The assessor system as a procedural safeguard in the face of adverse pre-trial publicity*

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OPSOMMING

Die assessorestelsel as 'n prosedurele beskermingsmaatreël te midde van ongunstige voorverhoorpublisiteit

Voorverhoorpublisiteit rakende 'n hangende strafsaak, welke publisiteit in die vorm van óf mediadekking van die saak óf 'n voorafgaande beslissing in parallelle geregtelike verrigtinge (wat uit wesenlik dieselfde feite as die strafsaak voortspruit) kan voorkom, mag tot die beskuldigde se nadeel wees. Sodanige mediadekking of bevindings in 'n parallelle geregtelike uitspraak mag die beskuldigde in die pleging van 'n misdryf, waarop hy of sy teregstaan, impliseer. Die publisiteit mag suggereer dat die beskuldigde "skuldig" is aan die misdaad waarop hy of sy teregstaan of van swak inbors is en 'n geneigdheid het om misdaad te pleeg. Daarteenoor mag voorverhoorpublisiteit die beskuldigde as onskuldig aan enige strafregtelike oortreding voorstel. In sodanige gevalle ontstaan die vraag of daar 'n daadwerklike of wesenlike risiko is dat sodanige publisiteit die onpartydige beregting van die strafsaak wesenlik sal beïnvloed of skaad; anders gestel: of die publisiteit waarskynlik 'n klimaat van vooroordeel in die beregtingsproses of uitslag van die saak by die verhoorhof mag teweegbring en daardeur die grondwetlike reg op 'n billike verhoor sal skaad. In die Suid-Afrikaanse reg kan voorsittende regters en landdroste strafverhore met of sonder assessore bereg. Die gebruik van assessore het ten doel om gemeenskapsdeelname aan die beregtingsproses te bevorder. Daar is derhalwe al geargumenteer dat assessore, in besonder leke-assessore in die landdroshowe, meer geneig sal wees om onbehoorlik deur ongunstige voorverhoorpublisiteit beïnvloed te word as wat die geval sou wees met opgeleide regsprekende beamptes. In hierdie artikel word daar egter aangevoer dat, aangesien die assessore tydens die beregtingsproses met die voorsittende beampte oorleg pleeg, dit tot verbeterde beregting kan lei deur 'n breër uitkyk op die feite ('n sogenaamde "enlargement of mind"). Sodanige interaksie en beredenering wat plaasvind

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tussen die voorsittende beampte en die assessore kan ook groter deursigtigheid in die beregtingsproses teweegbring of bevorder deur die ontbloting en uitskakeling van ontoelaatbare faktore in die regsbeslissing, soos byvoorbeeld voorverhoorpublisiteit of ander vooroordele. In hierdie verband ontleed die artikel die werking van die assessorestelsel in die Suid-Afrikaanse reg en verduidelik waarom besonder-ernstige strafsake wat uitgebreide voorverhoorpublisiteit voortbring, in die Hooggeregshof met assessore bereg behoort te word.

1 INTRODUCTION

Pre-trial reporting on crime in South Africa, as is the case globally, is an accepted and common phenomenon or practice, albeit one that can give rise to a tension between the right to freedom of expression, more particularly the right to a free press and other media, enshrined in section 16 of the Constitution of the Republic of South Africa, 1996,[1] and the right to a fair trial, guaranteed in section 35(3) of the Constitution.[2] In a previous article[3] the nature of pre-trial publicity in relation to a criminal case which is *sub judice* was highlighted, as well as the different forms of such publicity. Pre-trial publicity surrounding a criminal case may be in the form of media reports, statements or comments, or in the form of published findings or pronouncements made in parallel judicial proceedings arising from substantially the same facts as the pending criminal matter. Such publicity may be adverse to an accused: it may indicate or suggest that the accused is "guilty" of the crime with which he or she has been charged, or it may suggest that the accused is of bad character, so much so that the accused had the propensity to commit the crime in question. Media coverage in advance of trial may conversely portray the accused as innocent of the crime with which he or she has been charged.

The central question that may arise in the above circumstances is whether there is a real and substantial risk that adverse or prejudicial pre-trial publicity would materially affect the impartial adjudication of the accused's case or have a biasing effect on the outcome of his or her trial, thereby imperilling the right to a fair trial.[4]

Such a question may arise even in the context of South Africa's criminal justice system, where a trial is not adjudicated on by a jury, but by a trained

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1 Hereinafter referred to as "the Constitution".

2 See, eg, *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA); Snyman *Criminal law* (2014) 320–322; Hill "*Sub judice* in South Africa: Time for a change" 2001 *SAJHR* 563; Stevenson "Reformulation of *sub judice* rule and prior restraint of publications resolved: A victory for press freedom: *Midi Television (Pty) Ltd v Director of Public Prosecution (Western Cape)* 2007 9 BCLR 958 (SCA)" 2007 *Obiter* 614; Paizes "Conduct of proceedings" in Du Toit, De Jager, Paizes, Skeen, Van der Merwe and Terblanche (gen ed) *Commentary on the Criminal Procedure Act* (RS 60 2018) 22–42B (hereafter Du Toit *et al*); Van Rooyen "Challenges to the *sub judice* rule in South Africa" 2014 *HTS Teologiese Studies/Theological Studies* 1–9; Swanepoel "Pre-trial publicity: Freedom of the press *versus* fair trial rights in South Africa?" 2006 *Ecquid Novi* 3.

3 See Broughton "Accusatorial (adversarial) process as a procedural safeguard in the face of adverse pre-trial publicity" 2019 *THRHR* 214.

4 Broughton 2019 *THRHR* 217; *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 34E–H. Cf also *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) para 19.

judicial officer (either a judge or magistrate depending on the forum in which the trial is heard) sitting alone or with assessors.[5]

The essential purpose of the assessor system is to enable community involvement in the adjudication or judicial decision-making process.[6] In other words, it allows involvement in the court system or judicial process of persons other than the presiding judicial officer.[7] It has therefore been suggested that assessors, especially lay assessors in the magistrates' courts, may be more susceptible to being unduly influenced by adverse pre-trial publicity than a trained judicial officer;[8] judicial officers, who are trained and experienced and bound by their oath to decide a case on the facts before them, are generally regarded as being less likely than lay adjudicators to be influenced by most media reports and comments on pending proceedings – indeed, it is said that a statement outside of court would rarely affect the outcome of a case in a non-jury system.[9] It is

5 Broughton 2019 *THRHR* 213 ff. For a leading Southern African decision on the matter, see *Banana v Attorney-General* 1999 1 BCLR 27 (ZS). See also *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T); *Brown v National Director of Public Prosecutions* [2012] 1 All SA 61 (WCC).

