

Notes

Who Decides? Restructuring Criminal Justice for a Democratic South Africa*

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Serious change is coming to South Africa. Almost daily, the newspapers report of negotiations between the National Party government and organizations representing the black majority, most notably the African National Congress (ANC) and the Inkatha Freedom Party. While tragic outbreaks of violence persist, many expect dramatic changes in the political structure of South Africa in the next year or two. With the advent of meaningful black political participation, South Africa's legal system will surely undergo significant structural change. Demands for reform beset almost all aspects of the system—legal aid, the public defender's program, treatment of African customary law, the creation of a constitutional court, and the drafting of a justiciable bill of rights—to name a few.

Surprisingly, the identity of judicial decisionmakers in the "new South Africa" has received comparatively scant attention in the literature. While many legal scholars have focused on the drafting of a constitution with a justiciable bill of rights, few have discussed reform of the system of judges and magistrates who will apply its mandates. Although all recognize that the racially homogeneous (white) ranks of the upper and lower court systems are unacceptable to the majority of the citizenry, almost no serious examinations of alternatives have appeared in print. It is to this area of reform that this Note seeks to contribute, by analyzing alternative decisionmaking structures for criminal cases.

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Part I of this Note surveys the current judicial structure. Part II discusses the problems engendered by the current judicial structure. Part III defines the Note's criteria for judging reform proposals. Part IV examines the first alternative—the jury system—and explains why it is unsuited to South Africa. Finally, Part V considers and recommends a second major reform proposal for criminal cases: a representative, mixed bench (assessor) system that couples professional judges with other, more representative, legal personnel.

Two assumptions, shared by most observers, limit the scope of the reforms considered in this Note. One is that the transition to a democratic regime will be negotiated, and that reforms will be instituted through evolutionary, not revolutionary, change.¹ The second is that most judges currently on the bench will serve until mandatory retirement at seventy.² These constraints notwithstanding, an overhauled assessor system is a powerful tool for legitimating and improving judicial decisionmaking in South Africa.

I. OVERVIEW OF THE STRUCTURE OF THE SOUTH AFRICAN LEGAL SYSTEM

The South African judiciary is essentially divided into two layers—the Supreme Court (often referred to as the superior courts) and the lower courts. The Supreme Court consists of the Appellate Division and the General Division. The lower, or inferior, courts encompass a wide variety of judicial fora, the most important of which are the Regional and District (Magistrates') Courts.

The Appellate Division of the Supreme Court, the highest bench in the land, consists of a Chief Justice and fifteen judges of appeal. The Appellate Division does not have original jurisdiction. Rather, it hears appeals relating to the validity of statutes, and its decisions bind all of South Africa's courts. Judges are appointed to the Appellate division by the State President, almost always from the senior ranks of various divisions of the Supreme Court.

1. See Heinz J. Klug, *The South African Judicial Order and the Future: A Comparative Analysis of the South African Judicial System and Judicial Transitions in Zimbabwe, Mozambique, and Nicaragua*, 12 HASTINGS INT'L & COMP. L. REV. 175, 234 (1988) ("A negotiated political transition will . . . mean a more gradual restructuring of the judicial order with the increased likelihood of continuing . . . forms of judicial organization."). Many in the reformist community, including some members of the ANC Constitutional Committee, share this assumption. See generally ARTHUR CHASKALSON, *DEMOCRACY AND LAW, OCCASIONAL PAPER FOR THE INSTITUTE FOR A DEMOCRATIC ALTERNATIVE FOR SOUTH AFRICA* (1987); Nico Steytler, *Democratising Criminal Justice*, Paper delivered at Conference, *A New Jurisprudence for a Future South Africa*, The University of Pretoria (Oct. 25, 1989) (on file with author). Finally, it bears mention that in Zimbabwe's transition to multi-racial democracy, changes in the judicial structure were orderly and gradual. See generally Klug, *supra*, at 213-19.

2. This assumption is shared by virtually all South African legal scholars and by many ANC spokespersons. Despite the tremendous need to diversify the bench, research uncovered no article contemplating the removal of some or all of the current judges to make room for long-excluded potential replacements. Additionally, the Government is adamant that job security for current civil servants is not open to negotiation. Christopher S. Wren, *Whites Still Hold Key Pretoria Jobs*, N.Y. TIMES, Nov. 10, 1991, at A6 (citing cabinet minister responsible for negotiations).

The Provincial and Local Divisions of the Supreme Court,³ together comprising the General Division, are courts of first instance with original jurisdiction for certain classes of adjudication.⁴ The Supreme Court hears the more serious criminal matters, including all capital offenses, as well as the major civil litigation. The jurisdiction of these courts can, and has, been limited by statute.⁵ The Supreme Courts also hear appeals from the lower courts. Much like American federal courts of appeal, provincial and district Supreme Courts set precedent only in their own province or district, although their decisions often have persuasive effect in other provinces. Each division of the Supreme Court is headed by a Judge-President who, like judges, are appointed by the State President on the advice of the executive.⁶ At present there are approximately 142 permanent judges and 70 acting judges.⁷

The lower courts, which are staffed by magistrates, "perform by far the greater part of judicial work. Approximately 90% of all criminal cases are recorded in the regional and district courts."⁸ At the highest levels, the magistrates' courts are divided into regional and district courts. As of 1990 there were seven Regional Court Presidents (paralleling the seven districts of the Supreme Court) and 148 Regional Magistrates.⁹ In criminal cases, the District Magistrate is "limited to imposing a maximum sentence of one year's imprisonment, a fine of R.1,000 or a whipping, whereas the Regional Magistrate can impose a maximum prison sentence of ten years' imprisonment, a fine of R.10,000 or a whipping"¹⁰

Unlike judges, magistrates are members of the civil service and do not enjoy protection from salary changes, transfers, and demotions. Magistrates are usually

3. Although the Supreme Court technically includes the Appellate Division, the phrase usually indicates the General Division.

4. See The Supreme Court Act of 1959, No. 59 of 1959.

5. One trend has been to expand the jurisdiction of lower courts in both civil and criminal matters. For a recent proposal, see Proceedings of Extended Public Committee—Chamber of Parliament, *The Hansard* 8076 (May 10, 1991) [hereinafter *Hansard Debates*].

6. The Supreme Court Act, No. 59 of 1959, § 10 reads:

The Chief Justice, the judges of appeal, the judges president, the deputy judges president and all other judges of the Supreme Court shall be fit and proper persons appointed by the State President under his hand and the Seal of the Republic of South Africa, and shall receive such remuneration as may be prescribed . . . and their remuneration shall . . . not be reduced during their continuance in office

7. Desiree Hansson, *Selected Statistics on the South African Legal System*, 3 S. AFR. J. CRIM. JUST. 312, 316 (1990). Only two years earlier, the number of acting judges was approximately 30. See Ellison Kahn, *The Judges-IV*, 18 BUSINESSMAN'S LAW 249, 249 (1989).

8. ANNUAL REPORT OF THE DIRECTORATE OF JUSTICE 57 (July 1, 1989-June 30, 1990).

9. *Id.* at 78. The number of District Magistrates is not listed in the 1990 Annual Report of the Directorate of Justice, but at the end of 1988 it was estimated at 782. Kahn, *supra* note 7, at 250. Since at the end of 1988 there were 144 Regional Magistrates, 782 should approximate the current number of District Magistrates. Though this Note focuses primarily on these two levels of the magistracy, other forms of courts fall under the rubric of the lower courts, including small claims courts and divorce courts.

10. GEOFFREY BINDMAN, *THE INTERNATIONAL COMMISSION OF JURISTS, SOUTH AFRICA AND THE RULE OF LAW* 8 (1988).

appointed from the ranks of prosecutors, and are strongly identified with them.¹¹ Indeed, civil servants undergo a course of training at a national magistrates' school and are appointed initially as prosecutors before being elevated to the magistracy.¹² However, appellate review is afforded to criminal defendants appearing before magistrates. "Any decision of a District Magistrate in a criminal case where a fine of R.100 or a term of imprisonment of more than four months is imposed automatically goes on review to the Supreme Court."¹³

The bifurcated South African legal profession is comprised of attorneys and advocates, referred to as the side-bar and the bar, respectively. Attorneys can appear only in the inferior courts, and not before the Supreme Court. Generally, attorneys do pretrial work, meet with clients, and brief advocates—who undertake most court appearances. Advocates can represent clients before all the courts of South Africa, and may not be approached directly by members of the public.¹⁴ When an advocate reaches a certain stage in his professional career, he may apply or be designated by the Minister of Justice as senior counsel.¹⁵ With very few exceptions in the Republic's history, Supreme Court judges have been appointed from the ranks of senior counsel.

II. THE CURRENT CRISIS

A. *The White Monopoly on Judicial Decisionmaking*

The white stranglehold on the judiciary since the Republic's inception has been a powerful engine of discontent. Though whites constitute just over 15% of South Africa's population, until the summer of 1991 "no black person ha[d] been appointed to the Supreme Court bench since its creation in 1910—despite the fact that the Supreme Court Act itself places no prohibition on the appoint-

11. This was one of the many problems highlighted by the Hoexter Commission of Enquiry into the Structure and Functioning of the Courts. The government has long been criticized for all but ignoring the Commission's balanced, thorough, and voluminous findings. The Commission noted that

[t]he image of criminal justice in our lower courts is impaired by the observance of administrative arrangements incompatible with the standards of judicial aloofness expected of magistrates. It often happens, for example, that the magistrate and the public prosecutor share the same motor car and are seen to arrive together at the seat of the court where the trial is about to take place.

G.G. HOEXTER, COMMISSION OF INQUIRY INTO THE STRUCTURE AND FUNCTIONING OF THE COURTS, FINAL REPORT, RP 78-83. § 1.3.4.2.8 (1983) [hereinafter HOEXTER REPORT]. In addition, the Commission noted that lower court judges' status as functionaries of the executive "is quite incompatible with the doctrine of separation of powers and represents a glaring anomaly in the exercise of the judicial function in South Africa. The identification of judicial officers in the lower courts with the executive, sullies the image of the administration of justice in South Africa." *Id.* § 1.3.4.1.

