

[153] "Yacoob laments 'subjective' judicial appointments" *News24 City Press Archives* (2013-03-07) https://www.news24.com/Archives/City-Press/Yacoob-laments-subjective-judicial-appointments-20150429 (last accessed 7 October 2019).
[154] Section 178(6) of the Constitution.

in the past 25 years of democracy which will have a lasting impact on the administration of justice in the future.

CHAPTER 5

THE BENEFITS AND CHALLENGES OF A COMMUNITY-BASED JUDICIAL SYSTEM BASED ON THE JURY SYSTEM

5.1 INTRODUCTION

Critics of the jury system frequently refer to its breakdown in the past as definitive rejection of its reconsideration today and for the future. However, this study avers that arguments levelled against the reconsideration of the jury system must consistently be tested against the current context in which it is being considered. The context in which the administration of justice is being fulfilled today is vastly different from that in the 1960s when the jury system was abolished, as well as the 1990s at the dawn of the new democratic era for South Africa.

Therefore, in reconsidering a community-based judicial system, such reflection must be met with an assessment of the benefits and challenges of such system as it functioned in the past, as well as how it may play out in the present and the future.

5.2 THE JURY AS COMMUNITY-BASED JUDICIAL SYSTEM

The jury system's function and the rationale behind its implementation internationally is predominantly to ensure that those serving as judicial decision-makers are representative of the community.[155] Jury systems have been incorporated into the criminal justice procedures of various countries over time, with some countries later abolishing the system completely, while others opting to adjust and refine the procedures according to their criminal justice system's objectives. However, of all the countries that follow the jury system, the most known are arguably the English jury system and the American jury system.

The English jury system, as followed in the United Kingdom, is regulated by the Juries Act 1974.[156] The UK Juries Act provides for persons who appear on the electoral roll and who are ordinarily resident in the UK, and not otherwise disqualified, to be eligible to be called for jury service.[157] The Act further provides that where good reasons are provided, potential jurors may be excused from jury service.[158] Jury service is otherwise not optional.

An important right of parties to a trial is the process of challenging jurors for cause.[159] It is during this process that parties may question jurors before they are sworn in and before the commencement of the trial in order to identify potential bias or prejudice against the challenging party. Verdicts in jury trials need not be unanimous, but must be reached by the majority of the jurors.[160]

The jury system as followed in the United States of America was retained in the country's procedural law after it was introduced in the various American colonies under British rule.

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[155] Huebner (note 16 above) 970.
[156] Hereinafter referred to as the "UK Juries Act".
[157] Section 1(1) and section 3 of the Juries Act 1974.
[158] Section 8 and section 9 of the Juries Act 1974.
[159] Section 12(1) of the Juries Act 1974.
[160] Section 17 of the Juries Act 1974.

The jury system is provided for in the Constitution of the United States. For criminal trials, two constitutional sections provide for the right to a jury trial, namely Article III Section 2 that provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed...."[161] Article [VI], the Sixth Amendment to the Constitution of the United States, further provides that: [162]

> [i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....

Similar to the English jury system, jurors are randomly selected from the electoral roll for compulsory jury duty, except for instances where sound reasons are provided for excusal. Just as with the peremptory challenges of jurors in the English system, the American jury system provides for *voir dire*, a court procedure whereby the potential jurors are questioned in court and may be struck from the jury where one of the parties believe that the potential juror may be biased or prejudiced towards her during the trial.

Jurors are finders of fact. Therefore, after arguments have been heard by both parties, the jurors receive instructions from the presiding judge and retire to deliberate. Juries return a finding of fact for which they are not required to provide reasons.

The processes described above often lead to trials by jury being lengthy, as there are many procedural aspects that must be finalised before the trial may begin. This is often seen as a negative aspect in the reconsideration of a jury system in countries with already overburdened court rolls.

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[161] Article III Section 2 of the Constitution of the United States.
[162] Article [VI], the sixth amendment of the Constitution of the United States.

Jeary, in his research on trial by jury, identified three conditions which in are required for the effective functioning of a jury system.[163] Firstly, the community must be "socially homogenous," meaning that there should not exist any substantial divisions along cultural, racial, religious or linguistic lines. Secondly, the members of the community must be educated. Therefore, besides being basically educated, they must understand what a juror's responsibilities include, and they must be able to prioritise the fulfilment of those responsibilities above personal views, bias and prejudice. Thirdly, the members of the community and the resultant jurors must not have any major apprehensions or objections to the laws which they are required to apply to the cases at hand.

The requirements outlined above are problematic for various reasons. Firstly, the conditions are unrealistic. No territory or community in today's modern world can be said to be socially homogenous. Even in a community with a single predominant race, there are bound to be differences of religion, culture, belief systems, and upbringing; and beyond these, further diversity regarding morals, values, ideals and world views.

Secondly, the condition that jurors must able to place the fulfilment of their duties above their personal prejudices brings one back to the issue of implicit bias discussed above. It is expected of any judicial decision-maker to put aside personal beliefs and views and judge a matter objectively. However, this condition does not take into account implicit bias that is neither easily recognised in oneself, nor easily avoided. This condition set by Jeary suggests that the alternative – judges – are in fact able to put personal belief, bias and prejudice aside when judging a case before them, which, as already established, is not always possible. Therefore, the requirement cannot reasonably be an expectation in trials by jury.

[163] Jeary JH *Trial by jury and trial with the aid of assessors in the superior courts of British African territories* Journal of African Law (1961) 36, 46.

Thirdly, the condition that jurors must be in agreement with the laws they are to enforce is irrational. This requirement suggests that this same condition is in fact fulfilled by judges, which is an unreasonable assumption considering that judges apply a multitude of laws on a daily basis, irrespective of whether they are in agreement with them or not.

Regarding the power and authority of judicial officers, the legal maxim, *ius dicere, non ius dare*, is of importance as it holds that those presiding over cases are to "speak the law, not to give the law." In other words, judges are to apply the law and not to make it. Therefore, personal agreement with the law, whether one is the judge or the juror, is irrelevant to the application of the law in the adjudication of a case. Furthermore, the role of the jury is clearly defined as finder of fact, especially as the presiding judge provides instructions to be followed in adjudication, as well as a summing up of the case at hand. Therefore, it remains immaterial whether jurors are in agreement with the laws relevant to the case. However, jurors do have an acceptable avenue to follow should they find the law applicable to the case to be morally reprehensible, although this very rarely takes place. Jury nullification is discussed below.

The success or failure of the jury system depends very much on the context and the country in which it is applied. Its effectiveness is subjective to the relevant country's understanding of the successful administration of justice. Various findings discussed in a review by Hans indicates that the jury system is highly favoured and supported in the United States, Great Britain, and Commonwealth countries, because of the longevity it has experienced and the fact that it has become part of the political and legal fabric of those countries.[164] Hans explains: "There is extensive direct and indirect experience with juries, and people are

[164] Hans VP "Jury systems around the world" (2008: paper 305) *Cornell Law Faculty Publications* 276 282-283.

comfortable with the idea of lay justice."[165] In countries where the jury system has functioned for long periods of time, it enjoys the support of the public. However, territories in which the jury system is relatively new or where lay participation in the administration of justice is a new consideration, a system such as the jury system is generally met with mixed reviews and opinions.[166]

5.3 THE BENEFITS OF THE JURY SYSTEM

Before delving into the benefits of the jury system, it is important to acknowledge that some aspects discussed as benefits may in other contexts and experiences be viewed as challenges or shortcomings of the system. The benefits discussed below are a select few of all possible benefits which the jury system poses to countries which follow such system.

