THESIS TITLE:

THE EFFICACY OF JURY TRIALS IN THE SOUTH AFRICAN CIVIL JUSTICE SYSTEM

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CHAPTER 1

INTRODUCTION

In classical terms, democracy is synonymous with direct participation. However, as states grew and direct public participation became more difficult, a more minimal concept of democracy associated with enfranchisement was adopted.[1] Democracy, however, should not be limited to the enfranchisement of the masses.[2] It ought to include some level of direct public participation in branches of the government such as the judicial system.

Since the advent of democracy in South Africa, the judiciary has undergone significant transformation.[3] There has been an increase in racial and gender transformation among superior court judges and magistrates in South Africa.[4] Nonetheless, this is insufficient. Representation cannot only be limited to race and gender. A broader understanding of diversity and representation ought to be adopted – one which considers factors such as socio-economic class, culture, and spatial environment. Previously being Black[5] was considered the primary indicator of being underprivileged but this has changed as more Black persons are falling within the middle to upper-class brackets.[6] It would therefore be unrealistic to assume that simply because there is a Black judge on the bench, he or she will understand the plight of an underprivileged individual. Even though a judge might come from a previously disadvantaged background this does not necessarily mean that he or she has had any recent experiences of living in a township or gang-ridden area, or that he or she can relate to underprivileged members of society.

It is submitted that attempts to transform the judiciary have not made it more accessible to the public, nor have they changed the courtroom experience for many people. The complexity of court rules, pleadings, and the legal jargon used by judges can present great difficulties for the average person. Litigants with poor verbal and written communication skills or who are unfamiliar with court procedure may find it intimidating to testify before a judge – the 'Lord',

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[1] Lowry *Achieving Justice Through Public Participation: Measuring the Effectiveness of New York's Enhanced Public Participation Plan for Environmental Justice Communities* (Doctoral Dissertation, Syracuse University (2013) 1).

[2] Van Reybrouck 'Why elections are bad for democracy' *The Guardian* (29 June 2016): *https://www.theguardian.com/politics/2016/jun/29/why-elections-are-bad-for-democracy* (last accessed on 15 March 2019). See also Lues 'Citizen participation as a contributor to sustainable democracy in South Africa' (2014) 80 *International Review of Administrative Sciences* 789 at 802.

[3] Judicial Services Commission *Annual Report 2018/19* 52.

[4] Ibid.

[5] Blacks refer to persons belonging to the Black African racial category as used in South African legislation based on Apartheid law.

[6] Mattes 'South Africa's emerging black middle class: A harbinger of political change (2015) 27 *J. Int. Dev.* 665 at 671.

'Lady', or 'Worship' of the court. These feelings of intimidation are exacerbated by South Africa's adversarial court system where litigants are pitched against each other as they attempt to outmanoeuvre and intimidate each other in a court presided over by a judge who might have nothing in common with the litigants. To the average South African, the judiciary remains to a large extent an elitist group due to high educational and socioeconomic disparities in the country.[7]

High levels of protests, land grabs and the increase of informal people's courts[8] promoting mob justice are concerning.[9] Although the Constitution allows for protests, violent protests can cause significant damage to public and private property, disruptions in economic activity and injury to innocent persons. Much of this is attributable to the fact that citizens feel powerless and excluded. Many do not understand formal court processes and its role in attaining justice, and instead resort to protests. Studies have shown that a lack of meaningful and empowering public participation alienates the public.[10] During these periods of alienation, the public invents its 'own spaces of participation'.[11] These include the adoption of informal people's courts promoting mob justice, vandalism and violent protests. Hence civil justice reform is imperative.

This dissertation notes that a more significant concept of democracy and transformation which extends public participation to the civil justice system should be adopted. The dissertation, therefore, considers whether the implementation of a civil jury, as a means to extend public participation in the civil justice system, will be feasible in South Africa. Firstly, it considers whether South Africa, given its social, political and economic context should implement a civil jury system to allow for a more significant level of democratic and public participation that will in turn give greater legitimacy to the civil justice system. Secondly, it considers lay assessors as an alternative to a jury. Lay assessors would ensure public participation and the enhanced legitimacy of the civil justice system, albeit on a smaller scale.

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[7] Galanter 'Why the "Haves" Come Out Ahead: Speculation on The Limits of Legal Change' (1974-1975) 9 *Law and Society Review* 95.

[8] Also referred to as 'kangaroo courts', consists of community members who decide on the punishment to be meted out to a liable party. It should not be confused with Community Courts forming part of the formal criminal justice system to prosecute petty crimes. See Knox & Monaghan 'Agents of informal Justice' in *Informal Justice in Divided Societies: Northern Ireland and South Africa* (2002) at 29; Schwikkard & Grant 'People's Courts? 7 *SALJ* 304 at 305.

[9] Staff Writer 'South Africa's mantra: 'They only come when we start to burn things' *Business Tech* (19 September 2016): *https://businesstech.co.za/news/trending/137235/south-africas-mantra-they-only-come-when-we-start-to-burn-things/* (last accessed on 13 January 2020).

[10] Mchunu *The link between poor public participation and protest: The case of Khayelitsha* (Master's Thesis, Stellenbosch University (2012) 1).

[11] Ibid at 15.

Before determining whether there is scope for the jury in South Africa, chapter two considers the history of the jury system and how it operates in other countries such as the United States of America. The advantages and disadvantages of juries are considered in detail.

South Africa previously implemented a jury system in 1828 which was later abolished. Chapter three provides a brief historical overview of South Africa's first encounter with the jury and highlights its pitfalls. It is necessary to determine the dissatisfaction experienced with the previous jury system to develop a prototype civil jury system for contemporary South Africa.

It is careless to assume that because the jury failed in pre-democratic South Africa it will fail again without extensively examining the potential of the jury in the current South African landscape. Therefore, chapter four considers how a jury system would play out in South Africa in light of the current social, economic, and political challenges.

The implementation of a jury system in South Africa may not necessarily be feasible, hence chapter five considers lay assessors as an alternative. A lay assessor is a private individual who is not affiliated to the state or the justice system, called to assist a judge in a legal matter. It will be argued that the lay assessor system would maintain public participation and improve the public's understanding of the civil justice system while also eliminating some of the disadvantages associated with a jury – mainly costs.

CHAPTER 2

THE CIVIL JURY

ATHENA: Yea, me, even me, eternal right forbids
To judge the issues of blood-guilt…
I choose unto me judges that shall be
An ordinance for ever, set to rule
The dues of blood-guilt, upon oath declared.
But ye, call forth your witness and your proof,
Words strong for justice, fortified by oath;
And I, whoe'er are truest in my town,
Them will I choose and bring…

- Athena *in Eumenides*[12]

The concept of being judged by a jury of one's peers is as old as the Ancient Greek Gods. As dramatised in Aeschylus's 458 B.C.E play *Eumeneides*, the King of Argos, Agamemnon is murdered by his wife. Agamemnon's son, Orestos, avenges his father's death by killing his mother. Orestos' conscience, in the form of witches called the Furies, torments him thereafter. Attempting to escape the Furies, Orestos runs to the top of the Hill of Ares and pleads to Athena, the goddess of wisdom, to save him. As the Furies hover over Orestes, Athena appears and announces that Orestos should be judged by his fellow men and convenes a group of men from the town to determine his fate.

Myth aside, the exact origin of the jury system is contested. However, most scholars believe that it can be traced back to 6th century B.C. Greece.[13] The ancient Greek jury comprised of 501 jurors, and there is evidence to suggest that they increased to 2001 jurors for important cases.[14] The number of jurors remained an odd number to prevent a tie.[15] The excessive amount

[12] Aeschylus 'Eumenides': *http://classics.mit.edu/Aeschylus/eumendides.html* (last accessed on 5 May 2019); see also Bertoch 'The Greeks Had a Jury for It' (1971) 57 *American Bar Association Journal* 1012 at 1012.
[13] Grening 'The Civil Jury in the United States' (2017) 92 *North Dakota Law Review* 365 at 367; Keane 'The Jury — Some Thoughts, Historical and Personal' (1996) 5 *Hastings Law Journal* 47 at 1249.
[14] Tumanova, Sakhapova, Faizrahmanova and Safina 'The Origin of a Jury in Ancient Greece and England' (2016) 11 *International Journal of Environmental & Science Education* 4154 at 4157;
[15] Ibid.

of jurors also served to make it difficult for parties to bribe the jury. Juries considered cases of treason, attempts to disrupt democracy and other serious crimes. They exercised a judicial function by examining evidence and cross-examining parties.[16] Litigants were allocated a fixed amount of time, measured by a water clock,[17] to present their case. There were not many set rules on evidence and procedure, which meant that jurors often heckled litigants if they suspected their evidence or testimony was untrue.[18]

After both sides presented their arguments, jurors cast their votes. There was no formal discussion amongst the panel before voting, and each member was free to vote according to their conscience. Before casting their vote, each juror was given two pebbles: one white signifying innocence and one black to indicate guilt. Pebbles were placed into an urn and counted.[19]

Centuries later, the jury system still operates in certain countries[20] despite criticisms and calls for its abolishment. It has been praised as a democratic institution that places a portion of the government's power in the hands of the governed.[21] However, just because the jury has survived for centuries does not automatically mean that it is an ideal system to enhance access to justice in South Africa. An overview of the development of the jury, how it operates, and its advantages and disadvantages ought to be considered. While the jury system exists in many jurisdictions, this chapter will mainly discuss arguments relating to the American jury system because it is well-established and has attracted a considerable amount of debate.

I THE HISTORY OF THE MODERN JURY

The reign of King Henry II in the 12th century is regarded as the origin of the modern jury system.[22] Juries of six or 12 men from towns and villages were a prevalent feature in certain parts of England. Referred to as juries of presentment, these jurors were witnesses of crimes or incidents that occurred in their neighbourhood. As they came from the vicinity in which the incident occurred, they were considered to know the facts before deciding the matter and

[16] Tumanova et al (n14) 4158.
[17] A device allowing a specific amount of water to flow through the hole of one pot into another. A plug was used to stop the water from flowing from the first to the second pot when litigants were reading the evidence.
[18] Bers and Lanni 'An Introduction to the Athenian Legal System': *http://www.stoa.org/demos/intro_legal_system.pdf* (accessed 15 September 2019).
[19] Tumanova et al (n14) 4158.
[20] It currently operates in the United States of America, Australia, Canada, Hong Kong, New Zealand, and the United Kingdom.
[21] De Tocqueville *Democracy in America* (2000) 224.
[22] Grening (n13) 368.

therefore considered little evidence. Their knowledge of the case was based on first-hand experience, investigations and often, hearsay.[23]

In 1166, Henry II passed legislation[24] implementing trial by jury throughout the country. By 1215 it became more prominent once the Catholic Church banned trials by ordeal.[25] By then, in addition to juries of presentment, trying juries were also created. The latter assisted with questions of fact and assessed charges and allegations. Trying juries were both witnesses and judges of facts.[26] However, by the mid-1500s, jurors who witnessed incidents in their community were removed from the jury panel. Instead, they appeared as witnesses before a trying jury, which was now more impartial because its members had no prior knowledge of the case.[27]

II THE AMERICAN JURY

The English jury system was brought to America by British colonists. The Virginia Charter of 1606 allowed the British to maintain all their English rights, which included the right to trial by jury.[28] However, the first jury trial in the American colonies was held in 1630 in Plymouth (Massachusetts) when Mr John Billington was accused of murdering Mr John Newcomen.[29]

In 1765 the Stamp Act Congress[30] declared that 'trial by jury is the inherent and invaluable right of every British subject of the colonies'.[31] Subsequent to this, in 1788, Article 3 of the US Constitution[32] incorporated the right to trial by jury for criminal cases. Although the right to a jury trial is absolute in criminal cases, it is not the same for civil cases which are slightly complicated.

Civil juries are technically only allowed in courts applying federal law i.e. federal courts.[33] Federal laws, unlike state laws, apply to the country as a whole. However, in practice, although

[23] Smith *A History of England* 2 ed (1957) 26.
[24] Known as the Assize of Clarendon.
[25] Trial by ordeal subjected persons to painful experiences to determine their innocence. For example, a person would have molten metal poured onto their hands. If the wound healed after three days then they were considered innocent; see McAuley 'Canon Law and the End of the Ordeal' (2006) 26 *Oxford Journal of Legal Studies* 473 at 475.
[26] Grening (n13) 372.
[27] Ibid.
[28] Grening (n13) 373.
[29] Smith 'The Historical and Constitutional Contexts of Jury Reform' (1996) 25 *Hofstra Law Review* 377 at 422.
[30] A meeting held in New York between representatives of the British colonies in North America; Griffith *Historical note of the American colonies and revolution: from 1754 to 1775* (2016) 100.
[31] Resolution VII of the *Stamp Act Congress,* 1765.
[32] Constitution of the United States of America, 17 September 1787; hereinafter 'US Constitution'.
[33] Seventh Amendment, US Constitution.

each state has its own laws and courts, many states, through their constitutions, allow for jury trials in civil cases.

Furthermore, whether a request for a jury in a civil trial will be granted depends on the nature of the claim.[34] Cases involving equitable claims, are to be adjudicated by a bench trial and not a jury trial.[35] This distinction between equitable and legal remedy claims stems from the English common-law system which influenced the American legal system. It can be difficult to determine whether a claim sounds in equity. In such uncertain instances, courts use a two-pronged test. The first prong which is mainly a historical analysis determines whether the plaintiff's current claim is one which the equity courts of England in the late 1790's would have jurisdiction to hear. This encompasses a review of English law at that time. The second consideration, which courts give more weight to, is whether, in terms of contemporary law, the remedy sought by the plaintiff is equitable or legal in nature.[36]

The main distinction between cases in equity and cases in law lies in the type of relief requested. Generally, claims in equity seek non-monetary relief, for example: an injunction (interdict), declaratory judgment, specific performance of a contract, or amendment of a contract.[37] In actions seeking equitable relief, there is no right to a jury trial.[38]

On the other hand, claims for legal relief are generally those where monetary relief is being sought, such as damages for a breach of contract, personal injury or tort (delictual) action, or damages for the recovery of property. In these cases, parties are entitled to a jury trial, where the latter is responsible for determining issues of fact such as whether a party breached a contract and the amount of monetary damages the aggrieved party is entitled to.[39]

Courts tend to allow a jury trial even where there is a conflict in the two-pronged test. For example, in *SFF-TIR v Stephenson*[40] the defendant was entitled to a jury trial where the plaintiff's claim for breach of fiduciary duties sounded in equity under the first prong but sought a legal remedy in terms of the second prong. In such cases, where there is both an

[34] Coquillett 'Chapter 38: Right to a Jury Trial; Demand' in Coquillett (ed) Moore's Federal Practice: Civil (2019) § 38.10.
[35] Ibid § 38.10 [2][a].
[36] *Granfinanciera SA v Nordberg* (1989) 492 U.S 33 para 492.
[37] Coquillett (n34).
[38] Ibid.
[39] *Goettsch v Goettsch* (2014) 29 F Supp 3d 1231 para 1237; hereinafter 'Goettsch'
[40] (2017) 262 F Supp 3d 1165 para 1259.

equitable and legal claim, the jury may decide the legal claim while the court considers the equitable claim.[41]

(a) Jury Demand

Even in civil cases where the right to a jury trial exists, a party must first request it by serving the opposing party with a written demand for a jury within 14 days after the final pleading has been served.[42] Once the demand has been served on the relevant parties, it must also be filed at court.[43]

(b) Jury Selection

Jurors are chosen from a jury pool called the *venire.* Prospective jurors' names are obtained from electoral rolls, registered drivers' licences, identity documents, or other relevant databases. Once selected, jurors receive a summons to appear in a jury pool on a specified date. On the specified date, their names are randomly selected and called out by a jury pool clerk.[44] Depending on whether six or 12[45] jurors are needed, 15-30 prospective jurors are sent for *voir dire.*

Voir dire refers to the questioning of prospective jurors to determine their backgrounds, experience, relationships and potential biases that could jeopardise the progression of the trial, before selecting jurors.[46] The purpose of *voir dire* is threefold. It determines whether the prospective juror: (i) is eligible to serve on the jury; (ii) can be impartial; and (iii) can render a verdict based on the evidence adduced during the trial and not external factors.[47]

The *voir dire* is usually conducted by the judge from a questionnaire that the parties agree to in advance. Once each prospective juror answers the questions, legal counsel may ask further questions. Each party is given several chances to challenge prospective jurors' placement in the jury. Attorneys can conduct online research on the prospective jurors to obtain additional information to aid in the selection process.[48]

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[41] Goettsch (n39).
[42] Rule 38 of the Federal Rules of Civil Procedure; hereinafter 'FRCP'
[43] Rule 5(d) of the FRCP.
[44] Starr and McCormick *Jury Selection* (2009) 18.
[45] Rule 48(a) of the FRCP requires a jury to have a minimum of 6 and a maximum of 12 jurors.
[46] Weinberger, Simon & Etarri 'Civil Jury Trials in Federal Court' 2019 *Practical Law The Journal* 26 at 31.
[47] Bartol and Bartol *Psychology and Law: Research and Practice* (2015) 130.
[48] ABA 'Formal Opinion 466: Lawyer Reviewing Jurors Internet Presence' : *https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf*, (last accessed on 6 May 2019).

