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Emilie Taman

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LAY PARTICIPATION IN CRIMINAL JUSTICE: ENHANCING JUSTICE SYSTEM LEGITIMACY IN POST-CONFLICT STATES

EMILIE TAMAN

ABSTRACT

In the aftermath of de-stabilizing conflicts, the transition to sustainable democracy is a challenging one. Open and transparent decision-making processes which encourage lay participation are important to this transition. With few remaining functional institutions, Governments must undergo reform at every level in order to effectively promote and enforce the Rule of Law. Criminal justice reform, in particular, is essential. This paper will examine lay participation in criminal justice and the role it can play in building legitimate criminal justice institutions. The Canadian common law jury will be examined as one model and the French, civilian-style 'lay assessor' model as another. These two models will then form the basis of an analysis of post-Apartheid South Africa and post-genocide Rwanda. It will be argued that while the jury system is effective in common law countries with legal infrastructures which support it, it may not be the most appropriate form of lay participation for deeply fractionalized societies. Indeed, in both the South African and Rwandan example it will be shown that lay assessors are best suited to the promotion of legitimate criminal justice institutions in these States.

† Emilie Taman is a second year law student at Dalhousie University. Special thanks to Professor Bruce Archibald for his guidance and support in the writing of this paper.
I. INTRODUCTION

The transition from an oppressive regime to participatory democracy is often seen as the triumphant end to years of struggle and instability. However, effecting the change in political leadership is only one small step on the path to sustainable democracy. The long-term success of any new democracy will only be feasible where there are strong institutions which are capable of maintaining social order. This must occur not only through the provision of education and health-related services, but through the promotion and enforcement of the Rule of Law. Criminal justice reform, in particular, is essential. Indeed, as Chris Mburu stated at the World Bank Conference on Empowerment, Security and Opportunity Through Law and Justice:

Successful legal and judicial reforms depend largely on the existence of an institutional infrastructure that permits the coordination of projects by the different government entities involved in the administration of justice. In post-conflict situations, this infrastructure is largely lacking because the conflict usually leads to the demise of most institutions that symbolize the existence of a functioning state. To commence on a program of judicial or legal reform in such situations, it becomes necessary to try and reconstruct these institutions.¹

Those responsible for instituting reform proposals are left with a daunting task. However, the complete rebuilding of legal institutions provides reformists with an opportunity to implement infrastructures which will be the most conducive to long-term legitimacy. A key element to the promotion of this institutional legitimacy is lay participation in criminal justice adjudication.

This paper is primarily concerned with two models of lay participation and what, if anything, they have to offer to the promotion of legitimate criminal justice institutions in post-conflict societies: the jury system and the use of lay assessors. There are variations on each of these systems. For the sake of clarity, the Anglo-American model will be

examined as a template for the jury and the French system will be examined as one of many ways in which lay assessors can be used. At this point, it is important to note that the terminology used in the literature on this subject is inconsistent. Often, jurisdictions which employ a mixed bench of lay assessors and professional judges use the language of "jury" to connote the lay participants. In order to make the distinction clear, where the system does not involve an English-style jury, the term assessor will be used in this paper.

It will be argued that while the jury system works in common law countries with legal infrastructures that support it, it may not be the most appropriate form of lay participation for deeply fractionalized societies. However, it will be shown through an examination of South Africa in its transition to full participatory democracy, that the use of lay assessors should be promoted as a means of bringing legitimacy to criminal justice systems in post-conflict states. Further, Rwanda will be considered to demonstrate the extent to which lay participation has been encouraged in that country through the traditional gacaca courts which are used in the place of conventional trials to deal with people accused of genocide-related crimes.

II. THE ANGLO-AMERICAN TRADITION: THE JURY IN CANADA

The jury injects a democratic element into the law. This element is vital to the effective administration of criminal justice, not only in safeguarding the rights of the accused, but in encouraging popular acceptance of the laws and the necessary general acquiescence in their application... Martyrdom does not come easily to a man who has been found guilty as charged by twelve of his neighbours and fellow citizens.

- Black J., dissenting in Green v. United States\(^2\)

The symbolic function of the jury far outweighs its practical significance... Adulation of the jury is based on no justification or spurious justification... The jury is an anti-democratic, irrational and haphaz-

\(^2\) 356 U.S. 165 (1958) at 215-16 [Green] [emphasis added].
ard legislator whose erratic and secret decisions run counter to the rule of law.

— Penny Darbyshire

These statements are evocative of the important role that the jury has played in the Anglo-American tradition. Even Darbyshire’s comment which is clearly anti-jury, recognizes the symbolic significance of the institution. This symbolism must not be underestimated as it promotes a sense of connectedness of the general public to the criminal justice process, infusing it with an important democratic element. However, it will be seen that this “injection of a democratic element into the law” is not exclusive to the institution of the jury per se but rather may be achieved through alternative forms of lay participation.

