Transformation of the Magistracy: Balancing Independence and Accountability in the New Democratic Order

by

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Introduction

And this is in the end the key challenge: public confidence. This is not merely a public relations function, a creation of ad-men, something that image consultants can be hired to fix. Public confidence in a judiciary reflects far-reaching sentiments of belonging, identity and – ultimately – of justice among us all. These fragile sentiments were utterly destroyed in the South African past. It remains to be seen how far we can gather them together again. (Asmal foreword to Dyzenhaus 1998, p. x)

The central challenge presently facing the South African judiciary at every level is how to balance the need for independence and accountability required for the sense of public confidence and 'ownership' referred to in the above quotation. Generally judicial officials and institutions are quick to assert the need for independence, but slow and reluctant advocates of any form of accountability that extends beyond their own ranks. This set of attitudes even holds in countries like South Africa where the judiciary in the past was manifestly not independent - indeed conversion to its merits often smacks of expediency and self-interest - and where judicial officials and the courts as a result are viewed by significant sections of the public with suspicion and even hostility. There is, however, a genuine tension between the necessity for the judiciary to be both independent and accountable: is it possible to achieve both simultaneously, and if so, how?

This report documents this ongoing tension between independence and accountability as it affects the magistracy. It does so through three case studies that can be framed as encounters with the independence-accountability issue: the Truth and Reconciliation Commission (TRC), the lay assessor system, and social context training.

Why do magistrates matter given that it is judges of the higher courts, and now of the
Constitutional Court, who are primarily responsible for interpreting legislation and setting the standard of justice? They matter because the majority of South Africans come into contact with the legal system through magistrates. They are the 'coal face' of the South African judicial system:

It is in the Magistrates' Courts that justice is tested in its most crucial, most pervasive, most voluminous, most pressurised, and logistically most demanding dimensions – in literally thousands of cases every day … . The continuous struggle for the legitimacy and the efficacy of the instruments of justice is substantially lost or won in the Magistrates' Courts. (Mohamed 1998, p. 47-8)

Without independence and accountability for the magistracy there will not be independence and accountability for the judiciary as a whole.

The report is based on interviews with 24 magistrates conducted in Gauteng province in August and September 1999. Thirteen key informants from related professions and interest groups were also interviewed (see Appendix 1). All of the names of the magistrates and the names of two key informants have been changed to conceal their identity. Otherwise the citations from key informants are quoted alongside their real names. The background to and methodology of the study are described in detail in a companion report which analyses aspects of the work of magistrates during apartheid (see Gready and Kgalema 2000). The main argument and finding of this report is that magistrates both individually and institutionally have yet to properly engage with the need for both independence and accountability and that there is an urgent need for them to do so. Without this engagement there is little chance of genuine professional transformation.

The report begins by analysing the nature of judicial independence and accountability before outlining the position of magistrates in this regard in the apartheid past and how it has change in the post-1990 era. This discussion will be followed by the three case studies detailed above.

**Magistrates' Independence and Accountability**

Judicial independence needs to address a range of issues including appointment procedures, security of tenure, conditions of service such as financial security, judicial administration, and disciplinary mechanisms (Travers 1997 p. 3-5, Laue 1998, p. 93-6). Independence means essentially independence from the executive and from any other form of political influence and is, therefore, a series of structural conditions or protections, not simply a state of mind (a phrase more normally associated with the notion of impartiality). Invariably an important role is played by an intermediary but independent body, such as the Judicial Service Commission in South Africa. But as Laue states: "Judicial power … is not without limit" and crucially, "the other side of the coin of judicial independence … is judicial accountability" (1998, p. 96-7). The problem is that accountability, particularly external accountability, is often perceived by the judiciary as interference and therefore as compromising independence.

Forms of accountability however vary in scope and form. They include those internal to the profession (e.g. the requirement that judgements be reasoned, appeal and review
procedures, the oversight of the Magistrates Commission) and others that constitute a form of external scrutiny (e.g. media criticism, lay assessors). Complaint and disciplinary procedures could presumably be internal or external (Laue 1998, p. 97-8).

The dilemma is how to render the judiciary genuinely accountable without compromising its independence. Often descriptions of the linkage between the two from within the profession seem to privilege independence over accountability: "accountability measures, in whatever form, should exist solely for the purpose of protecting and upholding judicial independence. If they are applied for any other purpose or ineptly, they will undermine and weaken judicial independence" (Laue 1998, p. 98). The problem with this statement is that it reifies independence as the primary source of justice and public confidence and assumes that judicial independence is an unproblematic state of affairs that can be acknowledged simultaneously by all relevant actors. But many magistrates in South Africa think they are independent, and indeed have never been anything else, whereas public perceptions are far more sceptical and critical. In such a context of divergent perceptions and, given a history characterised by a lack of independence and unaccountability, what does accountability mean? And accountability to whom?

Under apartheid magistrates were public servants. Furthermore, they were usually appointed from the ranks of the public service rather than the legal fraternity and were appointed by the Minister of Justice in terms of Section 9 of the Magistrates' Courts Act of 1944. The majority were former prosecutors from the Department of Justice. The existence of executive magistrates was incompatible with the doctrine of the separation of powers. Magistrates received directives from the Department of Justice. Further, the Public Service Act of 1957 contained provisions relating to the organisation and administration of the public service as a whole, including the regulation of conditions of service, periods of service, discipline, retirement, discharge and dismissal of magistrates. As a result of the above factors the independence of magistrates was severely compromised: magistrates could be transferred without their consent; were dependent on merit assessments for promotion and salary increases; and could face an inquiry by the executive into charges of inefficiency or misconduct (where misconduct included publicly commenting "to the prejudice of the administration of any department" and disobeying a lawful order).

As public servants magistrates were manifestly not independent and were accountable to the state. Travers states: "No attempt was made to teach magistrates about judicial independence and what that really meant" (p. 20). The low status of magistrates within the legal profession was further entrenched by the fact that they performed both administrative and legal functions, often received an inferior legal training (civil service legal examinations), and were perceived by critics as significantly politicised. Nevertheless, or perhaps precisely for this reason, they came to enjoy wide powers and jurisdiction (by 1990, for example, magistrates in regional courts, which had greater jurisdiction than district courts, could try all offences except treason).

The status of magistrates began to change in 1993. Assessments of the Magistrates' Act (1993) vary considerably. Was it intended to bring about the independence of the magistracy? Or was its main aim to prevent the new democratic government from using magistrates to serve their political ends as the apartheid regime had done so effectively for many years? The Act statutorily removed magistrates from the public service. Furthermore,
it made provision for a Magistrates Commission as the statutory control body for magistrates, a salary structure approved by parliament, suspension to be confirmed by parliament, and for conditions of service determined by regulation by the Minister of Justice on the recommendation of the Magistrates Commission. In his submission to the TRC, however, Travers critiqued the Act and a set of regulations (Regulations for Judicial Officers in Lower Courts), both of which came into force in March 1994, stating that there is "no doubt that real independence for the magistracy was not the intention of the drafters" (p. 9). Among the stated shortcomings of the Act and Regulations are the following:

1) appointments of magistrates are still made by the Minister of Justice with the Magistrates Commission performing a purely recommendatory function;
2) the salaries of magistrates are determined by the Minister of Justice after consultation with the Public Service Commission;
3) magistrates are still subject to transfer without their consent – transfers are authorised by the Director-General: Justice (a public servant), "when it is expedient", the Magistrates Commission only has review powers, and the grounds for transfer are wider than under the Public Service Act;
4) magistrates, like civil servants, can be removed for "misconduct". While not defined in the Act, in terms of Regulation 25 "misconduct" includes arriving late for work, being absent without leave, or refusing to execute a lawful order;
5) the structure and procedure of a misconduct enquiry is the same as that for public servants. Further, the magistrate is required to disclose his or her defence at the outset - Travers states that "[d]espite requests by magistrates to amend this regulation the Commission has refused to do so" – and the onus in these enquiries is on the balance of probabilities and not beyond reasonable doubt; and
6) where a magistrate is found guilty of misconduct he or she is sentenced by the Minister of Justice, who has the power to withhold promotion, transfer the magistrate or caution/reprimand the person concerned.

Many of the above provisions compromise judicial independence (Travers, p. 10-13). Furthermore, to whom are magistrates ultimately accountable? In contrast to the above observations, Jasper Neet, a former Director-General: Justice, made the following comments about the Magistrates Act (1993):

I actually helped draft … the first Magistrates Act. That was the perfect Act, but that sort of made them independent with the Magistrates' Commission controlling them. And then it was subsequently, it was improved … . Now, some magistrates are very happy about it. Others feel, the Minister is still controlling them. But … the Minister always tried to carry out the wishes of the Magistrates' Commission … and, um, I don't think in any case the Minister has taken anybody just outside of the recommendations of the Commission … . They [white magistrates] are not very happy about it. They think that the Minister is not always following the recommendations of the Magistrates Commission … . Black people, senior positions … . But you also had to make the bench more representative. 

