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I. INTRODUCTION

In the ten years since the coming into operation of the interim South African Constitution and our first democratic elections, South Africa has embarked on a process of widespread political, legal, and economic reform, resulting in considerable changes. In the context of our justice system, laws and policies are now tested against the South African Constitution, which includes a very comprehensive Bill of Rights. Constitutional jurisprudence has been far-reaching, overturning laws and practices that discriminate on the grounds of race, nationality, HIV status, and sexual orientation. The Court has enforced social and economic rights and found a number of governmental policies in this area to be unconstitutional.

Despite this, there are continuing concerns about the extent to which the majority of South Africans are able to enforce their rights. The primary aim of this Article is to consider why alternative models of justice have, despite initial widespread discussion and some consequential changes, been relegated to the periphery of legal debate. There have been attempts to ensure wider access to justice through relaxing the rules of standing, expanding legal aid structures, and introducing specialized more cost-effective courts. Of course, the usual rights of accused, arrested, and detained persons[1] and the right of access to courts[2] are entrenched in our Bill of Rights. However, changes to the law have not been accompanied by a fundamental shift in the primary structures through which justice is dispensed — the courts. In addition, there has been no real challenge to the dominant notion that human rights are inherently individualistic. This view

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1. S. AFR. CONST. § 35.

2. *Id.* § 34.

of the nature of human rights goes hand in hand with a court structure that presupposes two equally-equipped adversaries doing battle before a neutral judge.

The premises on which this system is based have been described and challenged in the following way:

> A table, and behind this table, which distances them from the two litigants, the "third party", that is, the judges. Their position indicates firstly that they are neutral with respect to each litigant, and secondly this implies that their decision is not already arrived at in advance, that it will be made after an aural investigation of the two parties, on the basis of a certain conception of truth and a certain number of ideas concerning what is just and unjust, and thirdly that they have the authority to enforce their decision... [n]ow this idea that there can be people who are neutral in relation to the two parties, that they can make judgments about them on the basis of ideas justice which have absolute validity, and that their decisions must be acted upon, I believe that all this is far removed from and quite foreign to the idea of popular justice.[3]

This view of adjudication is still very much the dominant view in South Africa and results in the exclusion of certain groups from any kind of meaningful participation in the justice system. The popular justice movement is hardly a new concept. In the United States for example, alternatives to the formal, western model of justice were being proposed in the 1960s and 1970s.[4] In South Africa, a considerable amount of discussion and writing on alternative courts and broad changes to the judicial system emerged in the period leading up to the transition to democracy and in the early years of our democracy.[5]

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3. IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 96 (1990) (citing Michael Foucault).

4. Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, AM. INDIAN L. REV. 118, 126 (2000).

5. *See, e.g.*, WILFRIED SCHÄRF, *The Role of People's Courts in Transitions*, *in* DEMOCRACY AND THE JUDICIARY 167 (Hugh Corder ed., 1989); Brenda Grant & Pamela-Jane Schwikkard, *People's Courts?*, 7 S. AFR. J. ON HUM. RTS. 304 (1991); David McQuoid-Mason, *Legal Representation and the Courts*, 1991 S. AFR. HUM. RTS. & LAB. L. Y.B. 130, 143–4; DANIEL NINA, RETHINKING POPULAR JUSTICE — SELF-REGULATION AND CIVIL SOCIETY IN SOUTH AFRICA (1995); JEREMY SEEKINGS & CHRISTINA MURRAY, LAY ASSESSORS IN SOUTH AFRICA'S MAGISTRATES' COURTS (1998); for a historical overview, see THE OTHER LAW: NON-STATE ORDERING IN SOUTH AFRICA 44-52 (Wilfried Schärf & Daniel Nina eds., 2001) [hereinafter THE OTHER LAW].

Much of the impetus for popular or alternative models of justice comes from the concern that traditional models have a Western bias, in that they focus on adjudicating conflicts over individual rights rather than promoting communal interests in resolution and healing.[6] The argument is that certain groups are alienated from this model of justice because it is foreign to them. In the Indian context, it has been said that judges need to be more sensitive to different cultures as this plays a role in correctly interpreting responses of tribal witnesses. For example, contradictions are rare in tribal society — the word "no" is not often used and reluctance to answer a question often means that the answer is "no" rather than the expected "I don't know."[7] Groups of people may feel alienated from the justice system for a number of different reasons such as gender, race, and cultural identity. Thus, alternatives to traditional models have been proposed by indigenous, cultural, and ethnic groups, by communitarian critics and by women.

