

# **Magistrates Under Apartheid: A case study of professional ethics and the politicisation of justice**

by

**Paul Gready & Lazarus Kgalema**



Research report written for the Centre for the Study of Violence and Reconciliation, August 2000.

**Paul Gready** is from the Institute of Commonwealth Studies, University of London.

**Lazarus Kgalema** is a former Researcher at the Centre for the Study of Violence and Reconciliation.

Funding for the project came from the Economic and Social Research Council in the United Kingdom and CSVr. Thanks to Hugo van der Merwe for editorial comments on the report. The authors of this report welcome comments, corrections and questions.

## **Executive Summary**

The [Truth and Reconciliation Commission](#) (TRC) institutional or sector hearings represented an innovative attempt to gain insight into the societal context within which human rights abuses took place under apartheid. This paper is both a response to, and an off-shoot from, one of these hearings, the legal sector hearing held in October 1997. The hearings, like much previous commentary, revealed the extent to which the legal profession became complicit in the implementation of apartheid. Most analysis has focused on the fact that judges declined to appear at the hearings, on the grounds that it would compromise their independence. But magistrates were also largely absent. This was a cause for concern because the majority of South Africans came into contact with the apartheid legal system primarily through magistrates.

Magistrates during apartheid were public servants and as a result their independence was significantly compromised. Among the wide powers and jurisdiction they enjoyed, magistrates performed crucial functions in relation to political detainees, including overseeing the complaints and safeguard machinery. It was on the complaints and safeguard system that this study was initially focused. There is voluminous evidence that the complaints and safeguard system failed to protect detainees. This paper argues that it this system was inherently flawed, because as employees of the state magistrates confronted the situation of dual loyalties, on the one hand to their employer and colleagues and on the other to the detainee whose well-being they were charged with ensuring. This situation of dual obligations is crucial to understanding the attitudes and conduct of magistrates.

Magistrates' own understanding of their work remains unknown. This research project has extended beyond its initial area of concern to include other aspects of magistrates' interaction with detainees – such as the taking of confession-statements - some more general analyses of their structural position and approach (for example, observations on the

relationship between law and justice), and an assessment of the ongoing process of transformation affecting the magistracy. A separate report has been written on the latter topic (Kgalema and Gready 2000).

The main source of information for this study was interviews with magistrates. The interviews took place in Gauteng during August and September 1999. In all, 24 magistrates were interviewed, of whom four were African and four female.

The main findings of this report are as follows.

1) Magistrates presided over a safeguard system for detainees that was designed to fail for the following reasons:

- magistrates were public servants and therefore their independence was inevitably compromised and questioned,
- magistrates' reports circulated within the closed-off state world of government employees and departments, meaning that they went directly to the very people who were the cause of the complaints and abuse, and
- magistrates lacked control over the environment in which they worked as they were denied, for example, freedom of access and often did not know what, if anything, happened in response to their reports.

2) Due to the way in which magistrates administered the safeguard and complaints machinery they made an already flawed system worse. Three main ways emerged from the interviews:

- through the routinisation of visits (making appointments, keeping to set days),
- through the use of visits and reporting as a means of disengaging from rather than engaging with their mandate, and
- through the conduct of visits in the presence of police personnel.

3) The next section of the report argues that the confession-taking process mirrored the safeguard system. It too was and still is structurally flawed, but was again made worse by the way in which magistrates engaged with their mandate: a routinised and bureaucratic approach, a lack of engagement with or easy disengagement from their potential to protect and safeguard, and a trust in and association with the custodial authorities that undermined magisterial effectiveness.

4) In order to understand why magistrates became complicit in rendering faulty systems oppressive, and thereby in human rights abuses, it is necessary to examine their reflections on independence and the relationship between law and justice. Alongside the fact that magistrates saw law and justice as synonymous, one of the important themes that comes out of the interviews is the distinction made by magistrates between structural authority (law, government) and the individual, and a belief that it was possible for an individual to inhabit and serve the structures while remaining independent, to secure justice, for example, within an unjust legal and state machinery. This set of attitudes, it is argued in this report, needs to be seen as a retrospective device enabling magistrates to distance themselves from and even criticise the apartheid regime for which they worked, while maintaining their individual

credibility.