It was a "perfect Act" but one which was subsequently improved; it "sort of" made magistrates independent; the Act had a mixed reception with some still feeling that the
Minister had too much power; and remaining tensions were not only between the executive
and judiciary but also between blacks and white magistrates. There is also, it seems, a sense
in which state interference is now seen to take the form of affirmative action appointments
and promotions. The appointment policy clearly also engages with the relationship between
independence and accountability.

Travers expresses concern that, although in principle the independence of magistrates and
the magistrates courts are fully protected by Section 96 of the Interim Constitution (1994)
and Section 165 of the Final Constitution (1996), the Magistrates' Act and Regulations
remain in force (Travers 13, also see Laue 1998, p. 89-90). Among the relevant provisions
of the Constitution are the following:

The courts are independent and subject only to the Constitution and the law,
which they must apply impartially and without fear, favour or prejudice.
(Section 165(2), also see 165(3) - 165(5))

Other judicial officers must be appointed in terms of an Act of Parliament
which must ensure that the appointment, promotion, transfer or dismissal of,
ordisciplinary steps against, these judicial officers take place without favour or
prejudice. (Section 174(7))

At the heart of the controversy about the Magistrates' Act is the role and composition of the
Magistrates Commission. The initial Commission which served until October 1998 has
been widely criticised as a conservative body: "they sent out very strong signals, no change.
Keep up your standards. And that is just another word for apartheid". With the exception
of one black observer member (appointed after the 1994 elections), it was an exclusively
white body which undertook its deliberations in Afrikaans. The post 1998 Commission is
generally regarded as more representative and pro-change.

The Secretary of the Magistrates Commission, A. D. Schoeman, and another contacted
during feedback sessions in January 2000, the serving Director- General: Justice, Mr. V.
Pikoli, revealed ongoing tensions regarding magisterial independence. The division of
labour and responsibility between the Magistrates Commission and the Ministry of Justice
still appears to be a source of contention. Schoeman stated that the Commission has a role,
for example, with regards to misconduct and complaints (where it conducts an inquiry and
makes a recommendation but the sentence is imposed by the Minister); dealing with
magistrate's grievances; and appointments (where a process of interviews, recommendation
and review takes place before the Commission takes names to the Minister and he
appoints). All other service conditions are still dealt with by the Ministry. For example,
leave still has to be approved by the government. So although magistrates are no longer
public servants, their service conditions are in important respects unchanged.

Schoeman stated that there was about to be a review of service conditions pertaining to
magistrates and that the Magistrates Commission had recommended that responsibility for
such conditions be transferred to the Commission. He claimed that magistrates were
unhappy with various aspects of the current situation - for example, why are sentences for
misconduct passed by the Minister and not by the magistrates' controlling body? - and
continued that the Commission was under increasing pressure from institutions such as the
Association of Regional Magistrates of South Africa and JOASA to take action to secure an independent service dispensation. The Director General: Justice, Pikoli, asserted that the Ministry of Justice was doing everything possible to ensure the independence of magistrates, but that he didn't foresee complete independence, especially on administrative issues, except perhaps in the very long term. There will still be line responsibility with the Ministry, money will always come from the state. He concluded: "People want to take the question of independence to absurd extremes". The question here is essentially what degree and forms of independence constitute real independence for the magistracy? Furthermore, how do these concerns impact on accountability?

This section will conclude with some observations about judicial independence in the new dispensation from magistrates interviewed for this study. The first three quotes, all from the same magistrate, argue that process of securing independence is underway but as yet incomplete:

"we're still busy in the process of, um, you know total separation from the state. We haven't reached that as yet. But I believe the Minister is now in the process of doing so."

"… have not yet reached that stage of complete independence … it is still a matter of a few years [pause] before we reach that stage. We are moving in that direction. Its very positive. But it takes time."

"Everything has changed. We are now feeling more independent … we don't feel that the state is telling us that we must do this, we should do this, we have to do this. You get on a lot better with people. Um, (pause) it's really … it's all about independence, the whole magistracy." 9

The following comments by Fourie are in a similar vein, but recognise that magistrates are often still not seen as independent by the South African public:

"I think, um, at the present, the magistrates are still seen as part of the state organ. Um, and that, of course, is totally wrong. We are as independent as the judges. By saying that, of course, one must remember that independence is not fixed at the court it's fixed in the head of the person. Um, and I think what the government is doing, is on the way, taking the magistrates out of, or away from the past."

Among the stated implications of independence were an absence of interference, a freedom to criticize the state, and an ability to administer justice to all.

This section of the report indicates that independence and accountability are issues of considerable and ongoing significance for the magistracy, an observation that is confirmed by the following three case studies.

**Truth and Reconciliation Commission (TRC) and Magistrates**

In his paper delivered at a meeting of the International Commission of Jurists (ICJ) held in
South Africa recently, the Special Rapporteur to the United Nations on the Independence of Judges and Lawyers, Dato Cumaraswamy, considers judicial accountability. He says:

In a democracy, not one single public institution must be exempt from accountability . . . . However, judicial accountability is not the same as the accountability of the executive or the legislative or any other public institution. This is because of the independence and impartiality expected of the judicial organ.

The Commission finds that an appearance before the Commission in such special circumstances would have demonstrated accountability and would not have compromised the independence of the judiciary. History will judge the judiciary harshly. Its response to the hearing has again placed the questions of what accountability and independence mean in a constitutional democracy in the public domain for debate . . . . It is required that the judiciary display some sense of being able to balance its necessary and justifiable demand for independence with a measure of accountability to the South African nation it serves. (TRC 1998 Vol. 4, p. 107-8)

This quotation suggests that the judiciary, including magistrates, missed an opportunity offered by the TRC to demonstrate their accountability. What form did this failure take for the magistracy? In its quest to fully execute its mandate to establish "as a complete as possible of the nature, causes and extent of gross violations of human rights" the TRC decided not only to conduct individual hearings, but institutional investigations also. Institutional or sectoral hearings included those addressing health care, the media, the religious community and the legal sector in an attempt to ascertain how these institutions became complicit with apartheid. The TRC was particularly concerned to look into how these institutions were constructed in such a way as to allow or influence individuals working in them to commit human rights abuses and therefore recommend transformation in this regard that will protect human rights. In the TRC's legal sector hearings, held in October 1997, the magistracy was invited to account for its role in the apartheid order.

The Magistrates Commission, under its original, conservative composition, turned down the invitation on the grounds that it could not decide whether participation in an investigation would be of any benefit as it was "without clarity" on the exact allegations and "which section of the legal system is accused" (SALJ, 115(1) 1998, p. 16). There was only one written submission by a magistrate to the TRC prior to the legal hearing, from Regional Court President of Pretoria, Graham Travers. At the hearing itself two relevant oral presentations were made by former magistrates or magistrates. A. P. Laka, a magistrate in KwaNdebele between 1984 and 1986, described his work as a magistrate in a former homeland, a story of political interference, personal resistance and ultimately dismissal and imprisonment. Moldenhauer, the serving Chief Magistrate in Pretoria, expressed impatience at the pace of reform; stated that old ideas and ways of doing things persisted, as illustrated by the refusal by the Magistrates' Commission to make a submission to the TRC, a refusal of which he was "ashamed"; and referred particularly to the need for changes in attitude. The participation of magistrates in the hearing, therefore, was minimal.

The Magistrates Commission is widely perceived to have used the "lack of clarity" as an
excuse to avoid real engagement with the past, and therefore any kind of accountability. The TRC was so disappointed that it concluded in its findings that "they (magistrates) and the country lost an opportunity to examine their role in the transition from oppression to democracy" (TRC Volume 4, 1998, p. 108). A key informant for this study, the lawyer Jack Moloi, President of the Black Lawyers Association (BLA), also supported the TRC’s view by pointing out that:

If those people (magistrates) came forward to the TRC, for instance, and bared their breasts, as it were, then I have no doubt in my mind that people would understand better and accept them. We still suffer a syndrome of rejection of the white magistrates and judges in the country. And that issue would have been facilitated by their coming to the TRC and open their breasts which they didn't. And I lamented in my comment there (at the legal hearings) that they have missed an opportunity.\textsuperscript{11}

These conclusions were reached despite the fact that the Magistrates Commission made a written submission to the TRC after the legal sector hearings (see below). This is perhaps because of the importance attached to the public and personal reckoning with the past that was possible at the TRC hearings, but also because the Magistrates' Commission cooperation with the TRC appeared late, grudging and partial.