6 See, eg, *S v Jaipal* 2005 1 SACR 215 (CC) para 36, citing *inter alia* Richings "Assessors in South African criminal trials" 1976 *Criminal LR* 107; Van Zyl Smit and Isakow "Assessors and criminal justice" 1985 *SAJHR* 218; and Bekker "Assessore in Suid-Afrikaanse strafsake" in Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 32. See also Kruger *Hiemstra's criminal procedure* (RS 11 2018) 21-5.

7 *S v Jaipal* 2005 1 SACR 215 (CC) para 36.

8 Swanepoel 2006 *Ecquid Novi* 9 19.

9 See, eg, Moseneke "The media, courts and technology: Remarks on the media coverage of the Oscar Pistorius trial and open justice" (15 May 2015) 15–16 available at https://bit.ly/2HqElzi (accessed 30-06-2019); Van Rooyen 2014 *HTS Teologiese Studies/Theological Studies* 7 9; De Vos "The jury trial: Reflections of a South African observer in Western Australia" 2017 *TSAR* 269–271; Dugard "Judges, academics and unjust laws: The Van Niekerk contempt case" 1972 *SALJ* 278; Hill 2001 *SAJHR* 566–567; Cleaver "Ruling without reasons: Contempt of court and the *sub judice* rule" 1993 *SALJ* 533–534; Waye "Judicial fact-finding: Trial by judge alone in serious criminal cases" 2003 *Melbourne Univ LR* 427; De Vos "Oscar Pistorius: Why media reporting is not infringing on *sub judice* rule" (18-02-2013) "Constitutionally Speaking" available at https://bit.ly/2SxUKTZ (accessed 30-06-2019); *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 36F–H, 38C; *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* (1995) 98 CCC (3d) 20 (SCC) para 32 (Westlaw para 33); *S v Chinamasa* 2001 1 SACR 278 (ZS) 298E–F; *Brown v National Director of Public Prosecutions* [2012] 1 All SA 61 (WCC) paras 104–115; and *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) paras 8–9. Cf also *S v Mampie* 1980 3 SA 777 (NC) 779D–G; *Khan v Koch NO* 1970 2 SA 403 (R) 404E–F, citing *R v Essa* 1922 AD 241 246–247. However, in Loucaides "Questions of fair trial under the European Convention on Human Rights" 2003 *Human Rights LR* 40, it is argued as follows: "It may be correct that professional judges are less vulnerable to the influence of mass media than members of juries, but I believe that they are liable to succumb to such an influence if people around them have the same fate. It is not difficult to imagine cases where the mass media have given such extensive hostile publicity to persons suspected of committing crimes, especially abhorrent crimes, that everybody, even before the trial begins, is convinced that the suspects are guilty of what they are accused. I do not suggest that in so acting the mass media are trying to distort the facts. They may be basing themselves on actual facts, which they publish as part of their everyday task of informing the public on matters of public interest or, more precisely, on matters that the public finds interesting. But the fact of the matter remains that in these circumstances judges may, just like many other individuals, be reluctant to go against the general belief of the society where they function." See similarly, Schwikkard *Possibilities of convergence: An outside*

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nevertheless posited in this article that whereas assessors deliberate with the judicial officer in the adjudication process,[10] this may lead to improved judging through a so-called "enlargement of mind" and to greater transparency in adjudication, exposing and preventing any impermissible factors, such as pre-trial publicity or other prejudices, featuring in the judicial determination. It is therefore argued that the assessor system may serve as a procedural safeguard of a fair trial in the face of adverse pre-trial publicity. In this respect, the article explores how the assessor system functions in South Africa's legal system, and accordingly explains why more serious criminal cases that generate extensive publicity in advance of trial ought to be tried in the High Court with assessors.

2 APPOINTMENT OF ASSESSORS

In South Africa, judges or magistrates are "the sole decision makers except in those rare instances where they are assisted by one or more assessors".[11] A criminal case in the High Court may be tried either by a judge sitting alone, or by a judge and one or two assessors.[12] It is entirely in the discretion of the presiding judge whether assessors are to be summoned or not.[13] An assessor is a person who, in the opinion of the presiding judge, "has experience in the administration of justice or skill in any matter which may be considered at the trial".[14] In this regard, Basdeo, Karels and Swanepoel explain that

> "[u]sually the judge procures the services of advocates for this purpose, but occasionally magistrates (especially retired magistrates), attorneys and professors of law serve in this capacity. In cases in which expert evidence on a particular topic

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perspective on the convergence of criminal procedures in Europe (2008) 27; Swanepoel 2006 *Ecquid Novi* 9; Wistrich, Guthrie and Rachlinski "Can judges ignore inadmissible information? The difficulty of deliberately disregarding" 2005 *Univ of Pennsylvania LR* 1251; Damaška *Evidence law adrift* (1997) 50. Vicki Waye, in Waye 2003 *Melbourne Univ LR* 427, makes the observation that "there have been warnings that intuitive views regarding judicial immunity to community pressure may be over-sanguine. Cases that engender community outcry because of their shocking facts are likely to place difficult fact-finding burdens on judges whose opinions are later open to scrutiny and criticism when reasons for judgment are published".

10 This aspect is elaborated on below.

11 Schwikkard *Possibilities of convergence* 21. Cf the notable trial of Oscar Pistorius.

12 See s 145 of the Criminal Procedure Act 51 of 1977; *S v Jaipal* 2005 1 SACR 215 (CC) para 33. For a discussion of general aspects relating to assessors appointed by judges in High Court criminal cases, see Van der Merwe "Trial before superior court" in Du Toit *et al* 21-4–21-6; Kruger *Hiemstra's criminal procedure* 21-4–21-7; Basdeo, Karels and Swanepoel "The trial courts" in Joubert (ed) *Criminal procedure handbook* (2017) 260–262 (hereafter Basdeo *et al* in Joubert (ed)); Skeen "Criminal procedure" in 5(2) *LAWSA* (2004) para 291. For a critical analysis of the assessor system, see Steytler *Constitutional criminal procedure: A commentary on the Constitution of the Republic of South Africa, 1996* (1998) 263–265; Nel "Evaluering van die jurie- en assessorestelsel in die lig van die strewe om die regbank in die strafhowe meer verteenwoordigend van die gemeenskap te maak" 2001 *TSAR* 315–327; Van Zyl Smit and Isakow 1985 *SAJHR* 228–235; Huebner "Who decides? Restructuring criminal justice for a democratic South Africa" 1993 *Yale LJ* 977–980; Dugard "Lay participation in the administration of justice" 1972 *Crime, Punishment and Correction* 56–57.

13 De Vos 2017 *TSAR* 275; Nel 2001 *TSAR* 318; Skeen 5(2) *LAWSA* (2004) para 291; Richings 1976 *Criminal LR* 111–112.

14 See s 145(1)(b) of the Criminal Procedure Act. See also *S v Jaipal* 2005 1 SACR 215 (CC) para 33; Basdeo *et al* in Joubert (ed) 260.