Baldwin and McConville summarise the support of the jury system into four main aspects; namely: (i) that it is in defence of liberty, freedom and democracy; (ii) that it can signal outdated, unpopular or potentially incorrect laws; (iii) that it is possibly the most accurate means of establishing the truth; and (iv) that it embraces public opinion and fairness.[167]

5.3.1 Manifestation of democracy

Democracy by nature denotes the involvement and power of the people of a country. Therefore, it follows that the jury system's functioning in the administration of criminal justice, as providing a trial by one's peers, is to some degree regarded as "a manifestation of a truly democratic spirit."[168]

[165] Hans (note 164 above) 283.
[166] Hans (note 164 above) 284.
[167] Baldwin and McConville (note 36 above) 2.
[168] Strauss (note 23 above) 138.

Lay participation in the administration of justice through the jury system supports the separation of powers in state, governmental and judicial control of a country. It allows the community to be actively involved in the protection of constitutional rights and freedoms of the public. It may even be considered a form of opposition to governments that are seen as oppressive and that impose laws on its citizens without public input.[169]

A jury system is an essential form of giving power to the people by facilitating their direct involved in matters which affect the community. It allows members of the public to take ownership of their role as citizens and to play a part in giving effect to constitutional rights and freedoms. Dugard's concerns regarding the effects of a lack of lay participation in the administration of justice, as discussed above, are put to rest through the jury system as it provides a platform for effective public engagement in the judiciary, which, in turn, leads to a more active and involved citizenry in other spheres of public life. Furthermore, direct involvement in judicial decision-making ensures legitimacy of the legal system and judiciary.

5.3.2 Juries may bridge divides

The original intention of the jury system was to ensure that the adjudication of disputes was fulfilled by members of the community who had personal knowledge of the events which led to the trial, or who knew the accused and was thus able to consider the crime and its context more accurately. Therefore, jurors have always represented not only a member of the community, but an ordinary person.[170] Through the adjudication of disputes by "ordinary people", the administration of justice becomes more relatable process when one considers the idea of being tried by one's "peers", and brings a degree of balance between the parties.

[169] The South African Law Reform Commission (note 15 above) 18.
[170] Rood (note 14 above) 750.

Rood is of the opinion that "[d]ifferences of culture, class, race or ethnicity between accused and judicial officer can be bridged by a jury."[171] Therefore, despite jury diversity being seen as a challenge (as discussed below), in some instances it may assist in trials being judged more fairly by a jury that is more representative of the background or culture of an accused, as opposed to a presiding judge whose background may be far removed from that of the accused.

5.3.3 Highlighting of problematic legislation

It is often through juries that problematic legislation is highlighted and from which suggestions for change can be put forward to the legislature. Jury nullification is a feature of the jury system whereby the jury makes a statement regarding a law that it views as immoral, incorrect or outdated and which requires attention. The jury disregards the evidence presented at trial and the arguments made by counsel, thereby finding the defendant not guilty, despite evidence pointing towards guilt. Because the jury is not required to provide reasons for its verdict, the jury is able to sidestep its fact-finding purpose and instead highlight problematic legislation.

Jury nullification, a practice available in jury trials in the United States, originated and was justified in *Bushell's case*[172] in which the jury's freedom in deciding cases as they deem necessary, irrespective of the presiding judge's opinion, was affirmed. Even though *Bushell's case* is English authority, the principles decided in the case have been consistently applied in U.S. courts, and thus forms part of U.S. authority on jury trials. The English jury system also provides for a form of jury nullification, called jury equity.

[171] Rood (note 14 above) 749.
[172] *Bushell's case* (note 29 above).

5.3.4 May enhance the truth-seeking mission of the court

Inasmuch as there are arguments in favour of the accuracy and effectiveness of verdicts by juries, there are many who maintain that jurors are swayed by emotion and bias. Studies have produced mixed outcomes. However, the outcomes have leaned more in favour of the view that jurors take cognisance of instructions by the presiding judge, the evidence presented, and the arguments raised by counsel. Therefore, an argument can be made that juries may enhance the truth-seeking mission of the court.

Baldwin and McConville have indicated that most research conducted on the functioning and accuracy of the jury system in the United States, as well as in the United Kingdom, has shown indications contradicting beliefs that jurors are ruled more by emotion or bias than by the evidence presented in court or the arguments put forward by counsel. [173]

As more current authority on the study of the success of jury trials, Hans points out that "[m]ost scholars who study jury competence in the U.S. context reach generally favorable conclusions, finding that most jury verdicts are solidly grounded in the trial evidence."[174]

5.4 THE CHALLENGES OF A JURY SYSTEM

In the process of considering the challenges of a jury system, it is important to note that as with the benefits of the system, the challenges may in some instances also be subjective to the context in which it functions.

Huebner identifies three general challenges of the jury system, namely: (i) a lack of public support; (ii) the dysfunctions which follow the system in communities with deep racial,

[173] Baldwin and McConville (note 36 above) 15.
[174] Hans (note 164 above) 285.

cultural and class divides; and (iii) the high implementation and administrative costs of such a system.[175]

A select few challenges of the jury system are discussed below.

5.4.1 The jury system does not always ensure a just outcome

Throughout the work of Baldwin and McConville and their research on the accuracy of the fact finding of jurors, the results are mixed and depend very much on the judges involved. Many judges who assessed the accuracy of the jurors in fact finding when compared to their own conclusions, found the jury to be completely accurate in their findings; whereas other judges in the same studies found that the jury deviated from the conclusions the judges themselves had reached.[176] The outcomes of the research were mainly inconclusive, as there were too many stray variables in such an assessment. Even in instances where jurors and judges came to the same conclusion, it was not an indication of accuracy, as the manner in which each reached its conclusion may have been vastly different.[177]

Hahlo and Kahn indicate that in history, where civil juries were introduced and welcomed in a system where it was believed that judges generally awarded inadequate damages, the juries, instead of bringing a balance: [178]

> …went to the other extreme. It [the jury] seemed constitutionally unable to find in favour of the state; it gave excessive damages against it and against wealthy corporations; and elsewhere often bias, prejudices and emotions took command.

[175] note 174 above.
[176] Baldwin and McConville (note 36 above) 4.
[177] See generally Baldwin and McConville (note 36 above).
[178] Hahlo & Kahn (note 38 above) 215.

In support of this view, Rood explains that it is not only racially-charged cases which may prove unsuitable for a trial by jury, but also cases which are emotional in nature, complex and technical. [179] Rood refers to a letter to the *Grand Magazine* referred to in the publication (1906) 23 SALJ 307, which reads: [180]

> What chance has a co-operative store of gaining a verdict from twelve small tradesmen? If a poor man's cart collides with a rich man's motor car, what chance has the owner of the motor car?

The point referred to above can of course work both ways. It illustrates that whoever appears before a jury will either gain the sympathy or the disapproval of the jury, depending on the composition of the jury. This highlights the complex conclusions to be drawn about a jury's ability to judge fairly and reasonably. There is much conflict between evidence pointing to the jury's reliance on evidence and sound argument, and also evidence pointing to emotional, subjective findings.

What makes the reliability of the verdicts of juries more challenging is the fact that juries are not required to provide reasons for their findings. Therefore, it will rarely be clear on the face of a verdict which factors were weighed more heavily in the jury's findings. The lack of reasons provided also pose a challenge for the appeal of verdicts of juries.