12. For a disturbing analysis of this relationship, see JOHN D. JACKSON, JUSTICE IN SOUTH AFRICA 22-23 (1980). See also BINDMAN, *supra* note 10, at 114 (criticizing this relationship). This process is hardly unimpeachable as a safeguard.

13. BINDMAN, *supra* note 10, at 114. ("Potentially, this procedure can rectify any mistakes made in a Magistrates Court, but this does not happen in practice. Decisions of magistrates who have gained enough seniority do not go on review.")

14. Except when appointed by the court to handle a *pro deo* matter.

15. Senior counsel are commonly referred to as "Silks" or by the designation "SC."

ment of blacks to judicial office."¹⁶ On August 12, 1991, Mr. Ismail Mahomed SC, a South African Indian, was appointed as South Africa's "first black judge."¹⁷ Thus, of the approximately two hundred judges, all but the most recent appointment are white.¹⁸ All have been appointed by the National Party.

The numbers in the magistracy are similarly disproportionate. At the end of 1988, all 144 Regional Court Magistrates were white. Of the 782 ordinary Magistrates, 768 were whites, ten were Indians, and four were coloured; none was a black African.¹⁹ In a country where they comprise 85% of the population, people of color account for only 1.5% of the country's judicial decision-makers,²⁰ and black Africans 0%.²¹ "Furthermore, the judges in the South African System are not even representative of *white* society. Between 1950 and 1980, for example, the Appellate Division was dominated by Afrikaans-speaking men born in the Orange Free State who had spent time in Pretoria at the Bar or as civil servants."²²

The percentages of blacks practicing as attorneys and advocates is also discouraging. The Deputy Minister of Justice recently asserted that:

Of the 1089 advocates, only 1,6% are Coloured, 5,1% Indian and 2,6% Black. In other words, a percentage of 9,3% only are people of colour. As far as the attorneys are concerned—and I do not have the figures

16. D.D. Mokgatle, *The Exclusion of Blacks from the South African Judicial System*, 3 S. AFR. J. OF HUM. RTS. 44, 46 (1987).

17. Mr. Mahomed was the first nonwhite granted Senior Counsel status (in 1974). A nonwhite has sat on South Africa's bench only one other time, when Judge-President Milne (of Natal) precipitated a controversy by appointing Mr. Hassan Mall SC an acting judge of the Natal Supreme Court for the month of February 1987. However, liberal groups have mixed feelings about Mr. Mahomed's acceptance of the post. Informed sources say that he had been offered an appointment several times in the past but had always refused because of the racist laws he would be asked to administer. One headline announcing his appointment captures only too well the reason for these misgivings: *South Africa's Newest Judge Makes the Courts Acceptable*, WEEKLY MAIL (Capetown), Aug. 23, 1991

18. This phenomenon is found throughout the highest levels of the Government: "According to statistics cited in Parliament last year, blacks held only 14 of the 2,885 posts in the five highest salaried categories of the central and provincial governments." Wren, *supra* note 2, at A6.

19. See Kahn, *supra* note 7, at 250.

20. The phrase "judicial decisionmakers" is intended to include both district and regional Magistrates and Supreme Court judges. While functionaries at even lower levels (Small Claims Courts, Arbitrators, etc.) could conceivably also be thus designated, their extremely inferior status precludes them from inclusion in this assessment.

21. This Note will have little further occasion to discriminate between black Africans, Indians, Cape Coloured, Coloured, and the other "racial groups" not part of the white minority. Instead of referring to these groups collectively as "nonwhites," a term which many find offensive, this Note will follow the common custom (in South Africa among writers of all political persuasions) and use the term "blacks" to refer to this variegated grouping. The term "Black African" will be used when a further distinction is needed. Part III's reform proposals discuss the normative implications of this grouping in greater detail.

22. Anton Lubowski, *Democracy and the Judiciary*, in DEMOCRACY AND THE JUDICIARY, PROCEEDINGS OF THE NATIONAL CONFERENCE ON DEMOCRACY AND THE JUDICIARY, ORGANIZED AND PRESENTED BY THE INSTITUTE FOR A DEMOCRATIC ALTERNATIVE FOR SOUTH AFRICA 16 (1988). The conservative Afrikaaner's dominance is manifest throughout the civil service. Wren, *supra* note 2, at A6.

for the Cape Province—the total figure with regard to people of colour is 12.1%.²³

The Deputy Minister's estimates, however, are significantly more optimistic than those found in other quarters.²⁴ As important to the question of judicial decisionmakers, however, is the number of black Senior Advocates, or "silks"—the group from which judges have almost exclusively been appointed.²⁵ There are only a handful of black senior advocates in the entire country, and until quite recently there were only two.²⁶

B. *There is an Acute Crisis of Confidence*

Despite the lack of judicial review and of a justiciable bill of rights, the judiciary was largely viewed, for the first half of this century, as the only branch of government to which all South African citizens could turn with a reasonable expectation of justice. It is almost unanimously agreed upon,²⁷ however, that public confidence in the judicial system has steadily and precipitously eroded

23. *Hansard Debates*, *supra* note 5, at 7916. Other estimates on the number of black attorneys, the lowest rung of legal practitioners, are similar; Ellison Kahn estimated that at the end of 1988, 700 of the Republic's 6700 attorneys were black. Kahn, *supra* note 7, at 250. The numbers of blacks undergoing legal education is only somewhat less disproportionate. Additionally, commentators lament the impediments to blacks in the educational system, such as a Latin requirement for admission to the Bar. Unfortunately, there is little evidence that any steps are currently being taken to attract blacks to the bar. The system of pupillage and the bar admission examination, both introduced within the last decade, have placed new hurdles in the way of blacks joining the bar. Moreover, the bar seems quite content with the retention of the present Latin requirement for admission to the Bar, despite the fact that this requirement is known to deter blacks from qualifying as advocates.

Mokgatle, *supra* note 16, at 47.

24. See Mokgatle, *supra* note 16, at 46.

25. Indeed, the presumption that judges will be appointed only from the ranks of Senior Counsel is so strong that only a handful of judges in the Republic's history have not been so designated. In 1951 when L.C. Steyn left his position as Senior Government Law Advisor to accept a judicial appointment in Transvaal, he was boycotted by the Johannesburg Bar for the first three weeks he sat on the bench because he had not been a silk. Judge Steyn later went on to become chief justice.

26. Surprisingly, the Minister of Justice recently stated that "not a single application by a man of colour for silk . . . has been turned down over the last ten years." *Hansard Debates*, *supra* note 5, at 7940.

27. The government itself is perhaps the lone dissenter. As late as 1991, the Minister of Justice responded as follows to calls for reform:

Under no circumstances dare we now engage in a debate which results in the slightest suspicion about the legitimacy of our judiciary. . . . No one, however—and I want to stress this very clearly, and if anyone feels likewise inclined to say it, he should please put up his hand—has gone so far as to say that they have any doubt at this time regarding the status of the appointment of judges and magistrates, as well as their status as administrators of justice.

Hansard Debates, *supra* note 5, at 8074.

since the constitutional crisis of the 1950's,²⁸ in part because of the systematic exclusion of blacks.²⁹ According to one member of Parliament:

We are still perceived as having a White legal system in which White laws are administered in White courts by White judges for the benefit and protection of White interests. We have a duty to restore the law to its rightful position, one in which it is respected by the majority of the people, unlike today where it is not only suspect, but positively hated by that majority.³⁰

Commentators from a broad segment of the political spectrum concede that a radical increase in black representation on the judiciary is necessary. Understandably, the ANC is particularly vocal in this regard.³¹

C. *The Current Bench Perverts Justice*

Far more than "the perception of injustice" fuels the arguments of reformers. The white judicial monopoly has also resulted in real perversions of justice due

28. Many regard the constitutional crisis of the 1950's as the last time that the judiciary took a strong independent stand for liberty against the government. When the Nationalists came to power in the late 1940's, only two provisions of law were sufficiently entrenched to require a two-thirds joint vote of both Houses to overturn them; one was the installation of Afrikaans and English jointly as national languages; the other was the presence of coloured voters from the Cape on the common voters role. (S. AFR. CONST. § 35). The government was determined to take away voting rights from all nonwhite voters, and attempted to remove the coloured voters by passing the Separate Registration of Voters Act of 1951 with a simple majority vote in both houses. In the celebrated case *Harris v. Minister of the Interior*, 1952 (2) SA 428 (A), the Appellate Division of the Supreme Court unanimously declared this act invalid. The government then passed the High Court of Parliament Act declaring that Parliament had authority as a high court to review the Appellate Division in any instance where an act of Parliament had been declared invalid. In *Minister of the Interior v. Harris* 1952 (4) SA 769 (A) this act met the same fate as its forbearer. The government then implemented a court-packing plan. The quorum of the Court for invalidating acts of Parliament was increased from 5 to 11 by the Appellate Division Quorum Act which meant that five new judges had to be appointed to the Appellate Division. Act 27 of 1955. The Senate was then enlarged to almost double its former size, to ensure a sizable majority for their scheme. The Senate Act, Act 53 of 1955. With regard to this latest twist, the Appellate Division concluded 10 to 1 in *Collins v. Minister of the Interior* that the appropriate procedures had been followed and that the Court had no right to declare actions void based on their intent. 1957 (1) SA 552 (A). See generally W Le R De Vos, *The Role of the South African Judiciary in Crisis Periods*, 3 TYDSKRIF VIR DIE SUID-AFRIKAANSE REG 281 (1986) (describing chronology of constitutional crises).

29. C.R.M. Dlamini, *The Appointment of Blacks as Judicial Officers*, CONSULTUS, Apr. 1990, at 31 (total lack of blacks in higher ranks of judicial system belies possibility of credibility with black citizenry).

30. *Hansard Debates*, *supra* note 5, at 8046.