In *Lewis v American Sugar Refining Inc*,[49] after a trial, the defendant discovered previous anti-corporate comments posted by a juror on social media and requested a new trial which the court refused. The court held that 'the ability to be fair and objective does not require an absence of personal views outside the case'.[50] Had the defendant conducted online research and discovered those posts during the *voir dire*, the defendant would have had the opportunity to challenge the juror's selection.

Once the *voir dire* is completed, the judge calls the names of prospective jurors whose placement in the jury has been challenged by the parties' legal counsel. They are not selected. Instead, their names return to the jury pool for consideration in other trials. Prospective jurors who are not challenged but also not selected return to the jury pool and the jury is formed from the remaining prospective jurors.[51]

(c) Jury instructions

At various stages before, during and after the trial, a judge will issue jury instructions.[52] Before the trial, parties submit proposed jury instructions and a verdict form to the opposing party and the court. Judges also have standardised preliminary jury instructions that they give to the jury.[53]

The judge's preliminary instructions include procedural instructions relating to juror conduct. The judge will (i) issue prohibitions on posting trial-related information on social media and other platforms; (ii) prohibit the conducting of external research on the case; (iii) advise on whether jurors can take notes; (iv) request that all communication to the court is in writing; and (v) caution jurors against forming opinions until all evidence has been provided. Furthermore, he or she will explain the role of the judge and jurors, whether the jury's decision should be a majority or unanimous decision,[54] the powers of the judge to enforce procedural rules in court and the court's authority to hold jurors in contempt of court.[55]

[49] (2018) 325 F.Supp.3d 321 para 333-4.
[50] Ibid para 335.
[51] Weinberger et al (n46) 32.
[52] For example see United States District Court, Court's proposed jury instructions':*https://www.innd.uscourts.gov/sites/innd/files/Standard%20Jury%20Instructions%20Civil.pdf*, (last accessed on 25 October 2019).
[53] Weinberger et al (n45) 32.
[54] In federal courts jury decisions must be unanimous but in state courts this varies according to individual state laws.
[55] Weinberger et al (n46) 32-3.

The judge will also provide substantive law instructions which include: (i) defining key legal terms; (ii) explaining the legal standard the jury needs to apply when determining facts; (iii) setting out the law the jury must apply when reaching any decision on liability and the relevant remedy; (iv) explaining how the jury should consider evidence; and (v) explaining which evidence and information can and cannot be considered.[56]

Throughout the trial, the judge will issue warnings to the jury. This often occurs when inadmissible evidence has been brought before the court. In these cases, the judge will instruct the jury to disregard the evidence.[57]

Once all evidence is presented at the trial, a jury instruction conference is held between the judge and legal counsel.[58] It is usually informal, and parties can raise any objections or suggestions for the final jury instructions.[59] Shortly after this, the judge decides on the final jury instructions and verdict form to be given to the jurors. The verdict form contains the essential legal elements that must be proven for the defendant to be found liable and will contain ticking boxes for the jury to indicate whether each element was proven and if the defendant is guilty or not.[60]

III DISADVANTAGES OF THE JURY SYSTEM

The jury system attracts a considerable amount of debate, but in recent years it has attracted significant criticisms from academics and practitioners. Some of their criticisms are based on initial arguments against the jury system, such jurors not being legally trained, while other arguments are based on recent studies demonstrating the possibility of dominant jurors having a 'mind-altering' effect on other jurors' perceptions.[61] These criticisms will be considered in more detail below.

[56] Weinberger et al (n46) 32-3.
[57] Ibid.
[58] Levin, Jury Instructions and Verdict Form (lecture note, Harvard University, 2013) available at https://cyber.harvard.edu/~nesson/Instructions_and_Verdict.rtf (last accessed on 14 August 2019).
[59] Rule 51 of the FRCP.
[60] Montana Pro Bono 'Sample jury verdict form' : *https://www.montanaprobono.net/geo/search/download.61975* (last accessed on 26 October 2019)
[61] Colb 'The Downside of Juries in a World That Can't Stop Talking': *https://verdict.justia.com/2012/09/19/the-downside-of-juries-in-a-world-that-cant-stop-talking* (last accessed on 15 April 2019)

(a) Juror misconduct

The repercussions of juror misconduct are serious as it can warrant a mistrial[62] or other corrective actions such as removing a culpable juror.[63] Examples of jury misconduct include ignoring jury instructions, conducting independent research on the case, consulting other persons on evidence or even contacting a litigant. In 2011, a juror in the United Kingdom was sentenced to eight months imprisonment after she contacted the defendant via Facebook, causing the collapse of a £ 6 000 000 trial.[64]

Sometimes jurors consult external persons on the evidence or potential outcome of a trial. In *People v Neulander,*[65] a court overturned a verdict and ordered a retrial after discovering that a juror texted trial information to friends and family despite the instruction to refrain from third party communications.

Sometimes jurors conduct independent research. In *Mayhue v St Francis Hospital of Wichita Inc*[66] the court granted a retrial after a juror provided definitions to the jury were different to the applicable law contained in the jury instructions.

(b) Logistics

Certain logistical issues have the potential to become time-consuming. These relate to breaks, scheduling, and evidentiary disputes. Juries have set breaks, such as lunch breaks, that may require the court to adjourn while a witness is at the crux of his or her testimony. These breaks not only disrupt the momentum of the testimony or a productive cross-examination but also extend the trial period.[67]

Jury trials usually abide by a set schedule that includes lunch and tea breaks whereas judges and counsel in bench trials may readily work longer hours, and through lunch breaks, to finish a witness's testimony or cross-examination, to ensure that the trial concludes expeditiously. A

[62] This occurs when a trial is rendered invalid.
[63] Nicholas 'A Practical Framework for Preventing Mistrial by Twitter' (2010) 28 *Cardozo Arts and Entertainment Law Journal* 385 at 375.
[64] Deans 'Facebook Juror Jailed for Eight Months' *The Guardian* (16 June 2011): *https://www.theguardian.com/uk/2011/jun/16/facebook-juror-jailed-for-eight-months* (last accessed 7 August 2019).
[65] (2018) 162 AD 3d 1763 para 1766-68.
[66] 969 F.2d 919 para 44-6.
[67] Weinberger et al (n46) 34.

court in a jury trial may also need to adjourn earlier on days where a juror's schedule cannot accommodate the trial for serious and legitimate reasons.[68]

During bench trials, counsel will immediately object or raise concerns about evidence if, for example, a line of questioning is impermissible, the evidence constitutes hearsay, or a document shown to a witness constitutes new evidence. On the other hand, in jury trials, counsel must signal to the court that they wish to raise an evidentiary dispute and request either a sidebar or that the court gives the jury a break so that the parties can discuss the matter without the jury's presence. Clearing the court in such cases can prolong the trial.[69]

(c) Dominant jurors

Some jurors are more dominant than others and may affect the outcome of the jury's decision. Neuroscientist Gregory Berns conducted a social pressure experiment by showing participants two three-dimensional objects and asking whether the first object could be rotated to match the second.[70] The participants were divided into two groups: an experimental group and a control group. An actor volunteering the incorrect answer was planted in the experimental group while the control group answered the question on their own. Those in the control group were only 13.8 per cent incorrect while those in the experimental group were 41 per cent incorrect.[71]

Functional Magnetic Resonance Imaging (fMRI) scanners were attached to the participants to determine which parts of their brains showed heightened activity during the study. As expected, the visual-spatial area of the brain was active in those who solved the problem on their own.[72]

In the experimental group, participants who knew the correct answer but gave an incorrect answer due to peer pressure did not show increased activity in the frontal cortex as the scientists expected. The frontal cortex is responsible for conscious decision making i.e. whether to lie or not and choosing between right and wrong. Instead, they showed increased activity in the perception related areas of the brain.[73]

Those who gave in to peer pressure maintained that their answers were not influenced by members of their group. The fMRI confirmed that they were not lying. Instead, their peers with

[68] Ibid.
[69] Carrington 'The Civil Jury and American Democracy' (2003) 13 *Duke Journal of Comparative and International Law* 79 at 90.
[70] Berns, Chappelow, Zink, Pagnoni, Martin-Skurski & Richards 'Neurobiological Correlates of Social Conformity and Independence During Mental Rotation' (2005) 58 *Biological Psychiatry* 245 at 248.
[71] Ibid.
[72] Ibid.
[73] Ibid.

the incorrect view were distorting their brains' perceptual process. The effect of this on the group is akin to the impact of 'mind-altering substances' on one's perception.[74] Given the results of the study, it is questionable whether a dissenting but correct juror will maintain his or her view when facing dominant jurors with differing views because the latter's peer pressure may have a mind-altering effect on others.

Furthermore, those who gave the right answer despite the majority of the group thinking otherwise showed increased activity in the amygdala, which is responsible for feelings of aggression, rejection, or fear. Given this, it is likely that jurors in the minority may avoid speaking out during deliberations simply to avoid feelings of fear and aggression.

This study casts doubts on the supposed benefits of brainstorming in groups. If peer pressure, can have a mind-altering effect on people then dominant jurors may have the same effect on other jurors.

(d) Complex cases

Many argue that jurors cannot deal with complex cases which in turn creates other problems..[75] Complex cases strain jurors' memory and increase the amount of information they must grapple with. Although evidence should be presented in a relatable manner, the reality remains that not all jurors understand it.

Furthermore, juries are once-off. They consist of *ad hoc* groups most likely lacking in any specialisation, expertise, and skills that would enhance decision making. They are not given access to previous similar cases. Without these precedents there is not, as some would argue, enough guidance which creates a fertile environment for irrational decisions.[76]

(e) Swayed by emotion

Jurors have also been criticised for being 'swayed by emotions.'[77] Emotions can affect trial outcomes, but such impact cannot easily be measured. Juries do not have to justify their verdicts and if they do, their justifications are unlikely to include the impact of their emotions on the decision. A study by Kalven and Zeisel[78] noted that judges who disagreed with jury verdicts

[74] Berns et al (n70) 258.
[75] Lempert 'Civil Juries and Complex Cases: Taking Stock After Twelve Years in Verdict' in Litan (ed) *Assessing the Civil Jury System* (1993) 181; Schuck 'Mapping the Debate on Jury Reform' in Litan (ed) *Verdict: Assessing the Civil Jury System* (1993) 306.
[76] Lempert (n75) 185.
[77] Pettys 'The Emotional Juror' (2007) 76 *Fordham Law Review* 1609 at 1609-10.
[78] Kalven and Zeisel *The American Jury* (1971) 202.

associated their disagreements with jury emotions and empathy. The judges believed that juries would only act against the evidence if a defendant was physically challenged and/or emotionally distressed. One judge spoke about a case where a jury found in favour of the defendant after discovering the death of his son, the serious illness of his wife, and the birth of his blind daughter, who was also diagnosed with cerebral palsy, and that his house burnt down.[79]

The study concludes that twenty-two per cent of verdict disagreements between judges and juries are attributed to jury empathy and emotions.[80] However, there are several difficulties with this study. It is only based on the views of judges. The judge-jury disagreement could be influenced by several factors including the empathy of judges themselves. Judges are also empathetic beings and their verdicts may be shaped by their perceptions which they may not readily admit. Although this cannot be gauged from their judgments which are limited to case law and legislation it does not mean that their perceptions do not influence the application of the law.

(f) Systemic bias

It is presumed that juries are more sympathetic to certain parties, especially injured plaintiffs in delictual cases while large corporations and government entities with 'deep pockets' garner little sympathy.[81]

There is, however, no reliable data on bias because the concept of bias has varying definitions. The closest attempt at determining jury bias has been to compare a judge's views to the jury's outcome of a case but this may be an inaccurate measurement as judges also have their own biases.[82] Judges' biases could be even more ominous than those of jurors. After all, it was judicial bias that the framers of the Seventh Amendment[83] sought to check by establishing juries.[84]

Interestingly, several studies indicate that in most instances judges and juries are more likely to decide similar cases in the same manner. In particular, the percentage of cases in which judges and juries agree compares favourably amongst members of professional decision-

[79] Ibid.
[80] Ibid.
[81] MacCoun 'Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-Pockets" Hypothes'(1996) 30 *Law & Society Review* 121 at 122.
[82] Ibid.
[83] Of the US Constitution.
[84] Schuck (n75) 310.

making groups presented with the same facts. A study[85] on jury findings revealed that where juries and judges differed on their findings, there was no evidence of bias on the part of jurors to account for their reasoning.[86]

(g) Unaccountability

Juries are not required to justify their decisions or provide any formal written or oral reasoning. Given the lack of accountability, jurors can reach verdicts carelessly because they are not subjected to the same constraints as judges who must substantiate their judgments.[87]

Jury unaccountability manifest in various ways. First, the passive role of juries does not allow them to engage with parties, making it difficult to determine juries' thought processes when analysing evidence and reaching a verdict.[88]

Second, jury deliberations are held privately. There is no way of determining how the jury reached its decision. Jurors swear an oath that they will reach a fair and true verdict based on the evidence. However, there are little to no effective means available to determine whether they do so. While judges can dismiss jurors for improper conduct, the privacy of jury deliberations makes it difficult for the judge to ascertain whether jurors(s) conduct themselves improperly. Jurisdictions also differ on how far a judge can probe into allegations of improper conduct and the extent to which jurors can reveal what was discussed during deliberations.[89]

Third, even though verdicts may be appealed and reversed, a jury does not have to provide any reasons for its verdict to the public, so judges and parties are ill-equipped to review these reasons.[90]

(h) Risk of bribery

Critics argue that jurors may be susceptible to accepting bribes. In 2018, a Scottish juror was sentenced to six years imprisonment after she accepted a £3 000 bribe.[91] Despite the claim that jurors are susceptible to bribery, this is the only incident in the history of Scottish law where a

[85] Kalven Jnr & Zeisel *The American Jury* (1966) 64.
[86] Ibid.
[87] Jackson 'Making Juries Accountable' (2002) 50 *The American Journal of Comparative Law* 447 at 517-18.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Staff Writer 'Juror who took bribe jailed for six years' *BBC News* (19 April 2018): https://www.bbc.com/news/uk-scotland-glasgow-west-43823762 (last accessed on 5 July 2019).

juror has been found guilty of accepting a bribe. No other Scottish jurors have been prosecuted for corrupt behaviour. There are also minimal instances of juror bribery in America.[92]

Wong[93] argues that bribing an entire jury pool is improbable given that the names of the jurors are unknown until the trial. While jurors can be bribed after their identities are discovered, jurors only serve on one case and then fade from the court system limiting the corrupt jurors' influence on the overall fairness of the justice system. Thus, a corrupt juror's influence is not as systemic as a corrupt judge who holds an official position in the judiciary.[94]

(i) Jury duty can be traumatic

Some jurors suffer from post-traumatic stress after listening to evidence.[95] Common aspects that induce stress or anxiety amongst jurors include (i) not being prepared for the graphic nature of evidence (photos, videos, or gruesome testimonies); (ii) evidence that may trigger memories of past traumatic experience; (iii) heated disagreements amongst jurors during deliberation or pressure placed on certain members to reach consensus on a verdict; (iv) internalising the burden associated with making a decision that could affect the future of another; and (v) feelings of isolation after swearing to secrecy which means that jurors are unable to achieve catharsis through discussion with loved ones during the trial.[96]

Only two states in the US, being Alaska and Texas, have legislation in place providing for the counselling of jurors in severe cases. Although other states like California, New Jersey and Illinois offer counselling, it is not enforced by legislation.[97]

(j) Jury nullification

Jury nullification occurs when a jury intentionally disregards the law when determining its verdict. For example, a jury reaches a verdict contrary to the prevailing law because they

[92] I used Pressreader, which provides access to international news content published in print. The search was limited to the USA, and I used the search terms 'juror bribery', 'juror bribed', 'jury bribery', 'juror', 'bribery', and 'bribe'. Collectively, these searches generated over 2500 articles. Most articles related to allegations of juror bribery or jurors receiving bribes but immediately reporting such activities to court authorities. It would thus seem from the research that while people try to bribe jurors, hardly any ever take such bribes. Of course, the research cannot account for unreported instances.
[93] Wong 'Juries, Judges, and Corruption: A Cross-National Analysis' (2007) 9 *Public Integrity* 133 at 140.
[94] Ibid.
[95] Robertson, Davies and Nettleingham 'Vicarious traumatisation as a consequence of jury service' (2009) 48 *Howard Journal of Criminal Justice* 1 at 2.
[96] Ibid.
[97] Miller and Bornstein 'The Experience of Jurors: Reducing Stress and Enhancing Satisfaction' in *Stress, Trauma and Wellbeing in the Legal System* (2013) 247-8.

disagree with the law or believe that the law should not apply in that case.[98] This excludes unintentional instances where the jury makes a mistake or misunderstands the law or instructions.[99]

The main criticism against jury nullification is that it violates the right to due process. In terms of due process, one can only be found liable for a wrongful act if there is sufficient legal evidence to prove this. However, with jury nullification there is a risk that jurors may find one culpable even if the evidence is insufficient.[100]

It can also result in legal uncertainty. If people are liable in terms of the law then certain punitive measures are expected but if jurors nullify the law then legal outcomes would be uncertain.

A further criticism is that if juries nullify the law adopted by the legislature, they usurp the law-making function of the legislature. And, if jury nullification continuously 'softens' the impact of 'harsh' rules as its proponents suggest, then there will be no urgency to reform said laws via the legislature because laws may simply be changed by jurors.[101]

III ADVANTAGES OF THE JURY SYSTEM

While critics of the jury system cite costs, extended trials, and jurors' lack of specialised knowledge, proponents of the jury system argue that in addition to other benefits, it is cheaper and faster than bench trials.[102] These advantages and other benefits will be considered in more detail below.