> is expected to be led, the judge may sit with an assessor who is professionally qualified in the field in question (eg in medicine, engineering, accountancy)".[15]

Albert Kruger similarly notes that

> "[t]he judge decides before the trial commences whether it would be advisable to use assessors. Usually assessors will be able to make a contribution where complex factual or legal questions are envisaged. The assessors must have experience of the administration of justice or otherwise particular knowledge of a matter which will have to be considered in the trial, for instance an accountant [may] be useful in a particularly complicated commercial case."[16]

Where issues in a case "require a detailed knowledge of matters beyond the reach of the ordinary judge, such as medicine, engineering or accountancy", the judge may consider summoning assessors who are experts in the relevant field – the purpose of such latter assessors "is to explain the evidence led to the other members of the court, and not themselves to act as a source of evidence".[17]

Laypersons, apart from experts, are excluded from being appointed as assessors in the High Court.[18] It also rarely happens in practice that members of professions other than the legal profession are called up as assessors.[19] One

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15 Basdeo *et al* in Joubert (ed) 260.

16 Kruger *Hiemstra's criminal procedure* 21-4–21-5. See also in Du Toit *et al* 21-4, where it is said that: "The interpretation of the term 'a person experienced in the administration of justice' in practice leads to the appointment of advocates, magistrates, attorneys and legal academics as assessors. Persons with a specific skill will include such persons as accountants or auditors." See too Richings 1976 *Criminal LR* 110–111; Bekker in Strauss (ed) 37–39; and De Vos 2017 *TSAR* 274–275. Richings and Bekker provide an instructive analysis of the types of persons who may be appointed as assessors.

17 Richings 1976 *Criminal LR* 110.

18 *Idem* 111. While certain commentators argue that consideration can or ought to be given to the appointment of "lay assessors", that is, persons without a legal qualification (see eg Dugard 1972 *Crime, Punishment and Correction* 57–59; Van Zyl Smit and Isakow 1985 *SAJHR* 233–234; Nel 2001 *TSAR* 322–323), other commentators are opposed to such a proposition – Bekker "The American grand jury: Judicial empowerment of the South African population in general?" in Joubert (ed) *Essays in honour of SA Strauss* (1995) 21; Huebner 1993 *Yale LJ* 982–990, where it is argued that judges would heed assessors more who have legal expertise, and assessorships can be used to provide invaluable training to future black jurists in the process of transforming or making the judiciary more representative. Huebner makes the point that where assessors are drawn from the legal profession, this would make for better judging in that judges would consult with them on the facts and the law and they would also "have to explain and justify themselves to knowledgeable and interested peers" (988). Huebner opines further that such a process would moreover "bring judicial reasoning 'into the sunshine,' exposing and precluding any insidious attempts to let impermissible factors such as racism figure into the judicial determination" (*ibid*). I deal more fully with the latter aspect below. Bekker in Strauss (ed) 38 observes that apart from other problems that may arise with the inclusion of laypersons as assessors, it can be accepted that accused persons may have serious objections to being tried by laypersons. Such is a reality that cannot be ignored. Bekker pertinently notes in a separate work that "it is not practicable for a professional functionary to function on exactly the same footing as complete laymen" – see Bekker in Joubert (ed) 21.

19 See De Vos 2017 *TSAR* 274. Cf also, eg, *S v Prinsloo* 2016 2 SACR 25 (SCA), a complex commercial, Ponzi-scheme case (the *Krion* trial), where the presiding judge appointed two legal practitioners as assessors instead of qualified experts in the relevant field. In *Brown v National Director of Public Prosecutions* [2012] 1 All SA 61 (WCC) para 117, the court noted that assessors appointed in the High Court "are usually people who have had legal training and practical experience in the operation of our legal system". See too Swanepoel 2006 *Ecquid Novi* 9.

commentator opines that insofar as legally qualified or trained persons serving as assessors are concerned, the ideal assessor would be a person who has extensive practical court and life experience. After all, he or she together with the presiding judge are the triers of fact and hence it can be expected of a good assessor to have the ability to sift or evaluate the evidence and accordingly make proper determinations on the credibility of witnesses and the facts of the case.[20] John Dugard notes that "[t]he ideal assessor is a senior advocate who will bring an independent mind to bear on the fact-finding process".[21]

Certain commentators point out that personal predilections of the judge undoubtedly play a role in his or her selection of assessors, and that the danger is always present that where assessors are paid for their services or rely on assessing fees for their income (such as in the case of legally qualified persons who are retired from legal practice), they may be dependent on the goodwill of the judge for their next appointment and therefore be less likely to exercise the same degree of independence in the adjudication process as, for example, a practising advocate who sits as an assessor on rare occasions.[22] "The fact that the judge chooses his own assessors might create the impression that the judge is favouring particular individuals. There is a danger that the public will gain the impression that it is a system of patronage in which work is provided for retired brethren of the profession who might need extra support."[23] In such a system, there is a danger that a judge may appoint "yes persons", persons who could easily be influenced in their decision-making or persuaded to follow the judge's view on the merits of a case, or who would be reluctant to disagree with the verdict reached by the judge, so as not to antagonise the judge at whose pleasure they serve or at whose mercy they are for future employment.[24] It has thus been suggested that a system ought to be designed whereby the appointment of assessors and their allocation to cases should take place independently of the presiding judge, where all judicial discretion in the selection of assessors is eliminated.[25] It has also been suggested that "[a]n assessor system consistent with the principle of judicial independence must limit the appointment of assessors either to a single case or to a fixed period".[26] Ultimately, for greater transparency and independence of each member of the composite court in the adjudication process, there should not be a system where an assessor might be influenced in his or her decision-making because his or her next appointment may depend on the goodwill of the judicial officer in question, neither should there be a system where the judge chooses people to serve as assessors with

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20 Bekker in Strauss (ed) 38: "Die ideale assessor is . . . myns insiens die juris wat die wyds moontlike praktiese hofervaring en lewenswysheid opgedoen het. Hy is, tesame met die regter, die beoordelaar van feite en daarom kan van die goeie assessor verwag word om met feite te kan werk."

21 Dugard 1972 *Crime, Punishment and Correction* 56. See also Bekker in Strauss (ed) 37–38.

22 See Richings 1976 *Criminal LR* 111–112; Dugard 1972 *Crime, Punishment and Correction* 56–57; Van Zyl Smit and Isakow 1985 *SAJHR* 230–231.

23 Van Zyl Smit and Isakow 1985 *SAJHR* 230.

24 *Ibid*; Huebner 1993 *Yale LJ* 979–980; Steytler *Constitutional criminal procedure* 264–265; Nel 2001 *TSAR* 318–319.