1. A Brief History of the Jury at Common Law

Lay participation in criminal justice has been an entrenched feature of common law criminal justice processes for centuries. Indeed, it is believed to have been introduced in England with the Norman Conquest of 1066. The role and composition of the jury underwent many incarnations in its early years but by 1215, the jury of twelve, as we know it today, was the standard body of lay adjudicators, charged with the task of making findings of guilt. Initially, the jury played a different role in the criminal justice process than it does today. In order to bring a much needed local perspective, men from the community were asked to participate in criminal adjudication. The purpose of this participation was to include in the process people with particular knowledge of local morals and custom who were likely to have first hand knowledge of the events in question. In this respect, jurors performed a dual function: they were responsible for both providing testimonial accounts as witnesses

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4 Green, supra note 2.
6 Ibid.
and for assisting with the making of ultimate factual conclusions.\textsuperscript{7} This was particularly true in the days before the emergence of the common law doctrine of \textit{stare decisis}.\textsuperscript{8} Rather than look to a comprehensive body of law for legal application of factual findings, the early jury participated with a view to ensuring that local justice was achieved: "its structures looked to the society itself for the means and justification of dispute resolution."\textsuperscript{9}

By the 17th century, the jury was beginning to take its modern form. The transition was made from judicial reliance on jurors for their particular, local knowledge of the matter at issue to reliance by judges "on [jurors'] impartial, collective and unanimous response to evidence the existence of which they had been unaware."\textsuperscript{10} Furthermore, juries were not educated in the law and relied on judges to articulate it to them, particularly as a body of substantive law grew through the doctrine of \textit{stare decisis} and, ultimately, codification. These additions were not the result of widespread political change but rather part of a gradual institutional reform that helped keep the jury relevant as the underlying institutional structure was gradually transformed over time.

Today, the jury is a feature of many adversarial systems and enjoys significant institutional legitimacy, largely as the result of its long common law history. In fact, several countries now have constitutionally entrenched rights to trial by jury in criminal matters. In Canada, for example, the right to trial by jury is articulated in s. 11(f) of the \textit{Charter of Rights and Freedoms}:\textsuperscript{11}

\begin{itemize}
\item[\textsuperscript{11}]{Proceedings in criminal and penal matters – Any person charged with an offence has the right (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.}
\end{itemize}

\textsuperscript{8} \textit{Ibid.} at 264.
\textsuperscript{9} \textit{Ibid.} at 263.
\textsuperscript{10} Kahn, "Restore or Reform", \textit{supra} note 5.
\textsuperscript{11} Part I of the \textit{Constitution Act, 1982}, being Schedule B to the \textit{Canada Act 1982} (U.K.), 1982, c.11 [\textit{Charter}].
Furthermore, Canadian laws of evidence, both at common law and as codified in the *Criminal Code*, reflect the fact that lay jurors will often be employed to make findings of fact. The common law rules of hearsay and exclusionary rules relating to character evidence, for example, were partly developed in response to the need not to confuse juries with factual matters which were too disconnected to the material legal questions at issue. More generally, the underlying structures of the adversarial system complement the use of lay juries in a way which the civil inquisitorial system does not.

However, this is not to say that the jury system is without its problems. In Canada, and the United States for example, while the jury system forms part of a democratic framework which provides institutional safeguards for potential injustices that may result, it is nonetheless arguable that its long history overshadows potential problems with the reliance on jurors in criminal prosecutions.

### 2. Current Problems with the Jury System in Canada

Despite the fact that the jury allows for lay participation in criminal justice, it has been argued that juries are becoming increasingly unable to deal with the problems of contemporary society. Those who argue against the introduction of juries in post-conflict states, for example, argue that the jury system is appropriate only in homogeneous societies. Canada is an example of an ethnically diverse and linguistically pluralized society in which the jury has been able to survive despite the obvious lack of social homogeneity.

However, can it really be said that juries are effectively meeting the needs of minorities in Canada? Considering the fact that jury trials are far less common than they used to be and that the reality of population growth and diversity highlight that juries tend not to be truly representative of one’s peers, is trial by jury still relevant in this context?

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i. The Decline of the Jury

The first problem is not really a problem with the jury system per se but rather with the fact that the use of juries is on the decline. As one American author put it: "Although the [Constitution] mandates jury trials for 'all' criminal cases, the reality is far different. In place of 'all,' a more accurate term to describe the use of jury trial in the discharge of our criminal caseload would be 'virtually none.'" While the effects of bypassing trials by jury are beyond the scope of this effort, it is certainly an important trend to note. In particular, as criminal justice systems face increasing pressures to deal with mounting case loads, many accused people are induced to plead guilty in exchange for deals from the prosecution. As this becomes an increasingly common way of dealing with overburdened criminal justice systems, lay participation in criminal justice will be significantly reduced, leading to concerns that the legitimacy of the system may be compromised over time.

ii. The Jury as a Cross-Section of Society

Another problem is that while an underlying premise of the use of juries is to ensure that an accused is judged by his or her peers, individuals accused of crimes will often find themselves before juries whose social realities may be quite different from their own. In the United States, for example, juries tend to be comprised of largely white, middle-class citizens. Black Americans, who are hugely over-represented in the prison population, are under-represented on juries. This imbalance has the effect of not only undermining the legitimacy of a given proceeding for an individual black accused, for example, but of undermining the institution of the jury to the black community at large. This challenge to the institutional legitimacy of the jury may, over time, contribute to lack of confidence in the wider criminal justice process for that community.