5) The paper concludes with an examination of magistrates' reflections on, and moral engagement with, their individual and collective pasts. In general the scenario outlined by magistrates was as follows: torture did occur, they as magistrates knew about and were opposed to it, but lacked proof to back up the rumours, hunches and allegations.

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 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 section on reflection and moral engagement concludes with an analysis of magistrates' observations about the issue of apologies: is an apology from magistrates needed? If so, for what?

In conclusion, it is clear that, despite isolated and partial exceptions, magistrates in general lacked and still lack a moral vision to condition or evaluate their conduct. As a result, their moral engagement with the past is selective and self-interested. Magistrates were clearly not responsible for all of the ills that characterised, for example, the custodial system. These ills were the result of a complex relationship between unjust laws and government, politico-legal structures (such as magistrates being public servants) and a professional culture (magisterial allegiance to the state and its employees and the equation of the law with justice). However, magistrates do need to examine the ways in which they made a bad system worse and how they could have acted differently. The gap between these two modes of conduct, across a range of spheres of influence, can be seen as the area of magisterial complicity with the human rights abuses that took place. This complicity needs to be acknowledged and apologised for, thereby providing the cornerstone of reconciliation. While the move to an acknowledgement that abuses took place has generally been made, an acknowledgment of personal complicity in such abuses is completely lacking.

With a view to facilitating this shift from general acknowledgement to self-acknowledgement, and to enable the magistracy to address the past and move on into the future, the paper's main recommendation is that the Magistrates' Commission and other relevant institutions should convene a mechanism of institutional introspection such as an Internal Reconciliation Commission (IRC), to discuss with magistrates and a range of relevant stakeholders the role magistrates played in the past and ways of ensuring that mistakes are not repeated in the future.

## **Introduction**

### **The Truth and Reconciliation Commission and the Legal System**

South Africa is emerging from decades of systematic discrimination affecting every aspect of civil society. The Truth and Reconciliation Commission (TRC) institutional or sector hearings represented an innovative and unique attempt to gain insight into the societal context within which human rights abuses took place under apartheid:

How did so many people, working within so many influential sectors and institutions, react to what was happening around them? Did they know what

was happening? If they did not know, or did not believe it was happening, from where did they derive their ignorance or their misunderstanding? Why is it only with hindsight that so many privileged members of society are able to see that what they lived through was a kind of madness and, for those at the receiving end of the system, a kind of hell? (TRC, 1998 Vol. 4, p. 1)

The sector hearings focused on key institutions in South African society – business, the faith community, the health sector, the legal system, the media, prisons – and raised profound questions about the nature of human rights abuse and complicity in such abuse. Answers to such questions, sought beyond the relationship between individuals and the state in societal structures and processes, institutions and professions, would in turn affect issues such as accountability, truth, responsibility, reparations, punishment, justice, reconciliation and more.

This paper is both a response to, and an off-shoot from, one of the above-mentioned hearings, the legal sector hearing. The purpose of the legal hearing was "not to establish individual responsibility for human rights violations but to understand the role the legal system played in contributing to the violation and/or protection of human rights and to identify institutional changes required to prevent those abuses which occurred from happening again" (TRC statement, 19 October 1997). Written and oral submissions to the hearings in October 1997, like much previous academic commentary, revealed the extent to which the legal profession, as well as its professional organisations, became complicit in the construction and implementation of apartheid. In the words of one written submission to the TRC: "Any examination of the role of law in our society in the last thirty years must start from the recognition that law was the primary tool used to give effect to apartheid" (Chaskalson et al., 1998, p. 22). The widespread, if always uneven, politicisation of justice had an enormously divisive effect on the legal profession internally and on its relationship with broader society. As a result, within the profession and between the legal profession and the society it served, there was a need for truth-telling and reconciliation.