The charges that have been made against the Magistrates Commission are in many ways more serious still (see footnote 11). The role of the Magistrates Commission in encouraging or blocking the participation of magistrates in the TRC process was, during the various stages of this research project, the subject of confusion and disagreement. In its submission to the TRC, the Magistrates' Commission states that it had circulated a letter from the TRC of 20 November 1997 among magistrates countrywide "and invited them to assist the Commission by making individual submissions" (p. 1). Reference was made to only one submission, from Mr C. P. M. Meyer, a magistrate from Uitenhage. Schoeman, the Secretary of the Magistrates Commission, in a meeting with the authors of this report, and others associated with the institution, confirmed that a letter had been sent to all magistrates stating that they should feel free to participate. However, a magistrate with close links with the Commission commented that while such communication possibly took place he could not remember any circular sent by the Commission to magistrates. A further magistrate talked of a prevailing atmosphere of fear and intimidation (Fourie):

Q: in terms of notifying magistrates about the legal hearing, um, were you basically saying that the people who were in charge of the Commission simply didn't tell magistrates that they were being invited to make submissions. Fourie: That's, that's true … . They did not convey that in any way to magistrates. So, although the TRC criticised magistrates for not testifying, I feel that, um, with respect that was not correct, because the magistrates did not know that they are invited to testify before the TRC. One can very easily say, yes but what about all the news reports and invitations in the press.\textsuperscript{12}

Remember, those magistrates came from the era where you did not do anything without authority from head office or, at that stage, from the Magistrates Commission, not even speak to the press. Not even a simple word to the press.
And, um, with the lack of that authority from the Magistrate's Commission they would never talk to the TRC.\textsuperscript{13}

Regarding the magistrates. Well, you can't blame them (the TRC) for making that finding, but on the other hand, I would like, I would love it if they, especially … in their final report, that part in their final report that in fact it was to a great deal due to the Magistrates Commission that the magistrates did not come forward to testify.\textsuperscript{14}

The role the Magistrates Commission played orchestrating the response or lack of response from the magistracy is therefore something that requires further investigation and clarification. A final point, made by T. J. Raulinga, President of JOASA and Chief Magistrate of Bloemfontein, to one of the authors of this report is also of note: why, he asked, had the TRC approached magistrates through the Magistrates Commission, a body known to be conservative in its composition, rather than seeking to secure their participation through other, more promising, routes?

The Magistrates Commission submission opens by stating that following an initial exchange of letters, a letter from the TRC providing clarity on the issues it thought a submission by the Magistrates Commission should address, although dated before the legal sector hearings, was not received until after the hearings had taken place. The Commission, it states, had not been unwilling to make a submission to the TRC. It is impossible at this stage to gauge whether these comments were made in good faith, but a submission after the legal sector hearings was obviously of less value than one before. While its contents could be considered when drafting the TRC report its authors could not be questioned on its content in an open, public hearing. It is also clear that the Magistrates Commission made little or no proactive effort to make a submission to the TRC in time for the legal hearings.

The Magistrates Commission submission then details reasons why it could not make the kind of submission called for by the TRC. Firstly, as the Commission only came into being in 1993 it had, therefore not been in existence for most of the period covered by the TRC and as a result had "no means of effectively accessing the 'historical' information" the TRC was asking for (p.2). Secondly, the Magistrates Commission "cannot make submissions on behalf of magistrates in South Africa or, for that matter, on behalf of anyone else" (p. 2) as it is a statutory and not a representative body. Finally, the submission states that to address the issues raised by the TRC would "require intensive research" for which they lack resources or staff. As a result they responded "in rather broad terms only" (p. 2). There are two problematic aspects to these observations: firstly, it is not clear that making a submission about magisterial conduct in the past is the same as making a submission on anyones behalf; secondly, there is a danger that such a response will be read as a lack of will as much as a lack of means. This suspicion is exacerbated by the fact that not only is the submission drafted in "rather broad terms only", it is also only four pages in length.

The submission acknowledges that the magistrates' profession "had not been left unaffected by apartheid" (p. 3), they were "often called upon to actively participate in the execution of oppressive policies - both in their judicial and their administrative capacities" (p. 3). It continues: "Many of them uncritically deferred to the policy of the government of the day, some probably with enthusiasm" (p. 3). The reasons cited for this conduct were that
apartheid was an "all-pervading ideology" affecting all of society and that magistrates lacked independence from the executive. The submission states: "Magistrates constituted the category of judicial officers particularly prone to abuse by the executive. As civil servants … (magistrates) were often required to execute controversial policies unquestioningly" (p. 3). It is also noted that especially in security matters the jurisdiction of the courts was curtailed or totally excluded. While these are welcome acknowledgements, they do not tell South Africans who came into contact with the magistracy in the past anything that they did not already know. Further, probably because responsibility is far from completely owned – in what way were magistrates "required" to execute policies "unquestioningly"? – the submission does not at any stage move from acknowledgement to the making of an apology.

The submission then observes that the Magistrates Commission was established in an attempt to enhance the independence of the magistracy. The Commission states that it sees as its role "to cultivate a human rights culture among the members of the profession and to inculcate respect for and observance of the values associated with the rule of law" (p. 3). It then lists some of the ways in which it is attempting to fulfil this role – they do not include a full and frank engagement with the past of the magistracy (p. 3-4). Although the submission notes that the Magistrates Commission has a disciplinary function, there is more emphasis on the need for independence than on accountability. For example: "In short, the Magistrates Commission believes that it can best participate in the transformation of the magistracy … by inculcating a decided sense of independence with magistrates … . It also sees itself as a watchdog jealously guarding the independence of the magistracy" (p. 4). The submission concludes by expressing a willingness to learn from the failures of the past "in order to prevent a recurrence of government abuse of power ascribable to the judicial malfunctioning of magistrates" (p. 4). This comment again seems to pass responsibility from magistrates to the government. The question, however, remains: how can the agenda of learning from the past and not repeating its mistakes be embarked upon when it is not clear from this submission at least, other than in the most general terms, what these failures were.

More of a sense of the nature of the failure of the magistracy can be gleaned from the submission to the TRC by JOASA. The submission, also drafted after the TRC’s legal hearings had taken place, makes the following important acknowledgement:

We further acknowledge and accept without justification that influenced by the policies of the government of the day, the judiciary at the district level rendered itself culpable where it concerns the upholding of human rights. The non existence of an established human rights culture in the magistrates courts resulted in both a conscious and an unconscious perpetuation of policies that were discriminatory in nature, leading further to some gross violation of human rights. We acknowledge the illegitimacy of apartheid and the support the magistracy lent to it as an institution by act and omission in the process of applying these laws. We are also aware that we stood all the time bound to adhere to a strict professional approach to matters of judiciary and we should at all time have avoided being used as tools for the implementation of apartheid laws. We do concede that despite the nature of the dispensation there was at hand from time to time, in some instances judicial officers at the district level ought to have exercised their discretion differently so much that some of the
There follows an apology: "It is in that regard that we in (JOASA) therefore wish to apologise unreservedly for both conscious and unconscious acts and omissions by judicial officers at the district level that could have had the effect of undermining human rights from time to time. We sincerely seek to attain genuine reconciliation between ourselves and the many victims of injustices by acknowledging the truth of the past, settling the moral indebtedness arising therefrom and by actively engaging in setting the course for true justice" (p. 3, also p. 8-10). The remainder of the submission provides a kind of scorecard of past failures and successes (p. 3-8). While not detailing specific cases, at least this raises issues - the application of a range of laws that violated human rights; the biases and prejudices to which witnesses were subjected; the failure of custodial visits to provide protection; the mishandling of inquests; the recording of forced confessions – that provide the profile of past mistakes not to be repeated. The conclusion of the submission includes a "clarion call for … independence" (p. 9).

These submissions, taken together, constitute an unsatisfactory contribution from professional institutions involved with the magistracy. They are both short, lack detail – not a single magistrate is named in either submission other than Mr C. P. M. Meyer – and while in both there are calls for independence in neither is there any sense of how magistrates are accountable for their past conduct, and the resulting injustices and human rights abuses, and what the consequences of such accountability should be. One magistrate described the submissions to the authors of this report as "window-dressing".