25 Van Zyl Smit and Isakow 1985 *SAJHR* 231–235; Steytler *Constitutional criminal procedure* 265; Huebner 1993 *Yale LJ* 982.

26 Steytler *Constitutional criminal procedure* 265.

whom he or she is comfortable – people similar in disposition and outlook – and thus inclined to agree with the judge.[27] Perhaps consideration could be given to a system whereby the Judge President of a particular Division of the High Court allocates assessors from a predetermined list of suitable persons available to serve as assessors, where the presiding judge indicates that he or she intends presiding in a case with assessors.[28]

Before a trial commences (or before any evidence is adduced), an assessor appointed by the judge must take an oath that he or she will "give a true verdict upon the issues to be tried, on the evidence placed before him or her".[29] As soon as this oath has been administered by the judge, the assessor becomes a member of the court.[30]

As alluded to above, statutory provision is also made for the use of assessors in lower courts (district and regional magistrate's courts).[31] Laypersons may be appointed as assessors in these courts.[32] In a district or regional court trial, the magistrate may, if he or she deems it expedient for the administration of justice, before any evidence has been led or in considering a community-based punishment in respect of any person who has been convicted of any offence, summon one or two assessors to assist him or her at the proceedings.[33] When an accused stands trial in the regional court on a charge of murder, it is peremptory that the judicial officer be assisted by two assessors unless the accused requests that the trial be proceeded without assessors.[34] Where the accused makes such a request, "the judicial officer becomes clothed with a discretion either to summon one or two assessors to assist him or to sit without an assessor".[35] In such a case the quorum prescribed by section 93*ter*(1) of the Magistrates' Courts Act is three members, namely the regional magistrate and two assessors, unless the accused requests that the trial proceed without assessors, in which event the regional magistrate in his or her discretion can, sitting alone, constitute a quorum.[36] The

27 *Ibid*; Huebner 1993 *Yale LJ* 979.

28 For the suggestion that assessors should be drawn from a predetermined list of suitable persons, the compilation of which is subject to judicial supervision, see Van Zyl Smit and Isakow 1985 *SAJHR* 232–234.

29 *S v Jaipal* 2005 1 SACR 215 (CC) para 33. See also s 145(3) of the Criminal Procedure Act; Kruger *Hiemstra's criminal procedure* 21-5; Bekker in Strauss (ed) 44: "'n Assessor hoor geen getuienis aan nie tensy hy eers 'n eed aflê of 'n bevestiging doen wat deur die voorsittende regter waargeneem word, dat hy, op die getuienis wat voor hom geplaas word, 'n ware uitspraak sal gee oor die punte wat bereg moet word."

30 See Basdeo *et al* in Joubert (ed) 261. See also s 145(4) of the Criminal Procedure Act; Bekker in Strauss (ed) 45.

31 See s 93*ter* of the Magistrates' Courts Act 32 of 1944.

32 See *Brown v National Director of Public Prosecutions* [2012] 1 All SA 61 (WCC) para 116; Schwikkard *Possibilities of convergence* 21; Kahn "Restore the jury? or 'Reform? Reform? Aren't things bad enough already?' V" 1993 *SALJ* 324; Nel "Evaluering van die assessorestelsel in die landdroshowe" 2002 *De Jure* 66–67; and Swanepoel 2006 *Ecquid Novi* 9, noting that persons with no legal background can be appointed as assessors. See also Seekings and Murray *Lay assessors in South Africa's magistrates' courts* (1998), where an empirical analysis and evaluation of laypersons serving as assessors in lower courts are given.

33 See Basdeo *et al* in Joubert (ed) 259. See also s 93*ter*(1) of the Magistrates' Courts Act.

34 *Ibid.*

35 *S v Gayiya* 2016 2 SACR 165 (SCA) para 8. See also s 93*ter*(1) of the Magistrates' Courts Act.

36 *S v Gayiya* 2016 2 SACR 165 (SCA) para 11.

regional magistrate must therefore inform the accused, before the commencement of a trial on a charge of murder, that it is a requirement of the law that he or she must be assisted by two assessors unless the accused requests that the trial proceed without assessors.[37] Where the regional magistrate fails to do so, such failure constitutes an irregularity which vitiates the proceedings.[38]

In terms of section 93*ter*(2)(*a*) of the Magistrates' Courts Act, the judicial officer, in considering whether summoning assessors would be expedient for the administration of justice, shall take into account such factors as the cultural, social and educational background of the accused, the nature and seriousness of the offence, the punishment or potential punishment, and any other relevant factor.[39]

The underlying purpose of the use of lay assessors with reference to the factors to be considered in terms of section 93*ter*(2)(*a*) of the Magistrates' Courts Act in deciding to summon them or not, was enunciated in *S v Gambushe* as follows:[40]

> "As I understand the object of these provisions, it was to bridge what was conceived to be the cultural gap between the magistrates, on the one hand, and the large number of intellectually unsophisticated and uneducated accused persons who frequently came to trial before them, on the other. What was contemplated was that the presence of the assessors would make the trial of the accused more of a 'trial by peers' and constitute some protection against the conduct or reactions of the witnesses and the accused being judged by incorrect yardsticks not applicable to those of the environment and community to which those witnesses and the accused belong. In a limited sense, then, the assessors were intended to give the magistrate the benefit of their expertise and experience of the community from which the accused comes and of its communal values and standards, which might often explain conduct or reactions which a stranger to that community might regard as doubtful or suspicious."[41]

It is said that by enabling the judicial officer through the use of lay assessors to better understand the community from which the accused and/or witnesses come, a better decision can be reached or a greater degree of justice can be attained.[42] It is also claimed that the lay assessor system makes judicial officers more accountable.[43]

However, in *Gambushe*'s case, the Court referred to the "tuition" or directions which the presiding officer would, perforce, need to give assessors – who lack legal or procedural knowledge or experience or expertise – preparatory to their

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37 *Idem* para 8.

38 *Ibid.*

39 See Basdeo *et al* in Joubert (ed) 259.

40 1997 1 SACR 638 (N) 642*g*–643*a*.

41 For further reading on the aims and value of, as well as the criticism levelled by judicial officers against, the use of lay assessors in magistrates' courts, see Nel 2002 *De Jure* 70–71 74 78–79 89–90.

42 *Idem* 89–90.