Critics are quick to point out the dangers of any form of essentialism.[8] It is a mistake to assume that all people within a particular group, cultural or otherwise, have identical views about anything, including the purpose and process of dispensing justice. Alternative models may result in a failure of justice. Studies have indicated that alternative systems may not adequately deal with potential abuses by dominant people within a particular group. For example,[9] people may find their voices suppressed within alternative systems of justice and the deliberate lack of state interest in such systems may result in a double marginalisation.[10]

Alternative models of justice — be they customary courts, community courts, or more inquisitorial systems — present a challenge to the notion of separation of powers, which is an integral part of any theory of democracy. Arguments for greater community involvement in judicial decision-making threaten the idea that appointed judges,[11] as the third

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6. Joh, *supra* note 4, at 126.

7. Brian Lobo, 'Sarkarchya Payrya Chad Jos Noko' Experiences and Lessons of Seeking Justice in the Courts on Behalf of Tribal Communities and Individuals in General and Regarding Mass Displacement in Particular, Paper Presented at CHRI: Judicial Exchange on Access to Justice in Mumbai, India (Nov. 14-16, 2003), *available at* http://www.humanrightsinitiative.org/jc/papers/jc_2003/judges_papers.lobo_final.pdf (last visited June 29, 2005).

8. Joh, *supra* note 4, at 121.

9. Michael Anderson, Delivering Access to Justice at the District Level, Paper Presented at First South Asian Regional Judicial Colloquium on Access to Justice in New Delhi (Nov. 1-3, 2002), *available at* http://www.humanrightsinitiative.org/jc/ papers/jc_2004/supplementary_papers/michael_anderson.pdf (last visited June 29, 2005).

10. *See* Joh, *supra* note 4, at 130.

11. As lay assessors or in separate courts.

branch of government, bear sole responsibility for adjudicating disputes. Arguments for greater judicial activism and intervention raise legitimate questions about the appropriate role for this non-elected branch of government in a democratic state.[12] My argument is not that these concerns are trivial but that they are not insurmountable and should not prevent serious engagement with alternative models of justice.

In South Africa, deliberations about access to justice have centered mostly on less dramatic challenges to the system. Where significant changes have occurred, these have been in certain limited areas.[13] Much has been said about the impact of social and economic disparities in access to justice. Most people in South Africa are unable to effectively bring cases before the courts because:

> Access to court . . . means more than the legal right to bring a case before a court. It includes the ability to achieve this. In order to be able to bring his or her case before a court, a prospective litigant must have knowledge of the applicable law; must be able to identify that she or he may be able to obtain a remedy from a court; must have some knowledge about what to do in order to achieve access; and must have the necessary skills to be able to initiate the case and present it to the court. In South Africa, the prevailing levels of poverty and illiteracy have the result that many people are simply unable to place their problems effectively before the courts.[14]

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12. The appropriate role of the judiciary has been the subject of extensive debate in South Africa. Administrative justice and socioeconomic rights are two notable areas in which this issue has been considered. *See, e.g.*, Cora Hoexter, *The Future of Judicial Review in South African Administrative Law*, 117 S. AFR. L.J. 484 (2000); *Certification of the Constitution of the Republic of S. Afr. (First Certification case)*, 1996 (10) BCLR 1253 (CC); Marius Pieterse, *Coming to Terms with Judicial Enforcement of Socio-Economic Rights*, 20 S. AFR. J. ON HUM. RTS. 383 (2004); *see also* GERHARD ERASMUS, *The Role of the Courts in a Divided Society: A Political Question Doctrine for South Africa?*, *in* DEMOCRACY AND THE JUDICIARY, *supra* note 5.

13. *See* South African Law Commission, Project 73: Fifth Interim Report on Simplification of Criminal Procedure, Aug. 2002, *available at* http://wwwserver.law.wits.ac.za/salc/report/pr73-intrep5.pdf (last visited June 29, 2005); *see also* South African Law Commission, Project 107: Sexual Offences Report, ch. 5 Evidentiary Issues Relating to Sexual Offices, at 175, Dec. 2002, *available at* http://wwwserver.law.wits.ac.za/salc/report/report.html (last visited June 29, 2005). The Child Justice Bill provides, in chapter 7, for child justice courts with specialized procedures and rules of evidence. Restorative justice, defined as "the promotion of reconciliation, restitution and responsibility through the involvement of a child, the child's parent, the child's family members, victims and communities" is an underlying theme of the Bill. GOVERNMENT GAZETTE NO. 23728, Aug. 8, 2002, *available at* http://www.polity.org.za/pdf/ChildJustB49.pdf (last visited June 29, 2005).