31. The Freedom Charter, adopted by the Congress of the People at Kliptown on June 26, 1955, and viewed by many as the quintessential democratic statement of the majority of South Africans, states: "The Courts shall be representative of all of the people." Arthur Chaskalson, National Director of the Legal Resources Center and a member of the ANC Constitutional Committee, stated what should be obvious: "[T]he composition of the courts should change . . . and they should reflect the composition of the society as a whole." CHASKALSON, *supra* note 1, at 6. Many have seen the loss of confidence in the judiciary as the greatest impetus to the creation of People's Courts. As has occurred in other countries, citizens who despair of obtaining justice from the courts develop alternative, often frightening means to secure "justice." Klug, *supra* note 1, at 231. ("The emergence of people's courts as a rudimentary form of popular justice . . . reveals both the extent to which the black population views existing courts as illegitimate, and their desire to create popular courts as a legitimate alternative.") For a description of the rise of alternative courts in Peru, see HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* Ch. 8 (1989).

to the malice and ignorance that accompany racism and racial insulation.³² There are many well-documented cases of raw prejudice emanating from the bench. In fact, a well-known professor was twice prosecuted for contempt of court when he published findings showing that race influenced the imposition of the death penalty.³³ Some of the racist prejudices and stereotypes judges have expressed include: blacks have a propensity to stab; black women submit to rape without protest; blacks can recognize people in comparative darkness in circumstances in which a white person could not do so; black women will not generally support the evidence of their husbands against that of their lovers; black witnesses giving evidence of an alibi generally lie.³⁴ However, "[i]n many cases the discrimination is more subtle and unconscious, and this may account for the denial that race is a factor in the administration of justice."³⁵

Racism aside, the current judiciary has also long been attacked for being executive-minded and excessively deferential to the government. "Judges are increasingly coming to be seen as willing and obedient servants of a repressive legislature rather than impartial and objective arbiters and dispensers of justice, stepping in to protect the individual citizen from legislative and executive excesses."³⁶ Critics of the judiciary argue that even when presented with a choice, judges have almost without exception taken the most "pro-executive"

32. The current judges have been described as:

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

John Dugard, *Training Needs in Sentencing in South Africa*, 1985 DE REBUS 257. This point has also been made in the context of the United States: In a 1970 note in *The Yale Law Journal*, *The Case for Black Juries*, the author asks us to "consider, for example, the tableau of a Park Avenue juror grappling with the ghetto plaintiff's experience A jury which represents only one segment of the community sacrifices factfinding ability as well as legitimacy." Note, *The Case for Black Juries*, 79 YALE L.J. 531, 532-33 (1970).

33. See *S. v. Van Niekerk* 1970 (3) SA 655 (T) and *S. v. Van Niekerk* 1972 (3) SA 711 (A).

34. These and many other examples are documented by Dlamini, *supra* note 29.

35. *Id.* at 46.

36. M.G. Cowling, *Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premiss*, 3 S. AFR. J. HUM. RTS. 177, 181 (1987); see also De Vos, *supra* note 28, at 286 ("[I]n cases where there was a choice between competing statutory interpretations, the courts have often chosen an interpretation favouring the executive, rather than a construction upholding individual rights and liberties. Accepting the theory of a judicial choice in cases of uncertainty, the critics argue that it would have been legally permissible in these instances to construe the enactments in favour of the individual.").

stance.³⁷ It is for these reasons, among others, that reform of judicial decision-making must be a high priority.³⁸

D. *The Consensus for Structural Change and the Inclusion of Blacks*

The Ministry of Justice alone fails to recognize the need for serious structural change. J. Grobler, the Chief Liaison Officer for the Department of Justice, told the author that if there were any changes in the judicial structure or appointments process "they will be very slight." Additionally, the Department's official statement on "Policy Taken for the Advancement of Blacks in the Judiciary" describes the process as a pure meritocracy in which "[n]o distinctions are made in respect of race, colour, or creed as the Department is an equal opportunity employer."³⁹

The government is alone in this opinion. Virtually every other person and organization involved in the South African legal system has recognized that profound change is both critical and imminent. Both the Royal Society of Advocates⁴⁰ and the Association of Law Societies have proposed new legal dispensations,⁴¹ as have governmental commissions charged with investigating the problem.⁴² The consensus is clear—far-reaching, immediate steps are

37. In fairness to the judges, throughout the apartheid era the government quickly and unabashedly closed any loophole the judges managed to find in the draconian laws. In *Gumede v. Minister of Law and Order*, 1984 4 SA 915 (N), for example, seven members of the United Democratic Front who were detained challenged their detention because the Minister had not provided the reason for the detentions or the information prompting the detention orders as required by § 28 of the security laws. The detention orders merely restated the statutory language—that the detainees were engaged in "activities which endanger the maintenance of law and order . . . [and did] attempt to create a revolutionary climate within the republic of South Africa, thereby causing a situation endangering the maintenance of law and order." In a courageous decision, Law, J. held that the Minister did not fulfill the statutory requirements and that if the minister "confused his reasons for issuing the notice with the information on which those reasons are founded, he clearly has not applied his mind to the question of what information can be furnished without detriment to the public interest." *Id.* at 921. But upon the detainees' release, the Minister simply reissued the same order, with a qualification at the bottom that "no information can in my opinion be disclosed without detriment to the public interest." This type of immediate, effective, and scornful neutralization has consistently followed the court's few valiant attempts to imbue the South African regime with notions of basic rights.

38. The problem is even more acute at the lower court level, which lacks the independence and institutional pride enjoyed by the Supreme Court bench. Lubowski, *supra* note 22, at 16-17 ("Almost 90% of the criminal cases in the lower courts are undefended. In other words, the magistrate comes from the state prosecutor's office and the only other legally-trained officer in the courtroom is the prosecutor himself. Is it far-fetched to say then that 90% of people going to prison in South Africa and Namibia are being sent there by two prosecutors?").

39. Letter from J. Grobler, Chief Liaison Officer, Department of Justice, to Author (Aug. 1991) (on file with author).

40. *Legitimising the Legal System*, CONSULTUS, Apr. 1991, at 3 (editorial describing need for democratization and for experienced black lawyers).

41. See *ALS Proposes New Legal Dispensation for South Africa*, DE REBUS, Sept. 1990, at 587 [hereinafter *ALS Proposes New Dispensation*].

42. By far the most important of these was the Hoexter Commission, see *supra* note 11. Another critical report, published by the government think tank the Human Sciences Research Council, concluded in 1987 that

the legal system is suspect among large parts of the population because on the one hand, the administration of justice is controlled by whites and, on the other, because, as a result of various economic, language, and other factors, legal processes and administration as well as penal and

necessary to restore the courts to their proper role as adjudicators for all South Africans.⁴³

III. JUDGING REFORMS

The reforms considered in this Note will be examined along a number of axes. Three are most significant to South Africa. Loosely considered, they are: the quality of the justice rendered (the instrumental aim); the meaningfulness of the participation afforded (the participatory aim), and the system's efficacy in training blacks to assume judgeships (the training aim). Significant choices and tradeoffs are inevitable. For example, extremely participatory systems may not produce the "best"—or even barely adequate—decisions. The structures that best prepare blacks to assume judgeships of necessity do not include the laity, and thus will not be the most participatory. One's choices are affected by the relative weight of one's priorities. With these criteria in mind, it is now time to move from theory to the alternatives themselves, to see what each has to offer.

IV. THE JURY SYSTEM

The jury system immediately suggests itself as a possible avenue for reforming the justice system. Indeed, the jury's very function is to guarantee that judicial decisionmakers will be representative of society. Interposing the jury between the state and litigants is not new to South Africa, which had a jury system for much of this century. The jury's nefarious history in South Africa, however, demonstrates that in certain circumstances juries can terribly pervert justice. This history probably also accounts for the near-consensus among legal thinkers that the system should not be reintroduced. Despite the seeming utility of the jury as a democratizing institution, three major concerns militate strongly against it: the lack of support for it in the South African legal community, the dysfunctions often associated with juries in highly fractionalized societies, and the staggering administrative costs that the system would entail.

litigation procedures have become inaccessible and incomprehensible to many.

HUMAN SCIENCES RESEARCH COUNCIL, *THE SOUTH AFRICAN SOCIETY: REALITIES AND PROSPECTS* 166 (1987).

43. Arthur Chaskalson helps frame the problem this Note seeks to address:

It is important that the composition of the courts should change and that they should reflect the composition of the society as a whole It may be that for historical reasons there will be, in the beginning, a disproportionate number of white judicial officers. But this will be a temporary phenomenon which can be met to some extent by making use of lay assessors who would have an equal say with the judicial officer on issues of fact, and be guided by him or her in the application of the law. Consideration could be given to the reintroduction of juries in serious criminal trials

CHASKALSON, *supra* note 2, at 6.

Not a single scholarly article advocating reintroduction of the jury system has appeared in a South African legal publication in at least the last fifteen years.⁴⁴ Perhaps surprisingly, the dearth of considered support for reintroducing the system spans the fullest range of the intellectual and political spectrum.⁴⁵ Indeed, when one attorney at the Association of Law Societies conference in May 1990 suggested a return to the jury system, he was publicly referred to as a "fool."⁴⁶ A brief history of the system may help explain.

The jury was introduced in South Africa in 1828 with the adoption of English procedure in the Cape.⁴⁷ By 1954, a jury consisted of nine European males, seven of whom were required to reach a verdict.⁴⁸ Jury trials were available only in the General Division of the Supreme Court. Despite its prominent place in English jurisprudence, however, the jury system never took hold in South Africa, and many legal commentators criticized it from the outset. Restrictions on the jury system began almost immediately following Union in 1910. By 1917, the accused could elect to be tried by a judge without a jury.⁴⁹ The right to waive trial by jury was extended to defendants largely because of the racist verdicts of the all-white, all-male juries. Even given the deeply racist climate in South Africa during this period, these juries' pronouncements were often astonishing. As Chubb points out,

[t]imes without number have judges expressed shock at acquittals by juries. Particularly has this been the case where Europeans and non-Europeans have been concerned. These acquittals have often been made in the teeth of evidence pointing only one way. There are several instances where the judge has had to rebuke the jury in the strongest terms⁵⁰

Act 46 of 1935 authorized the Minister of Justice to direct that a trial be heard by a judge and assessors rather than by a jury if the accused was charged with having committed an offense "towards or in connection with a non-European

44. The author canvassed every South African legal periodical since 1975 and found fewer than six articles addressing this topic directly. The longest and most substantive of these was a six-page article arguing against any further thoughts on the jury.