43 *Idem* 90. See also Seekings and Murray *Lay assessors in South Africa's magistrates' courts* 139, where the observation is made that: "Whether or not assessors make a difference in court in terms of what they bring to the bench, their very presence helps to keep 'the magistrate on his toes', as one put it. In small towns, especially, magistrates come to wield a lot of power; the lay assessor system opens them to potential challenge, and thereby makes them more accountable."

analysis of the evidence at the end of the case, such as with regard to the approach to the evidence of a single witness or the evidence of accomplices. The presiding officer would also need to explain to the assessors why such rules of evidence are in place. The giving of such directions or instructions would be analogous to a court's directions to a jury, and would have to form part of the trial record.[44] The court pointed out that it could *not be presumed that lay assessors appointed in magistrates' courts would have the same status and capabilities as assessors appointed in the High Court in terms of section 145 of the Criminal Procedure Act*, who are usually, save in the case where there may be questions of fact involving specialist technical expertise, persons having previous experience in the administration of justice or criminal procedure and in the science of evaluation of evidence.[45] It was moreover underlined that the trial court would be required to give reasons for its verdict, including for any dissenting verdict, and in this regard it would be necessary for the judgment to reflect clearly whether the views expressed as to the acceptability of each material aspect of the evidence are the unanimous views of the members of the court.[46] The court in *Gambushe* also pointed out that where an assessor has special knowledge of some custom or habit peculiar to the community from which the witness or the accused comes, which may affect his or her conclusion as to the facts, he or she should inform the court of this knowledge and the existence or otherwise of the custom (and, of course, its effect on the assessment of the evidence) can then be properly aired in evidence and form part of the record in the trial.[47]

As in the High Court, presiding magistrates must, before the trial or the imposition of punishment, as the case may be, administer an oath to the person or persons whom he or she has called as an assessor(s), in terms whereof the assessor(s) must swear or solemnly affirm that he or she or they will give a true verdict or a considered opinion according to the evidence upon the issues to be tried or regarding the punishment, and thereupon he or she or they shall be a member or members of the court.[48]

3 ROLE AND FUNCTION OF ASSESSORS IN THE ADJUDICATION AND JUDICIAL DECISION-MAKING PROCESS

Although the role or function of assessors, especially in relation to lay assessors, has to some extent been likened to that of a jury or mini jury,[49] as they are

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44 1997 1 SACR 638 (N) 644*c–e* 644*i*–645*c*.

45 643*d–e* 645*a–b*.

46 644*f–h*.

47 644*h–i*. With reference to *Gambushe*, it is commented in Steytler *Constitutional criminal procedure* 264, that "unskilled" assessors would "require different procedures for the performance of their task". See moreover Nel 2002 *De Jure* 86–87, on the aspect of critical training that lay assessors need to understand trial court procedure and to fulfil the task of proper decision-making.

48 See s 93*ter*(3) of the Magistrates' Courts Act. See also Nel 2002 *De Jure* 68.

49 See *R v Mabaso* 1952 3 SA 521 (A) 524G; *S v Nieuwoudt (3)* 1985 4 SA 510 (C) 515D; *S v Maselela* 1996 2 SACR 497 (T) 500*b–i*; *S v Gambushe* 1997 1 SACR 638 (N) 643*b*; *S v Maphanga* 2001 2 SACR 371 (W) para 16; Bekker in Strauss (ed) 37; Steytler *Constitutional criminal procedure* 264; Huebner 1993 *Yale LJ* 976.

finders of fact and do not decide legal issues,[50] save possibly in High Court matters on the question of the admissibility of any confession or other statement made by the accused,[51] "the differences between assessors and juries are substantial and compelling" in that (i) assessors as members of the court determine questions of fact *with* the judicial officer (they deliberate together with the presiding officer in reaching a decision on the merits, that is, on the guilt or innocence of the accused); (ii) their reasoning is made public; and (iii) they may participate in the trial proceedings by putting questions to witnesses and the accused.[52] Assessors do "not constitute a separate fact-finding entity".[53] Even though assessors are restricted to making determinations of fact, unlike jurors they are at all stages of the trial under the constant and immediate "supervision" and "guidance" of the presiding officer (ie the judge or magistrate) with whom they make a joint deliberation and if they disagree with the presiding officer they are required to give reasons for their decision.[54] A jury, on the other hand, is a separate fact-finding entity to the presiding officer, in what is a bifurcated trial system,[55] and a jury does not furnish reasons for its decision.[56]

The fundamental distinction between jury systems and the South African system of assessors, in relation to both High Court and lower court trials, is summed up best by SE van der Merwe, as follows:[57]

> "Assessors in lower courts and in the High Court can to some extent be compared with jurors as they are all finders of fact and do not decide legal issues. But our system of adjudication differs materially from trial by jury. The role of jurors can briefly be summarised as follows: jurors are lay people and sole finders of fact. They listen to the evidence and hear arguments, and they receive a summing-up and instructions from the presiding judicial officer. They are then called upon in their capacity as sole finders of fact to consider and reach their verdict *in the*

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50 Van der Merwe "An introduction to the history and theory of the law of evidence" in Schwikkard and Van der Merwe (eds) *Principles of evidence* (2016) 15–16 (para 1 6).

51 S 145(4) of the Criminal Procedure Act.

52 *S v Jaipal* 2005 1 SACR 215 (CC) para 45; *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 37D–F; Hahlo and Kahn *The Union of South Africa: The development of its laws and constitution* (1960) 262; Richings 1976 *Criminal LR* 112–113; Bekker in Strauss (ed) 37; Van der Merwe "Introduction" in Schwikkard and Van der Merwe (eds) 15–16 (para 1 6); De Vos 2017 *TSAR* 275; Huebner 1993 *Yale LJ* 977; Van Zyl Smit and Isakow 1985 *SAJHR* 227–230.

53 Dugard 1972 *Crime, Punishment and Correction* 58.

54 *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 37D–F, 38H–I; *Brown v National Director of Public Prosecutions* [2012] 1 All SA 61 (WCC) para 117; Schwikkard *Possibilities of convergence* 21; Van der Merwe "Introduction" in Schwikkard and Van der Merwe (eds) 16 (para 1 6). The giving of reasons for a decision by a court comprised of a judicial officer and assessors is statutorily peremptory – see s 146 of the Criminal Procedure Act; s 93*ter*(3)(*e*) of the Magistrates' Courts Act 32 of 1944. See also *S v Jaipal* 2005 1 SACR 215 (CC) para 35; Richings 1976 *Criminal LR* 113; Van Zyl Smit and Isakow 1985 *SAJHR* 228; Skeen 5(2) *LAWSA* para 291: "A judge must give reasons for all decisions on questions of law and/or fact, and where an assessor differs from the judge on a question of fact, he or she must state the assessor's reasons"; Basdeo *et al* in Joubert (ed) 262.

55 See, eg, Damaška *Evidence law adrift* 26–27, 46–48.

56 See, eg, *S v Jaipal* 2005 1 SACR 215 (CC) para 45; Schwikkard *Possibilities of convergence* 27; Kahn 1993 *SALJ* 330; De Vos 2017 *TSAR* 261, 267.

57 Van der Merwe "Introduction" in Schwikkard and Van der Merwe (eds) 15–16 (para 1 6) (footnotes omitted; emphasis added).