(a) Costs

In America and other jurisdictions jury trials require less pretrial submissions than bench trials which reduces costs. Bench trials require the submission of legal conclusions before the trial, and towards the end of it once all evidence has been adduced. This is dispensed with during jury trials and saves costs because submissions can extend to hundreds of pages for which attorneys usually bill per hour.[103]

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[98] Noah 'Civil Jury Nullification' (2001) 86 *Iowa Law Review* 1601 at 1604.
[99] Ibid.
[100] Duvall 'The Contradictory Stance on Jury Nullification' (2012) 88 *North Dakota Law Review* 409 at 423.
[101] Noah (n98) 1639.
[102] Janata 'The Pros and Cons of Jury Trials' (1976) 11 *American Bar Association of Insurance, Negligence and Compensation Law* 590 at 593.
[103] Ibid.

(b) Speed

Juries have the potential to deliver verdicts faster than judges.[104] After a bench trial, the judge can wait for weeks or months to receive parties' post-trial submissions. Once received, the judge will consider it together with other information such as the records and briefs. Litigants do not expect to receive a judge's verdict within a few hours or days. It can take months before a judge hands down a decision. The judge also has other judicial activities. The jury, on the other hand, usually delivers its verdict within a few hours or days.[105] Furthermore, while juries are deliberating judges are free to continue with other judicial work which can assist in eliminating court backlogs.[106]

(c) Layperson perspective

Juries can bring a wealth of experience and a common-sense approach to the deliberation process.[107] According to Kalven, certain disputes are best adjudicated by laypersons, particularly, disputes that require a consideration of the 'community's sense of values'[108] and morals. Lay citizens are likely to bring a 'feel of the community' to such cases.[109] Given the diverse composition of a jury, they are more likely to apply community values more broadly than a judge – counteracting the rigidity of the law.

Furthermore, the random selection of jurors, instead of accepting volunteers, ensures that various community sentiments are considered. This allows a jury to ward off animosity and suspicion for socially necessary but tragic verdicts. The civil jury as a decentralised and representative group is more suitable to make such decisions than a judge who was appointed (and not elected by the majority of the citizens) and is considered to have nothing in common with the average man.[110] Hence the jury will enjoy more legitimacy. [111] This does not mean that judges do not attempt to determine community values and morals. However, in a bench trial the case can turn on the morality of one person whereas with a jury the moral outcome is

[104] Ibid.
[105] Ibid.
[106] Janata 'Federal Civil Jury Trials should not be abolished' (1974) *American Bar Association Journal* 934 at 935.
[107] Weinberger et al (n46) 29.
[108] Kalven 'The Jury, the Law and Personal Injury Damage Award' (1958) 19 *Ohio State Law Journal* 158 at 161.
[109] Kalven 'The Dignity of the Civil Jury' (1964) 50 *Virginia Law Review* 1055 at 1058.
[110] Ibid.
[111] Kalven *Report on the Chicago Jury Project: Aims and Methods of Legal Research* (1955) 155.

predicated on the morality of 12 people. Therefore, the moral outcome of the jury is likely to be considered more legitimate than the moral premises of a bench trial.

Several studies confirm that jurors take their roles seriously.[112] Most jurors make conscientious efforts to understand instructions, listen attentively during the trial and carefully consider all evidence and arguments.[113] Studies evaluating jury verdicts indicated that a majority of the verdicts are justifiable and correct.[114]

(d) The jury as a democratic institution prompting civil engagement

De Tocqueville believed that nothing espouses democracy more than the jury because it 'places the real direction of society in the hands of a portion of the governed, and not only in that of the government'.[115]

More specifically, jury duty is considered a form of deliberative democracy.[116] It promotes reasoned discussion amongst citizens on important public issues. It provides ordinary citizens with an opportunity to participate in government which fosters feelings of respect for the law.[117] Apart from voting in elections, jury duty is the most significant way to participate in government.[118]

Post-trial surveys revealed that jury service significantly impacts jurors' attitudes towards the courts. Most jurors are pleased with their jury duty and have more favourable views about the judiciary compared to before their jury service.[119] This suggests that jury service can encourage public engagement. A study by Gastil[120] found that jurors who participated in jury deliberation voted in elections more consistently after their jury duty in comparison to those who were not selected for jury duty.

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[112] Gastil, Deess, Philip, Weiser & Simmons *Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation* (2010) 2.
[113] *American Bar Foundation* 'How civil juries really decide cases: Lessons from an Empirical Study of Actual Jury Deliberations' (2007) 18 *American Bar Foundation* 2; Lempert 'The American Jury System: A synthetic Overview' 90 *Chicago Kent Law Review* 840 covering evidence on jury performance.
[114] Ibid.
[115] De Tocqueville (n21) at 263.
[116] Abrahamson 'Four Models of Jury Democracy' (2015) 90 *Chicago-Kent Law Review* 861 at 872.
[117] Gastil, Deess & Weiser 'Civic Awakening in the Jury Room: A Test of the Connection between Jury Deliberation and Political Participation' (2002) 64 *The Journal of Politics* 585 at 588.
[118] *Powers v Ohio* (1991) 499 U.S. 400 para 407.
[119] See generally Gastil et al (n117).
[120] Ibid.

(e) The jury as a political institution

Jurors constitute a political decision-making body. Like voting, juries provide ordinary citizens with the opportunity to serve their country by exercising power directly and making decisions based on the law of the country. All eligible jurors are given an equal opportunity for jury selection. Those receiving a summons to appear for jury duty are randomly selected. No preferential treatment is given to persons from certain socio-economic classes. Even former presidents such as George W Bush and Barrack Obama have been summoned for jury duty.

The jury is considered a political institution that protects citizens from arbitrary state power. It balances state power, particularly in cases where the government exercises substantial power.[121]

The jury also distributes government power. The US government is based on the separation of powers principle whereby the government is divided into three branches – the executive, the legislature and the judiciary. Each branch exercises checks and balances on the other.[122] The jury system then provides a further separation of government power, particularly the judiciary's power to adjudicate matters. This prevents judicial autocracy because juries (not judges) are responsible for determining the facts of a case, leaving little room for a judge's bias to permeate the matter. [123] The practice of politicians and presidents appointing judges creates the potential risk of judges being biased as some may only have been appointed to further the political agendas of certain politicians.[124]

The jury, therefore, acts as 'security against corruption'.[125] It shields litigants from biases that judges, who have very little in common the with the average citizen, may develop. [126] This does not mean that jurors do not have their own biases,[127] but their impact is less harsh than a judge's bias. Juries only serve on one case and then fade from the court system, limiting the impact of a juror's bias on the overall fairness of the justice system. A juror's bias is not as systemic as a biased judge who holds a long-term position in the judiciary.

[121] For example, in eviction proceedings.
[122] Sacks 'Preservation of The Civil Jury System' (1965) 22 *Washington & Lee Law Review* 76 at 85-7.
[123] Whitehouse 'Restoring the Civil Jury's Role' (2014) 55 *William and Mary Law Review* 1241 at 1266.
[124] Ibid.
[125] Thomas *The Missing American Jury* (2016) 64.
[126] Ibid.
[127] For more on juror bias refer to *(f) Systemic bias* p14 of this dissertation.

(f) The jury as an educational institution

De Tocqueville highlighted the jury's role in educating citizens on the justice system.[128] It is difficult to accept that a juror who experienced a trial, received jury instructions, grappled with evidence and deliberated with fellow jurors has not learnt anything about the law and the way the justice system functions.

Research confirms that jurors' political self-confidence and knowledge about the judiciary increased after their jury duty. While some argue that educating citizens via the jury sacrifices the productivity of the justice system, they nonetheless agree that it does inform citizens about the justice system.[129]

(g) Jury nullification

Jury nullification occurs when a jury intentionally disregards the law when determining its verdict. Although some critics consider jury nullification detrimental to the justice system,[130] there are others who consider it beneficial. Authors like Huemer argue that sometimes jurors are morally obliged to engage in jury nullification by disregarding the law, especially when a defendant is deemed to be legally culpable but morally blameless.[131]

Jury nullification proponents usually cite the 1735 trial of John Peter Zenger, the New York Weekly Journal publisher on trial for defamation. Zenger published factual articles about the New York Governor. Even though Zenger could prove the veracity thereof, the judge informed the jury that truth was not a defence to defamation, essentially noting that Zenger was guilty of defamation. Instead, the jury found Zenger to be not guilty even though according to the law at the time he was. This has become one of the most famous examples of civil jury nullification.[132]

Huemer promotes jury nullification by arguing that it is *prima facie* wrong to cause unjust harm to others. If one is walking down the street with a friend and is met by a homophobic gang questioning one about the friend's sexuality, a reasonable person would deny that the friend is

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[128] Dzur 'Democracy's "Free School": Tocqueville and Lieber on the Value of the Jury' (2010) 38 *Political Theory* 603 at 605.
[129] Consolini *Learning by Doing Justice: Jury Service and Political Attitudes* (PhD dissertation, University of California (1992) 186).
[130] For an explanation of jury nullification and its disadvantages see *(j) Jury nullification* p16-7 of this dissertation.
[131] Heumer 'The Duty to Disregard the Law' (2018) 12 *Criminal Law and Philosophy* 1 at 2.
[132] Tigar 'The Trial of John Peter Zenger of New York Printer' : https://history.nycourts.gov/wp-content/uploads/2018/11/History_Tryal-John-Peter-Zenger.pdf (last accessed on 17 September 2019).

gay. To lie in this case would save a friend from unjust harm.[133] Huemer argues that cases of moral uncertainty justify jury nullification and not deference to the law. As it is *prima facie* wrong to cause unjust harm, finding a defendant guilty for a morally blameless act would cause unjust harm to him or her. This is because finding a defendant guilty amounts to punishment, and one does not deserve to be punished for morally blameless conduct. Undeserved punishment is unjust harm. Given this, Huemer argues that the greater the potential unjust harm, the greater the duty jurors have to nullify the law.[134] Although judicial 'punishments' in civil cases are less harsh than criminal sanctions, they are nonetheless serious.

Even if a juror who acknowledges that an outcome is unjust argues that he or she did not create the unjust law his or her and that the complaint should be directed at the legislature, his or her argument is flawed.[135] If one reverts to the example of the gay friend's encounter with the gang, the person could confirm that the friend is gay and once the gang beats him argue that the gang, and not the person himself or herself, was the cause of the harm. The juror who alleges that it is not the jury's fault for reaching a verdict in accordance with an unjust law causes harm to the defendant in the same way that one would if one reveals to the gang that the friend is gay. Causation does not need to be direct. In both instances, causation is via another agent. Just as it is wrong to 'tell on' one's gay friend, it is equally wrong to cause harm to the defendant indirectly.[136]

An argument against jury nullification is that it violates the rule of law. This argument assumes that that jury nullification is lawless and that it causes legal uncertainty. It supposedly diminishes predictability of trial outcomes because a justice system should operate on clear and objectively defined rules as opposed to subjective human judgment. It also supposedly results in the unequal treatment of defendants i.e. two defendants guilty of the same misconduct receiving different outcomes because of jury views.[137] However, when a jury encounters a defendant being sued for a morally blameless act, it becomes difficult to accept the justification that the jury should decide to inflict unjust harm on the individual for the sake of uniformity amongst like defendants.[138]

[133] Huemer (n131) 3-5.
[134] Ibid.
[135] Huemer (n131) 5.
[136] Ibid.
[137] Opinion of Judge Sobeloff Simon in *United States v Moylan* (1969) 417 F.2d para 1002.
[138] Huemer (n131) 8.

The objective of any justice system is to mete out justice according to the particular facts of the case at hand. A verdict should only be made against a person who committed a blameworthy act deserving of a sanction. It is not the responsibility of a trial to mete out punishment convenient to a larger social policy objective.[139]

The justice system is characterised by unpredictability and subjective judgement.[140] Juries make varying decisions about defendants in trials, which means the system is unpredictable even without nullification. No one thinks that judges' discretion should be removed to ensure predictability.[141]

Admittedly not all examples of jury nullification are as defensible as the trial of John Zenger. Jurors may abuse jury nullification power, and this can be a justification for limiting it, but it is insufficient to justify its complete removal.[142] The fact that previous jurors may have abused their powers does not diminish the current juror's reason for wanting to nullify. The fact that jurors may have used nullification for perverse reasons does not make it incorrect to nullify for the correct reason.[143]

The fact that nullification is based on an individual's fallible moral judgment together with instances of moral uncertainty has been used to argue that it is best to defer to laws of the country, enacted by a democratically elected legislature but this has the potential to lead to rampant legal positivism.

Although critics of jury nullification may be motivated by reverence for the law, it is important to remember why the law is valued – not because of a desire to follow rules but because the law is a tool of justice. It should not be divorced from morality; to do so would place the preservation of law above the purpose for which it was created.[144]

IV CONCLUSION

The jury is considered by many as an element of justice. As a democratic institution, it gives a voice to society. As a political institution, it ensures that government power is distributed with checks and balances. It is one of the few mechanisms that allow citizens to serve their country by exercising political power by applying their own moral and community standards.

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[139] Ibid.
[140] MacLean 'Judicial Discretion in the Civil Law' (1982) 43 *La. L. Rev* 43 at 49.
[141] Huemer (n131) 8.
[142] Ibid.
[143] Ibid.
[144] Huemer (n131) 17.

Nonetheless, it remains a controversial entity because it can also be costly, time-consuming, and ineffective in dealing with complex cases. There are many disadvantages and advantages to the jury system, highlighting that the jury, like many other entities, is fallible. However, whether it should be eradicated entirely should not be the main focus. Instead, it should be determined whether it can be adapted to meet the demands of the unique landscape of South Africa.

CHAPTER 3

THE HISTORY OF THE JURY IN SOUTH AFRICA

I INTRODUCTION

The South African jury can be traced to the jury systems used in the four colonies prior to 1910[145] namely: Transvaal, Cape Colony, Orange Free State and Natal. Juries were first introduced in criminal and certain civil cases in the Cape Colony in the 1820s.[146] By the 1850s jury trials were implemented in all the colonies.[147] Jurors had to be males between the ages of 21 and 60 and had to own or possess immovable property of a specific value. There was no formal racial restriction, but at that time, juries comprised mainly of white males. Blacks[148] did not serve on juries. The civil jury and criminal jury was abolished in 1927 and 1969 respectively. South Africa has not implemented the jury system again.

This chapter, which primarily focuses on the jury in pre-democratic South Africa, is divided into two parts. The first part considers the legislation and rules applicable to the operation of juries in all four colonies. It considers amongst others, key legislation affecting the jury, eligibility requirements for jury selection and the different types of juries. Part two provides a critical evaluation of the jury. It analyses how juries carried out their duties by considering much of the criticisms of the jury. The analysis reveals that jurors were largely racist and incompetent. Essentially, part two aims to determine the flaws of the jury which were likely the cause of its failure.

[145] In 1910, all four colonies were unified to form the Union of South Africa.
[146] See Charter of Justice of 24 August 1827.
[147] Article 15 of The Grondwet of the South African Republic (Transvaal) of 1858; Section 49 of the Orange Free State Grondwet of 1854; Natal Ordinance 6 of 1852.
[148] Refers to those classified as Black African, Indian, Coloured and other mixed-race persons.

PART I

THE PRE-DEMOCRATIC JURY

II JURIES IN THE CAPE COLONY

The jury system was introduced in South Africa during the second[149] British occupation.[150] In 1826, the Crown Commission of Inquiry into the Administration of Justice in the Colony of the Cape of Good Hope[151] reported that the administration of justice in the Colony was lacking because judicial officers had no legal training.

Subsequently, the Charter of Justice of 1827[152] established circuit courts[153] and introduced the jury system for criminal trials.[154] The first comprehensive legislation regarding juries was Ordinance 84 of 1831 and was based predominantly on English jury rules. It required jurors to be free (i.e. not slaves) males between 21 and 60 years of age. There was, however, no mention of colour.

Jurors had to satisfy a property requirement. To be a petit[155] juror, one had to be paying annual rent of £1 17s.[156] Alternatively, one had to pay annual tax to the value of 30s in the Cape Colony. To be a grand[157] juror, one had to own immovable property to the value of £3000 in the Cape. Clergymen, attorneys, doctors, civil servants and officers of the court were exempted from jury duty.