45. One finds a smattering of articles or positions explicitly opposing the jury. Far more common, however, is the complete absence of consideration of the jury in places where one would have thought it natural. For a good example of this, consider Charles Dlamini's article *The Influence of Race on the Administration of Justice in South Africa*, 4 S. AFR. J. HUM. RTS. 37 (1988), in which he discusses structural steps that might involve more blacks and filter out some of the pervasive racism. The jury does not appear among them.

46. One of the very few articles supporting the jury system was an editorial in *De Rebus*. However, it is essentially one page of general sentimentalism. *A Time for Juries?*, DE REBUS, Aug. 1990 at 507.

47. I am indebted to J.A. Chubb and to L.G. Rood for their excellent histories of the jury system in South Africa. Much of the following information has been gleaned from their works. J.A. Chubb, *The Jury System*, 73 S. AFR. L.J. 194 (1956), and L.G. Rood, *A Return to the Jury System?*, DE REBUS, Oct. 1990, at 749.

48. In rare cases a female or juvenile could request to be tried by an all-female jury.

49. Act 31 of 1917.

50. Chubb, *supra* note 47, at 199.

if the accused is a European or towards or in connection with a European if the accused is a non-European."⁵¹ By 1954, after years of precipitous decline in the use of the jury,⁵² unless the accused specifically requested a trial by jury, the trial would be held before a judge sitting alone or with assessors.⁵³ In 1954 only 5.6% of all superior court criminal trials were held before a jury. In 1966 jurors sat in only 0.4% of cases, in 1967 in 0.57%, and in 1968 in 0.48%.⁵⁴ After years of virtual nonexistence, the jury system was abolished by the Abolition of Juries Act 34 of 1969.

The very fact that no South African legal scholars—from the left or right—are seriously discussing the reintroduction of juries is in itself enough to foreclose it as a viable option. The South African legal community, including its most reformist elements, has seemingly rejected the jury as a solution to the problem of the all-white judiciary. Nico Steytler, for example, head of the Public Law Department at the University of the Western Cape, writes:

The export of the jury system to English-speaking Africa has not met with success. It has been argued that the jury system, which implies autonomous decisionmaking by the jurors, can function properly only where the community in which it operates is socially homogeneous with no major racial, cultural, or religious divisions. In African countries where such divisions exist, kinship and group loyalties often overrule the fair application of the criminal law.⁵⁵

Steytler and others oppose the jury largely for this reason. South Africa remains a deeply factionalized society and the pending democratic changes will make but a small dent in the country's strong, deeply rooted group loyalties and intergroup and interracial enmities. Thus, Steytler concludes that: "In our divided society, participatory democracy in general, and lay participation in criminal justice in particular, may serve sectarian interests rather than that of the whole community. . . . The group loyalties of lay members of courts may stand in the way of rational fact finding."⁵⁶

The Freedom Charter, adopted by the Congress of the People at Kliptown in 1955, remains the strongest and most authoritative unified statement of the democratic aspirations of South Africa's black community. Yet, it says little

51. This legislation recognized that a white jury was often incapable of doing justice when an interracial crime came before it.

52. Legislation passed in 1935, 1948, and 1954 allowed the Minister of Justice to direct that trials take place without a jury in an ever-growing list of circumstances. For a detailed discussion, see Chubb, *supra* note 47, at 198. A third event responsible for jury trials' declining significance was the growing jurisdiction of magistrates' courts in which there was no right to a trial by jury.

53. Rood, *supra* note 47, at 753.

54. *Id.*

55. Steytler, *supra* note 1, at 23 (citation omitted). Steytler and many others support the idea of a mixed bench, since "[t]he joining of professional judicial officers with lay persons in a mixed bench seeks to address this problem." *Id.*

56. *Id.* at 29.

about judicial structure other than that "The courts shall be representative of all the people." In its 1988 "Constitutional Guidelines for a Democratic South Africa," intended as an interpretive statement of the Freedom Charter, the ANC made democratization of criminal justice an explicit goal, but gave virtually no more guidance than the Charter itself on the issue of structure. Clause (d) states only that "[a]ll organs of government including justice, security and the armed forces shall be representative of the people as a whole, democratic in their structure and functioning and dedicated to defending the principles of the Constitution."⁵⁷ Yet the ANC has not subsequently fleshed out the delphic pronouncement that the administration of justice be "democratic."⁵⁸ Although the ANC has published no detailed policy pronouncement on this topic, individuals and organizations affiliated with the ANC seem to oppose the jury.⁵⁹

Given South Africa's demography, one would expect that the strongest support for the jury would come from the reformist elements of the legal community, and thus it is no surprise that as one moves farther to the right, even qualified support for the jury is rare. Neither the established legal organizations, the Royal Society of Advocates and the Association of Law Societies, nor the government itself advocates reintroducing the jury.⁶⁰

A main reason the jury system attracts so little support is its failure in South Africa and elsewhere in Africa. In his exhaustive survey, J.H. Jearey found that most countries formerly ruled by Britain did not choose, upon gaining independence, to expand or install the jury system, despite their overarching goal of democratizing criminal justice. Jearey's description of the experience of Ghana is illustrative. In Ghana, the gaining of independence

has not led to any extension of trial by jury in spite of the eager adoption of the other marks of a modern democratic state. This may be interpreted either as further evidence of the unsuitability of jury trial in present African conditions or as an indication that the present rulers of Ghana are no more sensible of the liberties of the subject than were their colonial predecessors. It is submitted that this paper shows the former opinion to be the correct one.⁶¹

57. AFRICAN NATIONAL CONGRESS, CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA (1988), reprinted in 5 S. AFR. J. HUM. RTS. 130 (1989).

58. J.D. van der Vyver, *Comments on the Constitutional Guidelines of the African National Congress*, 5 S. AFR. J. HUM. RTS., 133, 145-46 (1989) (describing issues ANC Guidelines fail to address); see also Hugh Corder & Dennis Davis, *The Constitutional Guidelines of the African National Congress: A Preliminary Assessment*, 106 S. AFR. L. J. 633 (1989).

59. In addition to Steytler, Arthur Chaskalson, National Director of the Legal Resources Center and a prominent member of the ANC Constitutional Committee, seems to favor a mixed bench over the jury, as do other ANC activists and Constitutional Committee members with whom this author has had contact.

60. See *ALS Proposes New Dispensation*, supra note 41, at 587.

61. J.H. Jearey, *Trial by Jury and Trial with the Aid of Assessors in the Superior Courts of British African Territories: I*, 4 J. AFR. L. 133, 143 (1960).

Jearey identifies three conditions necessary for a jury system to function effectively, none of which were satisfied in the countries he surveyed (or in South Africa):

First, the community in which it operates must be socially homogeneous, that is, there must be no big racial, cultural, religious or linguistic divisions. Secondly, the people in the community must be sufficiently advanced educationally and otherwise to understand the responsibilities cast on them as jurors and to set the fulfillment of those responsibilities above private prejudices. Thirdly, the people of the community must be in basic agreement with the laws which, as jurors, they are required to enforce.

In no part of Africa does there exist, as yet, a community which answers to these conditions. It is, therefore, not surprising to discover from the foregoing account how small a part the jury plays in practice in the administration of the criminal law in the territories under discussion.⁶²

The fear that the jury system would perpetuate group divisions and enmities is probably the system's critics' strongest reservation. Jurors with strong ethnic, racial, or religious affiliations are likely to allow these affiliations to taint their judgments about the facts and law presented to them. The history of inter-tribe, inter-race, and inter-group conflict is manifested in South Africa on a dizzying number of planes, and these conflicts, it is feared, would keep the jury from rendering justice.⁶³ Thus, it is the historical inability of the jury to function in deeply divided societies,⁶⁴ including many in Africa and in South Africa itself, that leads South Africans to reject the system.

The third set of factors militating strongly against the jury center on the administrative nightmare that South Africa's linguistic pluralism would engender. In addition to English and Afrikaans, the two constitutionally mandated official languages, a bewildering number of languages and dialects are spoken by significant components of the South African population. Given the increasing

62. J.H. Jearey, *Trial by Jury and Trial with the Aid of Assessors in the Superior Courts of British African Territories: II*, 5 J. AFR. L. 36, 46 (1961).

63. Rood, *supra* note 47, at 752 ("Within ethnic and racial groupings there are deep and often bitter political divisions. It will be appreciated that finding a jury that will ensure that justice is done in many of these trials where there are often a number of accused, and where allegiance to a cause is made central to the proceedings, is no simple matter.")

64. Consider, for example, the American experience. Hundreds of studies have documented the racism of juries. Indeed, one author concluded that juries were so hopelessly racist that the only way to secure justice for blacks was to redraw jury districts to match (racial) community lines. Juries drawn from within these vicinages, where most crimes committed by blacks occur, would be from three-quarters to all-black: "By requiring that juries trying civil cases be drawn from the community where the cause of action arose, and in criminal cases where the crime occurred, we could ensure that civil and criminal law for black people would be administered by substantially all-black juries." *The Case for Black Juries*, *supra* note 32, at 548. Many studies have concluded that in a climate of racism and racial tension, juries achieve racial ends, not justice. See also Roger S. Kuhn, *Jury Discrimination: the Next Phase*, 41 S. CAL. L. REV. 235 (1968); S.W. Tucker, *Racial Discrimination in Jury Selection in Virginia*, 52 VA. L. REV. 736 (1966).

urbanization of the black population and the shifting of tribal groups, several languages are likely to be the first languages of prospective jurors in many cases. While "administrative costs" are often used as an argument against important reform, the magnitude of the costs necessary to institute the jury are indeed staggering. Jury panels might, for example, need simultaneous translation into three, four, five, or even six different languages—an administrative burden simply beyond the resources and capability of any judiciary. In addition to translation costs, jury boxes and deliberation rooms would have to be added to most South African courtrooms, money would be needed for juror stipends and travel, and an administrative organ would have to be established to manage the new system.⁶⁵

"Lay participation in courts, whether in the form of a jury or a mixed bench, is an expression of participatory democracy for it embodies the value of self-government."⁶⁶ Nevertheless, in the South African context, it is not overly surprising that support for the jury is virtually nonexistent.⁶⁷ If the jury system could meet the participative and instrumental challenges faced by the South African judiciary, the enormous administrative costs of reintroducing the system might be justifiable. However, both the experiences of many other African nations making the transition to majority rule, and the analysis of many South African legal scholars suggest that these aims will not be well-served by the jury. Another avenue must be sought to achieve the goals critical to the future of justice in South Africa.