> *absence of the presiding judicial officer. And they are not required to advance reasons in support of their verdict.* But in our system the judge or magistrate is at all times either a sole finder of fact or, where assessors are involved, a co-finder of fact. *A judge must give reasons for his verdict. Magistrates almost invariably do give reasons for their verdict and are at any rate legally required to do so.* It is true that the function of assessors can be compared with the function of jurors, because the function of assessors is – with one exception – also limited to fact-finding. But assessors – unlike a jury – *must give reasons for their verdict. They either agree or disagree with the presiding judicial officer's reasons and finding, and in the event of a disagreement must furnish their own reasons in a separate judgment which is read out in court by the presiding judicial officer.* And assessors – unlike jurors – *are under constant and immediate judicial guidance in the sense that a judge (or magistrate) and the assessors involved in the trial have joint deliberations in reaching their respective verdicts. During these deliberations the presiding judicial officer can and must draw the attention of lay assessors to certain rules which govern the evaluation of evidence.*"

It is submitted that the following are procedural safeguards and judicial mechanisms that would guarantee a fair trial with assessors, in particular the impartial adjudication of the case in the face of pre-trial publicity that is adverse to the accused: first, assessors deliberate with the presiding judicial officer in reaching a verdict and have ready access to the presiding officer and receive ongoing guidance and supervision from him or her at all stages of the trial. Second, the solemnity of the oath administered to the prospective assessors, as well as the presumption that they will perform their bounden duty with integrity, and determine the guilt or innocence of the accused free from extraneous considerations, and free from either prejudice against or favour for the accused contribute to this end. Third, the instruction or reminders of the trial judge to the assessors that the case is to be decided solely on the evidence elicited at the trial are further procedural safeguards. Fourth, the nature of the accusatorial trial is that the parties would focus the minds of the assessors on the evidence put before them rather than on prior publicity detrimental to the accused. Finally, reasons must be furnished for all factual findings with the prospect of an appeal if such findings are not justified on the admissible evidence.[58]

Assessors appointed by a judge are members of the court and participate in all decisions of the court on questions of fact.[59] In such instances, "the finding of the majority of the court on questions of fact shall be the decision of the court".[60] In the Appellate Division decision of *S v Malindi*, Corbett CJ, for the court, explained that:[61]

> "Where the Judge sits with two assessors the decision of the majority (on factual questions) constitutes the decision of the Court. Where, on the other hand, the Judge sits with only one assessor, then in the event of a difference of opinion the decision of the Judge prevails . . . An accused person has a right to have his case considered by every member of the fact-finding tribunal."

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58 *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) 38D–I; Hill 2001 *SAJHR* 567; Cleaver 1993 *SALJ* 534.

59 See *S v Malindi* 1990 1 SA 962 (A) 970G; *S v Jaipal* 2005 1 SACR 215 (CC) para 34.

60 Van der Merwe in Du Toit *et al* 21-5. See also s 145(4)(a) of the Criminal Procedure Act; *S v Jaipal* 2005 1 SACR 215 (CC) para 34.

61 1990 1 SA 962 (A) 970G–H. See also s 145(4)(a) of the Criminal Procedure Act; *S v Jaipal* 2005 1 SACR 215 (CC) para 34.

Two assessors may thus "overrule" or "outvote" the judge on factual questions.[62] "Only in the far rarer cases where a judge sits with one assessor is the decision of the judge on the facts automatically conclusive in the sense that it becomes the finding of the court."[63] Where the judge sits with two assessors, and all three members of the court disagree or have a difference of opinion on the facts, for example, where one assessor would convict of murder, the other of culpable homicide, while the judge is in favour of an acquittal, the trial is rendered abortive in that it is impossible for a verdict to be given. In such instances it would then be left to the Director of Public Prosecutions to institute a trial *de novo*.[64]

One writer observes, however, that disagreements are rare and "it also seldom happens that the assessors override the verdict of the trial judge".[65] An empirical investigation shows that in respect of determinations of fact, "judges were very rarely outvoted by their assessors when it came to public pronouncements on guilt or innocence".[66] The study concluded that from the paucity of recorded dissenting judgments by assessors, the actual influence of assessors on the verdict was slight, and the possibility remained that judges could easily persuade assessors to follow their view on the merits.[67] As to the influence of assessors, judges interviewed in the study indicated that the verdict reached jointly was the product of continual interaction throughout the trial between the presiding judge and the assessors.[68] As it is believed that a dissenting assessor would not necessarily press his or her opinion,[69] and may be inclined to give in to the judge's view,[70] which may be compounded by a system where the assessor's next appointment is dependent on the goodwill of the judge, it has been suggested that a system is needed where greater independence of assessors in the decision-making or adjudication process is guaranteed or ensured, as noted above.

If the presiding judge is of the opinion that it would be in the interests of the administration of justice that the assessor(s) assisting him or her 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 or her, the judge alone shall decide upon such question, and he or she may for this purpose sit alone.[71] A judge, then, may, in his or her discretion, together with the assessors determine the admissibility of any confession or other statement made

62 See *S v Jaipal* 2005 1 SACR 215 (CC) para 34; *R v Bellingham* 1955 2 SA 566 (A); Kruger *Hiemstra's criminal procedure* 21-5; Van Zyl Smit and Isakow 1985 *SAJHR* 225; Skeen 5(2) *LAWSA* para 291; Bekker in Strauss (ed) 45; Steytler *Constitutional criminal procedure* 264.

63 Van Zyl Smit and Isakow 1985 *SAJHR* 225. See also, eg, *S v Jaipal* 2005 1 SACR 215 (CC) para 34; Richings 1976 *Criminal LR* 113; Bekker in Strauss (ed) 45; and De Vos 2017 *TSAR* 275.

64 Cf *R v Ndoko* 1945 EDL 87. See also Richings 1976 *Criminal LR* 113; Bekker in Strauss (ed) 45.

65 Richings 1976 *Criminal LR* 113. See also *R v Von Zell* 1953 3 SA 303 (A) 312E.

66 Van Zyl Smit and Isakow 1985 *SAJHR* 229.

67 *Idem* 229–230.

68 *Idem* 230.