5.4.2 Juries are not always representative of the community

Many arguments have been levelled against the jury system for a lack of diversity in the composition of juries, and the lack of representation of the community. It must be borne in mind that because of the processes of peremptory challenges and *voir dire*, the resulting

[179] Rood (note 14 above) 753.
[180] note 177 above.

jury, which is sworn in before the trial, may appear markedly different in composition and demographics than when the potential jurors were first selected for jury duty or service.[181]

The rationale for the incorporation of juror peremptory challenges in England, and the *voir dire* procedure in the United States, originates from the belief that some jurors may, consciously or unconsciously, lean more in favour of one party than the other.[182]

Therefore, the challenge of diversity is not always as a result of a flawed selection procedure, but is often a result of excusal of jurors during the peremptory challenges and *voir dire* phase of proceedings. However, the objectives of an effective jury are best achieved through attempting diversity of the jury in order to have it reflect the community more accurately. As Mittlebeeler explains: [183]

> The accused's peers are to act as a screen through which the state can administer justice upon one of its subjects. Originally, trial by jury was to be a means of humanizing the law – of diluting the rigors of a more or less inexorable system with community notions of justice and propriety.

Therefore, although the jury trial has always had the aim of reflecting the community to a certain degree, challenges to individual jurors result in the risk of some juries being made completely unrepresentative of the diversity that is strived for.[184]

5.4.3 Bias and prejudice

Throughout the study the bias and prejudice which has been facilitated by jury trials has been discussed. Even today, with the freedom of any person to be included in a jury, the risk of bias and prejudice remains.

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[181] Baldwin and McConville (note 36 above) 90-91.
[182] Baldwin and McConville (note 36 above) 15.
[183] Mittlebeeler (note 102 above) 103.
[184] Baldwin and McConville (note 36 above) 91.

One of the main reasons for the abolition of the jury system in South Africa was the fear that an exclusively white jury, as was the norm in the past, would be prejudiced, or perceived as being so, in cases in which an accused was of a different race than that of the complainant or victim.[185] However, racial discrimination facilitated by the jury system was not just a fear, but a reality. There are a number of cases that illustrate severe prejudice in trials where the accused was of a different race than that of the jury. Huebner clarifies that "[j]urors with strong ethnic, racial, or religious affiliations are likely to allow these affiliations to taint their judgments about the facts and law presented to them."[186]

The harrowing case of *R v Hart and others* serves as a prime example of why an all-white jury system in a multi-racial, multi-cultural country could never succeed at ensuring a fair reckoning of wrongdoing and administering true justice. In this case the accused were charged with culpable homicide for causing a black man's death as a result of "inhuman flogging, torture and exposure."[187] The jury acquitted the accused of the alleged crimes. However, the presiding judge, "pronounced the verdict to be a disgrace to the community, and declined to thank the jurors who delivered the verdict for their services."[188] The *Cape Law Journal* stated in their report of the case that, "trial by jury is no guarantee that justice will be done."[189]

Historically, within racial and cultural groups with severely unequal histories and deep political divisions, the feat of overcoming such differences is made all the more difficult by cases in which one race is placed in judgment over another through the administration of justice. For this reason, even though strides are being taken in making juries around the

[185] The South African Law Reform Commission (note 15 above) 18.
[186] Huebner (note 16 above) 974.
[187] *R v Hart and* Others (a report by the Cape Law Journal of 1892) 275-276 as found in Rood (note 14 above).
[188] note 187 above.
[189] note 187 above.

world more representative of the community, the lingering concerns over fairness and just adjudication will always remain because of the inequality and prejudice which has followed the jury system throughout history. Rood summarises it well: [190]

> ...finding a jury that will ensure that justice is done in many of these trials where there are often a number of accused, and where allegiance to a cause is made central to the proceedings, is no simple matter.

Challenges of racial discrimination surrounding the jury system have not been overcome in countries such as the United States. This jurisdiction is still plagued by myriad challenges regarding racial discrimination, including non-white jurors being excluded from juries completely, or where peremptory challenges or *voir dire* are used to remove all jurors of colour from the jury.[191] Therefore, although formal prohibitions on persons of certain races forming part of a jury have been removed, substantively, these changes have not materialised in the various states. It remains then that the challenge of bias and prejudice, especially along racial and cultural lines, is still a major challenge in today's world – one which hinders other countries from reconsidering such a system for fear of repeating the mistakes of the past. As Mittlebeeler explains: [192]

> It is a generally recognized ideal that justice should be color blind, but the very virtue of the jury system – that it infuses community sentiment into the rigors of an otherwise mechanical administration of justice – can become a vice in communities plagued by racial tension.

5.4.4 Reluctance to serve on the jury

The South African Law Reform Commission's consideration of the jury system indicates that an array of factors led to the abolition of the jury system, one of which was a reluctance of

[190] Rood (note 14 above) 752.
[191] See generally Parson E and McLaughlin M "Black strikes: the focus of controversy and the effect of race-based peremptory challenges on the American Jury System" (2011:3) *Georgetown Journal of Law & Modern Critical Race Perspectives* 87-102.
[192] Mittlebeeler (note 98 above) 90.

members of the public to serve on juries.[193] Over time, the number persons exempted from jury duty was expanded, leaving very few competent persons in the pool from which jurors were to be selected.[194] Furthermore, as discussed above, the Minister of Justice had been given the authority to declare certain trials to be trials by judge instead of jury, which authority increased over time, resulting in the use of the jury trial declining drastically.[195]

It is important to acknowledge that jury duty places a personal, social and financial burden on jurors. Jurors have business and work obligations that only they can fulfil that are impacted negatively through their absence. Add to this the length of jury trials, and the reluctance of members of the public to serve on juries becomes understandable. Furthermore, jurors may face intimidation and threats to which no person would reasonably be willing to expose themselves and their families.

However, Hans indicates that in countries where lay participation in the administration of justice is encouraged and facilitated, the public, through such involvement, becomes more optimistic about the lay participation in the administration of justice.[196] Therefore, it appears that one factor depends on the other. The more the public are involved in the administration of justice, the more eagerness to be involved will develop, particularly where positive effects of lay participation in the administration of justice become evident.

5.4.5 Implementation and administration costs and challenges

Although this study does not intend to delve into factors relating to the implementation of the jury system, it is important to note the financial implications and administrative burden that

[193] Minister of Justice Debates of the Senate of the Union of South Africa, Second Session, Twelfth Parliament 1959 1208.
[194] The South African Law Reform Commission (note 15 above) 17.
[195] note 194 above.
[196] Hans (note 164 above) 284.

accompanies a jury system. There are myriad practical concerns around the implementation of a community-based system. These include structural changes to courtrooms, infrastructure development in line with the requirements of a community-based system, and administrative developments and expenses, to name a few.[197] Implementation and administration costs and challenges are most certainly a significant hindrance in the reconsideration of a community-based system in South African courts, considering the fact that the judiciary is challenged with severely overburdened court rolls which result in unreasonable delay in the administration of justice.

5.5 CONCLUSION

Understandably, the common law jury system has many critics. Most critics of the system hold such strong views on it that the mere reconsideration of such system is met with disregard.

The strong reservations regarding the use of juries in countries plagued by a history of racial discrimination and injustice, where often threads of the customs, societal norms and laws which enabled and encouraged such injustice still remain today, is wholly justifiable and reasonable. A certain amount of caution must always be exercised where a country has experienced extreme injustice and now ventures into the reconsideration of change which has the potential of setting a country back. However, it is equally important to recognise the benefits of a system which encourages and facilitates public participation in the administration of justice.