V. THE ASSESSOR SYSTEM

This Note's central thesis is that a system is already in place in South Africa—the assessor system—which, when transformed, will provide the best avenue for speedy and effective judicial reform. Though the system as it currently functions is rightly denigrated as ineffective, a series of structural reforms could turn it into both a powerful democratizing force and an unparalleled forum for training black judges.

65. Rood, *supra* note 47, at 750.

66. Steytler, *supra* note 1, at 22 (citations omitted).

67. As one commentator pointed out: "Having regard to the practical difficulties and the many sociological and other factors militating against the introduction of the jury system, it is difficult to envisage a role being found even for a modified form of jury, or any good purpose which could be served thereby." Rood, *supra* note 47, at 754. A second editorial foreclosed debate in even stronger terms:

A proposal was mooted some time ago that the jury system be re-introduced in South Africa, since blacks would then be able to serve on juries together with members of other racial groups and in that manner become involved in the administration of justice. As other commentators have already indicated elsewhere, this idea is, however, not acceptable; in fact, it is not even necessary to debate the matter further. Especially in view of the heterogeneous composition of South Africa's population, such a system would have the opposite effect to what was intended, and would indeed cause the credibility crisis to grow.

Legitimising the Legal System, *supra* note 40, at 3.

As the jury system was being phased out in South Africa, the assessor system was being incorporated into the country's statutory law, ostensibly to protect defendants from the judiciary's structural insulation.⁶⁸ The new system was intended to substitute for the jury—as a means of informing and broadening judicial decisionmaking. As Chubb urged in 1956,

[I]f the jury system is abolished some safeguards should be adopted in its place, against undue formalism, and the risk, however remote, of prejudice. In all trials in which a plea of not guilty is entered, assessors should be compulsory and not at the discretion of the presiding judge. The function of these assessors is in any event that of a jury.⁶⁹

Under this system, assessors join the judge on the bench to assist him in various judicial determinations. While this will be qualified below, it can generally be said that decisions of fact are made by the bench of three, while decisions of law are made by the judge alone.⁷⁰

A. *The Current Statutory Structure*

As juries began to fall into disrepute, assessors were increasingly viewed as an alternative to judges sitting alone.⁷¹ Currently, § 145(2) of the Criminal Procedure Act of 1977 provides that a judge presiding at a Supreme Court criminal trial may, in his discretion, summon one or two assessors to assist him. The use of assessors is mandatory in all Supreme Court criminal trials in which the judge considers the death penalty likely to be a valid sentence.⁷² The situation is radically different in lower courts, at which 90% of criminal trials take place. Magistrates, even at the regional level, must obtain the permission

68. As Justice Steyn noted while arguing for the abolition of the jury system,

[A] judge must constantly be aware of the fact that there is always the danger that, in view of his comparative isolation, he may cease to reflect the constantly changing realities of society and by his application of justice, removed from current attitudes as he is, forfeit the confidence of those whose mutual relationships he is supposed to regulate. The only safeguard the judge has in this respect is to choose his assessors wisely so that his court is balanced and, to some extent, representative also of the community.

J.H. Steyn, *Public Participation in the Prevention of Crime*, 88 S. AFR. L.J. 210, 218 (1971) (citation omitted).

69. Chubb, *supra* note 47, at 202.

70. A useful analogue to the South African system is the lay judicial structure found in West Germany, in which courts are composed of either one professional and two lay judges, or two professional and three lay judges. For a further description of the West German system, see John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195.

71. Section 36 of the General Amendment Act 46 of 1935 first enacted trial by a judge and assessors as an alternative to trial by jury.

72. Criminal Procedure Act No. 51 of 1977 § 145(2). Since many cases at the Supreme Court level involve the possibility of the death sentence, assessors are appointed in the majority of Supreme Court cases.

of the Minister of Justice to appoint assessors.⁷³ Largely for this reason, assessors are virtually nonexistent at the lower courts.

Under the current statutory regime, judges (and theoretically magistrates) are free to select their own assessors. Judges may choose any two people whom they believe have "experience in the administration of justice or skill in any matter which may be considered at the trial."⁷⁴ Although the statutory language is relatively open-ended, empirical work documents that the overwhelming majority of assessors are lawyers and/or former functionaries in the legal profession. Virtually all are known by the judges who select them.⁷⁵

In its early years, the assessor scheme was likened strongly to the jury, on the principle that trials were conducted before "one judge and a jury of three." This attitude was reflected in the treatment of assessors during the trial, and by a strict separation between issues of fact, on the one hand, and mixed issues and issues of law, on the other. Assessors were meant to have input only on pure factual questions. Until 1982, assessors were physically removed from the courtroom when issues such as the admissibility of evidence were discussed. In recent years, however, the distinctions have blurred. Since 1982,

if the presiding judge is of the opinion that it would be in the interests of justice that the assessor or the assessors assisting him do not take part in any decision upon the question whether evidence of any confession or other statement made by an accused is admissible as evidence against him, the judge alone shall decide upon such question, and he may for this purpose sit alone.⁷⁶

Given judges' current predilection, the exclusion of assessors is uncommon. Empirical work, discussed below, also suggests that most judges consult with the assessors on all aspects of the trial including issues of law.

B. *Shortcomings of the Current System*

Read alone, the statutory scheme seems encouraging. Two nonjudges are called upon to assist most Supreme Court judges with most aspects of

73. The Magistrates' Courts Act No. 32 of 1944, § 93ter.

74. Criminal Procedure Act, No. 51 of 1977, § 145(b); Magistrates' Courts Act, No. 32 of 1944, § 93ter.

75. In the Cape Province, for example:

In practical terms the appointment of assessors was determined largely by a roneoed list of persons who had indicated to the registrar of the Supreme Court or individual judges that they wished to be considered as assessors. A copy of this list, which is amended from time to time, is made available to all the judges. They all indicated that they made use of this list as a basis for their choice of assessors but that they would on occasion go outside the list. Several indicated explicitly that there were certain persons on the list with whom they would not wish to sit and that they had a more limited 'list within the list' of their own.

Dirk van Zyl Smit & Norma-May Isakow, *Assessors and Criminal Justice*, 1 S. AFR. J. HUM. RTS. 218, 223 (1985).

76. *Id.* at 226 (citing Criminal Procedure Act § 145(4)(b)).

trials—effectively constituting a jury of three in many cases. A closer look, however, reveals that the system falls far short of its intended aims. Like the judiciary itself, assessors are hopelessly unrepresentative of the population—an especially grievous flaw considering the problem the system was designed to counteract. The current problems are (1) that assessors are used too infrequently and (2) that the appointment procedure undercuts the goals of the assessor system.

As early as 1983, the Hoexter Commission criticized the requirement that Regional Magistrates, relatively senior judicial officials, obtain the Minister of Justice's permission to appoint assessors. "The practical result has been that assessors are hardly ever used in [the lower] courts. The Commission recognized that 'a grave responsibility often rests on judicial officers in the lower courts whenever they are required, sitting alone and unassisted to decide disputed factual issues.'"⁷⁷ Even at the Supreme Court level, assessors are not always used. As noted above, appointment is only obligatory when the judge feels that the death penalty may be appropriate. In other extremely serious cases, the judge decides the facts and law uninformed by any interpretation but his own. This problem is intensified by the resistance of many judges to using assessors unless statutorily obligated to do so.⁷⁸ Since the judges decide when death may be an appropriate sentence, they determine when assessors are needed, and understandably, many judges are inclined to sit unaided (and unfettered).

The fact that current judges choose their own assessors has also crippled the system's potential to encourage democratization. Rather than promote community participation, the current regime has spawned a professional assessor class—remarkably similar demographically to the judges themselves, yet selected in an unreviewable and idiosyncratic fashion. John Dugard warned as early as 1972 that

[t]he ideal assessor is a senior advocate who will bring an independent [sic] mind to bear on the fact-finding process. Less ideal is the person who could be described as a 'professional assessor'—that is the lawyer, usually retired from legal practice, who relies on assessing fees for his income. His continued employment as an assessor may be dependent on the goodwill of the judge and he is, therefore, less likely to exercise the same degree of independence as a busy advocate who sits as an assessor on rare occasions. In practice assessors are drawn from a very limited group.⁷⁹

Recent empirical work has substantiated these fears.⁸⁰ Not only are the

77. *Id.* at 232 (citing HOEXTER REPORT at § 5.12.1.4).

78. *See id.* at 225.

79. John Dugard, *Lay Participation in the Administration of Justice*, 1 CRIME PUNISHMENT & CORRECTION 55, 56-57 (1972).

80. Van Zyl Smit and Isakow undertook the one study investigating the assessor system's actual operation. Their study concentrated on the Cape Provincial Division of the Supreme Court; in 1984 they

same assessors used again and again, they almost always possess the very qualities Dugard feared. In 200 cases tried with assessors at the seat of the court in Capetown, only thirty-six different assessors were used.⁸¹ Nineteen of these sat in fewer than ten cases. The remaining seventeen sat in the vast majority (86.3%) of the Cape Town cases involving assessors. The nine busiest assessors sat in 60.7% of all the Cape Town cases.⁸² Amazingly, the group of assessors sitting in the majority of Cape Town cases in 1984 was significantly smaller than the number of judges they assisted. That an extremely limited number of repeat players dominate the assessor system undermines its potential to serve as a democratizing force.

While the current system does expand the bench from one to three, the resultant judicial forum is arguably inferior to a judge sitting alone. The assessors, overwhelmingly repeat players, are selected by the judge, occupy a position inferior to his, and are at his mercy for future employment. The appointment process pressures the assessors not to antagonize the judges at whose pleasure they serve, and the judges correspondingly choose assessors from a very limited group—one all too similar to the judges themselves.