Although magistrates did not formally take part in the TRC hearings, the hearings clearly impacted upon them in various ways both individually and institutionally. The TRC’s human rights violations hearings revealed widespread abuses in the domain of the magistracy. Former detainees, for example, told the TRC that their torture continued in the cells unabated as magistrates, charged with overseeing the complaints and safeguard system, nevertheless, failed to protect them. A companion report by Gready and Kgalema (2000) documents magistrates' responses to questions about torture. They are, in summary, that torture did occur, they as magistrates knew about and were opposed to it, but lacked proof to back up the rumours, hunches and allegations. This raises the question of complicity in torture and ill-treatment: were magistrates, who operated what was purported to be a complaints and safeguard mechanism, complicit in the abuses that took place?

Magistrates unanimously declared that their role in overseeing the safeguard and complaints system did not make them complicit in detention without trial or custodial abuse. Even when admitting that the safeguard and complaints system had failed to achieve its purported ends, magistrates granted themselves a clean bill of health. What criticisms there were never quite translated into self-criticism. This in part explains their non-appearance at the TRC – why appear before such an institution if you believe that you have done nothing wrong? – but it is nevertheless interesting to assess how magistrates reflected upon the TRC.

In general the TRC does appear to have punctured, if selectively, a cocoon of denial and ignorance within which magistrates operated. Some of this cocoon was externally imposed, some was willed ignorance and a terrain where not knowing blurred into not being bothered to find out and not caring, some was clearcut human rights abuse. Magisterial denial and
ignorance stretched from what happened at a distance, such as Vlakplaas, to what was happening under their noses: the treatment being meted out to detainees and the failure, therefore, of the safeguard and complaints system over which they presided. One magistrate who realised in retrospect that some of detainees he saw probably were tortured was asked how, as part of a system supposed to safeguard and protect, this made him feel:

when you look back on these things now, and you think back about what actually happened and all the things that have emerged from the Truth and Reconciliation Commission, then you sort of feel, um, (pause) sometimes you feel a bit upset and disgusted by everything that took place.\(^{15}\)

The quotations below illustrate the ways in which the TRC forced magistrates to confront to some extent the previously unknown, unacknowledged or denied in relation to torture and ill-treatment and the failure of the complaints and safeguard system.

- torture and ill-treatment

the types of complaints I used to receive were more or less the same … and listen to what is being mentioned in the Commission (TRC). One can tend to believe that a lot of things were being done, and such things were not mentioned to magistrates.\(^{16}\)

You've heard at the TRC of many types of torture and things that happened which you can't see … for instance, that's now what I've heard, I've never seen it, electrical equipment, for instance … that's very difficult to detect. And perhaps the person … not perhaps, most definitely, would be afraid to tell you. They never told me in any event if that happened.\(^{17}\)

to a very great extent, what we heard about it in the TRC it's not a surprise for me. The extent was a bit of a surprise. That they did indeed kill a person … but that they did torture people, that was no surprise to me.\(^{18}\)

- the safeguard and complaints system

Look, there's one thing I must say, from listening to the TRC … the system eventually seems to have failed, (pause) um, if half of the people spoke the truth then the system failed. If all of them spoke the truth, the system failed dismally (pause) … I mean it seems that people were tortured … It seems that people were murdered. It seems that horrific things would happen that we certainly never realized …\(^{19}\)

the system … if it was applied properly, should have worked. But listening to the TRC hearings, (pause) it certainly appears that some people were manipulating the system … . Certainly from the TRC hearings many things went wrong.\(^{20}\)

The magistrates in the above quotations acknowledge, both explicitly and implicitly, the
TRC's contribution to revealing the deficiencies of the old system of incarceration and the inefficiencies and brutality of its officials, including themselves.

In Gready and Kgalema (2000), interview material is presented to illustrate the three main forms of conduct revealed in interviews which can be construed as ways in which magistrates became complicit in human rights abuses with regards to their supervision of the safeguard system for detainees. These examples should be seen as the first cracks in a wall of denial and self-proclaimed innocence, relatively benign deeds that magistrates talked about because they did not see them as wrong or liable to open them up to criticism. They do not, therefore, represent a definitive list of malpractice:

- Moral disengagement – visiting and reporting as an end in itself as there was no follow through from magistrates to see whether complaints were acted upon.
- Routinisation of visits – removing any element of surprise.
- Police presence – e.g. one magistrate who when executing his safeguard duties in former the homeland of Venda admitted to the researchers that he did not care about the presence of security police in the cells when taking complaints from detainees.

These tentative insights into the past indicate how much work remains to be done for the magistrates' profession to fully confront and acknowledge its role under apartheid. They also raise important questions about accountability – were magistrates accountable to the Department of Justice? to the detainees? to the law and/or a sense of justice? The answers to these questions have implications for magisterial independence. But isolated, partial, private insights in the context of interviews for a study such as this are clearly not enough.

A range of issues about magistrates and their role in the past could have been explored at the TRC legal hearing including their role in visiting detainees, their involvement in taking statements and confessions, and their management of and judgements in courts. They missed the opportunity to reflect on the above issues at the TRC, something that could have facilitated a more effective transformation of their institution. Normally change follows only after there has been a sincere acknowledgement of mistakes. It is clear that magistrates were not independent in the past. As a result they require an acknowledgement of their past role and to engage with forms of accountability, past and present, as the cornerstones of their future independence. It is not possible to embrace transformation, including the idea of independence, without acknowledgement and accountability. This will require institutional leadership and individual reflection. Given this inauspicious beginning it remains to be seen how the profession will engage with future challenges in the process of transformation.

The Department of Justice recommended two key strategies for transformation of the magistracy in the new democratic dispensation: the introduction of lay assessors and the social context training for magistrates. It was, however, not clear whether they would significantly deal with the issues of independence and accountability. They are primarily designed to make the magistracy more sensitive and accountable to the communities they serve.

The lay assessors may present an immediate intervention to make courts accountable to communities. As transformation of values and attitudes is a long-term process, the social
context training offered to magistrates may begin to show its successes by making magistrates more sensitive to the needs of communities in a sustained way. It therefore, may be viewed as a long-term strategy for transformation. Some magistrates interviewed in the study welcomed the lay assessor system as a tool to bring justice to the communities, while others had fears that it will interfere with their independence (as shown below). Several who underwent the social context training admitted that the course empowered them to be perceptive in courts, thus delivering more accountable services to the communities by being sensitive to their cultures. However, others believe that they had been independent and therefore acted objectively all along. This raises again the important issue of the tension between accountability and independence in the transformation of the magistracy.

**Lay Assessor System**

In post-apartheid South Africa, the magistracy has been encouraged to come closer to the people, especially in relation to marginalized black communities, as they were the ones alienated by the former system. Many of the magistrates are whites and have little knowledge about the circumstances and culture of black communities due to the all-encompassing segregation of black and white lives under apartheid. One key informant interviewee acknowledged that apartheid also caused much harm to whites because it denied them the opportunity of associating with their fellow citizens (blacks) for so long. This association would have provided both sides with a space to develop as a nation with the capacity to understand and sympathise with the circumstances and views of other communities. In the absence of this socialization blacks and whites developed as strangers in one country. In dispensing justice in accordance with apartheid laws, most magistrates simply sentenced the accused without understanding or showing any sensitivity towards their social and cultural circumstances.

Alienation of/by the law was not just due to overt human rights abuses; it was rather the result of an entire culture and mindset within the courts. The management of the lower courts presents a good example of this. They were unfriendly or even hostile in their treatment of the accused and witnesses. This was particularly the case in dealing with blacks, the majority of whom were not highly educated, and were completely intimidated by the formality and rules of the courts. One black lawyer who worked in the courts during apartheid sums up:

> What I can remark about the majority of magistrates, is impatience. They don't have patience with people they deal with. They do not understand that to these people, the law court is a foreign place, particularly for an unsophisticated black person. Even to this day, they lack patience to try and get to the nitty gritty of the matter and listen. Often you hear, exclamations like "you are not going to waste the court's time," "you are not going to do this," or "you don't have to ask that type of question." Whereas, if they gave themselves time to try and understand the people, they could deliver much better service. It's lawyers that will know how the court functions, not the ordinary person in the street. And they need guidance and they need much more tolerance from the magistrates than they get.
However, it is notable that magistrates were not a homogeneous group who conspired with the apartheid order. There were some who acted against the influence of their political masters and conducted the business of their courts differently. As a former white lawyer (now a judge in the new dispensation) reflects on the conduct of one white magistrate:

I once had an acquittal. A man was charged under the Terrorism Act for sending information out of the country to the ANC in Botswana. He spent nearly a year in custody. And the trial took place in the Johannesburg Magistrate's Court. We tried to do a plea bargain. The state wouldn't do a deal. So it was all or nothing. The magistrate, an Afrikaans man . . . . I had never met before, acquitted him. Shortly thereafter he got transferred to Soweto. He was always unfailingly courteous to the accused and the witnesses, who were all black in the Soweto court. Most magistrates said, "Ja beskuldigde - Yes accused". He was always saying, "Yes Mr. Tshabalala." It was very noticeable. It stood out. Now in a 20 year legal career, that was one magistrate, one acquittal and one who behaved differently.24

In conditions of fear and intimidation people become stressed and their thinking processes do not operate freely. Stressful conditions may lead to people misrepresenting themselves thus leading to wrongful convictions. The creation of intimidation-free courts is necessary for human respect and good administration of justice as well as helping with a sense of 'ownership' and belonging. In such a context what do magisterial claims to independence and objectivity really mean?