Greater public involvement, a more active citizenry, and legitimacy of the legal system and judiciary are important considerations, along with greater representation of the community

[197] Rood (note 14 above) 750.

which a jury system may facilitate. The benefits and challenges of the jury system are not clear cut, as they often overlap and contradict each other based on the different experiences of the jury system in different settings. Reasonably so, it is clear that in countries reconsidering such a system, there is much apprehension regarding issues of bias and prejudice, emotional decision-making, and greater room for error in human reasoning in a jury setting. However, in countries which have had the jury system as part of their judicial landscape for many years, there is greater acceptance of its function and a celebration of its involvement of the public, despite the continued existence of historic challenges.

CHAPTER 6

TRADITIONAL (INDIGENOUS) JUSTICE AND CONFLICT RESOLUTION PROCESSES – A POSSIBLE LINK BETWEEN WORLDS

6.1 INTRODUCTION

A consideration of traditional (indigenous) conflict resolution may conjure images of simple African justice taking place under a tree, where tribes and families come together to engage in talks in an attempt to build bridges, bring restoration and focus on reconciliation, thereby achieving simple justice between individuals.

"Indigenous law", also known as "African customary law" in South Africa,[198] has co-existed with the common law since the common law's imposition through colonisation. Measures were put in place whereby customary practices would be rationalised through Western thinking, which, over time, resulted in some indigenous practices being westernised to a degree. However, the roots that indigenous law has always had in the community, reconciliation and restoration have always managed to push through the system to which it had to conform. It is these principles of solidarity with the community that this chapter seeks

[198] These terms are used interchangeably.

to explore in order to establish whether there may be a link between Western and African approaches to lay participation in the administration of justice.

This chapter has the objectives of considering the current status of customary law in South Africa, exploring features of indigenous justice as community-based conflict resolution practices, discussing the principles of restorative justice and *ubuntu* as part of indigenous conflict resolution processes, and considering challenges observed in the application of indigenous justice.

6.2 INDIGENOUS JUSTICE AS COMMUNITY-BASED CONFLICT RESOLUTION

6.2.1 Constitutional recognition of customary law

Customary law, as recognised and applied in South Africa, is defined as:[199]

> [T]he customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples....

Customary law takes on many different forms in the country, as each tribe, community and culture has unique customs which define its customary law. However, there are common features and practices which may be discussed together under the umbrella of customary law.

Since the advent of South Africa's constitutional democracy, the country's formal law has comprised of Western and African components. Although African customary law existed and was applied in South Africa long before its official recognition, it was only with its inclusion

[199] Section 1 of the Recognition of Customary Marriages Act 120 of 1998.

in the Constitution that it attained an equal status, as a source of law, to that of Western components, such as the common law.[200]

On the recognition of customary law, section 211(1) of the Constitution declares:

> The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

On the matter of application, section 211(3) of the Constitution provides:

> The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

These constitutional provisions ensure legal pluralism in South Africa's formal law by confirming, as in the case of *Gumede v The President of the Republic of South Africa*,[201] that "it is a legitimate object to have a flourishing and constitutionally compliant customary law that lives side by side with the common law and legislation."[202]

However, the attainment of the equal status and recognition of customary law in South Africa has remained a challenge. Despite its constitutional recognition as a parallel legal system to the country's common law, there appears to be a trend by the legislature towards blending the African and Western components of formal law and aligning it to the Western approach to law.[203] The ideal of the recognition of indigenous law has always been to have different systems of law operating in harmony, "in a relationship of equality."[204] Therefore, understandably, an approach aimed at achieving equality at the expense of the authenticity of indigenous law, by aligning it to a Western approach to law, causes much resistance.

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[200] Rautenbach C (ed) *Introduction to Legal Pluralism in South Africa* (2018) 5th edition 12-13.
[201] *Gumede v The President of the Republic of South Africa* 2009 (3) SA 152 (CC).
[202] note 201 above at para 22.
[203] Rautenbach (note 200 above) 13.
[204] Rautenbach (note 200 above) 16.

There is a distinction in customary law between official customary law, which is regulated by the state through legislation and application by the courts; and living customary law, which is indigenous law applied at grassroots level in the communities, and which involves the original customs of the people as they have changed and adapted to the times in which they are applied. Living customary law is in a constant state of evolution.

However, the challenge to the authenticity and accuracy of customary law becomes apparent when one considers that during colonial times, during which African and colonial customs and legal systems were forced to co-exist, many customs and usages were codified to a degree in order for them to be given more structure in terms of the Western approach to law.[205] It appears that state regulation of official customary law has at times led to a degree of misrepresentation of indigenous law, as there has been a growing discrepancy between living and official versions of customary law, because of the rigidity of the legislative process and the ossification of living customs and norms which follows.[206]

In the *Richtersveld*[207] case, the Constitutional Court held that:[208]

> [I]ndigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life.

The court continued by distinguishing the system of customary law from that of common law, by highlighting that indigenous law is historically unwritten, and passed down through the generations within communities that apply these laws and practice these customs:[209]

> It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community.

[205] Rautenbach (note 200 above) 30.
[206] Rautenbach (note 200 above) 14, 30.
[207] *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC).
[208] note 207 above at para 52.
[209] note 207 above at para 53.

The position in *Richtersveld*[210] was echoed in the case of *Bhe v Magistrate, Khayelitsha*[211] which held that every form of indigenous law – whether it be living customary law, official customary law or academic customary law that has a teaching purpose – are different forms of indigenous law.[212] The court made an important point that the ever-changing nature of living customary law presents a challenge to ascertaining and identifying indigenous law so that it may be applied as part of the country's formal law.[213] This contributes to the growing divide between official and living customary law.[214] The court stated that:[215]

> Indigenous law is a dynamic system of law which is continually evolving to meet the changing circumstances of the community in which it operates. It is not a fixed body of classified rules.

It becomes clear from this explanation that the community plays a central role in customary law. It is recognised that customary law comes from the community, and is for the community, and should thus be dictated by the evolution of the community. Community involvement and participation is a central element in the administration of indigenous law.

6.2.2 Development into the current official customary law

Prior to colonialism and the imposition of Western law on the South African people, indigenous communities were governed by traditional leadership, with the chief acting as the tripartite government of executive, legislature and judiciary, in one.[216] The chief, together with advisors and councillors, were responsible for the maintenance of law and order in the community. In the resolution of disputes, the restoration of "social solidarity" was a priority.[217] The community resolved their own disputes as far as possible, dealing with matters that

[210] note 207 above.
[211] *Bhe v Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC).
[212] note 211 above at para 152.
[213] note 212 above.
[214] note 211 above at para 86.
[215] note 211 above at para 154.
[216] Rautenbach (note 200 above) 245.
[217] note 216 above.

arose within the margins of the community. Only where these were not resolved were they referred to the chief's court to be dealt with.[218] The chief's court followed, what in Western terms is known as the inquisitorial approach, and had as its primary objective the reconciliation of the parties and the "[restoration of] the imbalance in the community caused by the wrongful conduct of one or more of the community members."[219] The achievement of reconciliation and justice in cases of wrongdoing was seen as the responsibility of the members of the community and thus the initial stages of dispute resolution fell to the people.[220]

Over the years, during and after the apartheid era, *makgotla* – otherwise known as community courts – developed along with the establishment of townships in South Africa. Along with the development of these communities came the need for a system of dispute resolution within the community. Formal court proceedings were expensive, and it was challenging for the township community to have access to and utilise such formal court structures.[221] Furthermore, the communities believed that the formal courts did not meet their needs in terms of crime control and conflict resolution.[222] Informal community courts developed, and they applied different laws originating from indigenous law, common law, and the community's own "self-made law."[223] These community courts looked to the elders in the community to discuss and resolve disputes in the community.