At the time of the hearings and subsequently most commentary has focused on the fact that while a number of judges made written submissions to the TRC,<sup>1</sup> none, past or present, white or black, appeared at the hearing, chiefly on the grounds that such moral accounting would compromise their independence (see Corbett 1998). Something of the incongruity of this stand is captured by the fact that judges were "prime movers in the conversion of law to the ends of violence and lawlessness" (Asmal, foreword to Dyzenhaus, 1998, p. ix), and, therefore, as Dyzenhaus claims: "One cannot easily argue that judges' independence will be compromised by asking them to account for their conduct when they are called to account because of conduct which compromised their independence" (1998, p. 54). By placing themselves above the process of truth-telling and reconciliation, judges indicated that they remained aloof from their public image. Further, they failed to appreciate that public respect for judicial independence must be earned rather than simply assumed - it is a goal and ideal to be gained rather than a reality in danger of being lost – in part through forms of accountability, acknowledgement and honest engagement with the past (see Dyzenhaus 1998).<sup>2</sup> But judges were not the only significant constituency to be absent from the hearings.

While magistrates were frequently criticised at the legal sector hearing, their testimonies

and views were almost completely absent. In a letter to the TRC the Magistrates Commission said 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).<sup>3</sup> 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. In his testimony, 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.<sup>4</sup>

The participation of magistrates in the legal hearing, therefore, was minimal. This was a cause for concern because the majority of South Africans came into contact with the apartheid legal system primarily through magistrates. Magistrates have been described by Dyzenhaus as the "cutting edge" of the legal order - "the place where subject meets law" (1998, p. 33) – and as managers of an "apartheid enforcement machine" (p. 59). A participant in the legal hearings condemned the magistracy as "the coal face of the apartheid legal system at its worst" (Vincent). Due to the pivotal role of magistrates within the apartheid legal and political system, their silence was a major disappointment and frustration to participants in the legal sector hearing:

We have spoken a lot about the role of the judges ... what we mustn't lose sight of, however, is the fact that most of our people's experience of the justice system was predominantly at a lower court level. We mustn't lose sight of the fact that some of the basic and fundamental violations of the rule of law actually occurred at a magistrate's court level where people were denied their rights to legal representation ... where people were not treated with dignity ... . They were the ones who prosecuted innumerable public violence offences. In many of those cases the attorneys who acted on behalf of those accused were as much on trial as the accused themselves, and we ask the question, why are they not here as well? (NADEL's oral submission to the TRC legal hearing)

The big gap really in today's proceedings has been the magistrates. They've been hearing hundreds of thousands of cases every year ... and we haven't heard virtually a word. And we got a very, with respect, derisory comment from the Magistrates' Commission which merely turned the questions back to you ... . So we've heard virtually nothing. (Professor Mason's oral submission to the TRC legal hearing)

Among the TRC's findings arising out of the legal hearings was the following:

The Commission deplores and regrets the almost complete failure of the magistracy to respond to the Commission's invitation, the more so considering the previous lack of formal independence of magistrates and their dismal record as servants of the apartheid state in the past. They and the country lost an

opportunity to examine their role in the transition from oppression to democracy. (TRC, 1998 Vol. 4, p. 108)<sup>5</sup>

Before outlining the nature of this research project it is necessary to describe the work of a magistrate and the position they occupied within the apartheid legal and political order. Were magistrates indeed "the coal face of the apartheid legal system at its worst" and if so, why?

### **Magistrates under Apartheid**

Magistrates 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.<sup>6</sup> The existence of executive magistrates was incompatible with the doctrine of the separation of powers. Magistrates received directives from the Department of Justice.<sup>7</sup> 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).

The low status of magistrates within the legal profession was further entrenched by the fact that they performed both administrative and legal functions,<sup>8</sup> often received an inferior legal training (civil service legal examinations), and were perceived by critics as significantly politicised.<sup>9</sup> 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). Ellmann has written: "It is important not to overstate the general role of these judges [Supreme Court judiciary], for the bulk of political trials are actually heard not by the judges but by magistrates" (1992, p. 226).<sup>10</sup> Magistrates performed further crucial functions in relation to political detainees, including taking down confession statements, overseeing the complaints and safeguard machinery, and presiding at inquests when custodial deaths occurred. It was on the complaints and safeguard component of magisterial duties that this study was initially focussed.