After the democratic elections in 1994, the government prioritised the need to make courts understand the social contexts of previously marginalized black communities. With the magistracy still too dominated by whites, a lay assessor system was expanded to assist the magistrates to arrive at a more informed judgement when trying alleged offenders. To advance the idea of lay assessors, the advisor to Dullah Omar (former Minister of Justice) strongly argued:

that assessors should serve as watch dogs over prejudiced magistrates. Assessors must ensure that accused persons receive fair trials and that justice is dispensed in an impartial manner. Assessors will have to monitor bias, rudeness and prejudice. (Seekings and Murray 1999, p.166)

The system, in short, was meant to bring about greater understanding of the social circumstances of alleged offenders and their victims (via lay assessors). The proposal was not well received by some magistrates. However, others gave it the benefit of the doubt and some wholly welcomed the assessors. In piloting the project on assessors the Department of Justice encouraged the chief magistrates to voluntarily implement the policy in their districts, mostly in Gauteng province D-G:Justice, Pikoli: pilot not without resistance; three given responsibility initially to introduce it to urban areas; at centre of the project is community participation in justice. The chief magistrates had to invite community leaders in their districts to forward people with at least a little formal education to act as assessors during trials. Those selected members of the communities would then form a District Assessors Committee that would be in charge of all other assessors. A black senior magistrate in charge of the assessors in one area said, "I normally prepare a schedule to
show the dates on which we will have cases where we need assessors." The magistrate also mentioned that assessors are paid R20 per hour to the maximum of R100 a day. The Justice College were invited to offer a crash course on court procedure to the assessors.

According to the Magistrates Courts Act of 1994, section 34 categorically states that the role of the assessors was to help a magistrate "in an advisory capacity" to decide whether a person is guilt or not. Again in the same section, it states that "the court may, upon application of either party, summon to its assistance … assessors". This situation is about to change significantly in a number of ways. Once the Magistrates' Courts Amendment Bill of 1998 [B 33 - 98] is passed, the use of lay assessors will become compulsory at the trial stage of the following offences: if the accused person is charged with committing a serious violent crime and is, in the opinion of the prosecutor, upon conviction liable to imprisonment without the option of a fine. And where, in the opinion of the prosecutor, the offence is of such prevalence in the jurisdiction of the court or of such serious nature, that the accused person would, upon conviction, be liable to imprisonment without the option of a fine. Moreover their status will be elevated to that of court members in decision making only on matters of fact in the event of dispute during the above circumstances (Clause 3(c), Magistrates' Courts Amendment Bill [B 33- 98]). This proposed change in assessor status has caused considerable controversy amongst the magistracy and makes this study and its engagement with the underlying issues of independence and accountability a timely and relevant one.

The proponents of the assessor system, mainly the black magistrates in the context of this study, hailed the reforms as bringing justice to black people. A black magistrate gave some examples of cases in which the assessors would be very important:

a) If I have an assessor sitting with me (as a white magistrate) and we have an accused person who says he could not come to court because he had gone to circumcision school, a lay assessor would understand that. I would understand that (as a black magistrate). But a white magistrate won't understand that because circumcision in white knowledge means going to hospital, under local anaesthetic, and having a foreskin cut and that's all it takes. But with us blacks it means going to school for many months. A lay assessor will help a white magistrate to understand that.

b) If an accused woman says they fought because another one said she had missed a chance to get married, I (as black) know it's an insult and so will a lay assessor. But with a white magistrate he will say if you did not get married, so what. It's no insult.

c) Black men would fight about the last drop of liquor as to who should take it. To a white magistrate that won't make sense. According to the custom the last share should belong to the most senior person. A lay assessor would help a white magistrate to understand that when making a judgement in a case like that.

In these examples, the argument is that inter-cultural understanding by magistrates is a key concern in applying the law. Knowledge of cultural values will help improve the fairness
and relevance of the administration of justice. Therefore, the use of lay assessors will compensate for the lack of knowledge of other cultures by magistrates. Another black lawyer said of the system that "it would make black people feel at home knowing that are being tried by peers and there is nothing to fear".28 According to this lawyer's view the lay assessors will provide a sense of belonging, ownership and reduce alienation from the courts. Without this sense of public confidence in the official institutions of law, parallel adjudicative system such as people's/community courts will continue to flourish and the courts will continue to be seen as hostile terrain.

Also supporting the assessor system was a white magistrate who regularly uses assessors. This magistrate who started using assessors in 1995, mentions that in 1996 he used assessors in about 177 cases. At present he uses a particular woman as his regular assessor:

In cases like maintenance I would follow her blindly because she is a mother. She knows what is happening in the poor parts of the communities. She knows how people would make ends meet. I'm totally in her hands in some instances. I am living with the assessor system very easily. To me (it) is a great help. I'm sitting in the maintenance court at the moment and she sits with me every day. And she helps me every day.29

This magistrate recognizes the importance of the contribution brought by this woman in her knowledge of poor environments in which other communities live. He further acknowledges that the woman in her capacity as a mother has a deeper understanding of issues related to child maintenance, and, in some instances, he follows her completely. In this scenario not only the concern about culture but also an element of gender sensitivity is presented. The magistrate here acknowledges the motherhood of the assessor as a relevant factor in providing a useful perspective on the issues of child maintenance. He concedes that, as a man, he may not be sufficiently competent in this domain.

In defence of the introduction of the assessor system, one assessor asserted that "better decisions are made as legal knowledge is now paired with community knowledge".30 In a study about lay assessors Seekings and Murray (1999) found that:

- Assessors themselves believe that their presence enhances the quality of justice
- Assessors say that their presence enables the court to understand better the 'community' and to come to better decisions
- Most magistrates agree that the presence of assessors helps the court to understand the community, but imply that this is largely irrelevant to the quality of justice(p. 169)

The fact that many magistrates still feel that understanding the communities in which they work is irrelevant to the administration of justice reveals a residual perception of the law as objective and divorced from its social and political context. From the above argument both the assessors and the magistrates appear to agree on the whole that the system will contribute in the culture of the court with regard to enhancing community knowledge and sensitivity. They mainly differ on whether the participation of assessors should extend to mandatory involvement in decision making. This, however, is a key distinction in the light of the proposed new legislation – what, in short, should the power of the lay assessor be?
Magistrates in our study and the one conducted by the Law Race and Gender Unit (LRG) did not directly express an opposition to compulsory use of assessors as the Magistrates’ Courts Amendment Bill [B 33B- 98] suggests, but object vehemently to the enhancement of their status to a position where they share power with the magistrates in terms of decision making. The assessor system is indeed a subject of some controversy among magistrates who felt that it offers a form of accountability that directly threatens their independence. The main frustrations mentioned by magistrates in this study were indeed around the status and independence of the courts that could be undermined by this system. To be a magistrate you were required to go through training processes which emphasised that it was a privilege to be admitted in the profession. This form of training, it is still believed, places magistrates in a better position to administer justice impartially.

Such beliefs are based on the belief that judicial officers, once on the bench, are independent administrators of justice. This, however, is not how they are seen by many South African communities. This suggestion may also lead to the unfortunate conclusion that magistrates cease to be human on the bench (i.e. are neutral implementers of the law without any personal biases or discounting any contextual understanding of the case). To de-link magistrates from human influences such as political, social, economical and cultural factors would be a serious mistake.

A particularly harsh condemnation on the system has been presented by Martin Schonteich, a former researcher at the South African Institute of Race Relations:

> Lay assessors are at best superfluous, and at worst a threat to the independence of presiding officers. Presiding officers have the theoretical knowledge, training and practical experience which place them in the best position to reach a decision on the basis of all the evidence which is presented in a trial. There is nothing a lay person can contribute in such a situation.

This argument assumes that magistrates have an inherent independence because of their position, a view that ignores the history of the magistracy, and reveals a reified view of the law and legal officials while completely overlooking the racial and cultural divides that still undermine the ability of the magistrates to comprehend the context in which the laws have to be applied.