14. Geoff Budlender, *Access to Courts*, 120 S. AFR. L.J. 341 (2004). Arguments about lack of resources may lead to challenges to the nature of the system. The efficacy of the adversarial

In addition, concerns about language in courts,[15] indications of "racial bias and ethnocentrism in the way in which judicial officers talk to or about people of colour"[16] and the marginalization of women through legal aid policies have all been raised.[17] However, there has been very little serious challenge to the system itself.

It is clear that there is a considerable amount of pressure on the South African state to conform to a traditional notion of justice. Aid and funding for African countries has been made conditional on a conception of democracy and good governance which is consistent with capitalism.[18] On this view, the primary "role of the judicial system is to guarantee the stability of economic transactions, social peace and improvements in the administrative ability of the state."[19] Such a role does not encourage meaningful engagement with the justice system with a view to fundamentally changing it.

This view raises questions about what role courts are playing in South Africa at the moment, and about whether institutions such as the new and supposedly more accessible equality courts, community courts and customary courts present any real challenge to traditional notions of justice.

Ideals of popular justice: a focus on "dialogic" as opposed to "microscopic" truth;[20] promoting relationships; resolution; and healing

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system has been questioned in cases where there is economic disparity between the parties, where the parties cannot be said to be equally "armed" in any real sense. *See* Justice Dhananjaya Y. Chandrachud, Poverty, Access to Justice and Implementation of Human Rights, Paper Presented at First South Asian Regional Judicial Colloquium on Access to Justice in New Delhi (Nov. 1-3, 2002), *available at* http://www.humanrightsinitiative.org/jc/papers/jc_2002/judges_papers/chandrachud_final.pdf (last visited June 29, 2005). However, Chandrachud's paper proceeds from the basis that there are many kinds of differences, not just financial, that may impact upon an individual's or group's ability to approach the courts with any measure of success.

15. *See* S v. Damoyi, 2004 (1) SACR 121 (C).

16. Raymond Koen, *The Language of Racism and the Criminal Justice System*, 11 S. AFR. J. ON HUM. RTS. 102 (1995).

17. Jessie Allen, *Focusing Legal Aid on Criminal Defence Marginalizes Women's Legal Service Needs*, 11 S. AFR. J. ON HUM. RTS. 143 (1995).

18. Jokin Alberdi Bidaguren & Daniel Nina Estrella, *Governability and Forms of Popular Justice in the New South Africa and Mozambique: Community Courts and Vigilantism*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 115 (2002).

19. *Id.*

20. The Truth and Reconciliation Commission's approach has been described as focusing on "dialogic" truth, where victim, accused, and others who were aware of the incident could all be heard and where, not just the incident itself but the circumstances in which it occurred, were relevant. S. Muralidhar, Alternative Dispute Resolution and Problems of Access to Justice, Paper Presented at CHRI: Judicial Exchange on Access to Justice in Mumbai, India (Nov. 14-16, 2003),

rather than conflict; a focus on community rather than purely individual claims are being explored in "alternative courts"[21] and in selected areas of the law in South Africa.[22] However, these values continue to be seen as appropriate for special cases, as supplemental to the justice system and not as part of the mainstream.

In this Article, I argue that the answer is to be found in a legal culture still firmly rooted in the past. The problems associated with alternative models of justice are no small obstacle to change. Further, it may be argued that there are more pressing demands on legal reform in South Africa. However, the cementing of a conservative legal culture that will define our jurisprudence in years to come is a matter for serious concern and discussion.

II. PROBLEMS WITH ACCESS TO JUSTICE IN SOUTH AFRICA

As noted above, the rights of accused, arrested, and detained persons are protected in the South African Constitution. These rights are fairly specific and include a qualified right to legal representation at the states expense for both detained and accused persons.[23] In addition, section 34 of the South African Constitution provides: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."[24] Though the right to legal representation in civil cases is not specifically guaranteed in the South African Constitution, section 34 has been interpreted to include this right where "substantial injustice" would otherwise result.[25] Much has been

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available at http://www.humanrightsinitiative.org/jc/papers/jc_2003/judges_papers/murali_final.pdf (last visited June 29, 2005).