69 Richings 1976 *Criminal LR* 113.

70 Van Zyl Smit and Isakow 1985 *SAJHR* 230.

71 See Basdeo *et al* in Joubert (ed) 261.

by the accused.[72] A presiding judge alone shall decide upon any other question of law (for example a question as to whether certain evidence is hearsay or not), or upon any question whether any matter constitutes a question of law or a question of fact, and he or she may for this purpose sit alone.[73] An application at the close of the state's case for the discharge of an accused in terms of section 174 of the Criminal Procedure Act is a question of law, and the decision in this respect is that of the judge alone.[74] Sentencing is the function of the presiding judge alone, but it is not irregular for the judge to discuss the matter with the assessors provided that the judge decides on sentence him- or herself.[75]

In lower court criminal cases, assessors decide on all matters of fact, and they do not decide on any matters of law.[76] Any question as to whether a matter for decision is a matter of fact or a matter of law is to be decided by the presiding judicial officer alone.[77] The presiding judicial officer may adjourn the argument upon any matter of law or any question as to whether a matter for decision is a matter of fact or a matter of law, and may sit alone for the hearing of such argument and the decision of such matter or question.[78] With regard to matters of fact, the decision of the court is that of the majority thereof.[79] Two assessors can, as in High Court cases, outvote the magistrate on factual issues.[80] If there is only one assessor, "the decision or finding of the magistrate prevails".[81] Nel observes that the interaction between the role or function of assessors and that of the presiding magistrate as regards the decision on matters of fact is as follows: assessors are limited in their participation in the decision-making process to evaluating the evidence and deciding which set of facts to accept, whilst the magistrate has to test the facts against the law and takes the responsibility of deciding whether the accused is guilty or not guilty.[82] Where an assessor is a

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72 *Ibid.* See also s 145(4)(a) and (b) of the Criminal Procedure Act; *S v Ngcobo* 1985 2 SA 319 (W) 320E–321E; *S v Hendricks* 1990 2 SACR 375 (C) 376*i*–377*a*. Cf also *S v Zulu* 1998 1 SACR 7 (SCA) 10*d*–*g*.

73 See s 145(4)(*c*) of the Criminal Procedure Act; *S v Ngcobo* 1985 2 SA 319 (W) 321C–D; *S v Jaipal* 2005 1 SACR 215 (CC) para 34; *S v Naidoo* 1998 1 SACR 479 (N) 486*a*–487*b*; Basdeo *et al* in Joubert (ed) 261–262.

74 See *R v Mgomezulu* 1955 3 SA 557 (N); *S v Magxwalisa* 1984 2 SA 314 (N) 317A; Basdeo *et al* in Joubert (ed) 262.

75 See Skeen 5(2) *LAWSA* para 291, with reference to *S v Sparks* 1972 3 SA 396 (A) 403F–405A. See also *S v Lekaota* 1978 4 SA 684 (A) 688C–E; *S v Botha* 2006 2 SACR 110 (SCA) paras 20–21 24; Van der Merwe in Du Toit *et al* 21-5–21-6; Kruger *Hiemstra's criminal procedure* 21-7.

76 See s 93*ter*(3)(a) and (d) of the Magistrates' Courts Act; Basdeo *et al* in Joubert (ed) 259; Nel 2002 *De Jure* 80.

77 *Ibid.*

78 See s 93*ter*(3)(*b*) of the Magistrates' Courts Act.

79 Basdeo *et al* in Joubert (ed) 259; Nel 2002 *De Jure* 80.

80 See Swanepoel 2006 *Ecquid Novi* 9. Cf also *S v Gambushe* 1997 1 SACR 638 (N).

81 Kahn 1993 *SALJ* 325. See also s 93*ter*(3)(*d*) of the Magistrates' Courts Act; Nel 2002 *De Jure* 80.

82 Nel 2002 *De Jure* 80: "Die wisselwerking tussen die rol van assessore en dié van die voorsittende amptenaar is kortliks soos volg: Assessore word beperk tot deelname aan die besluitnemingsproses oor die waarde van gelewerde (en toelaatbare) getuienis en welke feitestel aanvaar behoort te word; die regsprekende amptenaar moet dan die feite aan die reg toets en die verantwoordelikheid neem om te besluit of 'n persoon skuldig of onskuldig is." See also *Brown v National Director of Public Prosecutions* [2012] 1 All SA 61 (WCC) para 116, where it was held that assessors merely give their "input" to the presiding

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layperson, it is advisable that when the court must decide a legal question, especially the question of the admissibility of evidence, the presiding magistrate ought to adjourn the proceedings for argument on any such matter and sit alone when hearing such argument and deciding the issue. In this way the possibility of inadmissible evidence coming to the attention of and unduly influencing the lay assessor is avoided.[83]

Unless an assessor is appointed to assist a magistrate in considering a community-based sentence,[84] such as correctional supervision or a suspended sentence where the performance of community service as a condition of suspension is contemplated,[85] the assessor shall not have a say in the imposition of sentence.[86]

4 BENEFITS OF AN "ENLARGEMENT OF MIND" IN THE ADJUDICATION PROCESS OF A COMPOSITE OR MIXED TRIBUNAL WITH ASSESSORS

From the afore-going analysis of the function and role of assessors in the adjudication process, it is clear that there is close interaction and deliberation that take place between assessors and the presiding judicial officer in reaching a verdict in a case. For present purposes, the question arises why this feature of the assessor system is critical in ensuring a fair trial and a just decision when the trial court is confronted with adverse pre-trial publicity; in other words, it ought to be considered how the assessor system can be conceived of as a step towards judicial impartiality in adjudication.

Taking the perspectives of others into account, or critically examining one's own perspectives against the perspectives of others, in the decision-making process would lead to an "enlargement of mind", which in turn may enhance the "disinterestedness" that is necessary for impartial adjudication, in that it would enable judicial officers to gain objective insight into their own opinions, feelings and idiosyncrasies. In other words, it would free the presiding officer from the constraints of his or her subjectivity or "*partial* subjective knowledge".[87] Jennifer Nedelsky appositely notes that:[88]

> "What makes it possible for us to genuinely judge, to move beyond our private idiosyncrasies and preferences, is our capacity to achieve an 'enlargement of mind'. We do this by taking different perspectives into account. This is the path out of the blindness of our subjective private conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective . . . It is the capacity for 'enlargement of mind' that makes autonomous, impartial judgment possible."

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magistrate, with the final decision being left for the magistrate. But they may outvote the magistrate.

83 See Nel 2002 *De Jure* 80–81.

84 See s 93*ter*(1)(*b*) of the Magistrates' Courts Act.

85 See s 93*ter*(2)(*b*) of the Magistrates' Courts Act.

86 Kahn 1993 *SALJ* 325. See also Nel 2002 *De Jure* 79–80.

87 Cochran "Taking notice: Judicial notice and the 'community sense' in anti-poverty litigation" 2007 *Univ of British Columbia LR* 569–571 (author's emphasis).

88 Nedelsky "Embodied diversity and the challenges to law" 1997 *McGill LJ* 107, cited with approval in *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC) para 42 (Westlaw).