Franchois Botha, a former magistrate who now coordinates the Judicial Education Programme at the Law, Race and Gender (LRG) Unit based at the University of Cape Town points out that, according to many magistrates who have attended the courses, the lay assessor system so far has been a failed experiment. He argues that the assessors were supposed to cross a bridge between the community and the bench, but because of the many growing pains the system has not achieved these very aims. He says:

> The reasons for this could be that some magistrates feel threatened. There are also many other reasons advanced for this (like) incredible infighting (amongst) the assessors themselves to be selected. Now the process is being labelled as not transparent, and not democratic when someone is not selected. As a result, there were many meetings between the assessors and the senior magistrates trying to resolve these problems, and many assessors had to leave either in disgust or
dissatisfied with the process. And many other members of the communities felt that the assessors managed to get themselves into the pool while not deserving.

The point that Botha raises is that the system is not effectively managed. He argues that unless a formal pool is created whereby assessors can be accessed in the communities, the process will always create problems. Other complaints raised by the magistrates in our study included the delays of their cases. They claim assessors are usually not punctual and sometimes fail to attend court sessions, which leads to the postponement of cases. In cases where the defendants and witnesses travel long distances to court, this presents a particularly serious problem.

Nevertheless, Botha was quick to assert that, in principle, he is very much in favour of the system of lay assessors. He argues that it has significant potential for legitimising the judiciary. He says:

I do think we have to make sacrifices as magistrates, compromise some of the status of the court or high esteem or the elitism of the court in favour of the community acceptance. And if the lay assessors are going to provide courts with accessible services and people are going to feel more at home and feel there is a kind of legitimate process, then certainly, that is the process that must be (followed), even if it means by way of legislation. I am not sure though that the process is ripe enough for that piece of legislation (Magistrates' Courts Amendment (Bill 33B-98) to be pushed through.

One person who attended the seminar hosted by the Centre for the Study of Violence and Reconciliation (CSVR) in Johannesburg, in which the preliminary findings of this study were presented, privately raised a further relevant concern about the possibility of conservative assessors - those who will push for community vengeance. He feared that the conservative assessors may deadlock with the magistrates resulting in the disruption of courts proceedings. In response one interviewee argued that this could be prevented by utilising specific, well trained assessors. But a genuine tension remains here: lay assessors are the voice of the community in the courtroom – what happens if the community wants or is represented as wanting vengeance or other actions that violate the Constitution and Bill of Rights? While the assessors may bring to the courtroom understandings of justice at odds with the new legal order, one could also argue that the system may be a way of spreading the values of the Constitution into the community.

It is likely that some magistrates are opposed to assessors because it is perceived as a political strategy to introduce community participation and transform the magistracy. Equally their resistance may be a political strategy to resist change and maintain control over designated areas of the administration of justice. According to some of the magistrates in both our study and that of the LRG, assessors do assist courts in facilitating an understanding of cultures with which they are not familiar. While the utilisation of assessors thus seems key in the process of transformation, extensive additional work will have to go into promoting its full acceptance, addressing procedural issues that threaten the utility of the system and the scope of the role assessors will play. This could be done in various ways, one of such being for the government and Magistrates Commission to
convene a conference of relevant role players – including magistrates and assessors – to discuss the assessor system (see recommendations).

An assessor system should be viewed as a system that is meant to attempt to protect the rights and interests of the communities - rather than a technical issue in a legal context. This is a system which is intended to transform the past values of the magistracy which had operated and, in some cases, continues to operate outside the values and culture of the communities they serve. If managed effectively, the lay assessor system could render the magistracy more accountable without compromising the core components of their independence.

Social Context Training

Apart from the immediate corrective measures such as the assessor system, longer-term efforts are also in place to empower the magistrates with additional social skills and sensitivity. The Justice authorities decided to offer social context training to both new and serving magistrates through the Justice College in Pretoria. The college is the official body that coordinates all the legal training for magistrates, prosecutors and the court interpreters. In the new order, the Justice College had to include social context training in its curriculum and it contracted the University of Cape Town's Law, Race and Gender Unit (LRG) to perform this function. This training was based on the understanding that the magistrates, as human beings, bring their social beliefs, interests, values, norms, stereotypes, etc. to the court. Magistrates are thus susceptible to social conditioning when dispensing justice, especially in relation to cultures that are not familiar to them. There are two aspects to social context training: acknowledging one's own conditioning and gaining familiarity with the cultures of others.

The mission of social context training according to Ilse Olckers (co-founder and consultant on this training for LRG) is to promote sensitivity and knowledge to enable judicial officers to make more appropriate decisions. In an interview, she talked about the training as addressing a range of issues relating to the judicial process, court management and change management. The training provides a challenge to the positivist approach to the law and legal training that has predominated in South Africa. The training, for example, uses small groups, participation, peer facilitation, role play and experiential exercises. Botha stated that the content of the course revolves around the realities of people's lives and experiences that influence decision making. The course is structured to explore self-awareness, challenge comfort zones and introduce information about vulnerable groups. When asked if people take to it, Olckers replied "absolutely".

The LRG offers a variety of courses of different lengths. Olckers pointed out that there is a one-day compulsory workshop for every course that the Justice College run which is used as an ice breaker or introduction. It is also to identify people who could serve as change agents, and identify those that are committed to change. This is followed by weekend workshops with these people, moving around the country. The third level is an intensive two-week course for leadership types and potential future peer facilitators. Francois Botha, the course coordinator, explained that for this course they select 15 magistrates, and another 15 places are filled by lecturers from the Justice College. After two and a half months there is a follow-up meeting of the participants to sit for an examination. The exam consists of theoretical written tasks and an oral presentation about how the course has influenced their
decision making. The participants will then receive a certificate issued jointly by the University of Cape Town and Justice College.

One component of the training, called 'speak outs', is of particular interest as it provides a possible alternative arena in which magistrates could examine the past/their pasts. They take place when people are ready, especially during the final day of LRG training. Ockers stated that there have been a lot of contributions about prosecuting pass laws and political violence cases, taking responsibility, as well as black magistrates speaking about racist experiences or oppression they themselves suffered and women about gender issues ("A female magistrate from Nelspruit had never had a conversation with a black man before. She and a black magistrate arrived early for a course and both went for a walk on the beach. She told how her heart palpitated as the black magistrate came up behind her"). Ockers stated that the group must be mixed and needs to provide a relaxed and safe enough environment so that black and female magistrates will talk, and magistrates more generally can hear each others stories.

Claassen, from Justice College, commented about the training:

We would actually show them how stereotypes that we all have impact on the court procedure, the process and (how this) leads to injustices. Beside the legal training which is (in) substantive law, we show them how (stereotypes) finds its application in court. And that obviously then includes, nowadays, a huge component of social context training, breaking down stereotypes, a lot of human rights and constitutional training. And the whole issue of magistrates who are unaware who are white and male, who have never been to a township, know nothing about cultural practice and diversity. The social conditions of living 18 people in a shack. That's what social context training is about. It is sensitising about diversity, cultural practices. People are different.37

Social pressures in a given environment may force individuals to conform to certain stereotypes. Magistrates being mostly white and male South Africans were somehow prejudiced against or insensitive to the conditions of black defendants. Foster and Louw-Potgieter (1992) argue that the research they have undertaken seems to support the idea that, in highly prejudiced societies, attitudes are primarily determined by conformity to social norms. They reference a number of attempts to test this proposition:

Orpen (1971b; 1971c;1975) suggested that this could be done by showing that persons who conform more to typical South African norms and values in general would also be racially prejudiced. To prove this he constructed a "South Africanism scale" consisting of statements which raters felt expressed "traditional South African values". Highly significant positive correlations were found between this scale and measures of anti-black prejudice in samples of predominantly English speaking white South African university ($r = 0.50$ and $r = 0.53$) and high school students ($r = 0.43$). Orpen therefore concluded that racial prejudice in these subjects was largely a matter of conforming to a social norm. Other scales by Pettigrew (1958) produced similar findings which led to the conclusion that conformity is an important determinant of prejudice in South Africa. (p.179)
The above studies suggest that magistrates in the South African environment that was prejudiced against blacks may have conformed to these stereotypes and acted unjustly in courts. The social context training by the Justice College is aimed at making the magistrates more aware of their conformity (and possible stereotyping) during sessions in court. This was confirmed by a white magistrate who gave the following feedback on the training:

Yes, I do believe that magistrates now have a more independent sense of what constitutes justice. An organization that is doing a lot of work on this legal consciousness … fair consciousness and objective consciousness is the Law, Race and Gender Unit in Cape Town. They are doing a lot to better the social conscience of magistrates - sitting on the bench with your past being a magistrate in the new South Africa, if you know what I mean. And I have attended some of those workshops and for me especially it has helped a lot, because I come from a specific Afrikaans background. Most of the people before me are blacks, are, from their cultural backgrounds I can't sit and hear their cases coming from my perspective the whole time.38

This social context training has, in some cases, brought about transformation of personalities. For example, one Afrikaans former magistrate, now an employee at Justice College, explained her change:

So far in all the workshops I have been involved with, there was always some transformation, at least … of course with some people it happens slower than with other people. But I think the whole idea is to be sensitive towards that. Social context allows that concept that you have to be sensitive towards a person, where he comes from, and what he comes with. And there is always a form of transformation. Some people transform totally, like I did. And then you get others that take it slower but they do. In the short course though, I can really tell you that the transformation was, I always feel like total. You know it was sort of a complete transformation. And what happened with the one day courses that Law, Race and Gender do with the magistrates, its very difficult to see transformation. Because they do exercises and through exercises it's the only place where you can really see the kind of thinking the magistrate has. And it normally also tends towards social context awareness.39

Some of the magistrates in this study seem to accept that as social beings their experience plays a much greater role in every decision they make. However, others believe that they have always been objective on the bench and that they do not have biases or insensitivities that influence them. This reveals that there may be many people out there who still do not know, or are in denial about, how their background and experiences influence their thinking.