However, the lack of regulation and documentation of these community courts has led to them gaining a poor reputation regarding the methods that they employ in conflict resolution,

[218] Rakate PK "The status of traditional courts under the final constitution" (1997:30) *Comparative and International Law Journal of Southern Africa* 175 179-182 as found in Rautenbach (note 200 above).
[219] note 216 above; Rakate (note 218 above) at 181.
[220] note 218 above.
[221] Rautenbach (note 200 above) 260.
[222] note 221 above.
[223] note 221 above.

when considering that corporal punishment is heavily relied on as a punitive measure imposed by these courts. Corporal punishment is a practice that has been declared unconstitutional by the highest court in South Africa.[224] The functioning of these community courts highlights areas of concern regarding the informality and lack of regulation of these community structures.

Whereas *makgotla*, on the one hand, were allegedly developed to be an extension of the formal court system that the community found inadequate. “People’s courts,” on the other hand, were developed as alternative structures to the formal courts.[225] People’s courts were developed in response to the illegitimacy of the apartheid legal structures imposed on the people. Communities developed their own alternative model and mechanism of law and order, which was rooted in African justice and adapted to changing societal norms and values.[226] These courts were established to encourage stability and to ensure conflict resolution in the community that was in line with living indigenous law and practices. Pretorius and Zaire point out that:[227]

> People’s courts provided a way for Black communities to regulate themselves and promote cohesion and harmony through community participation in proceedings grounded on community values.

Despite recommendations from the South African Law Reform Commission, these structures and community courts continue to operate unofficially.[228]

Currently, the traditional administration of justice in indigenous communities remains dynamic and ever-changing according to living customary law unique to each area and the

[224] See *S v Williams and Others* 1995 (3) SA 632 (CC).
[225] note 221 above.
[226] Rautenbach (note 200 above) 15.
[227] Pretorius J and Zaire D “Community justice: society and government partnership in the fight against crime” (2001:20(3)) *Politeia* 105.
[228] Rautenbach (note 200 above) 16.

laws that find application there.[229] Skelton is of the view that the continuity of systems of customary law and their functioning parallel to the formal system is indicative of the eagerness to have the community play a participative role in conflict resolution.[230]

6.2.3 African legal tradition, values, practices and procedures

The dedication to preserve concepts of African justice extends even to the design of South Africa's Constitutional Court. The architects and designers of the space, Janina Masojada and Andrew Makin from Durban, and Paul Wygers from Johannesburg based their design of the court on the concept of "justice under a tree."[231] The symbolic elements of the design of the Constitutional Court in relation to African justice begin in the waiting area which is designed to resemble a meeting place under the trees. This image is created through the open space, slanting concrete columns and sky-lights, which, when reflecting the light from the sun, create the impression sunlight filtering through tree leaves. [232] Even the Constitutional Court's logo depicts the gathering of people under a tree.

Inside the courtroom, the justices sit in a semi-circle at eye level to the parties and the public; resonating the fact that in traditional African courts, the people involved generally resolve their disputes while sitting in a circle.[233] Furthermore, the principle of transparency is created metaphorically through a glass division along a side of the court building, through which the public can see in from outside. This echoes the public nature of court proceedings, as well as the constitutional right of access to the courts.[234]

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[229] note 216 above.
[230] Skelton (note 12 above) 230.
[231] Constitutional Court of South Africa website "The Building" https://www.concourt.org.za/index.php/about-us/the-building (last accessed 29 October 2019).
[232] note 231 above.
[233] Skelton (note 12 above) 236.
[234] Section 34 of the Constitution.

The shared values observed by African legal tradition through indigenous law include customs and usages passed down orally through the generations of a community. These customs are grounded in values of "communalism, collective responsibility, flexibility, reconciliation, symbolism and non-separation between law, religion and morality."[235]

Indigenous community practices are designed to encourage participation and involvement of the community in decision-making that impacts the community.[236] This is facilitated through structures known as *lekgotla* that are made up of senior relatives and heads of families that form a group of advisors. Where the ward head of a specific area in his jurisdiction presides over a matter, such ward head is always assisted by members of the *lekgotla*.[237] Serious cases are referred to the traditional leader's court after investigation by the ward head and his council.[238]

Traditional courts differ significantly from the country's formal courts in that the proceedings are informal and inquisitorial. The nature of proceedings is more closely linked with mediation than a trial, and reconciliation of the parties is the ultimate goal.[239] The matters are not heard before judges or legal practitioners, but, instead, the adult members of a family or community come together to discuss what has transpired that led to the dispute between the persons involved.[240] Should the parties not be able to resolve and reconcile the matter between them, the headman of the party accused of wrongdoing is involved in order to assist in reconciling the parties. However, should the headman not be successful, the dispute may be taken to the senior traditional leader's court. [241]

[235] Rautenbach (note 200 above) 22.
[236] Rautenbach (note 200 above) 25.
[237] Rautenbach (note 200 above) 259.
[238] Rautenbach (note 200 above) 260.
[239] Rautenbach (note 200 above) 26.
[240] note 239 above.
[241] Rautenbach (note 200 above) 26.

The informal nature of the proceedings ensures that technicalities and stringent rules regarding evidence are relaxed[242] in favour of simplicity. The parties to the dispute may only be assisted by a family member as legal representation is not allowed.[243] There are no time constraints to the hearing of disputes, thus each matter may be thoroughly deliberated upon and all necessary witnesses may be called.[244] The focus is predominantly on the substance of the matter, rather than the form of the proceedings.[245] Skelton emphasises this point by explaining that the less stringent rules of evidence allow the parties and the witnesses to "tell their stories in ways that make sense to them."[246] This method of fact-finding is favourable, as opposed to formal court procedures that may at times hinder the achievement of substantive justice.[247]

Informal judicial procedures have the potential to make justice more accessible to the public, by simplifying and breaking the procedures down to aspects that are familiar to a lay person, thereby eliminating the intimidation of the formal structure and process. However, as discussed below, the lack of formal court procedures may expose the system to abuse, or an infringement on the accused's rights, or a lack of protection for the victim or the witnesses.

Elechi summarises African indigenous justice as follows: [248]

> The African indigenous justice system is community based, human centred and employs restorative and transformative principles in conflict resolution. Restorative justice is negotiative and democratic; hence it empowers the community to mediate in conflicts. Ideally, African indigenous justice systems

[242] Rautenbach (note 200 above) 255-257.
[243] Rautenbach (note 200 above) 256.
[244] Rautenbach (note 200 above) 257.
[245] Rautenbach (note 200 above) 258.
[246] Skelton (note 12 above) 234.
[247] note 246 above.
[248] Elechi O "Human rights and the African indigenous justice system" (2004) unpublished paper presented at the *18th Conference of the International Society for the Reform of Criminal Law* Montreal 8-12 August 2004.

provide opportunities for dialogue amongst the victim, the offender, their families and friends, and the community.