21. *See* Wilfried Schärf, *Policy Options on Community Justice*, *in* THE OTHER LAW, *supra* note 5; TOM W. BENNETT, CUSTOMARY LAW IN SOUTH AFRICA ch. 5: Courts (2004)

22. *Supra* note 13

23. *See* S. AFR. CONST. § 35(2)(c) ("Everyone who is detained, including every sentenced prisoner, has the right to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly"); *id.* § 35(3)(g) ("Every accused person has a right to a fair trial, which includes the right 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").

24. S. AFR. CONST. § 34.

25. Nkuzi Dev. Ass'n v. Gov't of the Republic of S. Afr., 2002 (2) SA 733 (LCC), at 735. However, this has not yet been applied outside of the context of that case. *See* Stephen Ellmann, *Weighing and Implementing the Right to Counsel*, 120 S. AFR. L.J. 319 (2004).

written about the right to legal representation in criminal and civil cases.[26] There is general agreement that, while the situation has improved considerably post-1994, there are still problems with the availability and quality of legal representation.[27] Denial of access to justice has also been linked to the structure of our society itself, to more weighty issues such as the vast inequalities which exist between rich and poor. Most people in South Africa cannot access justice in any real sense because of financial, economic and geographical factors.[28] The fact that the large majority of our population is effectively isolated from justice is about more than just these factors. In other words, although creative and successful means of extending legal aid are being explored and implemented, and attempts are being made to locate courts in areas that do not have them, the manner in which the courts operate is not something that has been adequately addressed:

> In spite of profound changes after the arrival of democracy, the underlying structure of their [South Africa and Mozambique's] formal justice systems is still largely colonial, which makes them highly bureaucratic, incomprehensible (they operate in the colonial language), procedurally expensive and complicated. This results in large groups of people being excluded from the official systems.[29]

The South African constitutional experiment has been followed with great interest around the world and there are many reasons to be proud of the transformation of our legal system. However, the system remains deeply rooted in the past in some fairly fundamental respects. Writing in 1998, Karl Klare identified what he called a "disconnect" between the

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26. *See, e.g.*, Ellmann, *supra* note 24, at 318. The most important case on legal representation in the criminal context is still *S v. Vermaas.* S v. Du Plessis 1995 (3) SA 292 (CC); *see also* Jeremy Sarkin, *The Constitutional Court's Decision on Legal Representation*, 12 S. AFR. J. ON HUM. RTS. 55 (1996). Legal representation in civil cases has been dealt with in *Nkuzi.* Allen, *supra* note 17.

27. Ellmann, *supra* note 24, at 320; *see also* Bidaguren & Estrella, *supra* note 18, at 113; Budlender, *supra* note 14, at 351. There are also a number of cases dealing with the quality of free legal assistance. *See, e.g.*, S v. Charles, 2002 (2) SACR 492 (E); S v. Ntuli, 2003 (1) SACR 613 (W); S v. Nzima, 2001 (2) SACR 354 (C); S v. Chabedi, 2004 (1) SACR 477 (W).

28. *See* Budlender, *supra* note 14, at 341; Bidaguren & Estrella, *supra* note 18, at 122–23.

29. Bidaguren & Estrella, *supra* note 18, at 122-23. Although there is provision for interpreters in South African courts, there continue to be problems related to availability and expertise of such interpreters. In addition, the fact that few legal professionals speak any indigenous languages also impacts on the extent to which individuals can access the legal system. *See* S v. Damoyi, 2004 (2) SA 564 at 567; S v. Lubisi, 2004 (3) SA 520 (T) at 524; S v. Dzukudu, 2001 (2) SACR 244 (W).

South African "Constitution's transformative aspirations and the conservative character of South African legal culture."[30]

The South African Constitution itself embraces notions of participatory democracy, social, and economic equality, protection of culture,[31] openness, and transparency. As Klare points out "[T]he South African Constitution, in sharp contrast to the classical liberal documents, is *social, redistributive, caring, positive,* at least partly *horizontal,*[32] *participatory, multicultural,* and *self-conscious* about its historical setting and transformative role and mission."[33] Despite this, the legal community has retained an extremely cautious view of the role of judges and courts in the system. There are many people who still argue that the role of a judge is not transformative, that judges are there simply to implement the law.[34]

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30. Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 151 (1998).

31. *Id.* at 151. Note that the right to culture is conceived of as both an individual and associational right. *See* S. AFR. CONST. § 31(1).