14 Langbein, "The Myth", supra note 12 at 120.
15 "Black Juries", supra note 12 at 532.
16 "Black Juries", supra note 12 at 534.
17 "Black Juries", supra note 12 at 534.
However, the strength of legal institutions in the United States and Canada has the effect of providing an institutional means through which the effects of such problems may be mitigated against and thus public confidence in the system remains largely unharmed. In particular, due to the constitutional entrenchment of trial by jury and of legal equality in Canada\(^\text{18}\) there remains a right to challenge the validity of a jury verdict where the jury selection process offends either of these constitutional rights. Where a jury that is literally representative does not result, it is thought that the institutionalized random selection process nonetheless ensures trial fairness.\(^\text{19}\)

In Canada, this problem has been encountered largely in the context of aboriginal peoples charged with criminal offences. In \(R \text{ v. } Yooya\),\(^\text{20}\) for example, the Saskatchewan Court of Queen’s Bench looked at the scope of the right to be tried by a jury of one’s peers. In that case, the accused sought to be tried before a jury selected from among individuals who resided in Black Lake, the aboriginal community to which he belonged and in which his criminal charges arose. The Court held that although the trial was conducted in Prince Albert, there had been no infringement of Mr. Yooya’s constitutional rights and a fair trial was still possible. This was due to the fact that the procedure through which the jury panel was selected was done according to the Saskatchewan Juries Act\(^\text{21}\) and nothing in that Act operated in such a manner as to offend the \textit{Charter}. The Court cited Justice L’Heureux-Dubé in \(R \text{ v. } Sherrat\) as saying:

> the perceived importance of the jury and the Charter right to jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform many of the functions that make its assistance desirable in the first place.\(^\text{22}\)

On the other hand, the Court in essence qualified this statement with a quote from \textit{Regina v. Nepoose}, in which Justice McFayden of the Alberta Court of Queen’s Bench stated:

\[^{18}\text{Charter, supra note 11 at ss. 11(f) and 15.}\]
\[^{19}\text{See e.g. Juries Act, R.S.N.S. 1988 c. 16 and other provincial Juries Acts which legislate the means through which the random selection of jurors from the community should take place.}\]
\[^{22}\text{[1991] 1 S.C.R. 509 at 525, cited in Yooya, supra note 20.}\]
Canadian courts have consistently held that juries need not be selected from any specific community, any specific race, nationality or other identifiable minority, and that the right to trial by jury includes the right to be tried by a jury selected at random from persons representing a cross-section of the community. While participation from minority groups must continue to be encouraged and facilitated, no accused is entitled to trial by a jury selected on the basis of racial considerations which would result in the elimination of the general population from the jury panel. 23

It is clear then that in Canada at least, the goal is to have a jury which is randomly selected from the public at large. As long as there is equal opportunity to sit on the jury, the goal of representative juries will be deemed to have been achieved. Given the fact that the administration of justice is left to the provinces, 24 there is, at a minimum, a guarantee that the jury will be drawn from within the region. Beyond that, it would seem that the courts are largely satisfied that although juries may not always reflect a true cross-section of the accused’s socio-economic group, provincial jury selection legislation guarantees a jury system in which a fair and legitimate verdict should be attainable. Indeed, a jury comprised solely of an accused’s peers could have an equally de-legitimizing effect. As Mr. Justice Strach put it in R. v. A.F. 25

A jury’s power rests in the capacity of individuals with diverse viewpoints to reach a common decision that can be accepted as the community’s verdict and will carry weight with a diverse community. A jury representing the broad spectrum of society is a jury whose independence and impartiality need not be suspect, and whose legitimacy is thus protected. If a jury is weighted to reflect the values of a particular group – be it only of the accused or of both the accused and the victim – its impartiality and, hence, legitimacy will be questioned. A jury drawn on parochial lines cannot meet the necessary test of expressing the conscience of the community.

It would seem that despite the existence in Canada of case law challenging the jury selection process, 26 on the whole it is perceived as

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26 See also Carter et al v. Jury Commission of Greene County et al (1969), 396 U.S. 320, 90 S. Ct. 518 where a group of black citizens launched a class action law suit against the Jury Commission alleging that the exercise of discretion by jury commissioners led to systemic exclusion of black jurors.
rendering fair outcomes most of the time while allowing for popular participation in the process. Given the fact that a jury verdict which is patently unreasonable may be appealed and even overturned if it is inconsistent with the evidence, it is likely that jury trials are well suited to countries such as the United States and Canada. The Canadian courts have undertaken to achieve a balance between a jury system seen by the public as legitimately addressing the need for social representation on the one hand, and a system which is administratively efficient on the other.

iii. Jury Nullification

A final concern with the jury system in common law jurisdictions is the limited trend of jury nullification. It is arguable that jury nullification is the ultimate indicator that the jury is a truly democratic institution in that it allows members of the public to protest an unfair law by refusing to enforce it. At the same time, it is also arguable that jury nullification is anti-democratic in that it represents a disregard for democratically enacted laws and deprives the public of its right that laws be knowable in advance.

The Supreme Court of Canada has had to deal with jury nullification on a number of occasions. In R. v. Morgentaler, the court characterized the power of a jury to nullify as "the citizen's ultimate protection against oppressive laws and the oppressive enforcement of the law." At the same time however, the Court warned that "recognizing this reality [that a jury may nullify] is a far cry from suggesting that counsel may encourage a jury to ignore a law they do not support or tell a jury that it has a right to do so." In R. v. Latimer, the defence argued that an accused person has a right to a jury with the power to nullify. The Supreme Court rejected this argument stating explicitly that the right to a fair trial guaranteed by section 7 of the Charter does not encompass such an entitlement. On the contrary, the Court argued, trial judges

29 Ibid. at 35.
should attempt to instruct the jury in such a manner as to ensure that the jury applies the law properly and that jury nullification does not occur. A problem with jury nullification in the context of post-conflict states with weakened legal institutions is that it could be used not as a protest against laws which are unfair but as a way of circumventing the applicability of the law to certain classes of people. This problem has been encountered in parts of the United States for example where all white juries have refused to convict white men accused of violent crimes against black victims. In Canada, Supreme Court adjudication would suggest that the courts will not allow jury nullification to become a widespread enough phenomenon to cause concerns that criminal justice institutions are becoming anarchic. Indeed, this is an example of how a state with strong legal institutions can support a jury system where the lay participants ultimately reach their conclusions independently and without direct participation by the judge in the deliberation process.