The LRG challenges a range of prejudices and attitudes beyond simply that of race and gender. During the presentation of preliminary findings of this study at a CSVR seminar, some youth leaders raised a concern that there was no mention of the role of the youth, and the need for sensitivity towards youth attitudes in this process. In response, Botha comments:
The unit is called Law, Race, and Gender, which does not necessarily define the parameters of our work. I think and I am also hoping that it implies we deal with issues of diversity and diversity manifests itself in every single course of our life, it can be in age; old age or young people.

All the isms will find themselves under the umbrella of diversity.\(^{40}\)

Botha asserts that youth have not been ignored and marginalized by the programme, as they are part of the diversity that they work with. He says that their presentations are normally influenced by the priority of the situation in a particular geographic area. For example if they are going to teach in the Northern Cape province, and the main problem is domestic violence in the area, their course will address gender issues.

Accountability and legitimacy are closely intertwined. Independence can be a strategy used to avoid accountability, and without this, the goal of legitimacy cannot be achieved. Legitimacy does however still provide space for independence. In order to achieve legitimacy among the people they serve, magistrates need to be accountable to the broader expectations of how justice should be administered. It is the objective of the social context training to inform magistrates about the world-view that they bring to their work and about the contexts within which they are working - so that their decisions can be relevant to the people. Botha argued that they try to provide magistrates with information that equips them to respond appropriately to the needs of the communities. He believes that the more magistrates respond adequately to the communities' concerns, the more they will achieve legitimacy. Equipped with the right information, magistrates will administer justice sensitively and independently, the consequences of which will be greater accountability to the communities' needs and consequently their role will be accepted as more legitimate.

**Conclusion**

The study has looked closely at the present and future challenges which are faced by both the magistrates and their institutions in South Africa. The core challenge is the need to legitimise the judicial officers and the magistracy through accountability without losing their independence. The study has found that the three strategies of transformation employed in South Africa comprising the TRC, the lay assessor system and social context training were a positive, if uneven, step in this direction. The study found that insufficient preparation was done in order to ensure understanding and acceptance of the introduction of the lay assessor system. Though there were few magistrates who rejected the idea of a lay assessor system outright, there were many who welcomed it only on the basis of an advisory capacity rather than in the administration of justice. The main problem which the magistrates had with the lay assessor system was in relation to power sharing in decision making on matters of fact in certain criminal offences on the bench, while other administrative concerns such as delays were also creating reservations.

On the issue of social context training, the study has found that most magistrates see the strategy as a success. Those who went through the training agree and support that it equipped them with greater sensitivity. This sensitivity will help to change the conduct of courts from an impersonal and impatient manner to a warmer and more sensitive approach. The magistrates further confessed that the training introduced them to new cultures, thus
improving their understanding of the communities that they serve.

All the above strategies are aimed at improving the legitimacy of the magistrates and their institution among the communities they serve. The TRC wanted to encourage magistrates to explore the past in order to encourage them to recognise their failures and understand the reasons for their perceived illegitimacy. Recognition must precede transformation. The assessor system and social context training are, on the other hand, both forward-looking strategies of transformation of the magistracy. Particularly in relation to the social context training, most magistrates realised that there was a need to transform both personally and professionally.

Transformation is the route to legitimacy and public confidence. Independence itself will help to legitimise the magistracy but it needs to be earned rather than simply self-appointed. Further, independence cannot mean independence from accountability or solely accountability to internal mechanisms and processes: to many these are one and the same thing. External monitoring of judicial independence is itself a form of accountability. Where there is such a difference between self-perception and public perception, however, measures to secure independence are not enough; they will not bridge the gap to public confidence and ownership. The threat to independence that magistrates perceive in these transformation initiatives, in particular through the assessor system, also need to be addressed. As suggested above, this strategy in particular needs to be further discussed, implemented carefully and be well managed in order to safeguard the magistrates' independence. All actors need to acknowledge the reality that there will always be tension between accountability and independence. To achieve a suitable balance, the process needs to be widely debated. This study found that at present in some quarters the principle of independence seems to be used to avoid accountability and thus derail transformation. Independence has in many ways become the discourse of the status quo while it is accountability that is the language of change. Genuine transformation will require both.

If accountability is key, to whom then should the magistracy be accountable? One response is to make the magistracy more accountable to the community, and this is the goal of the initiatives discussed in this paper. But care has to be taken over the form such accountability takes and its impact on independence. Another response is to return to the Constitution: "The courts are independent and subject only to the Constitution and the law" (Section 165(2)). Magistrates could become creatures of the constitution, accountable to its ethos and values. Such a mind-set would provide the legal framework on which to hook a more critical legal approach, where discretion, interpretation and independence would enable and empower magistrates. But, again, such an approach would need to be externally monitored. The Director-General: Justice, Mr. Pikoli, stated to the authors that a balance of accountability and discretion constituted independence. This question clearly requires further debate.

**Recommendations**

The study, therefore, recommends that the magistracy still requires significant further engagement with the issues of accountability and independence in order to achieve a fully fledged professional transformation. Firstly the institution needs to examine its past before engaging in a forward-looking entreprise of transformation. For example, this study has offered a brief space to the participants to tell stories about their past roles. Based on the
interviews of this study we recommend the creation of additional space for the judicial officials to personally debate and interrogate their past roles in order to change their attitudes and thus their institution. Attitudinal change is a requirement for sustainable institutional reform. This can be facilitated by the Magistrates' Commission coming up with a mechanism of institutional introspection such as an Internal Reconciliation Commission (IRC). With the internal dialogue the magistrates will recover the lost opportunity of the TRC, by being publicly able to engage in a process of story telling about their past roles, share responsibility, acknowledge what went wrong, apologise and thus transform. This model of IRC was used by the University of the Witwatersrand's Faculty of Health Sciences to interrogate its past discriminations in its Medical School and to further suggest a way forward in issues of transformation. This model proved to be a successful initiative in institutional self-examination.\textsuperscript{41}

We also recommend a conference of relevant role-players to evaluate the success of the assessor system and social context training so far and address the role these initiatives should play in the future. It could also examine more generally the transformation of the magistracy, debate the form and degree of independence in an attempt to overcome any differences between the Department of Justice and magistrates, and discuss more generally the nature of independence and accountability within a democratic dispensation. We recommend that the Ministry of Justice, the Magistrates Commission and other relevant actors convene a conference of relevant role players – including magistrates and assessors. Issues to discuss could include:

- Is the use of assessors necessary or useful in courts or not?
- Most importantly, should the use of assessors be mandatory or voluntary and should their powers be advisory on cultural and social issues or taking part in decision making?
- Where magistrates and lay assessors disagree what is the best means of dispute resolution?
- Technical issues about the assessor system which seemed to worry many stakeholders such as magistrates, the Director-General: Justice Department, Mr. V. Pikoli and assessors themselves e.g. is it a form of employment? If so, is it full time or part time? If not, what is it? How will the nature of the work be transmitted to potential assessors so as to avoid misunderstanding?
- How will selection take place both into assessors pools and from those pools to serve in court? The process must be transparent and fair. Will assessors serve with the same magistrates or rotate?
- What training will assessors receive?
- Is there a disciplinary procedure for assessors who are late or fail to appear at all? Again it should be transparent and clear.
- What are the implications and importance of the assessor system and social context training for getting the right balance between independence and accountability for the magistracy? There is a need to change the prevailing understanding of what independence and accountability mean – independence, for example, means freedom from political interference, but not total separation from social and cultural context.
- How should the assessor system and social context training be evaluated?
- Does social context training address all relevant issues (race, gender, age …)
• How can social context training appeal to and reach a wider constituency?