6.3 PRINCIPLES EMBRACED BY INDIGENOUS CONFLICT RESOLUTION PROCESSES

6.3.1 Restorative justice

In order to understand indigenous justice and grasp the philosophies around its practices, one must consider restorative justice, as it is a cornerstone of traditional (indigenous) justice processes. Tshehla points out that with regard to the nature and process of restorative justice, there is a "resounding resonance between restorative justice and justice as practiced by Africans through community courts and chiefs' courts."[249]

Restorative justice has various definitions, because the concept manifests differently in a range of contexts. The United Nations defines restorative justice as: [250]

> [A]ny process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.

South African legislation defines the concept as: [251]

> An approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation.

[249] Tshehla (note 134 above) 16.
[250] United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (2002).
[251] The Child Justice Act 75 of 2008.

In each of the definitions above it is clear that, through the lens of restorative justice, the community's involvement in the resolution of disputes is integral to the successful administration of justice.

Restorative justice, although a recognised principle, has been slow to take root in South Africa's formal law. One of the contributing factors to this is that the principles involved in restorative justice do not easily fit into the accusatorial approach followed in the formal courts.[252] However, as discussed above, the informal, inquisitorial nature of indigenous conflict resolution is the ideal environment for the values of restorative justice to be effectively applied.

Skelton explains the nature of restorative justice as being: [253]

> ...both backward-looking, in that it includes dealing with the "aftermath of the offence", and forward-looking, in that it is a process that looks at the implications for the future.

Therefore, effective restorative justice not only involves looking at the present and finding an effective means of correcting and punishing an offender's wrongdoing, but it simultaneously considers the future effects of the crime on the victim, the community and the offender. Furthermore, it contemplates the prevention of re-offending in the future by considering appropriate steps in dealing with the crime in the present. Skelton continues by stating that restorative justice, as well as indigenous conflict resolution practices, "involve a crime prevention element, in that an effort is made to identify how future incidents may be avoided."[254]

[252] Schwikkard (note 73 above) 28.
[253] Skelton (note 12 above) 234.
[254] note 253 above.

Restorative justice is not meant to be sought as an alternative to a criminal justice system, but as Skelton explains: [255]

> [It] most closely reflects the third scenario of a parallel track in which a restorative justice approach is developed that is linked to and interdependent with the formal criminal justice system.

Therefore, it is possible to ensure that the principles of restorative justice such the collective involvement of individuals and the community in the resolution of disputes, as well as the priority of reconciliation, function alongside the formal criminal justice system.

6.3.2 Ubuntu

No consideration of indigenous practices or restorative justice would be complete without considering the African principle and philosophy of *ubuntu*. Archbishop Desmond Tutu explains that *ubuntu* "speaks of the very essence of being human."[256] He further explains that *ubuntu* means that one's humanity is inseparably caught up in that of another's; and that "a person is a person through other people."[257]

In the *Makwanyane* case discussed above, Mokgoro J described the philosophy of *ubuntu*:[258]

> Generally, *ubuntu* translates as humaneness. In its most fundamental sense, it translates as *personhood* and *morality*... While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.

[255] Skelton A "Restorative justice as a framework for juvenile justice reform: A South African perspective" (2002: 42(3)) *British Journal of Criminology* 504.
[256] Tutu D *No future without forgiveness* (1999) 34-35.
[257] note 256 above.
[258] note 68 above at para 308 (emphasis in the original).

The last part of the definition is significant – "marking a shift from confrontation to conciliation." This priority of reconciliation and peaceful resolution of disputes has always been at the core of indigenous conflict resolution, in stark contrast to the accusatorial system to which South Africa's formal court procedures conform.

The focus on the collective community in indigenous justice is intertwined with the principle of *ubuntu*. In the case of *MEC for Education: KwaZulu-Natal v Pillay*[259] the court explained:[260]

> The notion that "we are not islands unto ourselves" is central to the understanding of the individual in African thought. It is often expressed in the phrase *umuntu ngumuntu ngabantu* which emphasises 'communality and the inter-dependence of the members of a community' and that every individual is an extension of others.

In the *Bhe*[261] judgment, the court highlighted the "nurturing of communitarian traditions such as *ubuntu*"[262] as a value and principle of customary law.

Ubuntu may mean different things to different people. However, there are general values which are encompassed in the principle of *ubuntu*, as an "African philosophy of life."[263] These values include community harmony, unity, and collective consciousness of thought and behaviour.[264] Skelton explains that territories with indigenous conflict resolution practices as part of their histories, often demonstrate "a more communitarian approach to rights."[265]

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[259] *MEC for Education: KwaZulu-Natal v Pillay* 2006 (10) BCLR 1237 (N).
[260] note 259 above at para 53.
[261] note 211 above.
[262] note 211 above at para 45.
[263] Rautenbach (note 200 above) 28.
[264] Rautenbach (note 200 above) 28-29.
[265] Skelton A and Frank C 'How does restorative justice address human rights and due process issues? In Zehr H and Toews B (eds) *Critical Issues in Restorative Justice* (2004) 210.

6.4 CONCERNS AROUND INDIGENOUS CONFLICT RESOLUTION PROCESSES

6.4.1 Lack of safeguards

The informality of proceedings and the lack of stringent procedural rules may facilitate simpler administration of justice, but they simultaneously expose the process of indigenous conflict resolution to concerns regarding fairness, accuracy and potential abuse. The safeguards of the formal court system, as discussed above, have developed over time with the purpose of ensuring procedural fairness and accurate fact-finding. When these safeguards are removed, the dispute resolution process becomes vulnerable if there is no alternative to these safeguards. An example of such concerns in indigenous conflict resolution is the admissibility of hearsay evidence that has the potential of compromising the truth-seeking mission of deliberations.[266]

This lack of safeguards, together with a lack of regulation and documentation of community courts, have led to practices of indigenous conflict resolution being tainted by issues regarding the nature of punitive measures employed, concerns of sexism and male domination, the tendency to promote corporal punishment, and the hierarchy of to whom rights are afforded and to whom not. The court in the *Bhe*[267] case highlighted the consequences of these abuses of process:[268]

> [A]buses of indigenous law are at times construed as a true reflection of indigenous law, and these abuses tend to distort the law and undermine its value. The difficulty is one of identifying the living indigenous law and separating it from its distorted version.

[266] Rautenbach (note 200 above) 258.
[267] note 211 above.
[268] note 211 above at para 154.

6.4.2 Reliance on the supernatural

Indigenous law inherently embraces various supernatural elements in the pursuit of truth in conflict resolution. Forms of witchcraft and "smelling out" are heavily relied upon in deciding on wrongdoing.[269] These beliefs, although integral to the authentic functioning of indigenous law, may at times interfere with scientific or medical knowledge and reasoning, and lead to a miscarriage of justice.

Rautenbach provides the example that a woman who experiences complications during birth, is believed to have committed adultery.[270] Despite the fact that conclusions such as these may appear illogical and baseless to Western thinking, indigenous people firmly believe in the power of the supernatural in identifying a wrongdoer or in exposing hidden offences. As authentic as these practices may be to indigenous people, they present a challenge to fair and substantive justice.