In this sense, then, "several heads are better than one", being a central justification for appellate courts sitting in panels.[89]

Nedelsky draws on Hannah Arendt's conception of judgment in which the condition *sine qua non* of right or valid judgment is, with reference to Immanuel Kant, an "enlarged mentality" or "enlarged thought" where one's own judgments are compared with the possible judgments of others, and by putting ourselves in the place of any other person; "[t]o think with an enlarged mentality means that one trains one's imagination to go visiting".[90] An "enlargement of the mind" is the ability to abstract from private conditions and circumstances, which, as far as judgment is concerned, limit and inhibit its exercise.[91] Enlarged thought means disregarding the subjective private conditions of one's own judgment, by which one would be confined, and reflecting on one's judgment from a "general standpoint" (which one could only determine by placing oneself at the standpoint of others).[92] This general standpoint or the notion that one can "enlarge" one's own thought so as to take into account the thoughts of others is synonymous with impartial judgment; "*impartiality* is obtained by taking the viewpoints of others into account".[93] According to Arendt, imagination and reflection on the viewpoints of others enable us to liberate ourselves in judging from subjective private conditions and "to attain that relative impartiality that is the specific virtue of judgment".[94] One commentator captures the essence of this conception of judgment by Arendt, as follows:[95]

> "An enlarged mentality also allows for impartiality by adding perspectives to the *partial* subjective knowledge of the judge. A judge is always a member of communities, and it is by referring to the perspectives of the other members of those communities that valid judgment occurs. By training the imagination to 'go visiting,' a judge can expand the perspectives that are taken into account when forming a judgment."

In the present context, Arendt's notion of right or virtuous judgment would mean that where, as would be the case in the majority of High Court criminal trials where assessors with legal experience or expertise are used, the presiding judicial officer will have to explain and justify him- or herself to knowledgeable and interested peers or legal functionaries in the decision-making process, this would make for "better judging", and it would "bring judicial reasoning 'into the sunshine', exposing and precluding any insidious attempts to let impermissible factors such as racism figure into the judicial determination".[96] Indeed, it has been said that the need for assessors to sit and decide jointly with the judicial officer "is determined by the fallibility of human judgment": "Trial by a single judge or magistrate provides no safeguard against the vagaries of the individual".[97] The assessor system "would go a long way toward providing such a safeguard",

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89 Devlin, MacKay and Kim "Reducing the democratic deficit: Representation, diversity and the Canadian judiciary, or towards a 'triple P' judiciary" 2000 *Alberta LR* 795.

90 Arendt *Lectures on Kant's political philosophy* (1982) 42–44 73.

91 *Idem* 43 73.

92 *Idem* 43–44.

93 *Idem* 42–44 (author's emphasis).

94 *Idem* 73.

95 Cochran 2007 *Univ of British Columbia LR* 570 (footnote omitted; author's emphasis).

96 Huebner 1993 *Yale LJ* 988. See also Nel 2001 *TSAR* 327.

97 Van Zyl Smit and Isakow 1985 *SAJHR* 235, citing Williams *The proof of guilt: A study of the English criminal trial* (1963) 299.

and especially in a system which guarantees greater independence of assessors in the adjudication process, where they are in other words not simply "yes persons" *vis-à-vis* the presiding judicial officer.[98] The assessor system can serve as a safeguard against the risk of prejudice.[99] An effective assessor system can moreover assist to prevent error in the judicial determination.[100] Judges would also seem to heed assessors more who are knowledgeable legal functionaries than would be the case with lay persons.[101]

The assessor system, then, may promote justice and equity, bring "a fresh perspective" in the adjudication process, serve "as a deterrent safeguard", and protect "against potential tyranny by the government".[102] Assessors "may deter professional judges from being arbitrary, corrupt, or biased".[103] The assessor system would also compel the judicial officer to disclose the reasoning behind his or her decision and discuss these reasons with the assessors.[104] Assessors can serve as "a sounding board" for the judicial officer and keep the judicial officer on his or her toes, so to speak.[105] In such respects, the assessor system would promote transparency and accountability in the decision-making process and prevent individual prejudices from determining decisions.

In the premises, it is submitted that the "enlargement of mind" that would take place in the adjudication process where assessors sit with the presiding judicial officer would aid in reducing the risk of prejudice arising when the trial court is confronted with adverse pre-trial publicity; the assessor system would aid in enhancing impartiality in adjudication and thus it would serve as a procedural safeguard in the face of negative publicity whilst the case is still *sub judice*. The deliberation that takes place between assessors and the presiding judicial officer would help to prevent a decision from being based on or influenced by impermissible extraneous material in the form of pre-trial publicity.

5 CONCLUSION

As the assessor system has been likened to a so-called mini jury, one commentator suggests that assessors, particularly lay assessors, may be more susceptible to the influence of adverse pre-trial publicity than a trained judicial officer. However, assessors are in a fundamentally different position to juries in that they, as members of the court, deliberate with the presiding judicial officer in the decision-making process, that is, in reaching a verdict; they determine questions of fact with the presiding officer and their reasoning is made public. Assessors are also under the constant guidance and supervision of the judicial officer in the adjudication process. They do not constitute a separate fact-finding entity.

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98 Van Zyl Smit and Isakow 1985 *SAJHR* 235.

99 Chubb "Some notes on the Commonwealth and Empire law conference, 1955, and an address on the jury system" 1956 *SALJ* 202.

100 Basdeo *et al* in Joubert (ed) 260, with reference to *S v Mhlongo* 1991 2 SACR 207 (A) 211*f–g*.

101 Huebner 1993 *Yale LJ* 984, 990.

102 Ivkovic "Exploring lay participation in legal decision-making: Lessons from mixed tribunals" 2007 *Cornell Int LJ* 431–432.

103 *Idem* 450.

104 *Idem* 450–451.

105 *Idem* 451, citing Seekings and Murray *Lay assessors in South Africa's magistrates' courts* 94.

These features or aspects of the assessor system would serve as procedural safeguards to guarantee impartial adjudication on the part of assessors in the face of detrimental pre-trial publicity. It has moreover been noted that the assessor system itself would constitute a procedural safeguard in that the "enlargement of mind" that it would bring to the adjudication process would help to guarantee impartiality on the part of the trial court and to rid the influence of prejudice when the court is confronted with prejudicial publicity whilst the case is still *sub judice*. It would do so because the presiding officer would take the perspectives of the assessors into account in the decision-making process, and particularly where the assessors are persons with legal experience, the presiding officer would need to explain and justify his or her decision to knowledgeable and interested peers, thereby exposing and precluding any insidious attempts to let impermissible, inadmissible or extraneous factors or information figuring in the judicial determination. It is therefore submitted that consideration should be given to serious criminal cases which generate extensive adverse pre-trial publicity being tried in the High Court comprised of the presiding judge sitting with at least one assessor with legal expertise. This may enhance better judging in the face of hostile pre-trial publicity. After all, judges remain human and the possible influence of inarticulate premises or subconscious factors cannot be excluded.