Prospective jurors' names were derived from a list by the Collector of Tax in Cape Town and Commissioners of specific districts such as Cape and Stellenbosch. The list detailed the amount of tax paid by each person and was regularly reviewed by a magistrate to determine whether

[149] In 1795 the British launched a military expedition against the Dutch East India Company's (a megacorporation formed by the amalgamation of several Dutch trading companies in 1602) rule of the Cape Colony in South Africa. This is known as the first British occupation. In 1803 the Cape Colony reverted to Dutch Rule until 1806 when the British started regaining control – this became known as the second British occupation.
[150] Kahn 'Restore the Jury? Or Reform? Reform? Aren't Things Bad Enough Already? Part I' (1991) 108 *SALJ* 672 at 679.
[151] Led by John Thomas Bigge and William Macbean Colebrooke; hereinafter referred to as the 'Commission'.
[152] Hereinafter the 'Charter'.
[153] Judges travelled to outlying areas across the country to hear cases at different venues which became known as circuit courts
[154] Sections 34, 39 and 40 of the Charter.
[155] A petit jury hears evidence from both the plaintiff and defendant and delivers a verdict based on the evidence.
[156] Kahn (n150).
[157] Unlike a petit jury, the grand jury acts like a prosecuting authority, determining whether there is probable cause to believe that the accused committed the crime and should be put on trial.

jury lists should be updated.[158] Jurors living more than 25 miles from Cape Town or who had to travel more than six hours by horse could apply for exemption from jury duty.[159]

Between 1831 and 1885, several amendments were made to the jury rules. For example, the Charter of Justice of 1834, stipulated that jurors did not have to be proficient in English. In 1843 new requirements for petit jurors were introduced. Prospective petit jurors had to own or rent immovable property which had an annual value of £15.[160] Later the requirements for grand jurors were also amended. They had to own immovable property to the value of £1 500 (and no longer £3 000).[161]

In 1854 the civil jury was introduced. Civil juries of nine men were implemented in the Supreme Court.[162] Most of the rules applicable to criminal juries applied to civil juries. Civil juries determined questions of fact and assessed damages. A list of 36 jurors was provided, and each party was able to remove six jurors without cause. Any further removals by a party had to be substantiated with just cause.[163] Examples of just cause included lack of qualification, substantial interest in the case, previous expression of opinion on the merits of the case and relations with the litigants.[164]

Civil jurors did not have to reach a unanimous verdict. A majority verdict by six was sufficient as long as the jury deliberated for at least an hour. Hung juries would only be discharged as such after they deliberated for a minimum of six hours. Jurors were paid a daily rate of 10s by the plaintiff who, if successful, could reclaim that amount from the defendant.[165]

In 1891, the rules relating to juries in the Cape Colony were amended and consolidated by the Jury Act.[166] While a juror still had to be a male between 21 and 60, he had to own immovable property to the value of £300 or earn £150 annually. Special jurors[167] had to own land to the value of at least £1500 or earn £500 annually or fall within any of the following professions: architect, bank manager, civil engineer or broker. The Act listed three grounds of disqualification: (i) not being British; (ii) previous convictions of treason, rape, illicit diamond

[158] Kahn (n150) 682.
[159] Ibid.
[160] Ordinance 1 of 1843.
[161] Jury Law Amendment Act 1 of 1861.
[162] Supreme Court Act 7 of 1854.
[163] Kahn (n150) 684.
[164] Ibid.
[165] Ibid.
[166] Act 22 of 1891.
[167] Refers to jurors with expert skills relevant to the matter on trial.

buying, fraud or theft; and (iii) illiteracy.[168] Furthermore, men with disabilities were deleted from the prospective juror list. Judges, attorneys, doctors, clergymen, civil servants, pharmacists and dentists were exempted from jury duty.

As the Cape was the first to introduce the jury system many of the rules relating to juries in the other colonies mirrored that of the Cape with only a few differences.

III JURIES IN NATAL

In Natal, the jury system was introduced in 1845 but only applicable to criminal cases.[169] The jury qualification requirements were similar to that of the Cape Colony at that time. Jurors had to be males between the ages of 21 and 60, own or be in occupation of immoveable property to a certain value. There was no racial qualification. In 1852, the civil jury, consisting of seven males, was introduced.[170] It was only allowed in cases where litigants requested it, and the dispute exceeded £15. All seven jurors had to reach a unanimous verdict. By 1871 the civil jury was no longer required to reach a unanimous verdict – a majority of five was sufficient.[171]

In both criminal a civil jury trials, each litigant could challenge three jurors without cause and verdicts could be set aside on the grounds of juror misconduct, improper admission or refusal of evidence, a verdict contrary to the evidence, the discovery of new evidence and the misapplication of the law by a judge.[172]

By 1871 Blacks were excluded by a qualification that jurors needed to be exempt from the operation of 'native law'.[173] In 1883 potential Indian jurors were prohibited from serving on a jury because jurors needed to be registered voters and Indians were disenfranchised. [174]

In 1878, special civil juries,[175] consisting of five jurors, were created in Durban and Pietermaritzburg.[176] The special jury was able to reach a verdict by a majority vote of four. The jurors received a daily allowance of one guinea coin.[177] Other jurors were not compensated for

[168] Kahn (n150) 683.
[169] Kahn 'Restore the Jury? Or Reform? Reform? Aren't Things Bad Enough Already? Part II' (1992) 109 *SALJ* 87 at 88.
[170] Ordinance 7 of 1852.
[171] Law 10 of 1871.
[172] Kahn (n169) 90.
[173] Laws based partly on the traditional law of indigenous people of southern Africa, applicable only to Black people.
[174] The Natal Franchise Bill of 1894.
[175] See note 167.
[176] Law 8 of 1878.
[177] Ibid.

their services until 1892 when they were given a daily allowance 7s 6d. By 1896, civil juries were eliminated in minor cases where the dispute was £50 or less.[178].

IV JURIES IN THE ORANGE FREE STATE

In 1854, a criminal jury consisting of six to nine white males was introduced in criminal trials.[179] As with all the colonies, jurors had to be between 21 and 60 years old[180] and own immovable property to the value of £100 or more.[181] If a male did not own property but paid annual rent of £20 or more then he would be eligible to serve on the jury.[182] Unlike the other colonies, to be a juror in this colony one had to be white and a member of a Christian church. Persons exempted from jury duty included civil servants, legal officers, doctors, pharmacists, priests and theology students.[183]

The names of six or nine jurors were drawn from a box by the court registrar.[184] Each party could challenge three jurors. The grounds for challenging a juror mirrored that of the Cape Colony. It included: lack of qualification; relationship or close connection with the accused; and favouritism or hostility towards the accused.[185] Once selected, the jury was required to reach a unanimous verdict. Unlike in Natal and the Cape, jurors in the Free State were not compensated, and there were no civil or special juries.[186]

V JURIES IN TRANSVAAL

The 1858 Constitution of Transvaal[187] confirmed that judicial authority vested in a *landrost,*[188] four to six *heemraden*[189] and the jury. Jurors had to be white males who were least 30 years old and registered voters. Juries, of 12 jurors, only participated in matters before the High Court and were required to reach a unanimous verdict in criminal cases and a majority vote in civil cases.[190]

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[178] Supreme Court Act 39 of 1896.
[179] Article 49 of the Orange Free State Constitution.
[180] Although Jury Ordinance 17 of 1902 changed the age limit to persons between 30 and 60 years.
[181] Ordinance 2 of 1857.
[182] Ibid.
[183] Section 7 of Ordinance 14 of 1877.
[184] Ordinance 3 of 1856.
[185] Kahn (n169) 88.
[186] Ibid.
[187] Also referred to as the 'Grondwet' of 1858.
[188] A landrost was a boer magistrate.
[189] Assistants to the magistrate.
[190] Appendix III of the Grondwet published in the Government Gazette of 28 October 1859.

In 1887, when the British Empire annexed the Transvaal, the *landrost-heemraden* concept was abolished.[191] Instead, criminal trials were held before one judge and nine jurors who had to reach a unanimous verdict. Juries were removed in civil cases but was later allowed at the requests of the parties.[192]

The first civil jury was requested in 1894 in *Marx v Hess,*[193] which clarified the rules relating to civil juries.[194] Within 48 hours of the close of pleadings, the party was required to inform the opposing party of its intention to demand a jury trial. The opposing parties would appear before a judge in chambers to establish the issues to be determined by a jury of nine.[195] A jury was to determine questions of fact and the assessment of damages. It did not have to reach a unanimous verdict; a majority vote of six was sufficient. The party requesting a jury had to deposit £200, which was used to reimburse jurors for their time and travelling expenses. Nonetheless, civil juries were rarely used.[196]

In 1902, the Jury Ordinance[197] listing jury eligibility requirements similar to those of the other colonies was passed. Jurors had to be male between the ages of 21 and 60, and own immovable property to the value of £500. Jurors were paid a daily rate of 10*s* and those travelling more than five miles[198] were given a travel allowance. Unlike the Cape Colony and Natal, there were no special juries.

VI JURIES IN THE UNION OF SOUTH AFRICA

In 1910, after South Africa became a Union most of the jury-related rules of all four provinces were consolidated in the Criminal Procedure and Evidence Act.[199] A discerning feature between the pre- and post- Union jury rules related to race. Previously in the Cape, there was no racial bar. Natal had a *de facto* racial bar because jurors had to be registered voters and only a meagre number of non-whites were franchised. The Orange Free State and Transvaal expressly stipulated that jurors had to be white males. Post-1910, all jurors had to be males between 25 and 60 years old, be literate in English or Afrikaans, meet the income and property

[191] Shepstones Proclamation of 12 April 1877.
[192] Law 3 of 1883.
[193] (1894) 1 Off Rep 90.
[194] Even though civil trials were allowed in 1883, there was no immediate body of rules governing civil jury procedure. Judges were at liberty to set the rules.
[195] Supra note 193.
[196] Kahn (n169) 92.
[197] Ordinance 10 of 1902.
[198] Approximately 8 kilometres.
[199] Act 31 of 1917; hereinafter the 'CPEA'

qualifications and be registered voters.[200] Although there was no explicit mention of race in Union legislation, the property and franchise requirements meant that the racial barrier to becoming a juror remained the same. As no Black person was franchised in the Orange Free State, Transvaal and Natal, only Blacks in the Cape could serve on a jury. Nonetheless, the civil jury was abolished in 1927 while the criminal trial jury survived until 1969.

PART II

VII ANALYSIS OF THE PRE-DEMOCRATIC JURY IN SOUTH AFRICA

No formal studies evaluating the jury in South Africa have been conducted. The only source of information is anecdotal evidence from those in the legal profession. The perception gathered from many judges, academics and other professionals is that the juries rendered verdicts that were 'wrong'[201] or even 'scandalous'[202] because juries were 'emotional', prejudicial, racist, and unable to deal with complex issues.

(a) Jurors were racist

Solomon Tshekisho Plaatje, a journalist, court interpreter, and historian, is one of the only Blacks whose view on the pre-democratic South African jury can be located today. He travelled throughout the country to observe jury trials and always reported on the injustices of the jurymen, particularly in cases where a Black person was a litigant and seeking damages.[203]

Several judges criticised juries for exonerating white defendants despite evidence highlighting their culpability. For example, Botha J of the Orange Free State reprimanded jurors who despite evidence indicating a white defendant's guilt, deliberated for a mere 10 minutes, and found that he was not culpable.[203a]

Likewise, George T Morice KQ, who served as an acting judge from 1880 to 1925, frequently called for the abolishment of the jury system by arguing that it would not provide Blacks with the justice they deserved, and the continuation thereof would lead to perilous consequences.[204]

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[200] Section 167 of the CPEA.
[201] Seligson 'Lay participation in South Africa from Apartheid to majority rule' (2001) 72 *Revue Internationale De Droit Pénal* 273 at 274.
[202] Unnamed Author 'Juries' (1932) 1 *South African Law Times* 101 at 102.
[203] Willan *Sol Plaatje: A Biography* (1984) 312.
[203a] Kahn (n169) 108.
[204] (1920) 37 S*ALJ at* 136.

In one incident in the Cape where there were a handful of Black jurors, a judge threatened to hold a white juror in contempt of court after refusing to sit next to a Black juror.[205]

The injustices delivered by racist juries in civil cases were deplorable and were even worse in criminal trials. White defendants in criminal matters were almost always acquitted if the crime was committed against a Black person. One of many examples includes *R v Hart and Others*[206] in which a white man was accused of flogging and torturing a Black man to death but acquitted despite overwhelming evidence against him.

(b) Jurors were incompetent

Civil jurors were allegedly 'disappointing' because they often found against the State, awarded excessive damages and were irrational and emotional'. [207] Melius de Villiers[208] argued that it was customary for jurors to be more sympathetic towards individual plaintiffs in comparison to the state[209] and that jurors sympathy and lack of legal knowledge interfered with the administration of justice.[210]

Similarly, in 1916, Rev D P Faure, a Supreme Court interpreter and the founder of the Free Protestant Church in Cape Town, argued that jury trials were the most popular delusions because they operated on the assumption that men from workshops, counters, and farms were better equipped than judges to analyse evidence.[211]

Despite criticisms about juries, there were compliments of the jury system. Judge President Laurence[212] reported that civil juries try 'to be fair'[213] and usually 'succeed in their attempts'[214] to do so. Although there were some 'eccentric verdicts',[215] extremely 'perverse verdicts were

[205] Erasmus 'Circuit Courts in the Cape Colony During the Nineteenth Century: Hazards and Achievement' (2013) 19 *Fundamina* 266 at 289.
[206] Cited in Mouton '*R v Malan* (1901): Politics, justice and the South African War, 1899-1902' (2009) 15 *Fundamina* 154 at 154-55.
[207] De Villiers 'Trial by Jury in Civil Cases' (1918) 35 *SALJ* 393 at 393-4.
[208] He served as Orange Free State Chief Justice from 1889 to 190; see Schulze 'Melius de Villiers – a biographical sketch' (2008) 14 *Fundamina* 9 at 10.
[209] De Villiers (n207) 393-4.
[210] Ibid.
[211] Unnamed author 'Notes' (1916) 33 *SALJ* 177.
[212] He was a judge at the High Court of Griqualand in 1882 before becoming Judge President in 1888.
[213] Laurence *Collectanea: Essays, Addresses and Reviews* (1899) 300.
[214] Ibid.
[215] Ibid.

exceptional.'[216] Likewise, Judge Juta shared similar views of the jury, stating that they 'do very well on the whole'.[217]

VII THE JURY'S END

The civil and criminal jury was abolished in 1927[218] and 1969[219] respectively. Arguments relied on for its abolishment included that jurors were incompetent and emotional. The majority of the arguments, however, centred on racial prejudices and that justice would not be attained if the opportunity for lay representation was allocated to one minority group.[220]

The democratic strength of a jury trial lies in being tried by one's peers. A jury of one's peers is more equipped to assess the culpability of a defendant because they know the background the defendant comes from and are familiar with the community values. This was not the case in South Africa because only white males were eligible for jury duty. To transplant an English jury system, that only knew and considered the views of whites, in a diverse country like South Africa was bound to fail. A significant portion of the white male population disliked and feared Blacks. It was unrealistic to expect that such people would place their prejudices aside for Black litigants.

The sincerity of white professionals who called for the abolishment of the jury because it was prejudicial to Blacks is also questionable because those arguing that Blacks would not receive justice before an all-white jury never championed the removal of the racial requirement to become a juror.

While racism was mainly cited for the abolishment of the criminal jury it is likely that the real reason for the civil jury's abolishment was more political. Jurors were criticised for meting out harsher verdicts to large corporations and the government. The general opinion amongst the legal profession was that a jury would 'give more swinging damages against a rich man'.[221] According to Justice Centlivres[222] juries believed that government and corporations could afford to pay and applied this belief in all cases against them. The government's unhappiness

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[216] Ibid.
[217] Henry *Reminiscences of the Western Circuit* (1912) 55.
[218] Administration of Justice (Further Amendment) Act 11 of 1927.
[219] Abolishment of Juries Act No 34 of 1969.
[220] Morice 'The Administration of Criminal Law in South Africa' (1920) 37 *SALJ* 131 at 136-7.
[221] Kahn (n169) 96.
[222] He was the Chief Justice of South Africa from 1950 to 1957 and Chancellor of the University of Cape Town from 1950 until his death in 1966. See Zimmermann and Visser, Southern *Cross: Civil law and Common law in South Africa* (1996) 126.

with civil juries was particularly evident after the 1926 railway accident in which the state was sued for significant damages.[223] A year later the civil jury was abolished.

The 'rich man' against whom juries awarded higher damages was a palatable equivalent for white men. During this period, rich men were white men; an insignificant amount of Blacks was considered rich. Corporations and government entities, against whom juries awarded damages at the time, were also dominated by white males.

Thus, while there may be truth in the critique that jurors were emotional and unable to comprehend complex legal issues, it is likely that the abolishment of the jury was not to protect the Blacks from injustice but to preserve the status quo. If the reason for abolishing juries were to prevent Blacks from injustices then the criminal jury would have been abolished first and not decades after the abolishment of the civil jury.

XI CONCLUSION

Many authors cite incompetence, prejudice and racism for the jury's failure. Jurors delivered harsher verdicts in matters concerning the state and all-male white juries were unable to carry out justice in interracial cases. The jury, a democratic institution, was not implemented to promote any tenets of democracy.

Given the injustices associated with the jury system in the past, it is understandable that some may view the reintroduction of the institution with reticence. However, the political and social landscape today is considerably different. It is imperative to consider the social, political, and economic landscape of South Africa to determine whether re-implementing the jury system will be feasible.

[223] Lawrence 'The 90th anniversary of the Salt River railway incident' 2016 *Cabo* 49 at 49-50.

CHAPTER 4

REIMAGINING A CIVIL JURY IN SOUTH AFRICA

I INTRODUCTION

Despite the reasons for the jury's failure in pre-democratic South Africa, the jury still holds the potential to create a more inclusive legal system for people who have historically felt alienated from the formal court system.

For the court system to achieve greater legitimacy, the value of public participation should be acknowledged. It should be considered whether a jury or an adapted version thereof can be successfully implemented in South Africa. This chapter is therefore divided into two parts. Part one considers views on reintroducing the jury in South Africa. While the second part of the chapter considers how a jury prototype would play out.