The assessors' backgrounds provide further evidence that they add little perspective to judicial determinations. Every assessor identified by van Zyl Smit and Isakow was a white male with a legal background. A vast majority were former judicial functionaries.⁸³ Judges clearly choose people with whom they are comfortable—people similar in disposition and outlook—and thus predisposed to agree with the judge.⁸⁴ The results are not, therefore, surprising:

interviewed thirteen of that division's sixteen judges. Additionally, "interviews were conducted with twelve persons who sit regularly or fairly regularly as assessors in this division," and "all the criminal trial cases recorded for the first time in the files of the registrar of the Cape Supreme Court in 1983 were perused and the information about the judge and assessors (if any) in each case recorded." Van Zyl Smit and Isakow, *supra* note 75, at 220-21.

81. In all, assessors sat 387 times; in 13 cases the judges sat with only one assessor. *Id.* at 222.

82. *Id.* (During the Supreme Court Term six criminal divisions could be in session simultaneously and up to twelve assessors could be required at the same time. The busiest assessors would therefore be acting virtually on a full-time basis.)

83. "A striking feature of the professional backgrounds of the assessors was that a very large number of them had retired from active practise of the law. Amongst those who had retired were all the magistrates and attorneys-general." *Id.* The authors also provide the following data:

<i>Primary Occupation</i>	<i>Persons</i>	<i>Occasions as Assessor</i>
Magistrate	10	157
Attorney	8	96
Law Professor	7	17
Attorney-General	2	14
Advocate	9	103

84. That is, if they are selected at all. It should be remembered that trial judges presently have tremendous discretion about whether or not assessors are appointed:

Only one judge [in the Cape study] said that he did not heed recommendations not to appoint assessors in any case except those where he had been assured that the accused would plead guilty. His rationale is worth citing in full: "My view is that assessors are in a way latter-day jurors.

It is clear from the interviews that the judges were very rarely outvoted by their assessors when it came to public pronouncements on guilt or innocence, or on the existence or absence of extenuating circumstance. Eleven of the thirteen recorded that this had never happened to them. Of the remaining two judges one reported that he had been outvoted only once. The other judge reported that he had been outvoted 'in two or three cases.'⁸⁵

The number of times that assessors publicly recorded disagreements was almost as rare as the number of overrulings: "[A] majority of those interviewed, 61.5 per cent in all, had not sat with a single assessor who had disagreed publicly with them more than once."⁸⁶

The current system spawns far too intimate a relationship between a judge and the assessors he personally selects. This relationship "is certainly unsound from the point of view of the public presentation of the administration of justice. There is a danger that the public . . . will gain the impression that it is a system of patronage. . . ."⁸⁷ As Steytler points out, "Where assessors are limited to an advisory role and unrepresentative of the community, they represent an exercise in sham democracy."⁸⁸ The assessor system presently provides per diem judgeships to a small number of retired white practitioners strikingly similar to, and chosen by, the very judges whose opinions they are supposed to balance and inform. It is not surprising that their effect is trivial, if not deleterious.

C. *Reforming The System*

If the assessor system's scope is expanded and the selection process for assessors is radically restructured to include the ever-increasing number of black South African lawyers, the system can be a vehicle for profound change. The reformist community agrees that "some type of jury system" is necessary, yet as Part IV discusses, the traditional jury simply cannot work. Some writers have advocated reforming the assessor system in purely instrumental terms, without envisioning it as an avenue for fundamental change,⁸⁹ while other reformist

One should avail oneself of assessors in every case. One can never foresee the possibility of the death penalty and therefore should always appoint assessors. The view that assessors should be used sparingly because of the cost to the state is nonsense because the cost is actually very little."

Id. at 225.

85. *Id.* at 229.

86. *Id.*; see also *id.* at 229-30 ("The point about the relative paucity of recorded dissents can also be expressed in terms of cases tried. If one assumes that the average judge tries approximately 20 criminal cases in a year then the eight judges who recorded one or no dissents would have heard in the region of 1320 cases in all. As against this notional figure only five dissents were recorded. The percentage of dissents . . . calculated on this basis was 0.379 per cent.")

87. *Id.* at 230.

88. Steytler, *supra* note 1, at 24.

89. Van Zyl Smit and Isakow have published the definitive work in this vein. It is striking, however, that the reforms they recommend are limited to curing only the most egregious of the problems they document with such clarity. They suggest using assessors somewhat more than is currently the case, and recognize

scholars have in passing called for the greater use of blacks as assessors. No one, however, has combined these two streams of analysis and undertaken a serious examination of the assessor system as a vehicle for black participation in judicial decision-making. The subsections that follow undertake exactly that.

1. *The Use of Assessors Should Be Mandatory in All Superior Courts*

As argued above, there are reasons to extend the assessor system to all cases in the Supreme Court, especially since assessors already participate in the majority of cases.⁹⁰ The only reason not to extend the system is the administrative cost of doing so—a pale objection given the credibility crisis the judiciary faces and the benefits a well designed system would afford.⁹¹ The change is important symbolically, since the Supreme Court would function with a jury-type structure in every case, and instrumental in that every judgment would be shaped by more hands than those of the heavily criticized current judges.

2. *The Use of Assessors Should Be Expanded in the Lower Courts*

While extending the system to every lower court proceeding may not be feasible, it is inappropriate that magistrates need the Minister of Justice's approval to employ assessors in a given case. The Hoexter Commission recommended that regional magistrates be able to employ assessors whenever they considered it appropriate.⁹² Given the Regional Magistrates' already significant and ever-increasing jurisdiction, the use of assessors should be mandatory in all trials at the regional level. Another reason for expanding the assessor system at this level is that Regional Magistrates are criticized especially heavily for pro-government bias and lack of independence. The Hoexter

that assessors should be drawn from a broader and more representative pool than at present. They do not, however, view the system outside of its current parameters, nor do they conceive of it as a meaningful vehicle for black participation. As they point out after outlining the current systems of Zimbabwe and West Germany, "[i]t is beyond the scope of this paper to prescribe a detailed South African variation on these systems." van Zyl Smit and Isakow, *supra* note 75, at 234. This Note seeks to proceed precisely to this next step. By examining in tandem the needs of the black majority and the shortcomings of a traditional jury system, the assessor system can be placed in a larger context and its potential as a representative solution fully recognized.

90. One compelling reason is that under the current system it is possible for a single judge, sitting alone, to impose the death penalty. The Appellate Division has confirmed that if a judge did not appoint assessors at the beginning of the trial because he believed they were not statutorily warranted, but came to the opinion during the trial that death was, in fact, the appropriate sentence, his decision, reached alone, was valid. *S. v. Dyanti* 1983 (3) SA 532 (A).

91. Once again, van Zyl Smit and Isakow are right on point: only cases of considerable complexity and gravity are tried in the Supreme Court. In Zimbabwe, which has a similar system of assessors to that of South Africa, two assessors are appointed to act with the judge in *all* High Court Criminal trials. Two assessors should, as a matter of course, act in all Supreme Court criminal trials in South Africa as well. Van Zyl Smit & Isakow, *supra* note 75, at 232.

92. HOEXTER REPORT, *supra* note 11, at § IV.5.12.1.5.

Commission noted that “the very fact that magistrates and regional magistrates are functionaries of the executive makes their independence suspect,”⁹³ and was concerned because “the judicial officers of lower courts do not enjoy the benefit of any of the safeguards designed to entrench judicial independence.”⁹⁴ Others have been more critical,⁹⁵ and there is a consensus that one can expect less impartiality and independence from the magistracy than from the bench. Given the gravity of the cases before them, Regional Magistrates should not be afforded the luxury of choosing when to share their authority with assessors.

Legislation should also be enacted to permit District Magistrates to employ assessors. Given their very limited jurisdiction, many of the cases before them are indeed too minor to warrant assessors, but there may be some in which the District Magistrates feel that such aid is necessary.⁹⁶ If magistrates are entrusted with the responsibility of trying these cases, they should be given the discretion to enlist assistance when they deem it necessary.

3. *The Assignment of Assessors to Specific Cases Must be Restructured: Judges Should Not Choose Their Own Assessors*

It is clear from the analysis above that judges should not choose their own assessors. The manifest appearance of injustice alone should be enough to mandate overhauling this scheme. When corroborated by the facts—the rise of an assessor class that tends to agree with the judges who appoint them and have an interest in so agreeing—the argument becomes even more powerful. The most logical and effective reform is that assessors be randomly assigned to trials. This is similar to the West German system in which judges have no input regarding who will join them on the bench.

4. *Assessors Should be Chosen from a Very Different Pool, and at Least One Black Should Serve at Trials*

Perhaps the most important issue in restructuring the assessor system is “who are to be the new assessors and how are they to be selected.” Considered alone, participatory values suggest inclusion of the laity. If the system is supposed to “replace” the jury and provide the input of one’s peers, it is argued, it should

93. *Id.* § II.1.4.1.

94. *Id.* § II.1.4.2.

95. *See, e.g.,* JACKSON *supra* note 12, at 22-23 (arguing that magistrates’ training and experience makes them lean toward the prosecution, and that there is a troubling power dynamic with prosecutors, who may be superior in rank to magistrates.).