> Persons belonging to a cultural, religious or linguistic community may not Be denied the right, with other members of that community —
> (a) to enjoy their culture, practise their religion and use their language; and
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

Id.

32. *Id.* § 8(2) (stating "A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right"); *see also id.* § 8(3). In addition, the equality provision, section 9 is explicitly horizontally applicable. *See id.* § 9(4).

33. Klare, *supra* note 29, at 153.

34. The recent High Court decision in *S v. Shiburi* makes for interesting reading on the role of judges. S v. Shiburi, 2004 (2) SACR 314 (W). Two of the three judges held that there was no duty on the judicial officer in the lower court to inform the unrepresented accused of the right of access to police dockets upheld by the Constitutional Court in *Shabalala.* Shabalala v. Attorney-Gen. of Transvaal, 1996 (1) SA 725 (CC). Acting Judge E.M. du Toit found that

> it is certainly not a magistrate's duty, or function, in any way to advise either the prosecution or the accused on the preparation or conduct of their cases or to assist either of them, or appear to assist them in that regard . . . [t]his is not the function of a presiding judicial officer in an adversarial system, and in doing so a magistrate would not only not be seen to be impartial, but would actually be taking sides.

Id. ¶ 91. The dissenting judge, however, was of the view that, for the right to a fair trial to have any substance, the accused has to be made aware of what the right entails. This would include an unrepresented accused being informed of these rights by a judicial officer. While this requires some

With that as the overarching view of the place of judges in the system goes a particular conception of adjudication: making assessments on the claims of equally equipped parties in a neutral and noninterventionist manner.

It has been cogently argued that there is nothing neutral about the choice of this particular approach, that legal constraint is not an objectively knowable concept but is culturally constructed.[35] In interpreting texts, choosing when to (and when not to) intervene, making decisions about evidence, and other exercises of judicial power, judges, "[M]ake conscious and unconscious choices about how to deploy their intellectual energy and resources. These choices rest on values, perceptions and intuitions external to the legal materials, since the choices only arise in response to apparent gaps, conflicts and ambiguities in the materials."[36] Nothing illustrates this point more clearly in the South African context than the conflicting approaches to indirect discrimination taken by the Constitutional Court within a period of four years between the cases of *City Council of Pretoria v. Walker*[37] and *S v. Jordan*.[38]

Walker dealt with two policies of the City Council of Pretoria. The year 1994 saw the amalgamation of various townships into towns. In Pretoria, the black townships of Mamelodi and Attridgeville were merged with the still predominantly white town of Pretoria.[39] The townships had no meters for measuring the consumption of electricity and water and this situation was being remedied. The Council decided to continue to levy a flat rate while the meters were being installed.[40] Walker, who was a resident of the old white town of Pretoria claimed that the flat rate was lower than the consumption related rate residents of "old" Pretoria were paying, that debts for nonpayment were only being enforced in "old" Pretoria, and that both these policies constituted unfair discrimination.[41]

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judicial intervention, it does not mean that the judge has "entered the arena" improperly. *Id.* ¶¶ 17, 23, 24.

35. Klare, *supra* note 29, at 160–61.

36. *Id.* at 163.

37. 1998 (3) BCLR 257 (CC).

38. S v. Jordan & Others (Sex Workers Educ. & Advocacy Task Force & Others as Amici Curiae), 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC).

39. *Walker*, 1998 (3) BCLR 257, ¶ 4.

40. *Id.* ¶ 5.

41. *Id.* ¶¶ 1, 6. In South Africa, the term "unfair discrimination" is used to distinguish permissible forms of discrimination from impermissible ones. Not all discrimination is considered to be a limitation of the right to equality, protected in section 9 of the South African Constitution. Only discrimination which has the effect of seriously impairing the rights, interests or dignity of individuals is potentially unconstitutional. *See* Harksen v. Lane, 1997 (11) BCLR 1489 (CC); Harksen v. Lane, 1998 (1) SA 300 (CC).