PART I

II VIEWS ON REINTRODUCING THE JURY IN SOUTH AFRICA

(a) Lack of support for the reinstatement of the civil jury

Although Marshall Heubner dismissed the idea of having a jury, he is one of few authors that actively engaged with the possibility of implementing it in South Africa. One of his arguments against the reinstatement of the jury is that 'there is consensus amongst legal persons'[224] that it should not be reintroduced. This is true as a review of South African academic literature reveals there is no support for the reintroduction of the jury. Even though, Huebner considers this sufficient reason not to introduce juries, his argument is circular.[225]

Critics like Huebner who are against implementing the jury have not consulted those likely to be most affected – the general public – before making their argument. Sufficient engagement with the public would have revealed that people are conducting their trials in informal people's courts.[226] The creation and use of an informal court system reveals that there is a need amongst

[224] Huebner 'Who Decides? Restructuring Criminal Justice for a Democratic South Africa' (1993) 102 *Yale Law Journal* 961 at 970.
[225] Vogler 'The International Development of the Jury' (2001) 72 *Revue Internationale De Droit Pénal* 525 at 548.
[226] These are informal, community-based courts that do not operate within the formal structures of the judiciary; see Weiss 'The Great Democratizing Principles: The Effect on South Africa of Planning a Democracy Without a Jury System' (1997) 11 *Temple International and Comparative Law Journal* 107 at 127.

communities to govern themselves because they do not trust or acknowledge the legitimacy of the current civil justice system. The present system does not meet the needs of society.[227]

In 1997 the South African Law Commission acknowledged that the criminal justice system was experiencing a legitimacy crisis and called for suggestions.[228] It listed the jury and assessors as potential solutions, but the jury was dismissed on the argument that jurors may engage in '…deductive reasoning.' [229] Even though the jury was used in other countries the Commission thought that those countries' experiences with the jury were irrelevant to South Africa.[230] Since the initial work of the Commission, there has not been further engagement with implementing a jury in criminal cases or civil trials.

(b) Racial conflict

Prof Steytler argues that the racial divide and conflict in South Africa will not allow a jury to operate efficiently. [231] This view is informed by Jearey's study of the operation and failure of juries in Africa.[232] According to Jearey, there are three requirements for the success of the jury system. First, the community in which it operates must be homogeneous, i.e. there should be no significant racial or ethnic divide.[233] Second, the people in the community should be sufficiently educated to set aside their prejudices and perform their roles conscientiously.[234] Last, society should agree with the laws that they will need to enforce. The absence of these factors in African countries allegedly caused the jury to fail.[235]

If Jearey's three requirements were applied to contemporary South Africa, the jury would be unsuccessful. First, South Africa is not homogenous as the country has several racial and ethnic groups. Second, the education levels in South Africa are below average. The educational landscape is marked by a high dropout rate due to poverty, poor academic performance, teenage pregnancy, and crime.[236] Given this, it is questionable whether citizens are sufficiently

[227] Ibid.
[228] South African Law Commission 'Simplification of Criminal Procedure: Access to the Criminal Justice System' *Issue Paper 6* (1997).
[229] South African Law Commission 'Fifth Interim Report on Simplification of Criminal Procedure*' Project 73* (2002) at 55.
[230] Ibid.
[231] Steytler 'Democratizing the Criminal Justice System in South Africa' (1991) 18 *Social Justice* 141 at 141.
[232] Jearey 'Trial by Jury and Trial with the Aid of Assessors in the Superior Courts of British African Territories Part II' (1961) 5 *Journal of African Law* 36.
[233] Ibid at 46.
[234] Ibid.
[235] Ibid.
[236] Masondo 'Education in South Africa: A system in crisis' *News 24* (31 May 2016): *https://www.news24.com/citypress/News/education-in-south-africa-a-system-in-crisis-20160531* (last accessed 12 April 2019)

educated to set aside their prejudices. South Africa also has many cultural and religious practices which may influence people's prejudices. For example, some religious beliefs may be homophobic, and some cultural practical may be patriarchal. Last, it is uncertain whether society as a whole agrees with some of the laws of the country. This can be deduced from the high number of protests in South Africa.[237]

Despite the argument that racial conflict may inhibit the effectiveness of a jury, jury trials have operated favourably in multi-racial and ethnic countries.[238] Studies comparing racially diverse juries and non-racially diverse juries reveal that racially diverse juries deliberated longer, had more in-depth discussions, and made less inaccurate statements regarding evidence than all-white juries.[239] Jurors in racially diverse juries display more care and effort in the examination of evidence.[240] A racially diverse jury encourages all jurors to critically examine the support for their beliefs and views in preparation to defend and convince other jurors of their views. When a view is challenged, jurors are likely to abandon views that cannot be sustained by the evidence, allowing for a procedurally fair trial.[241]

A lack of juror diversity is the probable cause of the infamous verdict reached by the predominantly white male jury in the Rodney King trial. Despite video footage of four police officers violently beating King, the jury found that the police officers did not use excessive force. The verdict sparked great outrage and public protest.[242] A retrial by a more diverse jury found that the police officers used excessive force.

Other experts also confirm that diverse juries decrease groupthink errors which occurs when group members agree merely to avoid conflict and ensure peace. [243] This contributes to weak and irrational decision making. Groupthink is more common in groups that are isolated from

[237] The following article discuses protests by citizens calling for harsher sexual assault laws - Madisa 'Ramaphosa announces government plans against sexual offenders, murderers' *Sowetan Live* (5 September 2019): *https://www.sowetanlive.co.za/news/south-africa/2019-09-05-ramaphosa-announces-government-plans-against-sexual-offenders-murderers/* (last accessed 2 January 2020).
[238] *Peters v. Kiff* (1972) 407 U.S. 493 para 503.
[239] Sommers 'On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations' (2006) 90 *Journal of Personality and Social Psychology* 597 at 604-8.
[240] Ibid.
[241] Ibid.
[242]Alleyne 'Can Rodney King Get an Unbiased Civil Trial?' *Los Angeles Times* (26 December 1993): *https://www.latimes.com/archives/la-xpm-1993-12-26-op-5734-story.html* (last accessed 15 December 2019); see also *Rodney Glen King v City of Los Angeles* (1994) 16 F.3d 992.
[243] Litigation Insights 'What are the Benefits of Having Diversity in a Jury Panel': *https://www.litigationinsights.com/benefits-diversity-jury/* (last accessed 7 December 2019).

different perspectives such as non-racially representative juries. Diversity, therefore, serves as a remedy for groupthink.[244]

(c) Costs

Huebner, like many authors,[245] argues that implementing a jury system is too costly. A considerable amount of money would have to be spent to accommodate jurors. This includes building rooms for jurors to deliberate in and adding juror boxes in courtrooms.

Trials also involve the use of modern technology which requires flat screens in the jury boxes or a large screen for all jurors to view images, videos, and presentations. Speakers and microphones are also necessary. Technology and resources for differently-abled persons will also be required.

Given that South Africa has 11 official languages, jurors may need three or more simultaneous translators. This is costly.[246] Furthermore, funds would have to be earmarked for juror stipends, and administrative structures must be developed to facilitate and monitor the jury system. This includes clerical and other staff to select potential jurors, deal with exemption applications and coordinate jurors' attendance at court proceedings. This will place financial and capacity burdens on an already strained Department of Justice.[247]

Other repercussions extend to the legal profession. Attorneys and advocates would have to familiarise themselves with the operation of jury trials. This includes learning to conduct *voir dire*,[248] and drafting jury instructions and verdict forms. Tertiary institutions would need to add jury trials to their syllabus. Furthermore, the public would have to be educated on the jury system. Public awareness campaigns also come at a cost.

(d) *Language Limitations*

Although South Africa has 11 official languages, English is the language of record for all courts. Litigants, witnesses and legal counsel can address the court in any language, but if a non-English language is used, it must be translated.

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[244] Ibid.
[245] Rood 'A Return to the Jury System?' (1990) 274 *De Rebus* 749 at 750.
[246] Huebner (n224) 975.
[247] Rood (n245).
[248] This refers to the questioning processed by legal counsel to select jurors. See *(b) Jury Selection* p 8-9 of this dissertation for more on *voir dire.*

Consider the following example. When an isiXhosa speaking witness testifies in court, he or she gives their account, pauses and waits for the interpreter to translate it to English. This is followed by an English-speaking advocate posing a follow-up question and allowing the interpreter time to translate it to isiXhosa for the witness. This consecutive interpretation lengthens the trial and would not be feasible if a jury system were implemented. If, for example, a jury comprised three isiZulu and isiXhosa speakers, two Afrikaans and Sepedi speakers and one English and Setswana speaker then interpreting via the current system would protract the trial because each interpreter needs to be given the opportunity to speak. This would be incredibly confusing for the jurors, the judge and the litigants.

However, there is an alternative. Simultaneous interpretation, as utilised during United Nations[249] meetings, would be appropriate.[250] The UN has interpreters in six booths (one for each of its six official languages) located separately from delegates. Delegates are able to listen to the interpretations, using headphones and can switch between channels for different languages.[251]

The UN translators are aided by tools such as voice recognition software and computer-assisted translation applications.[252] These translators undergo rigorous examinations and training.[253] They are also required to read up on the subject matter when not engaged in interpreting, undergo training in regional dialects, accent identification, and are trained to match the speaker's pace.

Similar language personnel would be instrumental to the South African jury, but unfortunately mirroring this approach in South Africa may be difficult. It requires headphones, voice recognition software and computer-assisted translation applications and given South Africa's electricity crisis it is unclear what will happen to this equipment during load shedding. If there are no generators for this equipment to function during load shedding, trials may be delayed.

[249] Hereinafter the 'UN'.
[250] See also generally Gaiba *The Origins of Simultaneous Interpretation* (1998) 95.
[251] The United Nations Department for General Interpretation Service 'Translation': *https://www.un.org/Depts/DGACM/Translation.shtml* (last accessed on 1 December 2019).
[252] The United Nations Language Careers, 'Verbatim Reporters':*https://languagecareers.un.org/dgacm/Langs.nsf/page.xsp?key=Careers-Verbatim* (last accessed 5 June 2019).
[253] Ibid.

Although the UN has proven that the administration of linguistic plurality is not insurmountable, South Africa's linguistic pluralism could still 'engender an administrative nightmare'[254] and a significant cost burden.[255]

Translators and interpreters can also hinder the administration of justice.[256] Research conducted on the Eastern Cape courts revealed that interpreters regularly misinterpreted information because of a lack of training.[257] More than 75 per cent of court interpreters are not trained in languages or court interpreting.[258] Apart from a six-week orientation programme, interpreters receive little support.[259] Interpreters must use international models of interpreting as there are no South African based ones. These international models can create more problems than solutions given the linguistic and cultural differences.[260]

South Africa's high rate of absenteeism costs the country's economy approximately R12 billion per year.[261] Given such high rates of absenteeism it is reasonable to question what would happen if one translator is absent during a trial. It is uncertain whether the trial would be postponed, whether there would be a backup translator or if the trial will proceed without the translator, leaving the jurors who rely on that translator in the lurch.

(e) *Lack of knowledge*

The argument that jurors are not sufficiently knowledgeable to decide complex matters [262] has been used to argue against its implementation in South Africa is not specific to South Africa.[263] Debates on the jury's ability to understand complex cases are common throughout the world. However, a study analysing complex cases heard by juries revealed that most verdicts reached by juries in complex cases are defensible. [264] When juries deliver 'erroneous'

[254] Huebner (n224) 974.
[255] Vogler (n225) 548.
[256] Hlophe 'Receiving justice in your own language — the need for effective court interpreting in our multilingual society' 2004 *Advocate* 42 at 45.
[257] Mpahlwa *Language Policy and Practice in Eastern Cape Courtrooms with Reference to Interpretation in Selected Cases* (Master's Thesis, Rhodes University (2015) 7).
[258] Lebese *Formulating court interpreting models: A South Africa Perspective* (PhD thesis, University of South Africa (2018) 5).
[259] Moeketsi and Wallmach 'From sphaza to makoya: A BA degree for court interpreters in South Africa' (2005) 12 *International Journal of Speech Language and The Law* 77 at 77.
[260] Mpahlwa (n257) 6.
[261] Pierce 'The Impact of Absenteeism in the Public Service in the Context of GEMS' (26 October 2009): *https://www.pggmeds.co.za/Files/(1152009105647%20AM)%20Symposium%20-%20Absenteeism%2026%20October%202009.pdf* (last accessed 15 June 2020).
[262] Rood (n245) 751.
[263] See *(d) Complex Cases* p13-4 of this dissertation.
[264] Lempert 'Civil Juries and Complex Cases: Taking Stock After Twelve Years' (1992) *Center for Research on Social Organization Working Paper Series* 3-9.

verdicts, it is not necessarily because they are incompetent or lack the requisite knowledge, but because of the existence of factors that can lead jurors astray even in simple cases. For instance, conflicting expert evidence is enough to bewilder legal academics and judges. In *Anderson v W.R. Grace & Co*[265] the defendant was sued after dumping toxic waste into a river which contaminated the town's drinking water and caused several children to develop leukaemia. Experts from each side disagreed on whether the toxic waste could permeate the groundwater supplying the plaintiff's well. If the jury reached a verdict in favour of either party, then it could not be said that the jury made a mistake on the evidence and delivered an erroneous verdict.

Another factor leading to 'erroneous' jury verdicts is that of insufficient guidance by the court and unclear jury instructions. In *Olivas v City of Hobbs*,[266] the jury had to determine whether the police planted marijuana in the plaintiff's car to arrest him. When the jurors asked for assistance on the definition of 'planting evidence' the judge simply said there was no legal definition. The jury then defined it as assigning the possession of marijuana to the plaintiff instead of the friend who was in the car without probable cause. Based on this definition, the jury found that the police officer did not plant evidence in the car. The court granted a new trial on the basis that the jury relied on an incorrect definition. This could have been avoided if the court provided more guidance.

(f) *(Un)reliability*

Not all jurors may understand the need to be punctual and present throughout the trial. If one juror is delayed or fails to attend, the trial will be delayed. Even if exceptions were created for trials to continue in the absence of one or more jurors such exceptions may raise questions of procedural fairness.

Public transport is likely to impede jurors' punctuality. Many South Africans commute via public transport and unfortunately, the country has been experiencing escalating transport problems, caused by increased bus strikes, trains being set alight, and electric cable theft.[267]

[265] (1986) 805 F.2d 1.
[266] (2002) 50 F Appex 936.
[267] Hyman 'Prasa reins in thieves after losing R364m to theft and vandalism in 2019' (3 June 2020): *https://www.timeslive.co.za/news/south-africa/2020-06-03-prasa-reins-in-thieves-after-losing-r364m-to-theft-and-vandalism-in-2019/* (last accessed 25 June 2020).

(g) (*Im)partiality*

According to a recent World Happiness Report,[268] South Africa ranked 106 out of 156 countries – 1 being the happiest and 156 the least happy. This general state of unhappiness is likely due to a range of factors such as load shedding, state capture, gang violence, general crime, socio-economic circumstances, the economic downturn, corruption, the drought political landscape, and a failing public transport system. Thus, it would be reasonable to question whether South Africans can set aside their unhappiness and carry out a civic duty independently without bias.

PART II

III BASIC ASPECTS OF A SOUTH AFRICAN JURY PROTOTYPE

Despite the views against reintroducing the jury to South Africa, one must consider in practical terms how a jury system would be implemented in South Africa to determine whether it is feasible. This section, therefore, considers key implementation issues such as when a jury should be allowed and how jury selection processes, the questioning of potential jurors, jury training, deliberations, verdicts, and juror remuneration would pan out in South Africa.

(a) *Jury Demand*

Similar to the position in the US,[269] a jury trial should only be allowed if it is requested by either party. The use of a jury trial should be encouraged especially in cases requiring a consideration of community values. This includes amongst others class actions, claims against the state, and delict cases.

(b) *Jury Eligibility*

Potential jurors' names can be extrapolated from Home Affairs databases, voter registers, and drivers' license databases. Only South African citizens should be eligible for jury duty. Although 18-year olds are considered adults, it might be better to set the age requirements from 21 to 65 years old,[270] as these persons would have hopefully gained more life and work experience, and would have a higher level of maturity to appreciate the gravity of being a juror. Candidates should not have a criminal record. A juror should also be mentally stable and physically able to sit through a trial.

[268] Helliwell, Layard & Sachs 'Statistical Appendix 1 for Chapter 2 of World Happiness Report' in 'World Happiness Report (2019).
[269] See rule 38 of the FRCP.
[270] South Africa's life expectancy averages at 65 hence the maximum limit of 65.

Grade 12 should be a minimum requirement for jury selection because jurors will be required to keep notes, critically reason through issues and clearly articulate their ideas. Given that the grade 12 criterion will have an exclusionary effect as less than one-third[271] of the population has passed grade 12, an aptitude test could be utilised. However, aptitude tests may cause administrative difficulties as it will require venues for the tests to be written, invigilators, accommodations for persons with physical disabilities, and the use of psychologists and other professionals to draft and mark the tests. Furthermore, passing a general aptitude test does not automatically mean that citizens can assist in complex trials. Legal counsel may also challenge the validity of the tests which in turn could become a ground for appealing the selection process.

Once selected prospective jurors should receive a summons to appear in a jury pool on a specified date. Those who do not appear without a valid reason should be fined. The fine should depend on the individual's salary because given the vast economic inequality in South Africa, a blanket fine amount will disadvantage a majority of the population.