96. Other reasons underlie the recommendation that assessors not be mandatory at the district level. First, there are far more District Magistrates than Regional Magistrates, and they often sit in remote towns where there are few lawyers. Additionally, most of the cases heard by District Magistrates are minor, so the assessor system’s administrative and efficiency costs would not be justified. Other reforms, beyond the scope of this Note, are more appropriate in addressing problems in the District Magistracy.

draw participants from the nonlegal world.⁹⁷ In what was perhaps the first plea to rejuvenate and empower the assessor system, the motivating force behind John Dugard's argument was the "total absence of participation by *non-lawyers* in the administration of justice since the abolition of juries in 1967."⁹⁸ He saw the assessor system as a jury system which would ensure greater public participation without concomitantly incurring many of the costs and perceived failings of a full jury system.⁹⁹ However, a closer reading of Dugard reveals that his preference for lay participation is partially attributable to the fact that "[t]he legal profession would certainly be unable to provide the necessary assessors for such a scheme as it is already too short staffed. The only solution to the problem would be to employ lay assessors"¹⁰⁰ More recent work, however, has concluded otherwise.¹⁰¹

Others also seem to begin with the rhetoric of a jury or of lay participation, but end up acknowledging the advantages of legal training. Consider the following speech made in Parliament by Mr. G R W Babb:

[T]here is a widespread suspicion of the courts amongst the Black population in South Africa. As a consequence of that, a cry goes up from a whole wide range of people that the courts will only be made credible by a sort of jury system . . . [which] should only be applicable for serious crimes and criminal offenses in regional and supreme courts. Secondly, and perhaps this is the most important aspect, the use of assessors, even lay assessors, should be expanded to five or seven, but the name jury should be reintroduced for the symbolic and semantic effect that it has upon the community. At present, in the Black community, there is no knowledge or awareness of the existence of assessors. If there is, they are often seen as impotent. A jury at least pronounces itself on the result.¹⁰²

While there are advantages to lay participation, reformist South African thinkers do not seem to be putting their emphasis on the laity per se. Rather, they are looking for systems that will work toward the goals of informed justice and the appearance of justice. It must be frankly recognized that mandating a legal qualification represents a trade-off between participatory values and the aims of securing justice and training black practitioners. Including the laity in the assessorship scheme would be the strongest gesture towards participatory

97. As Steytler reminds us, "[t]o democratize criminal justice means the participation by *citizens* in the decisionmaking processes of its institutions." Steytler, *supra* note 1, at 19 (emphasis added).

98. Dugard, *supra* note 79, at 55 (emphasis added).

99. Since assessors would sit with the judge and be guided by him, Dugard felt they "would therefore be less likely to give the unreasoned, erratic type of decision associated with jury verdicts." *Id.* at 58.

100. Even this preference was not truly egalitarian—as he wanted a university degree to be a prerequisite. *Id.*

101. Van Zyl Smit & Isakow, *supra* note 75, at 233, concluded that the Bar could support a universal mandatory assessorship.

102. *Hansard Debates*, *supra* note 5, at 7923-25.

values. Two important concerns, however, militate against the inclusion of the laity. One is instrumental—judges seem to heed assessors precisely because the assessors have legal expertise; the second is that assessorships can be used to provide invaluable training to future black jurists.¹⁰³

When South Africa's desperate need for a generation of trained black judicial candidates is considered, the advantages of broadening the system to include the laity are outweighed by its effectiveness as a training and testing ground for future judges. Assessorship is an ideal "fast track" for training black legal practitioners and providing them with first-hand insight about, and experience with, life on the bench. They sit with an experienced judge, have an equal vote on issues of fact, and are involved in the judges' thinking on issues of law and issues combining both law and fact. Currently, judges are selected from the ranks of "Senior Counsel." Because of the pervasive racism in South Africa, only two blacks in the entire country enjoy this status.¹⁰⁴ How substantial numbers of black lawyers are to get the requisite training and exposure indispensable for judgeship has until now remained substantially unanswered. A revamped assessorship provides a heretofore unexplored avenue for expediting this training for black legal personnel.¹⁰⁵

Leading legal commentators from a surprisingly broad segment of the political spectrum support assessorships as an educational pathway for black legal practitioners. Ellison Kahn, a centrist legal thinker, points out that "there are sufficient blacks at the Bar or practising as attorneys or employed as magistrates to make it possible for blacks to serve as assessors in criminal trials where in the opinion of the presiding judge the sentence of death might be imposed."¹⁰⁶ Even the Royal Society of Advocates, the most elite section of the bar, has made murmurings in this direction.¹⁰⁷

103. Van Zyl Smit and Isakow recognize that this fundamental choice must be made. Thus, they suggest that assessorships could either be incumbent upon *all* legal practitioners, a duty they conclude would be an imposition but not impossible, or that some section of the laity be included. They look to the Zimbabwean system, which allows the Chief Justice or Judge President to choose assessors who have "any other experience or qualification which . . . renders [them] suitable to act as assessors in a criminal trial," and to the West German system, in which "potential lay adjudicators are nominated by political parties and other civic organizations." Van Zyl Smit & Isakow, *supra* note 75, at 234. A closer look at the West German system, however, reveals that the lay assessors in West Germany, hand-selected and most likely as well-educated and self-assured as the judges themselves, are dominated by the judges with whom they sit. Casper and Zeisel found that lay judges in Germany affected the outcome of only 1.4% of the cases. Gerhard Casper & Hans Zeisel, *Lay Judges in German Criminal Courts*, 1 J. LEGAL STUD. 135, 189-191 (1972). Coupled with the finding that South Africa's current judges heed and respect assessors precisely because they are legal professionals, it is unlikely that a system relying on the scandalously uneducated general populace to function effectively as assessors could succeed.

104. BINDMAN, *supra* note 10, at 45.

105. Though estimates vary, currently there are approximately 100 black advocates, and over 800 black attorneys in South Africa. There should be enough black legal practitioners currently to support the assessorship scheme detailed below, and in the coming years, the number of black legal practitioners is likely to continue to increase. *See also* van Zyl Smit & Isakow, *supra* note 75, at 233 (advocating requirement that all attorneys serve as assessors for minimum number of days each year).

106. Kahn, *supra* note 7, at 250.

107. An editorial in their official publication said:

Black commentators and ANC functionaries also support the idea of using the assessorship to involve and train blacks in the justice system. Leading black scholar D. Mokgatle argues that "the greater use of black assessors would undoubtedly serve to prepare the South African public for the day when blacks sit as superior court judges. At the same time, it would involve black lawyers to a greater extent in the administration of justice."¹⁰⁸ The ANC also seems to support assessors. Arthur Chaskalson, Director of the Legal Resources Centre and a member of the ANC Constitutional Committee, claims:

It is important that the composition of the courts should change and that they should reflect the composition of society as a whole. . . . making use of lay assessors who would have an equal say with the judicial officer on issues of fact, and be guided by him or her in the application of the law. . . . But the court system, administered by trained, independent and competent lawyers, should not in my view be tampered with.¹⁰⁹

Given the homogeneity of the bench, one or both of the assessors in every trial should be black legal practitioners. This is currently the case in many African nations.¹¹⁰ There are some contexts in which differentiation is critical to achieve basic justice and to redress profound and lingering imbalances. This is one of those cases—and it must be recognized that the justice system not only needs assessors, it needs *black* assessors. The surest way of ensuring this is to divide the legal practitioners into two pools, whites and blacks, and to mandate that one assessor be drawn from each pool for each trial. As the number of black attorneys and advocates currently stands at over 1000, there should be an adequate number to ensure that they would not be unduly burdened by this commitment. It would be an important step, both practically and symbolically, to ensure that there be a black decisionmaker at every criminal trial in South Africa.¹¹¹ This multiracialism would also add perspective, sensitivity and

The country's dilemma, however, is the non-availability of a sufficient number of—particularly experienced—black lawyers. The indications, therefore, are that in the ordinary course of events it will take a comparatively long time before full democratisation of the courts will be achieved. New methods that will enhance democratisation will accordingly have to be considered.

Legitimizing the Legal System, *supra* note 40, at 3.

108. Mokgatle, *supra* note 16, at 47-48.

109. CHASKALSON, *supra* note 1, at 6.

110. J. H. Jeary, *Trial by Jury and Trial with the Aid of Assessors in the Superior Courts of British African Territories: III*, 5 J. AFR. L. 82, 83 (1961) ("[I]t can be stated as a general rule that assessors of the same race (and, in the case of an African accused, of the same tribe if possible) as the accused and are selected by the trial judge from among suitable persons summoned to attend the trial.").

111. This raises a serious issue: if the blacks and whites of South Africa are considered too fractious and partisan to serve as jurors, why is it assumed that as assessors they will fairly administer justice? The answer is admittedly partial. Inherent in the arguments of those who condemn the jury system is that societies must be relatively homogeneous to have *juries*—but that judges and other functionaries of the justice system are, perhaps by virtue of their training and education, more able to administer justice impartially. The underpinnings of *this* contention are deep and controversial, but to design a system one must assume that *someone* is capable of rendering justice. I share that assumption here—that South Africa's lawyers will be

information to judicial determinations, and it would start training blacks to assume their rightful place and proportion on the bench.

This fast-track training may be critical for another set of reasons. There is growing concern that there will be a severe shortage of qualified candidates for the bench in the near future.¹¹² If the system outlined herein were used to accelerate the qualification process for all of South Africa's black lawyers,¹¹³ they would be prepared in much greater numbers to fill the coming vacant judgeships.¹¹⁴ Thus, not only would more blacks lawyers be *available* to become judges, the statistics reveal that more judgeships will soon be available for them. If they can get the requisite experience and training in time, South Africa's black lawyers can step in to fill the projected need.¹¹⁵

5. *The Function of Assessors and the Fact/Law Dichotomy Should be Reexamined*

As mentioned above, assessors were originally conceived of as a direct substitute for the jury. One manifestation of this thinking was a strict separation

able to rise above their ethnic (and racial) affiliations and administer justice fairly.

The system outlined above might also be faulted for failing to distinguish between South Africa's many nonwhite groups. It is simply not possible at present, however, to design a system that takes into account ethnic and racial groupings other than the most important one: black/white. Not only is the pool of black lawyers simply too small to allow for this type of matching, but extraordinarily difficult questions immediately present themselves—should an assessor be chosen from the same group as the victim or as the defendant? What if the only match currently available is on the other side of the country? Given that the main power imbalance has unquestionably been between whites as a group, and nonwhites as a group, the dichotomy suggested above seems to be workable and reasonable, though not perfect. Undoubtedly, an ideal world could produce a much better system than the one designed here, but given the limitations of the situation, this may well be the best option available at present. It is certainly immeasurably better than the current system. At some later date, reformers might enjoy the luxury of distinguishing between the various groups, or of not needing to distinguish at all; this is not, however, feasible today.

112. At the Bar Conference in 1988, three of the four speakers argued that the current pool of Senior Advocates will soon and increasingly fail to provide an adequate number of candidates for the bench. Others have also offered this thought. *See, e.g.,* Kahn, *supra* note 7, at 249 (offering data furnished by Justice P J J Olivier, Vice-Chairman of the South African Law Commission, which indicates that current rates of population growth require training of large numbers of additional judges).