Magistrates (and latterly inspectors of detainees), alongside district surgeons, were charged with ensuring the well-being of detainees particularly from the late 1970s and early 1980s following high profile deaths in custody. In short, the main legislative provisions and regulations were as follows:

- 90-day detention law (1963): visited once a week by a magistrate.
- 180 day detention law (1965): visited once a week by a magistrate.

- Section 6 of the Terrorism Act (1967) made visits discretionary: "If circumstances so permit, a detainee shall be visited in private by a magistrate at least once a fortnight" (Section 6(7)).
- After Steve Biko's death, regulations ('rules for the treatment of detainees') were introduced providing for the appointment, from June 1978, of two inspectors of detainees. The appointees were two retired officials of the Department of Justice, a former chief magistrate and a former Attorney General. The inspectors were empowered to visit detainees at any time, to call for immediate medical examinations, and to bring any matters to the attention of the security police. They were required to visit Section 6 detainees in private and report confidentially to the Minister of Justice on conditions of detention and treatment of detainees. Reports were not available to parliament or to the public.
- Internal Security Act, 1982: detention of state witnesses (Section 31) and those detained for the purposes of interrogation (Section 29) were to be visited not less than once a fortnight in private by a magistrate and a district surgeon. For Section 29 detainees, in addition, an inspector of detainees was required to visit as "frequently as possible so as to satisfy himself as to the well-being of such a person" (Section 45(1)). This formalised, without significantly improving, the procedure instituted in June 1978 and described above.
- Subsequently, in November 1982, 'Directions Regarding the Detention of Persons in Terms of Section 29(1) of the Internal Security Act' were issued, reiterating that detainees were to be visited by magistrates, inspectors and district surgeons under specified circumstances; further, records of such visits were to be kept and reports submitted on observations during visits. Critics of the regulations identified their equivocal language as problematic: the right of access to detainees by these officials was not absolute and they simply had to report "instances where a detainee [was] not available", together with the reasons (Davis in Foster et al. 1987:37). Furthermore, these regulations, like those of 1978, were not legally binding.<sup>11</sup>

There is voluminous evidence that torture under apartheid was widespread and systematic. It is clear, therefore, that the complaints and safeguard system failed to protect detainees. Criticism of magistrates and the system over which they presided long precedes the TRC. Nevertheless, both oral and written submissions to the TRC's legal hearing are illustrative of the kinds of criticisms that have been made:

In my experience I did not know of any magistrate who supposedly visited detainees as required then and who assisted detainees and made reports of any torture or maltreatment or assault whatsoever. (Jana, oral testimony to the TRC legal hearing)

There is also the question of visits by magistrates to prisoners and detainees ... all I can say in this regard ... is that I'm unaware that there was any regular visiting by magistrates or if there was that it ever produced any tangible results. (Bozalek, oral testimony to TRC legal hearing)

How diligently did magistrates perform this duty, the neglect of which could have tragic consequences? There is evidence that visits were not carried out with the required regularity ... . Where visits were compulsory, there is little evidence of independent, effective visits. To the contrary, detainees have reported cursory, superficial visits and interviews. There are many clear indications that magistrates' visits to detainees provided little or no protection against abuse by the police ... (NADEL's written submission, SALJ 115 (1) 1998, p. 92)<sup>12</sup>

Detainees were totally cut off from family, friends, their lawyers and private doctors. In this context the responsibility on magistrates was immense: they were one of the very few outlets detainees had to non-custodial personnel. But magistrates ultimately were part of the world of the state and custodial authorities and this rendered their position compromised, and the safeguard system over which they presided inherently flawed (as will be argued in detail later in this paper). This situation of dual obligations is crucial to understanding the attitudes and conduct of magistrates.

Magistrates were state employees and, insofar as they ministered to the needs of detainees and prisoners, they worked within state-controlled institutions alongside other state employees, guardians of the state, such as the security police. As such, when assigned responsibility for overseeing the complaints and safeguard system for detainees they faced the challenge of dual obligations, on the one hand to their employer and colleagues and on the other to the detainee whose well-being they were charged with ensuring. In this context, the system of custodial supervision was designed to fail because magistrates were deliberately placed in an invidious position, they were asked to monitor the activities of the state and its employees and report against them and to safeguard its enemies. They were asked, in essence, to bite the hand that fed them.