(c) *Voir Dire*

During the selection process, attorneys should be able to put *viva voce* questions to the jurors and conduct online research on prospective jurors who have an online presence. If attorneys wish to challenge certain prospective jurors' placement in the jury they should provide reasons for not wanting specific persons selected as jurors.

(d) *Pre-trial discussions and juror training*

The public should be made aware of the initiative through public awareness campaigns so that jurors have a basic understanding of the jury before they appear for jury duty. Additionally, juror guidelines should be provided. This guideline should, at a minimum, provide training on basic trial processes and key court role players. Not all South Africans know, for example, who or what a defence attorney, advocate, or judge's secretary is and what their roles are or even where these players sit in the court. Following the trial process can also be difficult given that not everyone knows the sequence of events such as testimony, cross-examination, and re-examination.

[271] Staff Writer 'Less than a third in SA have matric' *News 24* (30 October 2012): *https://www.news24.com/SouthAfrica/News/Less-than-a-third-in-SA-have-matric-20121030* (last accessed on 8 November 2019).

Jurors also require brief social-context training. For example, not all laypeople will know about battered woman syndrome, which causes a woman to surrender to authority and withdraw claims. A wife who has been physically and/or emotionally abused may withdraw a claim simply because she fears the other party will indulge in intimidation tactics outside of court. Awareness of such issues will aid jurors in understanding the lived realities of many litigants. Comprehensive social context training may be too time-consuming thus the guideline should briefly address this.

Jurors should also receive basic training on the rules of evidence. This includes an explanation of hearsay evidence, inadmissible evidence, inadmissible questions, leading questions, and badgering witnesses. It should also include instructions to the jurors not to conduct external research on the matter or share any trial information with the public.

Finally, jurors need training on basic principles of the relevant law. For example, in a delictual case, this would include the elements of a delict, as well as applicable defences and remedies.

Some form of face to face training is necessary but this poses logistical difficulties. Presiding officers cannot be expected to provide training to 12 jurors. It will be too time-consuming for presiding officers whose time ought to be spent reading court files, preparing for trials, and writing judgments.

A potential option would be to create partnerships with non-governmental organisations, community-based organisations and the pro bono departments of law firms to assist with training jurors. However, this requires detailed planning and commitment from all parties involved. Having persons other than the presiding officer and court officials providing the training will put the jury at ease, particularly those who may be too intimidated by the presiding officer to ask questions.

(e) *Deliberations*

At the end of the trial, the jury should commence with the deliberations. They should be provided with a jury instruction form comprising questions of fact they ought to consider. The jury should also be provided the option of having one of the jury trainers (discussed above) in the deliberation room. This is similar to the Spanish jury system where a secretary of the court, who has a law degree, assists the jury during its deliberation proceedings and helps draft the findings.[271a] The trainer should remain in the room to provide any technical assistance to the

jury. If the trainer is unable to answer a question then should it be directed to the presiding officer. If the jury is multilingual, translators should also be present in the room.

(f) *Jury Verdict*

To prevent a hung jury, [272] the jury should reach its decision with a majority of at least ten. Furthermore, unlike its US counterparts, South African juries must provide reasons for their verdicts. The verdict form should, at a minimum, allow a jury to stipulate which facts were proven and what evidence was used to reach the verdict and why said evidence was relied upon. This has worked well with the Spanish jury, which is required to give reasons for its verdicts.[273] Verdict forms should mirror Spanish verdict forms, which at a minimum, have five key elements which the jury must address and document. These include (i) the facts which prove the commission of the breach or delict (ii) key arguments for the defendant; (iii) facts which prove the defendant's culpability; (iv) any aggravating or mitigating circumstances; and (v) the act of which the defendant should be found guilty or not guilty.[274] The jury is also required to list all evidence it used to reach its verdict. If the jury does not provide satisfactory answers, the judge may refer questions back to the jury.[275] Requiring juries to justify their verdicts will increase jury accountability, strengthen jury legitimacy and remove the secrecy of jury verdicts which receives continuous criticism.

(g) *Jury funding*

Juror remuneration and related costs can be financed through the introduction of court fees and/or the creation of a fund. The money for the fund could come in part from government, international aid and from taxing attorneys' remuneration – the latter only to apply if a jury trial continues for more than two weeks. For example, one per cent could be deducted from attorney's fees charged for pretrial work and three per cent for work carried out during the trial. This tax has the potential to encourage early settlement of claims as well and to ensure that trials are not delayed unnecessarily.

[271a] Thaman 'Spain Returns to Trial by Jury' (1998) 21 *Hastings International and Comparative Law Review* 241 at 374.
[272] This occurs when jurors cannot reach an agreement on the verdict and leads to a mistrial which means that the case must be retried before a different jury.
[273] Article 120(3) Constitution of Spain, 1978.
[274] Articles 52 and 61(l)(d) *Ley Organica del Tribunal del Jurado* known as the Spanish Jury Law of 1995.
[275] Ibid; see also Thaman 'Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in *Taxquet v Belgium'* (2011) 86 *Chicago Kent Law Review* 613 at 629.

(h) *Implementation of the jury system*

A pilot jury programme cannot be introduced as it is a fundamental deviation from the law. People may argue that their justice rights are severely impacted in pilot areas and that there are two forms of justice in South Africa – one in the pilot areas and another in the non-pilot areas.

Instead, the jury could be implemented only in civil cases where either party requests it and can show good cause as to why a trial by jury would be beneficial. For example, trial by jury may be more beneficial in cases requiring the consideration of community values such as class actions, claims against the state and delict cases.

IV CONCLUSION

South Africa's socio-economic context is likely to prevent the jury from succeeding. The country's failing public transport system, marked by strikes and vandalism, may hinder jurors from arriving at court on time or at all. South Africa's multilingual citizens will require translators. If 12 jurors require the services of different translators, the trial will be protracted. Attempts to remedy such language limitations such as implementing simultaneous interpretation services as used by the UN will also be impeded in the South African context. Expensive equipment and resources are required to implement simultaneous translations. With load-shedding, the equipment will be inoperative especially since many courts do not have generators. It appears that the more people are introduced into the civil justice system in one instance, the greater the risk of things going amiss. With a system that requires 12 people, the jury poses a high risk of debilitating trials. If one juror is absent the trial cannot continue. If a translator for one juror is late or absent, the trial will be delayed as well.

Many of the disadvantages associated with the jury relate to resources, particularly financial resources – a difficulty which many first world countries such as the US and Spain with a successful implementation of the jury do not have to face. Unfortunately, South Africa is not a first-world country and thus many of its third world characteristics impede the successful performance of a jury system.

CHAPTER 5

LAY ASSESSORS: AN ALTERNATIVE TO THE JURY

I INTRODUCTION

The costs and resources associated with implementing a jury system specifically designed for South Africa will receive much criticism. The costs for implementing a simultaneous translation system for potentially 12 linguistically diverse jurors and restructuring court buildings to accommodate jurors, amongst others, will be too high.

Given that this dissertation aims to improve civil justice through public participation and not to promote the jury unwaveringly, it would be appropriate to consider an alternative to a jury system. Lay assessors might be the answer to ensuring that there is some type of community representation and participation in the civil justice system.[276] Such lay representation may highlight the legitimacy[277] of civil courts from a broader societal perspective and ensure that citizens do not turn to parallel informal courts.

Lay assessors in courts is not a novel idea. An assessor is a private individual who is not affiliated with the state or the justice system and who is called to assist a judge in a legal matter. Assessors can either be members of the legal profession (practising privately) or lay citizens from all walks of life. This chapter will consider the potential implementation of a lay assessor system, where two lay citizens assist a presiding officer[278] in a trial as an alternative to the jury system. The lay assessor system, it is submitted, would maintain public participation but also eliminate some of the disadvantages associated with a jury – mainly costs.

It is interesting to note that South Africa previously had an unsatisfactory experience with a lay assessor system. The causes of this dissatisfaction will be analysed in this chapter to develop a prototype lay assessor system for contemporary South Africa.

[276] It is not within the scope of this dissertation to determine whether lay assessors should apply in criminal trials. The author will have to conduct more research to comment on its applicability in criminal cases.
[277] See Human Science Research Council study on the legitimacy crises facing courts - 'In the court of public opinion' http://www.hsrc.ac.za/en/review/hsrc-review-may-2013/in-the-court-of-public-opinion-attitudes-towards-the-criminal-courts (last accessed on 12 June 2019).
[278] For purposes of this chapter, presiding officer refers to judges and magistrates in the superior and magistrate courts respectively.

II LEGAL PROVISIONS RELATING TO ASSESSORS

South African legislation allows for assessors in criminal and civil matters. Assessors are allowed in lower and high courts for criminal matters.[279] However, the appointment of assessors in civil matters is restricted to the lower courts as the Superior Courts Act[280] does not provide for the appointment of assessors in civil proceedings.

(a) Criminal matters

An assessor in high court criminal matters is a person who, in the opinion of the judge, has 'experience in the administration of justice or skill in any matter which may be considered at the trial.'[281] In practice, the interpretation of the term 'a person experienced in the administration of justice' has led to the appointment of advocates, magistrates, attorneys, and legal academics as assessors.

In regional magistrates' courts where the charge relates to murder, the MCA requires the presiding officer to be assisted by two assessors unless the accused requests a trial without assessors – in which case the presiding officer will exercise his or her discretion.[282]

Unlike the CPA, the MCA does not require 'experience in the administration of justice'[283] which technically permits individuals who have no legal background to be appointed as assessors. In other words, the MCA allows for lay assessors.

(b) *Civil Matters*

Section 34 of the MCA allows assessors in civil matters in both district and regional courts. Any party to a civil litigation can request the appointment of one or two persons who are 'suitable, available, and willing to sit as assessors.' Rule 59 of the Magistrates' Courts Rules notes that the court should have a list of persons able to act as assessors. These individuals are selected based on their ability, reputation, qualification and willingness to act as assessors.

Despite the legal provision for assessors, particularly lay assessors, the concept has received minimal media or governmental coverage in present-day South Africa. The word 'assessor'

[279] Section 145(1)(b) of Criminal Procedure Act 51 of 1977 hereinafter 'CPA'; and section 34 and 93ter of the Magistrates' Courts Act 32 of 1944 hereinafter 'MCA'
[280] Act 10 of 2013.
[281] Section 145(1)(b) of the CPA.
[282] Ibid.
[283] Supra note 279.

only appears once in the Judiciary's 2018/2019 annual report. [284] Nothing appears in the 2016/2017[285] or 2017/2018[286] annual reports. Assessors are only mentioned twice in passing on the Judiciary's website.[287]

Assessors received some public attention during the criminal trial of Oscar Pistorius where two expert assessors, assisted Judge Masipa in determining the accused's fate.[288] However, this mild interest in assessors faded shortly after the trial.

III SOUTH AFRICA'S HISTORY WITH LAY ASSESSORS

Before 1991 expert assessors were used in magistrates' courts, most of whom came from the legal profession.[289] This was changed in 1991 when the requirement for assessors to have any skill and experience in the administration of justice was removed, allowing ordinary citizens to become assessors.[290] The effect of the change was that ordinary citizens could become assessors. Despite this, magistrates were not required to appoint lay persons as assessors and in cases where they could appoint assessors such as regional court murder cases, or where parties requested it, magistrates generally continued to appoint assessors from the legal profession.[291]

Between 1992 and 1993, the Department of Justice[292] attempted to promote the use of lay assessors countrywide but received little buy-in from the community. One deputy Director-General of the Department travelled to all magistrates' courts across the country to assist with compiling lists of lay assessors, but it was futile.[293] Although Blacks could be assessors, the community was very suspicious of this initiative. For example, Chief Magistrate Jooste of Cape Town tasked with compiling a list of lay assessors, faced increasing resistance from people

[284] See Office of the Chief Justice *Annual Report* (2018/2019) at 12 for the only reference to assessors: "…the value of vehicles procured, travel and subsistence allowances, as well as *assessor appointments*" [my own emphasis].
[285] Office of the Chief Justice *Annual Report* (2016/2017).
[286] Office of the Chief Justice *Annual Report* (2017/2018).
[287] The website states that if a matter in court concerns a serious crime then a judge 'and two experienced persons in law, usually retired advocates or magistrates, will sit as assessors to aid the judge'. See *https://www.judiciary.org.za/index.php/about-us/16-magistrates-courts* (last accessed on 2 January 2020) and *https://www.judiciary.org.za/index.php/about-us/100-high-court* (last accessed on 2 January 2020.
[288] Bateman 'Pistorius Trial: Role of Assessors in Spotlight' *Eye Witness News*: *https://ewn.co.za/2014/03/29/Pistorius-trial-Role-of-assessors-in-spotlight* (last accessed on 18 January 2020).
[289] Seekings and Murray 'The Introduction of Lay Assessors 1991-1998' in Seekings and Murray (ed) *Lay Assessors in South Africa's Magistrates' Courts* (1998) 36.
[290] Magistrates' Courts Amendment Act 118 of 1991.
[291] Seekings and Murray (n289) 36.
[292] Herein after the 'Department'.
[293] Ibid.

who questioned the motive behind the initiative.[294] The list eventually consisted mainly of white National Party[295] supporters, as did the list in George.[296] Unfortunately the assessor system was highly racialised.

Aside from the disinterest shown by the large majority of the population, magistrates, too, were unenthusiastic about the initiative and avoided using assessors wherever possible. Where lay assessors were used, only one was allocated to a magistrate and the magistrate was given the power to overrule assessors.

In 1994 the then Minister of Justice, Dullah Omar, revitalised the lay assessor system and saw it as a mechanism to achieve community participation in the justice system to legitimising the judiciary, which at that point was still not adequately representative of South African demographics.[297] Minister Omar established the Assessors Co-ordinating Committee[298] to manage the implementation of lay assessors in the magistrates' courts.

In August 1994, a pilot project with nine assessors[299] was launched in the Cape Town magistrates' courts. They worked full-time and only one was allocated to a magistrate at a time unless the magistrate requested two. Assessors appear to have been limited to criminal cases. They were involved in matters relating to housebreakings, theft, fraud, assault and drug related offences.[300] Unfortunately, the so-called lay assessor system predominantly used expert assessors and only a handful of lay assessors.

By December 1996, the so-called lay assessor system was theoretically implemented in all nine provinces. The practical realities, however, were quite different. According to research by Seekings and Murray, lay assessors were rarely used in some provinces and the implementation in others failed dismally.[301]

[294] Seekings and Murray (n289) 38.
[295] This was an Afrikaner ethnic political party in South Africa that promoted Afrikaner interests and implemented Apartheid in 1948. Hereinafter referred to as 'NP'.
[296] Seekings and Murray (n289).
[297] Parliament of the Republic of South Africa, Hansard, Questions and Replies, 11 May 1995, columns 319-21.
[298] Consisting of Chief Magistrate of Cape Town, Mr A Jooste, attorneys Mr Essa Moosa and Ms Gadija Khan and Senior Magistrate Mr H.A.B Jooste.
[299] Six of which were male and three female.
[300] Seekings and Murray (n289) 44.
[301] Lay assessors were rarely used in the Northern Cape and the implementation in North West, Kwa Zulu Natal and Eastern Cape was equally poor. In the North West, the Premier's Office failed to select a representative from their office to liaise with the Co-ordinating Committee to appoint assessors, while in Eastern Cape the conflict between chiefs and civil society organisations made it difficult to select impartial assessors.

IV ASSESSMENT OF THE LAY ASSESSOR SYSTEM AFTER 1994

The Department did not introduce any method for monitoring the overall implementation of the lay assessor system. Magistrates' courts allegedly sent monthly reports regarding the use of lay assessors to the Department but there is no trace of such information.[302] Notwithstanding this, it was a known fact that the nationwide introduction of this system did not have the impact the Department had hoped for. There was resistance from magistrates, lack of training for assessors, and insufficient public knowledge on the initiative.

(a) *Magistrates' resistance*

There was significant resistance to the system amongst magistrates. As magistrates had the discretion to appoint assessors, they rarely did so. In some Pretoria magistrates' courts, assessors were rotated according to a roster but even then, magistrates found ways to bypass the process.[303]

According to Magistrate Hurt, lay assessors were incapable of assisting magistrates because they had no legal or procedural knowledge.[304] Magistrates had to explain legal concepts to the assessors and were required to place on record the instructions they gave to assessors. This 'burdened' magistrates who had to 'tutor' the assessors and include 'unnecessary information' on record.[305]

In many instances where assessors disagreed with magistrates, the latter would overrule them on the assertion that his or her (the magistrate's) stance was correct because of his or her legal knowledge. There were also numerous occasions where magistrates ignored assessors' opinions, revealing, according to Enver Daniels,[306] that a 'majority of magistrates were white men with ideological beliefs and biases in favour of the state, ensuring the preservation of white privilege and unequal treatment of Blacks'.[307] It would thus seem that magistrates resisted transformation in the courtrooms and were fundamentally opposed to any intrusion into their judicial function that might have indirectly monitored their performance in the administration of justice.

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[302] Seekings and Murray (n289) 68.
[303] Ibid.
[304] *S v Gumbushe* 1997 (1) SACR 638 (N) para 643 I - H.
[305] Idem para 643H.
[306] At the time Mr Enver Daniels was Minister Omar's advisor. He is currently the Chief State Law Advisor at the Department of Justice and Constitutional Development.
[307] Seekings and Murray (n289) at 49.