3. Conclusion

The jury system works in Canada, despite its problems. The effectiveness of jury trials can be explained in two main ways. First of all, the adversarial process and underlying common law system complement the use of juries in such a manner as to make it a desirable form of lay participation. Secondly, the Canadian institutional framework is able to support the jury despite its shortcomings. However, an examination of the lay assessor system in France will demonstrate that it is likely the system best suited to the needs of emerging democracies and post-conflict states.

30 Ibid. at 35. See also, R. v. Shipley (1784), 4 Doug. 73, 99 E.R. 774 (K.B.), at 824, cited with approval by Dickson C.J. in Morgentaler, supra note 28 at 78.

31 “Black Juries”, supra note 12 at 540.
III. THE CIVILIAN SYSTEM: LAY ASSESSORS IN FRANCE

1. A Brief History

The jury in France made its first appearance as a result of a vote by the Revolutionary Assembly in September of 1791. Before that time, criminal justice adjudication occurred in secret with routine use of torture and other oppressive means to ensure convictions. In fact, all over continental Europe, with the fall of autocratic monarchies and the transition to constitutional monarchies there was a tendency to adopt the common law style jury in criminal matters as a reflection of the political change and a symbol of democratic values. In France, therefore, the adoption of the jury system was more a product of political achievement than of judicial reform.

However, the English-style jury never really took hold in France with frequent calls for its abolition starting as early as 1800. Ultimately, most European countries including France, which had eroded the powers of the jury over the years, abandoned the jury because it was not well suited to the inquisitorial process. In France, this occurred under the Vichy Regime of 1948. Unlike the English situation, where the substantive law, including the law of evidence, evolved with the institution of the jury in mind, in France it was found that the jury did not complement the pre-existing legal system. Nonetheless, it is clear from the usage of lay assessors in the modern French state that the democratic ideal of lay participation in criminal justice was never abandoned.

34 Kahn, “Restore or Reform”, supra note 5.
36 Kahn, “Restore or Reform”, supra note 5 at 678.
37 Kahn, “Restore or Reform”, supra note 5 at 678.
2. Lay Assessors in the Modern French State

Today, the use of lay assessors in criminal proceedings is governed in France by the *Code of Criminal Procedure* (the *Code*). Interestingly, the French Constitution does not mandate trial by jury in criminal matters. However, the Code provides at least a statutory guarantee of lay participation in criminal justice in the *Courts d'Assize* in which the most serious criminal offences are tried.

Articles 254–267 lay out the procedure for the selection of lay assessors. These procedures resemble those set out by provincial Juries Acts in Canada. Article 255 stipulates that lay assessors must be citizens of at least 23 years of age who are able to read and right in French and who enjoy full political, civil, and family rights. Furthermore, once an initial gathering of names has been generated from the electoral list, names are to be selected through a lottery to ensure that there is a reasonable element of randomness. In general, as with the Canadian example, the statutory selection procedure provides safeguards promoting a panel of assessors which represents a cross-section of society.

Pursuant to Article 240, the Assize court is deemed to include both the professional and the lay assessors. Specifically, there are to be three judges (the President of the Court and two professional assessors) and nine lay assessors. Therefore, unlike the jury system where jurors are considered to be a separate entity from the judge, in France the *Code* calls for a collegial bench of mixed lay persons and professionals. In fact, both the professionals and the lay people retire together and deliberate as a group. Furthermore, Article 359 requires only a majority of eight votes to convict unlike the requirement of unanimity in jury trials. The demand for eight votes ensures that a majority of the lay assessors agree on the conviction.

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40 Tomlinson, *supra* note 38 article 255.
41 Tomlinson, *supra* note 38 article 261.
42 Tomlinson, *supra* note 38 articles 243 and 248(1).
43 Tomlinson, *supra* note 38 article 296(1).
44 Tomlinson, *supra* note 38 article 355.
45 Tomlinson, *supra* note 38 article 359.
assessors are in favour of conviction without requiring a full consensus to be reached by the court.

All of this is not to suggest that assessor systems will not face similar concerns as jury systems with the challenge of ensuring representativeness as was discussed in the Canadian case law in the previous section. However, the response to this concern is twofold: first, the assessor system is no more prone to this problem than the jury system and second, the collegial nature of the mixed bench ensures that juror biases are curtailed to some extent.

3. Conclusion

In France there is supervision both of the judiciary by lay participants and of lay participants by professional judges in the criminal justice process. In creating a mixed bench the French have ensured that judges cannot convict an accused without the support of the majority of lay participants, thereby infusing the process with an important participatory democratic element. Additionally, lay assessors cannot convict an accused without having to explain themselves to some extent to the judge. This can serve to guard against emotionally driven verdicts by juries. In other words, the French system would seem to be conducive to achieving a balance between democratic involvement in criminal justice on the one hand, and judicial control over lay participants on the other.