6.4.3 The *autrefois acquit/convict* principle

Where restorative justice through indigenous conflict resolution is considered, it may pose a risk to the *autrefois acquit/convict* principles, which provide that an accused person can only be tried once for an offence where a verdict has been reached regarding the specific offence.[271] As restorative justice practically may entail that all individuals concerned, including community members, meet regarding the alleged offence, and where such meeting would take place independent of the formal criminal trial, it would expose the accused to a potential infringement of his protection under *autrefois acquit/convict* principles. Tshehla further points out that a meeting such as described above may take place before

[269] Rautenbach (note 200 above) 258.
[270] note 269 above.
[271] Section 106(c) and 106(d) of the CPA.

or after a trial, resulting in the accused's constitutional right to remain silent being infringed.[272]

6.4.4 Inconsistency in comprehension of restorative justice

An understanding of restorative justice may at times be subjective and dependent on the context in which it is considered. Therefore, it may mean different things to different people, and without clear explanations and guidelines on the meaning and implementation of the concept, it allows room for variation and irregularity. Tshehla highlights this through his experience at a conference on restorative justice, where it was evident that the South African Police Service, various state departments, and the United Nations each had their own understanding of restorative justice.[273] Therefore, each of these entities has their own ideas of how it should be implemented. Therefore, it is paramount to the success of endeavours relating to restorative justice practices, that clarity of understanding and uniformity in approach be reached.

6.5 CONCLUSION

It is evident from the discussion above about informal and inquisitorial nature of customary law, together with the priority of reconciliation of parties, and the incorporation of restorative justice principles and the philosophy of *ubuntu*, that customary law leads the way in a model for the collective involvement of individuals and the community in the resolution of disputes. Furthermore, customary law is not only concerned with the punishment of crime, but with restoring balance to the community where such balance was disrupted by wrongdoing. Therefore, crime is seen as having an effect on the entire community, and thus should be dealt with together as a community.

[272] Tshehla (note 134 above) 10.
[273] Tshehla (note 134 above) 10.

In much the same way as the Western development of the common law and the jury system, indigenous law developed as a community-based dispute and conflict resolution system in response to the needs of the community. The involvement of the community not only in the resolution of disputes but also in the achievement of reconciliation, restitution and restoration, has been integral to the functioning of indigenous law. However, the organic development of indigenous law has seen challenges and concerns stem from a lack of accountability and regulation, which has exposed the system to abuse. As the court in the *Bhe*[274] case emphasised, these abuses of processes have cast a dark shadow over the true nature and objectives of indigenous law.

Inasmuch as African and Western ideologies and practices may be vastly different from one another, there are a number of links which may be drawn between the development of African indigenous law and community dispute resolution, and that of Western common law and the development of the jury system. These links will be discussed in the following chapter.

[274] note 211 above.

CHAPTER 7

CONCLUSION

7.1 INTRODUCTION

Public participation in the administration of justice is a contentious topic. Opinions on the matter are resolute, with only a few commentators who are prepared to consider features of the debate that are in conflict with their personal views. At the outset, this study made the point that arguments in favour of or against any form of change, although reasonable and valid at the time they were made, must consistently be tested in relation to the context in which there is a call for reconsideration.

Lay participation in the administration of justice in South Africa has not had a successful track record. The dysfunction of the jury system's application in South Africa has led to fears that involvement of the public in the administration of justice through a community-based judicial system would lead to the system reverting back to the old ways with a perpetuation of bias, injustice and racial division. However, while acknowledging and discussing the injustices of the past, as facilitated by a community-based system, this study highlights that the majority of assessments of the viability of such system in South Africa are solely based

on the functioning and outcome of such system under colonial and apartheid rule, which is a very poor standard for reconsideration.

The social, political and legal context South Africa finds itself in today is vastly different to that of the years under colonial and apartheid rule. With a growing need for public participation and involvement in the administration of justice, it is perhaps time for the consideration of options whereby such elements may be better integrated into the criminal justice system.

Schwikkard points out that "[w]e need to interrogate our procedural systems and ask what values and goals we seek to promote and how we can best promote them in a post-colonial context."[275]

South Africa's traditional (indigenous) law and procedures, which were applied by the people long before the Western imposition of law, provide an alternative image of community-based conflict resolution to that of the common law jury system. As different as these two systems may appear – one being an African approach to conflict resolution and the other a Western approach – this study considers whether there may be links between these two worlds in the way in which each involves the public in the administration of justice. If such connections can be established, then it may identify features of public participation which may be considered to be to the benefit of the development of South Africa's procedural law.

Apart from considering links between the African and Western approach to community involvement in the administration of justice, the second main aspect this study considers is whether a community-based judicial system based on the common law jury system is a

[275] Schwikkard (note 73 above) 29.

viable consideration for South African courts. This is contemplated through considering whether the current criminal justice system functions well with the limited public participation it relies on, and whether the positive qualities and continual growth of the current system outweigh the call for greater public involvement.

7.2 LINKS BETWEEN THE AFRICAN AND WESTERN APPROACHES TO COMMUNITY INVOLVEMENT IN THE ADMINISTRATION OF JUSTICE

7.2.1 Reliance on the Divine and supernatural

Each of the stages of the progression and development of English procedural law, as outlined above and explained by Van der Merwe, bear resemblance to indigenous law and conflict resolution processes to a certain degree.

The religious stage of English procedural law saw almost exclusive reliance on divinity in the determination of wrongdoing and the judgment of wrongdoers. At the time, the people believed that God was the only one who knew the truth of what had transpired and would thus identify and punish the wrongdoer. This is illustrated through the “ordeal of the accursed morsel,” during which it was believed that the wrongdoer would choke if she was guilty. The “trial by battle” also relied on the belief that God would ensure that the party who is truthful would be victorious in a duel.

In much the same way, indigenous law places substantial weight on the power of the supernatural to identify wrongdoers. Witchcraft and practices by diviners are often used to expose wrongdoing, and it is believed that certain manifestations in individuals – which may have scientific or medical explanations – are indications of sinfulness or criminal behaviour.

Just as with the religious stage in the English progression of procedural law, these signs by the supernatural are accepted as definitive authority on the matter.

7.2.2 Personal knowledge and association with community

The abandonment of the reliance on divinity in the search for truth in the development of English procedural law, led to the reliance on oath-helpers or compurgators who were familiar with the accused and could vouch for her character, reputation in the community, upbringing and behavioural history. It was believed that through this personal knowledge and familiarity with the alleged wrongdoer, oath-helpers could provide a context in understanding the wrongdoing, which could assist in the fair administration of justice. As already established, the role of these oath-helpers later developed into the formation of the concept of a jury, which has always embodied not only the representation of the community, but the ordinary, everyday person.

Similarly, indigenous law relies on the elders in the community, who understand the community and know its members, to discuss and resolve disputes. This often takes the form of *lekgotla*, which entails the senior relatives and heads of families forming a group of advisors who assist the ward head in discussing and making determinations on matters that affect the community. This personal knowledge, in the same way as with the oath-helpers, is what allows for the fair administration of justice as it provides for context and understanding of the wrongdoing.

7.2.3 Forms of self-regulation and manifestation of democracy

In indigenous law, it is believed that, in order to promote harmony and unity in the community, it must be allowed to regulate itself according to community values, which the elders and heads of families are in a position to dictate. The structures in indigenous

communities encourage the participation of the community in matters that directly affect them. Furthermore, it is believed that the community itself is responsible for resolving disputes that arise within its boundaries. This empowerment and involvement of the people at grassroots level, is where true democracy lies. As discussed above, community courts and other community-based dispute resolution structures developed as a result of the indigenous community's belief that the formal system was inadequate to deal with community matters as it neither appreciated nor applied the indigenous values and customs to the resolution of conflict or disputes. This led to the community establishing its own structures and procedures.