(b) *Lack of objectives for the lay-assessor initiative*

Minister Omar initially noted that the introduction of lay assessors was to ensure community participation in the justice system and to establish legitimacy in a judiciary that was, at that time, largely unrepresentative of the population.[308] However, throughout its implementation, the priorities were constantly shifting from monitoring biased magistrates who might have been protecting white supremacy, to benefitting the communities by having at least one member of the bench with similar socio-cultural qualities to those of the accused in criminal trials.[309] Perhaps, if Minister Omar emphasised the access to justice aspect of the lay assessor system more than the government's stance of eradicating white privilege in the courtrooms, the initiative might have had a better chance of succeeding. The politicisation of the lay assessor system in stark racial terms was a recipe for disaster. It is important to emphasise this point because the failure of the initiative might have had nothing to do with the theoretical underpinnings of having lay assessors in the justice system but more to do with the Minister's ideological packaging of the project.

(c) *No training for assessors*

Lay assessors did not receive adequate training or a manual on their duties. [310] One assessor described it as being placed in an arena without being told what game was being played or the rules thereof.[311] Another reported that he was not informed of what to expect or bring to court and was therefore unaware that he needed to bring a pen and notebook or what the court etiquette was.[312] It was irresponsible to assume that citizens who never experienced a trial would know what to do after receiving a brief explanation from a magistrate.

(d) *Selection of lay assessors*

The selection of lay assessors was non-transparent, largely undemocratic and tainted with bias. It will be recalled that the pre-1994 list of assessors comprised mainly white supporters of the NP. The selection of assessors for the 1994 pilot project in Cape Town was no better. Six (of the nine) assessors were recommended by a close friend of Minister Omar. The selection

[308] Hansard (n297).
[309] Seekings and Murray (n289) 69.
[310] There were weekly lectures, but this was more of a learn as you go than a preparation lecture.
[311] Seekings and Murray 'The experience and views of lay assessors' in Seekings and Murray (eds) *Lay Assessors in South Africa's Magistrates' Courts* (1998) at 112.
[312] Ibid.

criteria used to screen them were not revealed. Allegations were made that Minister Omar gave positions to friends,[313] and this impacted negatively on the legitimacy of the entire project.

Many of the assessors selected were given permanent jobs which may have had undesired consequences. Permanently appointed assessors, as opposed to once-off assessors, may not have freely voiced disagreements with a magistrate especially since his or her career progression was dependent on the influence of the magistrate.[314]

(e) *Insufficient public awareness*

In November 1994, the Department held deliberations on reforms to promote the administration of justice. Unfortunately, lay assessors were only briefly mentioned. They were also barely mentioned in the Department's report on *The First 1000 Days (1994 -1997*), *Justice 2000 Vision Statement*[315] or in any important government speeches. A survey conducted on members of the public present in and around some magistrates' courts revealed that few people knew about the role of lay assessors.[316] It was clear that the Department failed in its duty to create public awareness. This lack of public awareness on the role of lay assessors resulted in myths and suspicions arising in the minds of the public. Assessors were perceived as champions acting for the accused at the expense of the victim of a crime.[317] This in turn negatively affected the courts' legitimacy in the eyes of the public.

V REIMAGINING LAY ASSESSORS IN CONTEMPORARY SOUTH AFRICA

If South Africa is serious about improving the legitimacy of civil litigation and ensuring that citizens do not feel estranged from the judicial system then basic elements of a reformed lay assessor system ought to be considered. The model proposed is essentially premised on two lay assessors assigned to a presiding officer. This model should apply in civil matters in all magistrate and superior courts throughout the country. Aspects relating to assessor selection, training, implementation costs, and logistics will be discussed in more detail below.

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[313] Noseweek 'Dullah Omar: Jobs for Pals' :*https://www.noseweek.co.za/article/349/DULLAH-OMAR-JOBS-FOR-PALS* (last accessed on 1 January 2020.
[314] Vogler (n225) 544.
[315] 'Justice Vision 2000: Executive Summary' : *https://www.gov.za/documents/justice-vision-2000-executive-summary* (last accessed on 12 December 2019).
[316] Seekings and Murray (n289) 59.
[317] Seekings and Murray 'Comparing the attitudes of assessors, magistrates and members of the public' *in* Seekings and Murray (eds) *Lay Assessors in South Africa's Magistrates' Courts* (1998) 140-48.

(a) *Lay assessor eligibility*

Only literate[318] South African citizens 21 years and older should be eligible to serve as lay assessors. [319] There should be no age limit but persons over the age of 65[320] should be permitted to request an exemption from assessor duty. Persons with criminal records, mental disabilities or any physical impairments that hinder them from sitting through a lengthy trial should be excluded from the list of potential candidates. Also, persons residing more than 15 kilometres[321] from the trial court should be excused because requiring persons to travel from afar may place undue hardship on a majority of the population especially those reliant on public transport. Others who, on good cause, can show that assessor duty may place undue hardship on them should also be permitted to apply for an exemption. These include, amongst others, doctors whose absence from work will negatively impact the community, teachers and lecturers who are teaching during term and parents who are unable to afford or make arrangements for childcare services while performing assessor duties.

Candidates ought to have some level of education so that they can take notes, critically evaluate concepts and articulate their views. However, selecting the minimum education level of a potential lay assessor in South Africa is challenging given the country's low levels of education. There are three options to address this: having no minimum education level, setting the minimum education level at grade 10, or setting the minimum education level at grade 12. The latter is the best option given the current landscape of South Africa.

(i) No minimum education level

Given the statistics, the solution allowing for maximum participation levels would be to implement aptitude tests and not require candidates to have a minimum grade 12 as it bars two-

[318] According to UNESCO and Statistica approximately 93% of South Africans are literate; see Statista 'Literacy Rate in South Africa 2015': *https://www.statista.com/statistics/572836/literacy-rate-in-south-africa/ (last* accessed on 12 January 2020); UNESCO, 'South Africa: Literacy Rate': *http://uis.unesco.org/en/country/za* (last accessed on 10 January 2020). It is however unclear how literacy is determined in South Africa. Whilst 93% is a high rate, several other articles in the media note the poor quality of South Africa's literacy rate. For example, see Newman 'Literacy levels still a concern in SA': *IOL* (23 April 2018) ; *https://www.iol.co.za/dailynews/poor-literacy-levels-still-a-concern-in-sa-14601496* (last accessed on 10 January 2020)

[319] The legal age of majority in South Africa is 18 but 21 would be ideal as citizens would have hopefully gained more life and work experience at this age. The age of 21 is also in line with international standards.

[320] This is per South Africans' average lifespan.

[321] The distance of a 15km radius appears to be a reasonable distance. This is evidenced by the fact that service addresses must also be within a 15km radius of the courthouse. See rule 13 of the MCA for more information on the 15km radius for serving of documents.

thirds of the population from becoming assessors.[322] In the ideal scenario, a general aptitude test would determine whether candidates have the necessary skills to understand concepts and evidence. The use of aptitude tests may enhance public confidence in the system if it becomes known that assessors underwent a test to determine their ability to deal with evidence. Despite this, aptitude tests are impractical in South Africa.[323]

(ii) Minimum requirement of grade 10

Limiting the education level to grade 10 ensures that there is some level of formal education and also covers capable persons who perhaps were unable to complete grade 12 due to financial or social reasons. If information about the lay assessor system is incorporated into school curriculums through subjects like Life Orientation[324] then persons with grade 10 may be eligible to serve as lay assessors.

(iii) Minimum requirement of grade 12

Although people who have not completed grade 12 can be considered intelligent, intelligence is relative. People may be intelligent in terms of managing a business or household, but this does not necessarily mean that they can analyse evidence and apply the rules of evidence. Therefore grade 12 should be used as a blunt mechanism when selecting assessors. While there are no guarantees that a person with a grade 12 qualification will always be a suitable assessor, as one may encounter a PhD graduate who cannot either the risk of mistakes being made by assessors with low levels or no levels of education is higher than those with a good educational footing. Given the disadvantages associated with the aptitude tests and potential risks associated with a low education level, the best option for South Africa would be to set grade 12 as a minimum requirement for becoming an assessor.

(b) Assessor selection process

Every year people who have been selected via a random selection (from relevant databases) as the following year's assessors should be notified of their selection. At this stage, they should

[322] Less than one third of the population has completed grade 12; see Staff Writer 'Less than a third in SA have matric' News 24 (30 October 2012): *https://www.news24.com/SouthAfrica/News/Less-than-a-third-in-SA-have-matric-20121030* (last accessed on 15 November 2019).
[323] For a discussion on the impracticability of aptitude tests see *(b) Jury Eligibility* p42-3 of this dissertation.
[324] It is a subject taught at South African schools focusing on, amongst others, personal skills, being a responsible citizen and maintaining a healthy and productive life. For more information see http://www.wcedcurriculum.westerncape.gov.za/index.php/fet-futher-education-training/lo (last accessed on 5 January 2020).

not be required to attend court but should use the time to apply for exemptions if necessary.[325] It also gives these persons time to familiarise themselves with public awareness campaigns on the duties of a lay assessor.

There should also be a mechanism to exclude certain categories of people who provide critical services such as doctors and nurses as they cannot be expected to serve in the courts when their services are needed more urgently elsewhere. Furthermore, any person who wishes to be relieved from assessor duty should be able to apply on good cause shown why he or she should be excused. For example, a potential candidate from Manenberg[326] may not want to be selected because the case involves a gang member in Manenberg or from another area; and lecturers and teachers would also not be able to serve as assessors during term time. In such instances, where there are valid reasons, the candidate should be excused.

Three months before the trial date, a further random selection should be held to select ten candidates. These ten candidates should be notified that they are to appear at a particular court two days before the trial date for the final two assessors to be selected. In Japan, lay assessors appear at court long before the trial date, but this should not be applicable to South Africa because in South Africa many cases are settled between the set down date and the trial date.

Two days before the trial, the ten potential assessors should proceed to a courtroom or the presiding officer's chambers. The presiding officer will question the potential candidates to determine two assessors best suited for the trial. The Rules Board[327] should create rules to assist presiding officers in the selection of assessors. This should involve, amongst others, allowing legal counsel to submit specific questions to the presiding officer to ask potential candidates.

It could be suggested that another presiding officer unrelated to the case should be the one to question the candidates. This will ensure that the presiding officer of the case does not attempt to manipulate the selection of assessors to indirectly appoint an assessor he or she prefers. However, this may create additional difficulties. If another presiding officer, with no knowledge of the case, must select the assessors he or she would have to spend time familiarising him- or herself with the facts of the case to determine suitable assessors. This is

[325] A similar process is used for the selection of lay assessors in Japan; Yoshihiro Takatori et al, 'The New Saiban-in ("Lay Judge") System and Its Effect on the Working Environment' *Paul, Hastings, Janofsky & Walker LLP* :*https://www.paulhastings.com/docs/default-source/PDFs/1167.pdf* (last accessed on 5 July 2019).
[326] Manenberg is a poverty stricken and gang ridden township in Cape Town.
[327] The Rules Board for Courts of Law is a statutory body established to make, review, amend and or appeal rules of court. See s6 of the Rules Board for Courts of Law Act 105 of 1987.

time-consuming. Thus, it is best to have the presiding officer of the matter select the two assessors.

When selecting assessors, the presiding officer should be cognisant of the surrounding racial, social, linguistic and cultural factors of the case and the community affected. For example, if the matter concerns an LGBTQI person from a township then perhaps at least one assessor should be from that township and one identifying as a member of the LGBTQI community. This will ensure that the bench is better informed of the social factors affecting the case.[328] This, however, places a high level of discretion in the hands of presiding officers and may reflect their biased and incorrect perception of the litigants' social and cultural environment. Taking assessors from the vicinity in which the facts arise may also place that assessor under immense community pressure. Furthermore, civil cases have multiple parties and finding assessors that are representative of all the litigants would be improbable. However, at least some effort should be made in this regard.

Once the assessors are selected, the presiding officer must administer an oath where assessors undertake to give a true verdict or a considered opinion according to the evidence before the court. Once the oath has been administered the two assessors must be deemed to be members of the court. Unlike the assessors of 1994 who were given full-time positions as state assessors once they were selected, those selected under the proposed system should not be given permanent positions. This will avoid assessors agreeing with presiding officers simply for career progression.

(c) *Training for lay assessors*

On the date of selection, the two assessors should receive a guideline[329] that covers several issues such as basic trial processes and key court role players, social context training, rules of evidence and basic legal elements of the law relevant to the case at hand.[330] During this time they should be given a copy of the court file to peruse. They should also be allowed to ask the trainer[331] questions regarding their role and the court file.

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[328] Seekings and Murray 'Conclusions and Recommendations' in Seekings and Murray (eds) *Lay assessors in South Africa's Magistrates' Courts* (1998) 172.

[329] The information in the guideline should also be made available to the public as part of an awareness campaign in newspapers, radio stations, online videos, magazines and brochures.

[330] For a detailed discussion on this training see (d) *Pre-trial discussions and juror training* p 43-4 of this dissertation.

[331] The presiding officer could be the trainer, or someone not employed within the judiciary. For more detail on trainers from non-government organisations see (*d) Pre-trial discussions and juror* training p44 of this dissertation.

(d) *The role of assessors during trials*

Assessors should be present throughout the trial but should not be allowed to ask questions sporadically throughout the trial. Instead after certain periods during the trial, for example, after a witness has been cross-examined the presiding officer should determine whether the assessors have any questions. Allowing questions by lay assessors at set times (and not intermittently throughout the trial) forces lay assessors to listen carefully to the testimony and take notes to understand the case. Although assessors will be allowed to ask questions they should be encouraged to ask these questions at the end of the trial during deliberation proceedings with the presiding officer. This avoids irrelevant questions that will protract the trial.

(e) *The role of assessors after trial*

The main duty of an assessor is to assist the presiding officer in determining the facts in issue at the trial. The assessors' role can somewhat be compared to jurors in that they are both finders of fact and do not deal with any questions of law. For example, if a company is sued after dumping toxic waste into a river that contaminated the area's drinking water and caused several people to develop cancer then the assessors would have to determine the factual elements of the alleged delict. This includes conduct, causation, harm and fault. Based on the evidence, the assessors would need to establish if and when chemicals were dumped in the river, whether the toxic waste contaminated the drinking water, and whether the contaminated water caused cancer. In other words, whether the defendant did something is a question of fact. But what negligence entails or means would be a question of law which is to be decided by the presiding officer. Sometimes the distinction between law and fact is not always clear; hence the presiding officer should determine what constitutes a question of fact and law.[332]

At the end of the trial, the presiding officer must provide the assessors with an instruction sheet detailing what questions of fact need to be determined and noting that all evidence relied upon to make factual findings should be referenced. Assessors must then engage in joint deliberations with the presiding officer. This is different to jurors who deliberate and reach verdicts in the absence of a presiding officer. During joint deliberations, assessors will be able to ask the presiding officer questions for clarification and if necessary, the presiding officer and assessors may compile a list of questions to be sent to the legal counsel for clarification. Joint deliberations ensure that assessors receive immediate and continuous guidance from the

[332] Section 93ter (3)(a) of the MCA.

court. The presiding officer will be able to guide assessors on important rules especially those relating to evidence. For example, the presiding officer will explain to assessors what a balance of probability entails and the rules governing inferences drawn from circumstantial evidence.

As is the case in Germany deliberations between lay assessors and the presiding officer should not form part of the court record.[333] If deliberations between lay assessors and presiding officers formed part of the record, legal counsel may use it as a basis to appeal or review proceedings. This may cause unnecessary litigation which will only increase court backlogs. Furthermore, the privacy of deliberations between assessors and the presiding officer will facilitate better deliberations. If assessors know that their deliberations will be made public, they may not engage in deliberations as freely.

Assessors may complete their instruction sheet during the deliberation proceedings with the presiding officer but should also be afforded time to complete it in the absence of the presiding officer to ensure that the presiding officer does not attempt to influence their factual findings. As mentioned above, the assessors should only focus on issues of fact. They should briefly include justifications for their findings. This will enable the presiding officer to identify whether the assessors relied on inadmissible evidence.

The two assessors could potentially overrule the presiding officer when deciding on the facts. This is based on the doctrine of majority. In other words, if two assessors find that there was a delict (and there is no indication that the assessors incorrectly applied the rules of evidence or misunderstood the facts) or the presiding officer and one assessor come to such a conclusion then that conclusion will be the accepted one. However, the final application of the law should be carried out by the presiding officer.

(f) *Assessor feedback*

At the end of the trial, once judgement has been delivered, assessors and presiding officers should complete evaluations on their experience of the lay assessor system. These evaluations should be considered by an independent body and will assist in monitoring the overall implementation of the lay assessor system. Much like the questionnaires lay assessors in Japan complete, the evaluations should cover several aspects such as the level of ease to talk during the deliberations and how thorough deliberations were.[334] The evaluations should be limited to

[333] Perron 'Lay participation in Germany' (2001) 72 *Revue internationale de droit pénal* 181 at 185.
[334] Foote 'Citizen Participation: Appraising the saiban'in system' 22 *Michigan State International Law Review* 755 at 767.

presiding officer and lay assessors because it may not be beneficial or effective to ask for public feedback i.e. from the litigants because the successful litigant will generally always be happy with the result while the losing party will not be.