The Constitutional Court in *Walker* held that both policies were indirectly discriminatory on the basis of race.[42] The Court defined indirect discrimination as emanating from a policy or law which appears to be neutral but which has a discriminatory effect, in that a disproportionate number of a particular group feel its negative impact.[43] The Court went on to hold that, whilst the policies here were apparently directed at geographical area, one could not ignore the fact that the areas were still predominantly populated by particular race groups.[44] On the question of whether the discrimination was unfair, the Court upheld the flat rates but found the selective recovery of debts to be unconstitutional.[45]

Compare the approach of the *Walker* court to indirect discrimination to that of the court in *S v. Jordan*.[46] In this case, section 20(1)(aA) of the Sexual Offences Act was challenged on the basis that it violated the right to equality, amongst other rights protected in the South African Constitution. The section provides that, "[a]ny person who has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward . . . shall be guilty of an offence." The court of first instance found the section to be unconstitutional, mainly relying on the privacy arguments put forward in the case. The High Court in *Jordan* did not really deal with the argument that the section amounts to indirect discrimination on the basis of gender.[47]

The case then went before the Constitutional Court for confirmation of the order of invalidity, as is required by section 167(5) of the South African Constitution. This court did address the arguments regarding gender discrimination in detail. The Constitutional Court accepted the appellant's argument that the section is aimed only at the prostitute[48] — in other words, it does not target the customer.[49] The Constitutional Court went on to find that, as the distinction made was between prostitute and customer, there could be no direct gender discrimination. The argument on indirect gender discrimination centered on the facts that most prostitutes

42. *Walker*, 1998 (3) BCLR 257, ¶ 32.

43. *Id.*

44. *Id.*

45. The decision has been criticized for this finding but a discussion of this is beyond the scope of this Article. *See id.* (J. Sachs, dissenting) Walker, 1998 (3) BCLR 257, ¶ 87; *see also* Saras Jagwanth, *What is the Difference? Group Categorisation in* Pretoria City Council v. Walker, 15 S. AFR. J. ON HUM. RTS. 200 (1999); S v. Jordan (cc), 2002 (II) BCLR 1117 (cc), ¶5. 45(B) *Id.* ¶ 34.

46. *See supra* text accompanying note 38.

47. S v. Jordan, 2002 (1) SA 797 (T).

48. The term used in the majority judgment. *Id.* ¶ 13.

49. S v. Jordan (CC), 2002 (11) BCLR 1117 (CC), ¶ 8.

are women, and the legislation did not target the predominantly male clientele. On the issue of whether indirect discrimination existed, the Constitutional Court held that section 20(1)(aA) must be read in the context of the general laws on prostitution.

There are other laws under which the customer may be liable for an offence. Under South African common law, the customer is an accomplice to an offence and the customer could also be charged under section 18(2) of the Riotous Assemblies Act 17 of 1956 for instigating, inciting, commanding, or procuring another to commit an offence. A person charged in this way is liable to the same penalties as a prostitute.[50]

In light of this, a majority of the judges found that there was no indirect discrimination on the basis of gender. They found section 20(1)(aA) to be "gender-neutral" because it is aimed at both male and female prostitutes.[51] The majority did not find the fact that most prostitutes are women to be very significant in the analysis on indirect discrimination.[52] Furthermore, the majority rejected the argument that the practice of prosecuting prostitutes and not the customers amounts to unfair discrimination — while the faulty application of the law was a problem, it was not a constitutional defect relevant to the constitutionality of section 20(1)(aA).[53]

A minority of the judges took a different view,[54] holding that the impugned section amounted to indirect discrimination on the basis of gender. These judges found that the provision had a disproportionate impact on women because most prostitutes are women.[55] The other law, under which the customer could be prosecuted, did not assist the state as the result was that the prostitute was seen as the principal offender which perpetuates stereotypes about gender roles. "[T]he infererence is that the primary cause of the problem is not the man who creates the demand but the woman who responds to it: she is fallen, he is at best virile, at worst weak."[56]

The majority judgment is a glaring departure from the approach in *City Council of Pretoria v. Walker*. By the Constitutional Court's own definition, *Jordan* was clearly a case of indirect discrimination as it

50. *Id.* ¶ 11.

51. *Id.* ¶ 15.

52. S v. Jordan (cc), 2002 (II) BCLR 1117 (cc), ¶ 19.

53. *Id.* ¶ 19.

54. Justices O'Regan and Sachs delivered this judgment. Deputy Chief Justice Langa and Justices Ackermann and Goldstone concurred in it.

55. *Jordan*, 2002 (11) BCLR 1117, ¶ 59-60.

56. *Id.* ¶¶ 61–65.

concerned a law or policy which, although facially neutral, impacted negatively on disproportionately more women than men.