### **The Research Question**

Research on magistrates is needed because of the lack of relevant research and the non-participation of magistrates in the TRC process coupled with the crucial role they played both within the apartheid legal and political system and within the new dispensation. Magistrates' own understanding of their responsibilities and actions in relation to detainees, as with all other facets of their work, remains unknown. The TRC began a process of truth recovery and reconciliation, but both remain unfinished tasks, generally and more specifically in relation to the legal sector. One of the undervalued contributions of the commission has been precisely to identify and highlight work that remains to be done. The commission itself stated that it hoped that the legacy of these hearings "will be to stimulate further debate, further discussion and further exploration of the difficult and complex issues that underpinned apartheid" (TRC, 1998 Vol. 4, p. 3). Dyzenhaus has made much the same point:

The archive is an invitation to do better; indeed, in understanding the flaws of any particular hearing, one gets a sense of how to continue the work of elaborating the archive. One can opt to treat the trauma of the past, and the problems in retelling it, as a promise. (1998, p. 179)

This paper in a small way seeks to engage with that promise. Its central aim was initially to

complement and go beyond the work of the TRC by addressing the following research question: how did magistrates experience and perceive their work overseeing the complaints and safeguard machinery for those in detention? Further subsidiary questions included: in what ways did magistrates experience political interference or feel professionally compromised in their interactions with those held in detention and how did they respond to such situations? and, how did magistrates deal with their dual obligations? This was essentially, therefore, devised as a study of legal professional ethics in the context of a politicised system of justice, through a case study of the supervisory work executive magistrates were required to do with apartheid's detainees. It sought to answer the fundamental question: how did legal officers, in this case magistrates, become complicit in torture, ill-treatment and a range of other human rights abuses?

The research project has, however, extended beyond this initial area of concern to include other aspects of magistrates' interaction with detainees - such as the taking of confession-statements - some more general analyses of their structural position and approach (for example, observations on the relationship between law and justice), and an assessment of the ongoing process of transformation affecting the magistracy. The research expanded in this way due to pressure from magistrates and others to address the past and present, and the linkages between the two. It also enables the study to engage more fully with the remit of the TRC's legal sector hearing ("to understand the role the legal system played in contributing to the violation and/or protection of human rights and to identify institutional changes required to prevent those abuses which occurred from happening again" (*italics added*)). A separate report has been written on the ongoing transformation of the magistracy (Kgalema and Gready 2000).<sup>13</sup>

### **Methodology**

The main source of information for this study was primary interviews with magistrates. The interviews took place in Gauteng during August and September 1999. In all, 24 magistrates were interviewed, of whom four were African and four female. Most of the interviewees were white, Afrikaner men. Thirteen other interviews were conducted with key informants (see Appendix 1 – these are distinguished in the text by dates accompanying quotations). These included personnel from the Justice College, the Law, Race and Gender Unit at the University of Cape Town, legal institutions like the Bar Council and Black Lawyers Association, as well as opposition lawyers, former employees of the Department of Justice, and human rights activists from non-governmental organisations and parliament. Key informants were advised that information would be attributed to them by name in our research products (the only exception being that pseudonyms have been used for two key informants at their request: Claassen and Du Plessis). All of the interviews were face-to-face and conducted by one or both of Paul Gready and Lazarus Kgalema. Interviews were in-depth and semi-structured. They were transcribed and analysed using qualitative methods, with an emphasis on dominant themes and arguments.

Magistrates perceive themselves to some extent to be a professional group under siege, criticised for the past and subject to reform in the present. In this context, it was thought probable that some, possibly many, would refuse to take part in the research project. For this reason a combination of convenience and snowballing sampling methods were preferred. Convenience sampling operates through networks of personal contacts, publicly available information (for example, in telephone directories) and contact lists or directories.