(g) *Assessor remuneration*

Lay assessors must be remunerated. They are required to be away from work, school, home and even childcare duties, which can place financial hardship on the assessor and his or her employer. Parents who ordinarily cannot afford public transport or babysitters to look after their children would be placed in a difficult position when called for assessor duty. Although they may apply for an exemption this would not help to achieve adequate public participation. Therefore, assessors should be paid. The payment must be reasonable enough to encourage public participation instead of absenteeism, appear more attractive to the unemployed and part-time workers, assist low-paid workers and ensure that higher-paid ones would at least feel less penalized.

(h) Implementation

Legislation governing the implementation of the lay assessor system should be developed. This would be ideal as an Act with public comments and proper oversight will engender a more robust system.

Once the rules governing the administration of lay assessors are determined, the programme should be implemented in one province only. A pilot project approach, rather than implementing it throughout the country simultaneously, may be better to determine its feasibility. Usually, the argument against implementing a pilot project within the judiciary is that it is a deviation from the law because it creates two forms of justice, severely impeding peoples' justice rights.[335] However, this argument does not apply to the lay assessor system proposal because it is not implementing a fundamentally different framework. South Africa already has some framework in place for lay assessors (which with a few reconfigurations can prove to be successful). Furthermore, the presiding officer still has a significant level of oversight in the proceedings.

The public must be made aware of the lay assessor programme before and during its implementation. Pamphlets, flyers, articles in magazines and newspapers, online videos and

[335] For example, if the jury system was only implemented in the Western Cape then it would create two forms of justice and impede peoples' justice rights because a litigant in another province would be exposed to a completely different civil litigation system than his or her contemporary in the Western Cape.

other advertisements should highlight the programme's aim of contributing to the civil justice system, and aim to educate the public so that they are aware of their role if they are called for assessor duty. It could also be introduced through schools during Life Orientation[336] so that students know of the programme before they become eligible for assessor duty in the future.

(i) *Funding*

As with the funding suggestions discussed for jury implementation in the previous chapter, the lay assessor system can be financed through a fund that is subsidised by government, international funding and the introduction of court fees.[337]

Part of the funding ought to be earmarked for stationary for assessors such as notebooks and pens[338], the creation of assessor guideline booklets, and educating the public via an awareness campaign in newspapers, online videos, magazines and brochures and on radio.

VI DISADVANTAGES OF IMPLEMENTING LAY ASSESSORS IN CONTEMPORARY SOUTH AFRICA

The lay assessor system is likely to receive many of the same criticism meted against the jury system. These include implementation costs and resources, [339] the protraction of trials and the argument that people may be incapable of being fair during trials because they are emotional, unreliable and can be bribed. Another argument relates to assessors' ability to improve the justice system or the public's perception of courts. Some of these criticisms of the lay assessor system will be discussed below.

(a) (In)a*bility to improve the justice system and the public's perception of courts*

It might be argued that lay assessors add little value in terms of enhancing the justice system or improving public perceptions of the administration of justice. Schönteich described lay assessors as 'superfluous' and 'a threat to the independence of the presiding officer'.[340] He argues that presiding officers, because of their theoretical knowledge and experience, are better

[336] See note 324 on Life Orientation.
[337] For more on funding see refer to *(g) Juror funding* p45-6 of this dissertation.
[338] Assessors with writing difficulty may require the use of laptops and other devices.
[339] The disadvantage of implementation costs and resources for lay assessors will not be discussed as it similar to the costs and resources required for a jury (albeit on a smaller scale) which has already been addressed. For more on implementation costs and resources see *(c) Costs* p38 of this dissertation.
[340] Schönteich 'Compulsory Lay Assessors: popular (in)justice' (1998) 1 *Judicial Officer* 78 at 82; see also Kgalema and Gready 'Transformation of the Magistracy: Balancing Independence and Accountability in the New Democratic Order' 2000 *Centre for the Study of Violence and Reconciliation* at 18.

equipped than lay assessors to deal with evidence and reach fair decisions. In the study conducted by Seekings and Murray, one magistrate remarked that 'assessors do not improve the administration of justice… It's more a perception thing.'[341] The authors concluded that their research was unable to determine whether lay assessors improve the administration of justice, public perception of the courts and magistrates' knowledge of community values. However, at the time of their research, there was no objective baseline or mechanism to measure this. If lay assessors were implemented throughout the country, a more systematic study would be possible, especially if there was a process of evaluation and monitoring as suggested above.

(b) *Assessors protract trials*

Assessors can protract the length of trials if the presiding officer must explain various processes to them. An assessor may ask irrelevant questions or rely on inadmissible evidence which requires the presiding officer to interrupt the proceedings and remind the assessor of particular concepts. If assessors require translators, this too could protract the trial and more so if the translator was late or unable to attend.

(c) *Risk of bribery*

The repercussions of bribery are far-reaching. Not only does it create two forms of 'justice' – one for the poor and one for those who can afford to pay bribes – but it also erodes the judiciary's capacity to enforce the rule of law and justice. The difficulty with bribery is that it is not easily detected. For example, if an assessor reasoned contrary to the evidence (because of a bribe) a presiding officer would be able to identify that something is amiss but would still not be certain that bribery occurred unless it is blatantly apparent. However, assessors will be paid for their services and it is hoped that this might discourage some from accepting bribes.

(d) *Unreliability*

In one study, magistrates complained about assessors' punctuality and general conduct.[342] Several assessors came late to trials, fell asleep during trials, or simply failed to pitch at all. Some forgot trial dates and very few kept diaries.[343] Many assessors did not understand the importance of being present throughout the trial. In one instance an assessor refused to attend a trial because the dates were spread in increments of a few days over several months. When

[341] Seekings and Murray (n328)166.
[342] Seekings and Murray 'The views of magistrates on lay assessors' in Seekings and Murray (eds) Lay assessors in South Africa's Magistrates' Courts (1998) 69-83.
[343] Ibid.

the magistrate proceeded in the assessor's absence the judgment was overturned due to procedural irregularities.[344] It may be argued that this will reoccur under the proposed lay assessor model. However, this can be addressed through the development of a code of conduct for assessors and sanctions for those who fail to attend or are repeatedly late without justification. Exceptions should be made for presiding officers to continue a trial in the absence of an assessor if it is in the interest of justice to do so.[345]

Public transport will also impede assessors' punctuality. Many South Africans commute via public transport and unfortunately as discussed[346] transport in South Africa is fraught with strikes, inefficiencies and violence, and is largely unsustainable. This year, 4000 commuters in Cape Town were stranded for days as trains and buses were suspended.[347] In 2017 and 2019 several taxi routes in Soweto were shut down because of violence between taxi associations relating to the control of taxi routes. In one instance, 300 drivers linked to two rival taxi associations blocked Johannesburg CBD, creating a gridlock for several hours.[348] The country's unreliable public transport system will undoubtedly impact assessors' ability to reach court on time if at all.

(e) *Assessors may be too emotional*

Several magistrates argued that lay assessors base their decisions on emotions especially if the case involves a woman or a child.[349] Cultural and religious bias promoting patriarchy and homophobic concepts can also sway emotions. Some may also not understand concepts such as evidential onus and may make snap decisions relying on face-value judgments. There is also a risk that assessors will rely on hearsay evidence even when a presiding officer has noted that the evidence is inadmissible.

Weiss also argues that the average citizen would not have any prior trial experience and is therefore likely to be overly deferential and agree with judges' views because of the latter's

[344] Ibid.
[345] For example, if an assessor is late and has not sent any prior communication regarding his or her delay then the magistrate should proceed in the assessor's absence. The Rules Board should assist in developing rules to assist in determining when a presiding officer should proceed in the absence of an assessor.
[346] See *(f)(un)reliability* p41-2 of this dissertation.
[347] Montsana and Washinyira 'Nightmare start to 2020 for thousands of Cape Town commuters' *Times Live* (14 January 2020) *https://www.timeslive.co.za/news/south-africa/2020-01-14-nightmare-start-to-2020-for-thousands-of-cape-town-commuters/* last accessed (15 September 2020)
[348] Gous 'These Joburg taxi ranks and routes will be closed from Friday' *Sowetan Live* (13 March 2019)*https://www.sowetanlive.co.za/news/2019-03-13-these-joburg-taxi-ranks-and-routes-will-be-closed-from-friday/* (last accessed on 1 January 2020).
[349] Seekings and Murray (n342) 95.

experience.[350] Citizens may be nervous, overwhelmed and intimidated by the unfamiliar environment and succumb to presiding officers' views.

VII ADVANTAGES OF IMPLEMENTING LAY ASSESSORS IN CONTEMPORARY SOUTH AFRICA

The lay assessor system is a cheaper alternative to the jury that allows for public participation, ensures that justice is seen to be done, bridges the gap between society and the civil justice system, and ensures that the presiding officer understands the context in which the relevant laws are applied. As with the jury system, the lay assessor system is also a democratic, educational and political institution that promotes civic engagement.[351] It balances state power by allowing citizens to participate in government. It also promotes deliberative democracy by encouraging reasoned discussion amongst citizens on important public issues and educates citizens on the formal justice system.[352] Some of these advantages will be discussed below.

(a) *Cheaper Costs*

When compared to the costs of a fully-fledged jury system, the lay assessor model is a cheaper alternative. This is mainly because it utilises fewer people which in turn requires fewer resources. Essentially two heads are cheaper than twelve. Translation costs will be less because the fewer parties involved, the lower the likelihood that many different languages will be spoken, eliminating the need for more than one or two translator(s).

Deliberation rooms are not required as the assessors will be deliberating with the presiding officer and can therefore use the latter's chambers. This saves a significant amount of money as adding to court infrastructure would be costly.

Although changes to some court benches which can only physically accommodate the presiding officer will be necessary, most courts already have the physical space for a presiding officer and two assessors. For example, all High Courts have seating available for two assessors. The district and regional magistrates' courts in Belville, Wynberg and Cape Town, also have seating available for two assessors to be seated next to the presiding officer. Mitchell's Plain district magistrates court however, does not have seating available for assessors. Thus, the funding required to change the physical court infrastructure to

[350] Weiss (n226) 127.
[351] For more on this see *(d) The jury as a democratic institution prompting civil engagement,* (e) *The jury as a political institution* and *(f) The jury as an educational institution* p19-21 of this dissertation.
[352] Ibid.

accommodate lay assessors is not as significant as would be required if jury boxes were to be included in courts.

(b) *Speed*

A presiding officer together with two lay assessors can deliver a decision faster than a jury. Even if the concern is that assessors protract trials when asking irrelevant questions, this can be dealt with by ensuring that assessors only pose questions to the presiding officer once in chambers.

(c) *Layperson perspective*

A study by Kgalema and Gready[353] illustrates how lay assessors can assist presiding officers in understanding the socio-cultural context in which they need to apply the law. For example, if a litigant cannot attend court on a specific date because he must be circumcised, a non-Black presiding officer may not understand the cultural significance of circumcision in Black African communities. For Blacks, circumcision does not happen in a hospital under local anaesthetic as many are accustomed to. Instead, it marks a boy's journey to manhood and involves attending initiation schools for several weeks.[354]

Other examples relate to liquor and calls to become a traditional healer commonly known as *sangoma*. There is a genuinely held belief amongst many Black African cultures that a person receiving a calling to become a *sangoma* does not have a choice to ignore it and must undergo training. Dismissing the calling can result in ominous consequences including, as some believe, death. This would be vital information in a case where an employee, who after being refused leave to become a *sangoma*, suffers from severe panic attacks and sues her employer in delict.[355]

Furthermore, in some Black African cultures, it is custom that the last share of alcohol is reserved for the elder person.[356] Contravening this is considered sufficient reason to scuffle. In a personal injury claim brought by one of the members involved in a scuffle, one may argue that this does not detract from the fact that harm was caused and that there was causation.

[353] (n340) 16.
[354] Papu and Verster 'A Biblical, Cultural and Missiological Critique of Traditional Circumcision Among Xhosa-Speaking Christians' (2006) 178 *Acta Theologica* 178 at 179.
[355] See for instance *Kievets Kroon Country Estate (Pty) Ltd v Mmoledi & Others* 2014 (1) SA 585 (SCA) where an employee was dismissed for misconduct after leaving work for one month to attend *sangoma* training.
[356] Kgalema and Gready (n340) 16.

However, not only does this provide contextual background but also becomes influential in the determination of contributory negligence and (dare I say) wrongfulness.

A white magistrate who used lay assessors in 177 cases in 1996 spoke about his experience with a female lay assessor that he used regularly. He followed 'her blindly'[357] in maintenance matters 'because she is a mother' and knew what was 'happening in the poor parts of the communities'.[358] He praised her ability to explain the dynamics relating to child maintenance.

By ensuring that the presiding officer understands these social contexts, lay assessors can assist in preventing racial, social or other discrimination against litigants and witnesses. Although it may be argued that the law ought to be objective and not swayed by subjective social, cultural and racial factors, this ignorantly presupposes that the law should be divorced from the social context in which it is applied. Understanding the communities in which the law applies is key to the administration of justice.

(e) *Assessors bridge the gap between the judiciary and society*

According to one magistrate lay assessors make litigants 'feel at home knowing that they are tried by their peers.'[359] This reduces feelings of alienation from the judiciary and encourages a sense of belonging. This may ensure that justice is seen to be done – thereby increasing the legitimacy of the courts in the eyes of the public to ensure that the public does not turn to informal courts.

(d) *Assessors are likely to reach well-reasoned decisions*

Assessors are more likely than juries to reach well-reasoned decisions. They will engage in joint deliberations with the presiding officer who will detect and correct any errors made by the assessors such as relying on inadmissible evidence when determining facts. Deliberations will not be placed on record hence assessors will feel at ease to discuss most of their views, making it easier for the presiding officer to identify errors. Furthermore, unlike jurors, assessors will be required to give reasons for their opinions.

VII CONCLUSION

The implementation of a lay assessor system in South Africa will undoubtedly involve significant costs and resources but when compared to the costs and resources required to

[357] Ibid.
[358] Ibid.
[359] Kgalema and Gready (n340) 17.

implement a jury system in South Africa, the lay assessor system provides a cheaper alternative. It promotes public participation within the civil justice system just as a jury would, while posing less of the jury's disadvantages. These include, amongst others, reduced costs for translators, reduced remuneration costs for two lay assessors (compared to 12 jurors) and the elimination of largescale courtroom restructuring to accommodate 12 jurors. Essentially, the fewer people involved in one instance, the lower the risk of South Africa's socio-economic landscape thwarting progress.

South Africa's previous dissatisfactory experience with the lay assessor system is by no means an indication of its potential to operate in contemporary South Africa. Previously there were no clear objectives for the lay assessor programme, the selection process of lay assessors was non transparent and largely undemocratic, assessors did not receive adequate training and the public was not made sufficiently aware of the implementation of the lay assessor programme. The model proposed in this chapter provides a blueprint to ensure that the programme is implemented effectively to ensure adequate results and that the errors of the past are not repeated. This includes, amongst others, the careful and transparent selection of lay assessors, adequate training for lay assessors, increased public awareness campaigns and joint deliberations between lay assessors and presiding officers

Lay assessors increase public participation which may reduce feelings of alienation from the judiciary and encourage a sense of belonging. This ensures that justice is seen to be done – thereby increasing the legitimacy of the courts in the eyes of the public.

CHAPTER 6

CONCLUSION

This dissertation has considered two options to promote public participation in the civil justice system, namely the jury and lay assessor system. Given South Africa's socio-economic difficulties it is likely that no perfect solution exists. The jury system will not be feasible in South Africa for several reasons – of which cost is a significant factor. The costs for implementing a translation system for potentially 12 linguistically diverse jurors and upgrading court buildings to include deliberation rooms for jurors is likely to be a cost that South Africa cannot afford. Adopting simultaneous translation systems used by global organisations such as the UN would be futile if load-shedding continues. Many courts do not have generators and the expensive translation systems would serve no purpose if courts do not have a reliable source of electricity. With the current public transport systems plagued by vandalism, delays and strikes, many jurors may not make it to court on time if at all.

The preferred option proposed by this dissertation is the lay assessor system. When compared to the jury, it presents itself as a better option to transform the civil justice system to ensure public participation and legitimacy in formal civil proceedings. The lay assessor proposal like any civil reform has its disadvantages and cost implications. Yet, it is one of the only options with the least disadvantages and administrative difficulties. It presents reduced costs for translators, reduced remuneration costs as only two assessors (instead of 12 jurors) are paid per trial. It also circumvents largescale courtroom restructuring needed to accommodate 12 jurors. Essentially, the fewer people involved in one instance, the lower the risk of justice being delayed in the name of public participation.

South Africa could choose not to implement the jury or lay assessor system and leave the current civil justice system as it is, but this would be most unwise. Allowing the public to participate in decisions that impact their surroundings is imperative. Not only does public participation benefit the public, but it also assists in ensuring that the civil justice system is responsive to the public's needs. If the public participates in initiatives, then these initiatives are likely to be considered legitimate. Hence the lay assessor system will not only increase and promote more meaningful public participation, but it can ability to improve the legitimacy of the civil justice system in the eyes of the public.

If South Africa fails to implement any civil reform measures to enhance the legitimacy of the civil justice system and reduce feelings of alienation, parallel informal courts promoting

vandalism, mob justice, and violent protests will steadily increase – while the civil justice system continues to be viewed as a hostile, foreign body only serving the privileged minority. Essentially two forms of justice will prevail – one for the 'haves' and another for the 'have nots'.[360]

[360] Galanter (n7) 95.

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