In addition, the Constitutional Court's sudden reluctance to concern itself with how a policy or law is implemented is also at odds with the approach taken in *City Council of Pretoria v Walker.* In that case, council policy did not state that debts were only to be enforced against the residents of old Pretoria but that was how officials were implementing the policy.[57] The majority had no problem finding this to be unconstitutional. Most interesting perhaps was the majority's lack of concern with the serious impact on the dignity of prostitutes (and women generally) which results from their being singled out and viewed as more culpable than their male clients in the context of sex. The reasoning is at odds with the Constitutional Court's insistence on the centrality of dignity in the equality analysis in its previous cases, despite serious criticism of this approach.[58]

The reason for the departure is, to be found in the following passage from *Jordan*:

> The Legislature has the responsibility to combat social ills and, where appropriate, to use criminal sanctions. In doing so, it must act consistently with the Constitution. Once the Legislature has done so, courts must give effect to that legislative choice and may not enter into the debate as to whether the choice made is better or worse than others not chosen . . . It is not for this Court to pass judgement on the effectiveness or otherwise of the choice made by the Legislature. Indeed, we are not entitled to set aside legislation simply because we may consider it to be ineffective or because there may be other and better ways of dealing with the problem.[59]

The passage supports Klare's description of South African legal interpretation as "highly structured, technicist, literal and rule-bound."[60] This description is as accurate today, perhaps even more so, than it was in 1998. The Constitutional Court's conservatism, reflected in the passage

57. *See* City Council of Pretoria v. Walker, 1998 (3) BCLR 257 (CC), ¶ 76.

58. *See* President of the Republic of S. Afr. v. Hugo, 1997 (4) SA 1 (CC); Harksen v. Lane, 1998 (1) SA 300 (CC); Nat'l Coalition for Gay & Lesbian Equal. v. Minister of Justice, 1999 (1) SA 6 (CC); Cathi Albertyn & Beth Goldblatt, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*, 14 S. AFR. J. ON HUM. RTS. 248, 256-60 (1998).

59. *Jordan*, 2002 (11) BCLR 1117 (CC), ¶¶ 25–26.

60. Klare, *supra* note 29, at 168.

above, is at odds with the project of transformation so clearly articulated in the South African Constitution itself.[61]

The Constitutional Court has,[62] at times, been quite candid about the pliable nature of legal interpretation.[63] However, in difficult cases and increasingly often, it has retreated into the received wisdom of justice as neutrality and nonintervention.[64] This is accompanied by a dogged refusal to acknowledge that this view of justice is itself a construct. Choosing when to (and when not to) intervene is as much a value-based decision as deciding what circumstances are relevant in adjudication. The majority's approach in the *Jordan* case is an example of this. Their refusal to see the fact that predominantly male clients are never prosecuted in this country as relevant was truly a case of blind justice.

There are numerous other examples of this kind of caution.[65] In the decision of *Volks NO v. Robinson*,[66] the Constitutional Court found that a

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61. *See* S. AFR. CONST. pmbl. §§ 8, 9, 36, 39.

62. Or, more accurately, specific judges have.

63. What Klare has referred to as the plastic (not infinitely) nature of adjudication. *See* Klare, *supra* note 29, at 149, 171; S v. Makwanyane, 1995 (3) SA 391 (CC). In *Makwanyane*, Chaskalson P, as he then was, stated:

> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.

Id.; *see also* Klare, *supra* note 29, at 158 (citing *Makwanyane*, 1995 (3) SA 391, ¶ 207 (Justice Kriegler's reference to the relevance of extralegal considerations)).

64. For criticisms of this approach, see YOUNG, *supra* note 3; ROBIN WEST, CARING FOR JUSTICE (1997); VIRGINIA HELD, JUSTICE AND CARE (1995).

65. Bel Porto School Governing Body v. Premier, 2002 (3) SA 265 (CC) (showing Constitutional Court's narrow interpretation of "reasonableness"); *see also* Minister of Health v. Treatment Action Campaign, 2002 (5) SA 703 (CC) (showing Constitutional Court's approach to the minimum core obligation argument in the context of socioeconomic rights). In the earlier case of *Government of the Republic of South Africa v. Grootboom*, the Constitutional Court was unwilling to set out a core minimum but left open the possibility of doing so in appropriate future cases where there was sufficient evidence. Gov't of the Republic of S. Afr. v. Grootboom, 2001 (1) SA 46 (CC), § 33. In *Treatment Action Campaign*, however, the Constitutional Court went much further, saying that "the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them." *See Treatment Action Campaign*, 2002 (5) SA 703 (cc), ¶ 34.