It is for this reason that the use of lay assessors is likely better suited to the needs of post-conflict, fractionalized societies than is the jury system. Lay participation ensures that judges are kept in touch with the social reality beyond their otherwise privileged existence. This is particularly important in post-conflict societies where the social divide tends to be far greater than it does in more institutionalized democracies. On the other hand, keeping the assessors at arm’s length ensures that the element of accountability for decision-making tactics remains integral to the process.
IV. CASE STUDY:
LAY PARTICIPATION IN CRIMINAL JUSTICE IN POST-APARTHEID SOUTH AFRICA

1. The Context of the Transition to Participatory Democracy

Both during and after apartheid, South Africa was one of the most deeply fractionalized societies imaginable. The division of society along racial lines perpetuated this fractionalization into the post-apartheid era. Despite the existence of strong institutions in South Africa during apartheid, the need for institutional reform in that country was as great as in any post-conflict state. In fact, the strength of the bureaucratic infrastructure during apartheid resulted in widespread distrust of institutions by most citizens. The courts, in particular, were viewed 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."46 Of particular note is the fact that the jury system was abolished in South Africa in 196947 and there was therefore no lay participation possible, with the exception of very limited use of assessors which will be discussed below.

During the period leading up to the transition to full participatory democracy, a great deal of legal academic work went into drafting a new constitution with a judiciable bill of rights.48 The Constitution which eventually emerged from these discussions has been championed as a model for any emerging democracy. However, it would seem that far less academic thought went into how to reform many of the institutions which would ultimately be charged with the task of putting the theory behind the new Constitution into practice.

A particular challenge was that the pre-apartheid judiciary was to remain in place when the new regime took power.49 Therefore, the

48 Huebner, "Who Decides", supra note 13 at 961.
49 Huebner, "Who Decides", supra note 13 at 962.
enforcers of apartheid who were largely responsible for the distrust of legal institutions in the first place, were to participate in a new legal order which it was hoped would ultimately be seen as legitimate by the public at large.

No doubt, the new Constitution was a step in the right direction. Modeled in part after the Canadian Charter of Rights and Freedoms, the Constitution of the Republic of South Africa 1996 has a section devoted to the rights of accused persons:

35 (3) Every accused person has a right to a fair trial, which includes the right

a. to be informed of the charge with sufficient detail to answer it;
b. to have adequate time and facilities to prepare a defence;
c. to a public trial before an ordinary court;
d. to have their trial begin and conclude without unreasonable delay;
e. to be present when being tried;
f. to choose, and be represented by a legal practitioner and to be informed of this right promptly;
g. to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
h. to be presumed innocent, to remain silent, and not to testify during the proceedings;
i. to adduce and challenge evidence;
j. not to be compelled to give self-incriminating evidence;
k. to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
l. not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
m. not to be tried for an offence in respect of an act or omission for which that person has previously been either convicted or acquitted;
n. to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and of appeal to, or review by, a higher court.\footnote{Constitution of the Republic of South Africa 1996, No. 108 of 1996.}
The rights guaranteed by this Constitutional document are in many ways reminiscent of the rights encompassed by the Canadian Charter. However, the right to be tried by a tribunal with lay participants is conspicuously absent. This is likely due to a recognition by the Constitution's framers that the jury system had been largely unsuccessful in South African history. However, it is unfortunate that an alternative form of lay participation was not contemplated at that time.

2. A Brief History of the Jury in South Africa

The jury was first introduced in South Africa in 1828. However, as in France, the system never gained widespread acceptance and by 1910, statutory reforms were beginning to limit the use of juries. By 1917, the accused could elect to be tried by a judge alone due to the fact that the all-white juries were proving unable to render verdicts which were fair to blacks accused of criminal offences. In 1969, juries were being used in less than 1% of cases and the jury system was ultimately abolished by the Abolition of Juries Act 34 of that year.

During the period leading up to the transition to participatory democracy, what little discourse there was about legal institutional reform was largely opposed to the reintroduction of the jury system to South Africa. Michael Huebner identifies three major concerns militating against the implementation of a jury system in South Africa:

(i) the lack of support for it in the South African legal community; (ii) the dysfunctions often associated with juries in highly fractionalized societies; and (iii) the staggering administrative costs that the system would entail.

Indeed, as one prominent South African legal commentator, Nico Steyler, put it:

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

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52 Ibid at 199.
53 Ibid at 199.
autonomous decision-making 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 fair application of the criminal law.  

However, as was previously discussed, the jury has been able to endure in ethnically diverse societies such as Canada and the United States. One potential explanation for this is that Canada and the United States are largely harmonious societies and have not experienced the same degree of fractionalization as South Africa.

Racism continues to be a real problem in North America; however, the jury system and legal institutions more generally are able to accommodate these concerns to some extent. This may be due in part to the fact that ideas such as judicial independence and impartiality are more widely accepted by the public as bringing legitimacy to the system. Nonetheless, Steyler concludes by saying:

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.  

The skepticism about the suitability of a jury system in South Africa was more than mere conjecture. In Ghana, for example, it was argued that juries were not appropriate following the transition to democracy:

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 ...as further evidence of the unsuitability of jury trial in present African conditions.  

Huebner's first two concerns were, therefore, clearly widespread. His third concern, that the cost of implementing a jury system would be staggering, arose out of the reality of linguistic pluralism in South Africa. The need for and cost of translation services would be astound-
ing. However, he notes that the main concern with the administrative costs is tied to his belief that the jury system is not appropriate for South Africa. In other words, Huebner argues, if it was demonstrated that introduction of the jury system was the ideal way to bring public confidence to the justice system it might be justifiable. However, given the near unanimous opposition to reintroducing the jury system into South Africa, the cost cannot be justified.60

Having demonstrated that the jury system would be unlikely to solve the problems with lack of public confidence in the criminal justice system, it is necessary to look at whether the use of lay assessors might overcome the shortcomings of the jury system while maintaining the needed element of democratic participation.