113. They would serve as assessors far more often than would their white counterparts.

114. It must, of course, be recognized that the assessorship system is only one of many avenues that must be opened to ensure that blacks are given the chance to reach the highest judicial offices. The assessorship system is especially attractive for the short- and medium-term because it takes the black South Africans who have already risen significantly through the system and brings them the final distance through greater exposure to the judicial process. Equally important, though beyond the scope of this Note, are the myriad of other steps that need to be taken. These include greater access to general and legal education, dropping the Latin requirement for advocate status (long criticized as discriminating against blacks for whom it is a third or fourth language), and even abolishing the bifurcated bar. I propose but one of many necessary reforms.

115. Which suggests discussion of an issue that has not thus far been explicitly addressed—whether this system is intended to be permanent or transitional in nature. It is currently the case that blacks neither serve in any meaningful numbers as legal decisionmakers, nor do a significant number possess the skills and experience necessary to do so were positions available. The assessorship scheme provides a bridge to the future—a future in which black South Africans will be able to assume senior positions in the legal structure in proportion to their place in the citizenry. When this hope is realized, it will certainly be necessary to reevaluate the wisdom and necessity of the system.

of issues of fact from issues of law. In earlier times, for example, assessors were removed from the courtroom whenever the admissibility of evidence was discussed. This distinction, and the treatment of assessors by judges generally, has undergone significant change since the system's inception. Part of this evolution is reflected statutorily. Section 145 of the Criminal Procedure Act now provides that once assessors have taken the oath they are "members of the court." In recent years, assessors have increasingly been involved in all aspects of the trial, a change that has occurred precisely because assessors are trained legal professionals.¹¹⁶

Judges and assessors confirm both that the influence of assessors is felt in all areas of the trial, and also that this is so largely because assessors are respected legal practitioners. In the Cape Province, "[e]ven of the twelve assessors claimed that they were regularly consulted on the law by the judges, although four of the eleven qualified this by saying that it varied from judge to judge."¹¹⁷ Most of the judges agreed that they consulted assessors on questions of law,¹¹⁸ echoing the sentiment articulated by one of their colleagues:

As concerns consultation with assessors in matters of *law*— in the run of the mill criminal cases, *assessors being court men with extensive experience, well equipped on legal points, legal points are discussed. On the question of guilt one cannot divorce legal points from factual points—they go hand in hand. Unlike the jury, assessors have a knowledge of law.* There is a lot of law in deciding cases especially on intricate facts. Sometimes I take down law reports and discuss the law with assessors. In this way assessors are involved in applying law to a case but not propounding it."¹¹⁹

In the opinion of judges, therefore, not only is it nearly impossible to divorce issues of law from issues of fact, but assessors are useful and widely consulted *precisely because* they are well versed in the law.

This is a second critical support for continuing to draw assessors from the ranks of the legal profession—it is their very qualification as lawyers that encourages judges to consult with and respect them. If assessors were untrained civilians, the likelihood that they would be intimidated, bullied or marginalized by the white judges is extremely high. In Europe, for example, where the

116. As one judge recently said:

In considering the exercise of such a general discretion the status and judicial qualities of assessors is such that it must obviously be an important consideration when evaluating the possible prejudicial quality of the evidence under consideration, in that they are far better able to disabuse their minds of matters prejudicial if the need arises than laymen would be.

S. v. Mbatha, 1985 (2) SA 26 (A), 31.

117. Van Zyl Smit & Isakow, *supra* note 75, at 227-28.

118. *Id.* at 228.

119. *Id.* (second and third emphases added).

assessors are lay persons, "few would deny that the professional judge on a mixed bench is such a towering figure that the lay influence is rather negligible, and nowhere does this influence [of lay assessors] seriously impede uniformity and predictability of decisionmaking."¹²⁰ The mixed bench system is frequently criticized for failing to affect the outcomes of trials, yet it is clear that if assessors are drawn from the ranks of legal practitioners, and specifically from the ranks of black legal practitioners, this concern is likely to be largely vitiated.¹²¹

Given that the assessors will all be legal professionals, consultation with the assessors should take place on all points of law and on issues of mixed fact and law.¹²² Though the judge should retain the ability to decide the *substance* of these issues by himself or herself (or else it would be a full bench of three—with the opinions of two inexperienced and unqualified judges being given equal weight), the *process* should include a full consultation with the assessors. On the one hand, this will significantly enhance the learning curve of the assessors—since they will be exposed to the full dimensions of legal reasoning, and will gain from tracking the thought processes of an experienced judge on issues of law and on mixed issues. It will also make for better judging—since the judges will have to explain and justify themselves to knowledgeable and interested peers. Finally, it will bring judicial reasoning "into the sunshine," exposing and precluding any insidious attempts to let impermissible factors such as racism figure into the judicial determination.¹²³

D. *Concluding Thoughts on a Reformed Assessor System*

A modified and expanded assessor system seems already to have garnered the support of a wide spectrum of South Africa's legal community. Jeary's words of thirty years ago are scarcely less valid today:

In many parts of Africa today the choice lies between a trial by a judge with the aid of assessors or trial by a judge sitting alone. The latter

120. Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975), reprinted in ROBERT M. COVER & OWEN M. FISS, *THE STRUCTURE OF PROCEDURE* 292, 295 (1979).

121. The main work arguing that assessors too often agree with the judges is Casper and Zeisel's study of the West German system, *supra* note 103. For the argument that the impact of assessors in Europe is underrated by Casper and Zeisel, see Langbein, *supra* note 70, and Peter Blanck, *What Empirical Research Tells Us: Studying Judges' and Juries' Behavior*, 40 AM. U. L. REV. 775, 799-801 (1991).

122. All of the judges cited in the van Zyl Smit and Isakow study said that they discussed sentencing with the assessors. Indeed, the Appellate Division has ruled that it is not irregular for assessors to be consulted on the sentence. See *S. v. Sparks*, 1972 (3) SA 396, 398 (A). This process should also be codified by statute; though decisions on sentencing would be the judges' alone to make, the judges should do so only after consultation with the assessors. This view has been argued for elsewhere. See, e.g., P H S van Zyl, *Do Assessors Have any Part in the Assessment or Imposition of the Sentence?*, DE REBUS, Jan. 1991, at 36, 37 (urging statutory reform to clarify that judges may consult assessors about sentence).

123. For a description of this function, see AHARON BARAK, *JUDICIAL DISCRETION* 22-23 (1989).

seems most undesirable from every aspect, and any move which would strengthen the institution of the assessor would be welcome.¹²⁴

Extensions of the assessor system elsewhere in Africa have met with success.¹²⁵ In 1981, with the passage of the Primary Courts and Customary Law Act of 1981, Zimbabwe introduced the use of assessors in both the village and community courts, though in an advisory capacity. In Tanzania, assessors are appointed in the primary courts and can outvote the magistrate.¹²⁶ Comparative evidence, and the growing support for the system within South Africa's legal community, suggests that an integrated, modified assessor system could have astonishing results.

VI. CONCLUSION

Major structural changes are needed to bring the South African legal system apace with the democratic forces that are gaining momentum and shaping South Africa's future. As the courts will be the interpreters and enforcers of the new substantive legal regime and the coming bill of rights, it is particularly critical that they be equipped to do so fairly and well. The consensus of most observers is that as currently structured, they are not. The white stranglehold on judicial decisionmaking, the longstanding charges of executive-mindedness and racism leveled at the judiciary, and the worsening crisis of confidence make the need for serious structural change even more clear.

In an overwhelmingly black country, the jury system immediately suggests itself as the logical counterbalance to the white judiciary. Closer examination, however, reveals three reasons why this alternative does not seem realistic. The first is the enormous administrative cost of implementing the system. The second is the fact that the jury is thought to be ineffectual and even counterproductive in societies with deep racial, religious, or cultural divisions. While South Africa presents one example, Africa has provided many others. These two reasons help explain the third—with remarkable unanimity, the South African legal (and reformist) community staunchly opposes juries.

The mixed bench system therefore remains the most viable option for structural reform. Many argue that to regain public confidence and to address the participatory values that are served by such inclusion, the laity must serve

124. Jeary, *supra* note 110, at 98. As he points out, assessors have become prevalent in most of the countries that he studied:

With the exception of one territory, Nigeria, all trials in superior courts which are not held with a jury are held with the aid of assessors [In a few jurisdictions] the trial judge is given discretion as to whether he will sit with assessors or not, but it seems that this discretion is seldom, if ever, exercised so as to exclude assessors.

Id.

125. See generally Chubb, *supra* note 47; Steytler, *supra* note 1.

126. See Steytler, *supra* note 1, at 23 (citation omitted).

as assessors. While this position has much to recommend it, two concerns dictate that the legal system be kept a strictly professional affair. One is the training function—there is a desperate need for experienced black jurists to fill the many positions on the bench. A crisis already looms, as almost 39% of South Africa's Supreme Court judges are "acting judges"—many called back from retirement. Judges themselves will remain the cornerstone of the South African legal system, and the need to train blacks to assume their rightful places on the bench is extremely pressing, often overlooked by otherwise acute observers, and presently unmet by any other avenue.

The second reason the "legal" requirement is worth maintaining is that evidence shows that judges listen to assessors precisely because the assessors are knowledgeable legal functionaries. If they were called upon, it is easy to imagine that often uneducated and long subjugated laity might be completely dominated by the imposing judges, well-versed in the law and well-accustomed to the exercise of power and authority. It is because justice will be better served under the proposed system that the participatory values of direct citizen involvement must be largely sacrificed. Maintaining the legal requirement will result in more, not less, actual reform and real "democratization" than will the inclusion of the laity.

If the system proposed herein is implemented, it immediately will be the case that at least one black will sit on the bench in a decisionmaking capacity in every criminal trial in South Africa.¹²⁷ The immediate change in the structure and attitudes of the justice system will be enormous; the future benefits will also be marked. A professionally qualified black taking part in every criminal trial, for the present, and training for the bench, for the future—this is no small step. With its strong Dutch-Roman and English heritage, the South African justice system seems destined to continue to rely upon professional judges as its cornerstone. The assessor system addresses this need as well, training for the future so that the South African judiciary can mete out the impartial, fair, and representative justice that the people of South Africa have so long been denied.

127. Except for minor cases at the district level, at which there will be the discretionary ability to appoint assessors.