Notes:

1 This contrasts with the near exclusion of state employees from the bench as almost all judges came from the senior counsel of the private bar (advocates). Judges did not regard themselves as public servants and enjoyed more of the trappings of independence (for example, security of tenure).

2 Among the most notorious of these departmental instructions were those in which magistrates were cautioned against criticising the police in their judgements (The General Council of the Bar of South Africa, Submission to the Truth and Reconciliation Commission, p. 68-9).

3 The Hoexter Commission (1983) made a series of recommendations of relevance to magisterial independence, which were rejected or ignored (Travers p. 6-8,22-3).

4 The written submission by the Director-General of Justice to the TRC stated that "magistrates, particularly rural magistrates, performed a great variety of quasi-judicial and administrative functions. There were done on an agency basis, on behalf of government departments that had no official representation in specific communities". These functions included marriages; elections; citizenship; censuses; determination of cases in need of care and related matters such as the authorisation of free medical treatment, medical aids and hospitalisation; applications for social pensions, grants and allowances including social relief; collection of, and other functions relating to, taxes and stamp duty; and so on (p. 9-10). Acting as implementers of government policy clearly compromised magisterial independence. The authors of the report fed back initial analysis and findings from their research in January 2000 to the Secretary of the Magistrates Commission, A. D. Schoeman, who said that magistrates and the Commission were fighting to get a separation of administrative and judicial tasks. The Commission argued that the present combination of tasks interfered with the quality of legal work. Further, with regards to independence, as long as magistrates do administrative work they will receive instructions from the Department of Justice.

5 The Judicial Officers' Association of South Africa (JOASA, a voluntary association of judicial officers at a district level), formed in 1996, in its written submission to the TRC stated: "Some judicial officers at the district level were given to a rather discomforting association with the politicians of the day which led to either real or perceived influence by such politicians over their sense of judgement. This could have led to the direct or indirect undermining of human rights" (p. 6). The influence of the Broederbond among magistrates was also strong (one interviewee stated that the Broederbond controlled the Ministry of Justice, that the Director General: Justice and all his deputies were members, and membership was effectively a pre-requisite for becoming a Chief Magistrate. Further, he stated that the Magistrates Commission was controlled by the Broederbond until October 1998 (Fourie); also see JOASA p. 7). As a final notorious example, in 1985 the security police gave briefings and showed video clips on political unrest to magistrates and prosecutors in Durban. The film "apparently contained 'revolting death scenes', pictures of explosives and maps of trouble spots in a programme designed to inform the courts on what
was 'really' happening in the country". It was later reported that the Judge President of Natal, Mr Justice Milne, and three other Natal judges, recommended to the Chief Magistrate of Durban that the magistrates who had attended the briefing should not preside at trials or hearings involving 'unrest' (Human Rights Index South African Journal on Human Rights (SAJHR) 2 (1), 1986, p. 122, also Human Rights Index SAJHR 5 (2) 1989, p. 274).

6 Magistrates in the former homelands were placed under the auspices of the Magistrates Act (1993) by the Judicial Matters Amendment Act (1995) (Laue 1998 p. 89).

7 Interview with Neet: 28 September 1999

8 Interview with Fourie: 23 August 1999, also see, for example, Travers p. 12-13.

9 Interview with Muller: 10 September 99

10 At the end of the hearing it was placed on record by the chair that Moldenhauer had brought magistrates from Pretoria who had informed him that the TRC's letter of invitation had not been passed on to them by the Magistrates' Commission or the Department of Justice. It was stated that an arrangement had been made that the magistrates could forward submissions in writing to the TRC. According to Dyzenhaus, Travers persuaded two other magistrates to make submissions, "but too late for them to be heard" (1998, p. 29). It is not clear whether these references are to the same individuals. Moldenhauer when offered a chance to provide an evaluation of the hearing thanked the chair for putting the record straight: "The magistrates are willing to testify but it did not come to their notice. I was only invited to attend and also take part in the discussion, otherwise I would also … testify."

11 Interview with Moloi: 24 August 1999

12 Interview with Fourie: 23 August 1999

13 Interview with Fourie: 23 August 1999

14 Interview with Fourie: 28 August 1999

15 Interview with Cartwright: 3 September 1999

16 Interview with Mashudu: 9 September 1999

17 Interview with Muller: 10 September 1999

18 Interview with Nel: 8 September 1999

19 Interview with Bekker: 2 September 1999
Although primarily associated with the new, democratic order, the lay assessor system appears to have had its beginnings under the old order. According to the Director General of Justice, Submission to the TRC, in 1991, Section 93 of the Magistrates' Courts Act was amended to provide for the appointment of lay assessors for criminal cases in magistrates courts – the idea was to "increase community involvement in criminal matters" (p.89). The section allowed the magistrate to appoint one or two people to be assessors in judging a case, whether or not they were experts, if s/he believed it would fair and just to do so. The submission also refers to the work of assessors in regional courts and in imposing community-based sentences. It concludes: "We want to expand the lay assessor system further. We have therefore appointed a committee that has submitted draft proposals which aims to expand the lay assessor system in the lower courts with a view to enhancing community involvement in our criminal procedure. The proposals are currently being considered" (p. 89).

There were, however, some exceptions to this general rule. Mlambo stated that he was worried about independence: "Magistrates should request assessors, not be compelled. If we are compelled is our independence not compromised?"

One white magistrate in our study was similarly dismissive of the whole system and fundamentally questioned its value: "in what way can a lay assessor assist in court?" (Eloff: 10 September 1999).
34 Interview with Botha: 15 February 2000

35 Interview with Mashudu: 9 September 1999

36 These concerns are part of wider debates about the public accountability of the judiciary. During a discussion about to whom magistrates should be accountable, Mlambo stated: "To be accountable to the public can interfere with independence. The current pressure to be accountable to the public, I have a problem with that … I see the review and appeal process as a form of accountability. We are accountable to the legislature, we can't be accountable to the executive. Why not leave us to be independent? Why not trust the judiciary?" He concluded by saying that it was very difficult to be a judicial officer today, particularly in sex-related cases.

37 Interview with Claassen: 24 August 1999. Terreblanche provided one example of persisting stereotypes and biases.

I was very much aware of the fact that certain regional court magistrates, um, you had to prove a case beyond, beyond, beyond, reasonable doubt to get a conviction in rape cases … because, um, the bias and the stereotypes, [pause], that is still very much part of the judiciary in South Africa. And I'm not very proud to say that … it was very, very difficult to prove rape cases in front of male, white male magistrates … I remember a very well known magistrate … he always used to say that when a, um, a female victim … in a rape case, she always falls on her back, things like that … he was making jokes about that … very, very, difficult to prove rape cases in front of them.

38 Interview with Eloff: 10 September 1999

39 Interview with Du Plessis: 24 August 1999

40 Interview with Botha: 15 February 2000


Appendix 1

Key Informants

1. N. Melville, Independent Complaints Directorate (23 August 1999)
2. J. Moloi, President of the Black Lawyers Association (24 August 1999)
3. Du Plessis (pseudonym), Justice College (24 August 1999)
4. Claassen (pseudonym), Justice College (24 August 1999)
5. K. Satchwell, opposition lawyer, now a judge (25 August 1999)
6. R. Sutherland, Chair of the General Council of the Bar of South Africa (26 August 1999)
7. I. Olckers, Law, Race and Gender Unit, University of Cape Town (17 September 1999)
8. J. Neet, former Director General, Justice (28 September 1999)
9. H. Suzman, former parliamentarian (21 September 1999)
10/11. A. and M. Coleman, Johannesburg (1 September 1999)
12. J. D. de Bruin, former Director, Security (6 October 1999)
13. F. Botha, Law, Race and Gender Unit, University of Cape Town (15 February 2000)

Magistrates directly quoted (Pseudonyms used)

1. Fourie: 23 August 1999
2. Muller: 10 September 1999
3. Nel: 20 September 1999
4. Eloff: 10 September 1999
5. Bekker: 2 September 1999
6. Mashudu: 9 September 1999

References


TRC Submissions

The Director-General of Justice, Submission to the Truth and Reconciliation Commission (October 1997)
The General Council of the Bar, The General Council of the Bar of South Africa Submission to the Truth and Reconciliation Commission (October 1997)
JOASA, Submission by the Judicial Officers Association of South Africa (JOASA) to the Truth and Reconciliation Commission (September 1998)
G. Travers, Submission to the Truth and Reconciliation Commission (Judicial Hearings) (October 1997)