There is currently only limited use of lay assessors in South Africa. In fact, as of 2001, the use of lay assessors was only mandatory in cases involving murder, rape, robbery, assault and indecent assault although it remained optional for a wider range of criminal offences.61 This is indicative of the fact that South Africa has not undergone the extent of institutional reform of criminal justice that is arguably needed if the system is to enjoy any real legitimacy in the long term. In fact, the use of lay assessors is scarcely more widespread than it was before the political transition.

The Criminal Procedure Act of 1977 granted judicial discretion to judges of the Supreme Court, the highest level in the hierarchy of courts of first instance, to summon one to two assessors to participate in the proceedings. The use of lay assessors was only legally required in trials in which the judge saw the imposition of the death penalty as a potential sentence.62 However, less than 10% of criminal cases are heard at the Supreme Court level. The majority are heard by magistrates in the lower courts where the use of assessors was only possible with the permission of the Minister of Justice before apartheid, which resulted in its virtual disuse.63 Furthermore, the system for the selection of lay assessors did nothing to bring participation in criminal justice to “the people.” On the contrary, assessors were virtual professionals, who usually had prior

60 Huebner, “Who Decides”, supra note 13 at 975.
legal training and who were usually friends of the justices who requested their assistance.64

If the purpose of employing lay assessors in the criminal justice system is to inject an element of democracy into the process in order to legitimize it, the pre-apartheid scheme in South Africa was clearly unable to achieve this goal. A 1984 study undertaken to determine the actual operation of the assessor system came to the following conclusion: “It is clear from the interview that the judges were very rarely outvoted by their assessors when it came to public pronouncement on guilt or innocence, or on the existence or absence of extenuating circumstances.”65 Therefore, as Steyler noted: “where assessors are limited to an advisory role and unrepresentative of the community, they represent an exercise in sham democracy.”66

Huebner makes a series of recommendations for reforming the assessor system to better suit the needs of the post-transitional criminal justice institutions. He sees the use of assessors primarily as a means of training black lawyers for careers as judges.67 In effect then, what Huebner advocates is not really lay participation but rather broader participation by a more diverse sector of the legal community. In other words, he sees the use of assessors as a short term tool for the achievement of greater ethnic diversity in the judiciary. However, if this is the sole reason for implementing an assessor scheme, the longer term goal of achieving a legitimate criminal justice system through lay participation will remain elusive.

The limited use of lay assessors at present in South Africa is a step in the right direction. However, in order to infuse the system with the needed element of democratic participation, the use of lay assessors must be greatly expanded. Indeed, it should be mandatory, or at least available at the option of the accused, at all criminal trials. Furthermore, the selection process must ensure an element of randomness in order to promote better representativeness. Amendments to the South African Magistrates’ Act in 1998 took some of the initial steps towards reform.

64 Huebner, “Who Decides”, supra note 13 at 978
In particular, Clause 1 amended section 34 of the old Act to remove the requirement that assessors have “skill and experience in the matter to which the action relates,” which would seem to suggest a move away from more professional assessors to true laity in public participation. Clause 2 amended the old s. 93 by providing that assessors may be summoned in any matter, expanding somewhat the scope of offences in which assessors may be used. However, the perpetuation of a system in which the use of assessors is at the option of Magistrates is insufficient to effectively promote true lay participation in South Africa.

3. Conclusion

Unfortunately, it is too soon to tell what effect lay participation is having on public confidence in criminal justice institutions. This is due in part to the fact that its use is not sufficiently widespread. Criminal activity is on the rise in South Africa which suggests that the system is currently failing to meet the needs of the South African people. A decade after the transition to participatory democracy, South African legal institutions are in need of further reform. Incorporation of widespread lay participation in criminal proceedings would bring popular legitimacy to criminal justice institutions which they have likely never fully enjoyed.

V. AN EXTREME FORM OF LAY PARTICIPATION: GACACA TRIALS IN RWANDA

1. A Brief History of the Conflict and of Resulting Criminal Justice Concerns

Rwanda offers a tragic example of a country faced with significant challenges in the aftermath of a devastating conflict. It is estimated that the 1994 genocide claimed the lives of up to 1 million Rwandans in fewer than three months. Most of these victims belonged to the Tutsi

minority ethnic group. Another two million took refuge in neighbouring countries. In the aftermath of the genocide, a new government – comprised largely of Tutsis who had been in exile since before the genocide – took power in Rwanda. They inherited a state in which virtually no functioning institutions existed. Yet, in order to rebuild the country, the government was forced to rely upon those institutions which remained despite their weakened state.

The civilian-style criminal justice system in particular, was plagued with the dual function of maintaining or inducing social order in a fractionalized society and bringing the perpetrators of the genocide to justice. This proved to be an impossible task under the existing infrastructure. Ultimately, the United Nations instituted the International Criminal Tribunal for Rwanda (ICTR), an ad hoc tribunal to assist in bringing justice to the people of Rwanda and ending the cycle of impunity. However, domestic prosecution remained a national priority in order to ensure that perpetrators who did not fall within the jurisdiction of ICTR were brought to justice.

A problem arose with the government’s commitment to continuing with local prosecutions in that legal institutions were virtually non-existent after the genocide. In fact, the Government of Rwanda provided the following statistics on the extent to which legal infrastructures had been damaged: of 750 judges in early 1994, 244 remained after the genocide; out of eighty-seven prosecutors, fourteen remained; out of 193 Inspector Police Judiciaries (investigators), thirty survived; out of 214 court clerks, only fifty-nine remained. The Government of Rwanda further estimates that, given the lack of prosecutors, judges, and lawyers, it would take the conventional court system over 200 years to deliver justice.