The jury system is also considered by some to be a manifestation of democracy through the competence of a jury to be involved in a trial of one of its "peers," and to be actively involved in the protection of the rights and freedoms of the citizens. The engagement of the public in the judiciary may ensure that the public is enabled, to a certain degree, to become a more active and involved citizenry. Another feature of the jury system, which is a manifestation of democracy, is the practice of jury nullification or jury equity. Through these practices the jurors are able to exercise a measure of control in highlighting problematic legislation through refusing to apply it to a matter at hand. Although this practice is rarely used, it is available to jurors to play an active role in the protection of the rights of citizens.

7.2.4 Simplifying the law

As highlighted above, Mittlebeeler points out that one of the original functions of the jury system was to make the law more relatable through "humanising" it and simplifying it, through tempering its inherent rigidity with community values. The law as enforced through the community is more readily accepted than when it is imposed by detached authority.

Indigenous law is similar in character in that the informal, inquisitorial nature of its practices removes the formality and stringent rules employed in the formal courts, in favour of substantive fairness. With the main objective of reconciliation and the focus on the restoration of balance within the community, the people are empowered to mediate and resolve disputes in line with its values and customs rooted in African justice.

7.3 RECONSIDERING THE JURY SYSTEM

7.3.1 The modern-day jury system

The links between indigenous conflict resolution and the common law jury system outlined above highlight that there are aspects which establish common ground between the two approaches. However, as emphasised throughout this study, the context of reconsideration is essential to drawing accurate conclusions on the viability of change.

The reality is that the modern-day jury system is markedly different in character than when it was originally established. The initial core identity of the jury – that of being a group of members from the community who have personal knowledge of and familiarity with an alleged wrongdoer – today disqualifies a potential juror from serving on the jury. Furthermore, with the removal of the personal element, it follows that the context and understanding of the wrongdoer and the crime falls away with it. The modern-day jury consists of a group of strangers randomly selected from an electoral roll and who do not necessarily bear any similarity in background, culture, or community values as that of the accused. The jury system has over time and through continual development, shifted from being a community-based conflict resolution system to being a structure which involves a group of randomly selected members of the public adjudicating a matter in terms of which they may have no frame of reference.

Furthermore, pre-trial jury selection processes, such as *voir dire* and peremptory challenges, often result in the jury being less representative and diverse than initially intended. It can thus not always be said that the jury is a representation of the community.

Therefore, although the original intention and features of the jury system bore a resemblance to, and had common ground with, indigenous conflict resolution practices, the current form of the jury system is markedly different.

A further aspect to contemplate in the reconsideration of the jury system is the diverse and mixed opinions, views and conclusions about the jury system's effectiveness in the accurate adjudication of cases. The conclusions of studies, as mentioned above, on the one hand indicate that juries are capable of adjudicating based on facts and reasoning, with little emotional sway, whereas, on the other hand, conclusions of further studies indicate that juries tend to extremes and are inaccurate in their findings of fact and easily influenced by subjective factors. This inconsistency in the reviews of the effectiveness of the jury system, together with the historic challenges of discrimination, prejudice and bias which the system has facilitated in the past, presents a major hindrance to the reconsideration of such a system.

In light of the discussions throughout this study and the conclusions drawn above, the modern-day jury system is not a viable consideration for South African courts.

The current judicial system of South Africa has developed in leaps and bounds in the years following apartheid. Representation on the bench, which has been a barrier to non-whites in South Africa for decades, is finally being achieved, the impact of which will undoubtedly be experienced over time. Furthermore, developments in court structures have contributed to

ensuring better access to justice for the public, in line with the constitutional right of access to the courts.

7.3.2 The assessor system

The assessor system, as a direct replacement of the common law jury system in findings of fact, has brought about important improvements to the involvement of lay persons at trial. This has been achieved by greater accountability through the requirement of the furnishing of reasons for findings of fact. Assessors also fulfil their roles with greater judicial guidance, which ensures that assessors are aware of and understand the scope of their responsibility, as well as the relevant evidentiary rules, thereby ensuring more rational decision-making. However, the assessor system may require further refinement, as well as stricter rules, regarding instances in which assessors must be summoned.

The discretion of the presiding judge to appoint assessors, and further, whom to appoint as assessors, and whether they have the required expertise or skill, is of concern. Suggestions on the reform of the assessor system made by Van Zyl Smit and Isakow entail:[276]

> (a) First, it should be designed to ensure that as far as possible individual judicial officers do not themselves determine the composition of the courts over which they preside; (b) Secondly, assessors should not be appointed from as narrow a group as is at present the practice.

For the assessor system to be more effective as a feature of public participation in the administration of justice, it needs to be amended and refined to embrace and facilitate greater involvement in a manner that does not compromise the position of the assessors as representatives of the community. As Steytler affirms: [277]

[276] Van Zyl Smit D and Isakow NM "Assessors and criminal justice" (1985) *South African Journal on Human Rights* 218 231.
[277] Steytler N Democratising criminal justice, based on a paper delivered at the conference, "A new jurisprudence for a future South Africa" (25 October 1989) The University of Pretoria, South Africa 22.

> Lay participation in courts, whether in the form of a jury or a mixed bench, is an expression of participatory democracy for it embodies the value of self-government.

Three aspects are to be contemplated in the development and enhancement of the assessor system. Firstly, a consideration of the extension of the assessor system to allow for more assessors to be summoned at trial, depending on the matter before the court. In this way, there may be greater public involvement and a wider range of knowledge to be drawn on in deliberations. The collective involvement in deliberations, which is evident in a jury system, would be created by the summoning of more assessors to sit with the presiding judge.

Secondly, the summoning of assessors needs to be made mandatory in certain cases. Regulations need to be promulgated that make the summoning of assessors a standard practice at trial in certain matters. Thereby, the discretion of the judge is limited, and the achievement of the involvement of the public in the administration of justice is ensured to a greater degree.

Thirdly, the assessment of the qualification of assessors cannot be left up to the discretion of the presiding judge. This practice opens the system up to abuse by allowing the same assessors to be called upon by judges, resulting in concerns regarding the objectivity of the assessors. Regulations must be promulgated that standardise the selection of assessors and that ensure a bigger pool of assessors from which the court can allocate assessors to cases.

7.4 CONCLUSION

In the reconsideration of a former system, it is important to note, as Skelton points out, that "to draw from the past processes does not mean that the injustices of the past need to be taken along with the wisdom from the past."[278]

This study has shown that the structure of the current criminal justice system and the developments made over the past 25 years have established a system with the potential to fulfil the aims of substantive justice. However, the lesson from indigenous law in "making a shift from confrontation to conciliation" should be a priority for the system in moving forward. Many of the values and ideals encapsulated in indigenous law provide guidance towards reconciliation and restoration, which objectives require greater commitment from the judiciary. Therefore, the aim should not be a blending of African and Western approaches to achieving justice at the expense of the authenticity of indigenous law, but rather to suggest that aspects of the African approach to law and conflict resolution should be considered as valid and valuable, and as such received and accepted in order that the Western approach to law may be tempered with African values. This tempering may lead to the administration of justice consisting of a fairer and more peaceful approach to the achievement of substantive justice.

[278] Skelton A 'For the next generations: Remaking South Africa's juvenile justice system' in Doxtader E and Villa-Vicencio C (eds) *To Repair the Irreparable: Reparation and Reconstruction in South Africa* (2004) 212.

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