66. Volks v. Robinson, 2005 (5) BCLR 466 (CC).

woman could not claim support from the estate of her deceased life partner.[67] Although the court acknowledged the vulnerability of women in South African society generally and life-partnerships in particular, Justice Skweyiya, writing for the majority, held that, "[t]he vulnerability of this group of women is, in my view, part of a broader social reality that must be corrected by the empowerment of women and social policies by the legislature."[68]

There are examples on the other end of the spectrum too: the Constitutional Court's willingness to develop the common law to embrace state liability for negligent omissions in policing and prosecuting provides examples here.[69] It is difficult to find a principled basis on which one can explain that difference in approach and the rationale underlying the shifting attitude to adjudication bear much further study. Legitimacy concerns may play a role here — a highly interventionist court handing out judgments which are never enforced would do serious damage to what is a relatively young democracy.

My concern is not necessarily with the result of any of these cases but with the pretense that there is a principled distinction to be made between them, that vast differences in approach may be traced back to some kind of common and "correct" understanding of the judicial role.

III. CONCLUSION

When one considers what access to justice means, it is understandable to focus one's attention on the availability of legal advice and representation, the courts themselves, interpreters, and education. The

67. In this case, the couple had been in a stable life partnership for about fifteen years. *See id.* judgment ¶ 3.

68. *Id.* ¶ 66. Compare the approach of the three dissenting judges, Justices Mokgoro, O'Regan (the two female justices on the bench), and Sachs. The three judges found the impugned legislation to be unconstitutional (Sachs for somewhat different reasons from the other two) but suspended the order of invalidity for a year to enable government to amend the legislation. *Id.* ¶ 145.

69. *See, e.g.*, Carmichele v. Minister of Safety & Sec., 2002 (1) SACR 79 (CC) (showing the Constitutional Court found that the lower court erred in not developing the common law to ensure consistency with the Bill of Rights, as required by section 39(2) of the South African Constitution). This constitutional argument had not been raised. *Id.* ¶¶ 36–37. The Constitutional Court went on to find that the public (state) authorities could be held liable in delict (tort) for failure to carry out their duties. *See id.* ¶¶ 63–72. The case has been followed in a number of Supreme Court of Appeal decisions.

South African legal system continues to suffer from serious deficiencies in these areas. In light of these obvious and very important problems, arguments about judicial attitude may appear insignificant. However, access to justice pertains to more than just courts and lawyers, and addressing the more obvious issues will not ensure that the majority of South Africans are able to make their voices heard within the legal system. So debates about the role of judges, judicial interpretation and attitude are extremely important.

To date, there has been relatively little reflection, criticism and honesty about the judicial role. The transformative agenda so clearly articulated in the South African Constitution cannot be limited to the text itself. There is a misplaced confidence in the certainty of the text and of the values underlying it which enables judicial officers to retreat into legal formalism when they choose to do so. It is only through a more candid, self-reflective approach by judges, lawyers, and legal academics that one can begin to reconsider the manner in which our courts work.

A true reconsideration of the system may move us away from a strictly adversarial approach toward a more inquisitorial one. The fact that there are a huge number of people who cannot afford legal representation and who do not qualify for legal aid, means that many people have to navigate through a very difficult system with little assistance.

In some ways more troubling is the fact that people who do have legal aid often end up with inexperienced lawyers. Such circumstances make a complete fiction of the idea of a neutral judge hearing arguments from equally equipped parties. The judge may be in a unique position to interrogate the situation in order to find a resolution.

The approaches of community and customary courts, with their more relaxed procedures and a less strict notion of the separation of powers, have their own shortcomings and may not provide the best approach in all cases. However, it may be the case that disputes over human rights issues, for example, are more appropriately dealt with using the kinds of methods preferred in such courts. It has been argued that South Africa's equality courts may be able to draw from feminist thought on the ethic of care.[70] The focus on sharing of stories and healing and collective justice emphasized in such an approach is not completely foreign to the South African system — it has much in common with the approach taken by the Truth and Reconciliation Commission in its hearings. The point is that these ideas will not be considered as long as we retreat into convenient fictions about adjudication.

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70. Narnia Bohler-Muller, *What the Equality Courts can Learn from Gilligan's Ethic of Care: a Novel Approach*, 16 S. AFR. J. ON HUM. RTS. 623 (2000).