70 Mburu, “Challenges”, supra note 1 at 4.
71 Mburu, “Challenges”, supra note 1 at 2.
72 Official Website of the International Criminal Tribunal for Rwanda, online: <http://www.ictr.org/wwwroot/ENGLISH/geninfo/relevance.html>
73 Mburu, “Challenges”, supra note 1 at 11.
In order to deal with the problem, the government, with the assistance of the international community, established a number of intensive training programs aimed at establishing a core of trained legal personnel who could undertake the daunting task of rebuilding the judicial system.\(^{75}\) In the meantime, thousands of genocide suspects sat in prison, with no prospects for a trial in the near future. In fact, by the end of 2000, there were over 130,000 prisoners being held in facilities which could not accommodate such numbers.\(^{76}\) Furthermore, most of the efforts at rebuilding were geared towards government-oriented infrastructure, such as the prosecution service and the judiciary. At this stage, however, little effort was put into providing genocide suspects with defence counsel.\(^{77}\)

In light of the fundamental inability of the formal justice system to deal with the detainees, it was determined that a creative solution was necessary. If legal institutions were to have any hope of rebuilding in any sustainable way, it would be necessary to relieve them of as much of the burden of dealing with genocide suspects as possible. Structural expediency had occurred to some extent in the early aftermath of the genocide through the creation of temporary legal structures known as commissions de triage which undertook to quickly process genocide cases.\(^{78}\) It was not long, however, before it became clear that the commissioners simply lacked the legal training to conduct trials in such a manner as to ensure even minimal legitimacy and the project was abandoned. Furthermore, the lack of any lay participation in the process no doubt further undermined the legitimacy of the process since it was completely detached from the people of Rwanda.

### 2. The Establishment of the Gacaca Courts

In response to concerns that the domestic prosecution of war criminals was failing to address both the need for impunity of genocide perpetrators and national reconciliation, the Government decided to reintroduce

\(^{75}\) Mburu, "Challenges", *supra* note 1 at 12.

\(^{76}\) *Troubled Course*, *infra* note 88 at 1.

\(^{77}\) Mburu, "Challenges", *supra* note 1 at 13.

\(^{78}\) Mburu, "Challenges", *supra* note 1 at 12.
a traditional community-based justice system known as the *gacaca*. This form of traditional justice was typically reserved for conflict resolution within small communities, particularly with respect to property disputes; however, it was felt that it could be transformed to suit the needs of the grossly overburdened criminal justice system. According to Peter Ulvin, a consultant for the Belgian government, the aim of the *gacaca* is twofold: (i) speeding up the trials and emptying the prisons; and (ii) involving the community, including the victims, in establishing the truth – and through that truth, promoting reconciliation.

### i. The structure and function of the *gacaca* courts

The *gacaca* tribunals have been created throughout the country and will allow for public participation, even at the most local level. Indeed, the plan is that over 200,000 people will participate in more than 10,000 *gacaca* tribunals. The government has created a hierarchy of genocide offences as well as a hierarchy of courts:

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<tr>
<th>CATEGORY</th>
<th>GENOCIDE OFFENCES</th>
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<tr>
<td>1</td>
<td>(i) persons whose criminal acts or acts of participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or any other crime against humanity</td>
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<td></td>
<td>(ii) persons who acted in positions of authority at the National, Prefectorial, Communal, Sector or Cell level, or in a political party, army, religious organizations or militia and who perpetrated or fostered such crimes</td>
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<td>(iii) notorious murderers who through particular zeal distinguished themselves in certain areas.</td>
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<th>GACACA JURISDICTION</th>
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<td>ICTR, Conventional Justice System</td>
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<td>CATEGORY</td>
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<td>Appeals</td>
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**Hierarchy of Offences and Jurisdiction of gacaca tribunals**

Therefore, even at the level of small rural communities (Cellule Level), there will be an opportunity for public participation in the trials. Every level of court has a general assembly which is present before the tribunal, participates in discussing the acts (providing testimony and counter-testimony), and which contributes to the making of arguments in favour or against findings of guilt. The members of the general assembly at the Cellule Level are further responsible for compiling lists of those who were victims of the genocide including victims of rape and of those who participated in the crimes. They must also compile lists of those who moved away from their usual residences during the genocide. The general assembly offers strong inducements towards confession through significant reductions in penalties. This is likely the result of the belief that confession best ensures truth and thus reconciliation. At the Cellule Level, the general assembly is made up of all inhabitants of the Cellule who are over 18 years of age. At the higher levels in the

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82 Official Government of Rwanda Website, supra note 74.
83 Official Government of Rwanda Website, supra note 74.
84 Official Government of Rwanda Website, supra note 74.
court hierarchy, the members of the general assembly are comprised of representatives from lower levels. 85

The judges of the gacaca court council itself must be “respectable people of at least 21 years of age and elected by people of voting age” from within the general assembly. All members of the gacaca at all levels are lay people. There are no professionals involved in the process with the exception of members of the Coordination Committee which is due to be set up by the Ministry of Justice in corroboration with the High Court to monitor the progress of the gacaca courts and to ensure that the proceedings are undertaken in a fair and equitable manner. 86

To a foreign observer, in particular a foreign observer from a state with strong legal institutions, there are immediate concerns about the legitimacy of the gacaca process. Indeed, the gacaca system subverts several fundamental principles of democratic justice agreed upon through international human rights instruments such as the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. There is a lack of separation between the adjudicators and the prosecution, no defence counsel, strong pressures to self-incriminate, no legally reasoned verdicts, and no nationally agreed upon punishment – which could result in vast regional differences in sentencing. 87 As a result, many human rights observers have been skeptical of the gacaca process. 88 However, such analysis must not be undertaken in a vacuum. Indeed, as Peter Ulvin argues, some compromise is inevitable due in part to the fact that international standards of criminal law “were not designed to deal with the challenges faced when massive numbers of people – victims and perpetrators of crimes – have to live together again, side by side.” 89

It is important, therefore, when assessing the gacaca system, to bear in mind the alternative. While the formal justice system may appear on

85 Official Government of Rwanda Website, supra note 74.
86 Official Government of Rwanda Website, supra note 74.
87 Ulvin, “Modernized Gacaca”, supra note 69.
88 See e.g. Amnesty International, News Release “Rwanda: The Troubled Course of Justice” (26 April 2000) online: Amnesty International <http://web.amnesty.org/ai.nsf/\&Index/AFR470152000?OpenDocument&of=COUNTRIES\&RWANDA> [Troubled Course]. In this report, it is argued that the gacaca courts will not fall within the acceptable range of international human rights standards without the safeguards of institutionalized justice systems, such as provision of defence counsel.
its face to be an institution that is more capable of respecting human rights norms, the reality is quite different. In fact, the formal system has proven unable to guarantee the right to a trial within a reasonable time (at present, some of the accused have been incarcerated for almost a decade without a trial). The conditions are abhorrent by international standards as the prison population is almost double that which can be reasonably accommodated. Furthermore, less than forty percent of those brought to justice through the formal system had access to defence counsel and the quality of the prosecutors, investigators, and judges was minimal at best.

While prosecution by ICTR does guarantee respect for the rights of the accused, it is incapable of processing large numbers of people. Furthermore, ICTR is greatly removed from the Rwandan people. Not only is the tribunal itself located in Arusha, Tanzania, but with no lay participation, it is likely that most Rwandans have little knowledge of the prosecutions undertaken by the tribunal.

Ulvin argues that while the gacaca procedure may not appear conducive to the respect of international norms of criminal justice, it may be so indirectly. For example, while there is no defence counsel or formal prosecutor, the back and forth dialogue among members of the general assembly may actually amount to the equivalent of a full and fair defence. Furthermore, the members of the general assembly have first hand knowledge of the events and are perhaps more likely to come up with a realistic picture of what actually happened than a dossier assembled by bureaucrats in Kigali. It is worth noting as well that the prisoners and their families seem to support the gacaca, which suggests that they see it as a superior system to the one that has been failing them thus far. According to a 2001 United Nations Study, pilot gacaca courts acquitted in approximately 1/3 of cases and emphasized incorporating community public works service in sentencing instead of further prison time. These numbers are promising in that they do not indicate a propensity towards conviction in all cases.

90 Troubled Course, supra note 88 at 11.
92 Ulvin, “Modernized Gacaca”, supra note 69 at 5.
In many respects, the *gacaca* courts resemble pre-17th century juries at common law. It is arguable, in fact, that the lack of infrastructure in Rwanda, both institutionally and in terms of transportation and communications, has resulted in a system with needs similar to those faced by early common law courts. Early common law juries were felt to be capable of delivering justice and there is no reason why the *gacaca* courts should be any different.

3. Conclusion

The *gacaca* courts have been instituted as a means of achieving *transitional justice*. In other words, once the perpetrators of the 1994 genocide have been dealt with, the role of the *gacaca* courts will have become obsolete. However, it might be in the best interest of the people of Rwanda for the government to consider a similar system in the longer term. Widespread corruption in what remains of the formal justice system, as well as a general lack of confidence in severely weakened government institutions, has created fertile soil for widespread reform.

Indeed, whether the civil-style court structure is rebuilt or an entirely new criminal justice system is instituted, lay participation will be the key to its success. Particularly in the aftermath of significant public participation in the *gacaca* trials, as the new Rwandan democracy is built and institutions are strengthened, the government should continue to promote lay participation at all levels in order to ensure the sustainable legitimacy of criminal justice in Rwanda.

**VI. CONCLUSION**

Institutional reform must be a priority of emerging democracies and post-conflict states. In particular, legal institutions must be reformed with a view to increasing lay participation in criminal justice processes. Effective promotion of the Rule of Law will only be attainable when institutions are seen as legitimate by the people. This will be most possible if democratic values at a macro-political level infuse every level of government. In particular, the use of juries or lay assessors in
criminal justice systems allows for democratic participation at one of the most potentially hostile intersections between the individual and the State – where the individual’s liberty is at stake through the potential application of criminal sanctions. It has been argued that in deeply fractionalized societies, lay assessors are likely best suited for the fulfillment of the need for lay participation.

South Africa has acknowledged this need only to a limited extent. Academic literature seems to recognize the need for lay participation and yet this has not been put into effective practice in criminal justice adjudication in South Africa at present. South Africa remains a deeply fractionalized society which could benefit from increased democratic participation.

Rwanda, on the other hand, is best described as remaining in a state of transition. The gacaca courts represent a creative means of dealing with the overburdened criminal justice system. With any luck, the lesson learned from the gacaca trials will be that including the public in such important proceedings helps bring legitimacy to legal institutions and thus forwards the adoption of democratic values.

A sad reality of the state of world affairs is that the trend towards democratization through conflict is far from over. The number of states actively involved in attempts to rebuild and strengthen institutions in the name of sustainable democracy is significant. The importance of democratic participation at all levels, therefore, must not only be promoted, it is a value upon which the legal system must insist.