Snowballing is a related technique whereby key informants or magistrates passed on details of, or facilitated interviews with, other magistrates. The magistrates interviewed were all working or had worked most recently in urban settings. Although several brought rural experience to the study, magistrates currently serving in rural areas were clearly under-represented. Insight into magisterial experiences in apartheid's homelands was also limited. A further, related bias within the sampling is that only four African magistrates were interviewed - also no coloured or Indian magistrates were part of the study. With reference to gender, the sample numbers are probably not unrepresentative of the ratio of male to female magistrates in the past, but are likely to under-represent women in the present. The study, therefore, while providing insights of more general relevance, reflects most accurately the reality of what was 'white', urban South Africa.

Informed consent was obtained from all interviewees. Magistrates were guaranteed confidentiality and that their anonymity would be preserved in all publications to encourage them to participate in the study. Another reason for adopting this approach was the intention not to identify specific instances of malpractice or to apportion blame to individual magistrates, but rather to identify structures and processes that brought about the politicisation of the legal system and widespread complicity in human rights abuses. A related point is that the aim of the study is not to demonise magistrates, individually or collectively, but rather to contextualise and try to understand their behaviour within a continuum of legal practice. The names of magistrates cited in the study are therefore pseudonyms, but names have been chosen to indicate the race of the magistrate referred to. The use of pseudonyms allows the contributions of particular individuals to be traced through the study while preserving their anonymity.

In fact very few magistrates refused to speak to us outright. Several magistrates asked to be faxed the interview questions in advance and prior to agreeing to be interviewed. One would not allow the researchers to tape record the interview. The study was sanctioned by the Magistrates' Commission and several magistrates betrayed both a reluctance to participate in the study and/or a residual hierarchical mindset in their insistence that the study be approved not only by the Magistrates' Commission but also by more senior magistrates in their area. Interviews were sometimes difficult encounters, with magistrates remaining wary and deploying various strategies to contain the scope of the interview. In essence, while most agreed to talk, many did their utmost not to say anything of note. One magistrate, Louw, on several occasions refused to answer questions (when asked whether he thought that in the past dispensation torture was widespread he responded, "I decline to comment on that", and when asked if there were laws the implementation of which morally troubled him, he stated, "No, lets leave that"). Magistrates also claimed not to have presided in cases where unjust laws might have led to moral unease and/or had recall difficulties. In response to a question about whether he could remember if he received any complaints of torture, Louw replied: "Not that I can recall ... there must, there could have been, but not that I can recall at this moment."

The remainder of this report presents a discussion and analysis of certain facets of the work of magistrates under apartheid, based largely on interviews with magistrates themselves.

## Background about Magistrates

### Why a Magistrate?

Magistrates articulated many different and sometimes conflicting reasons for their choice of profession. For a few interviewees it appeared to be a matter of chance and accident: "it just so happened, you know, I joined the civil service ... in the Department of Justice you progressed until you eventually became a magistrate" (Smit). The vast majority of interviewees, however, were able to isolate at least one factor contributing to their career choice. One such factor was family background, either in public service or the law. Liebenberg ascribed his decision to study law to "my childhood I suppose ... my father was a policeman. It's a, um, a continuation of, yes, it's a certain field of [pause] growing up." Van Zyl described her father as "also a government worker" while another magistrate had been advised in his choice of career by a brother who was an attorney (Muller). A further subset of magistrates had felt that it was a profession that brought with it status and societal standing. "You know [pause], as I've said many a time ... as a child ... I thought to myself ... magistrate, that's a very important person. I would like to be a magistrate myself one day". This quote is from Smit who talked later in the interview of fulfilling a childhood dream.

A rather greater number of magistrates asserted that an interest in the law and/or the job of magistrate had influenced their career path (Liebenberg, Van Rooyen, Van der Walt, Van Zyl). Sometimes this interest came from having worked within the court system (Mulaudzi), sometimes it was generated by a variety of factors:

I used to see some magistrates ... in the area where I was staying ... I used to go to court just to listen ... to develop an interest. And decided that I was also taking part in a certain drama which was called 'At Last Musical Play'. I acted as a magistrate in that drama. (Mashudu)

An observation by Prinsloo is also worth quoting as it reveals that his reason for becoming a lawyer was driven by interest, but a profoundly apolitical interest:

it was just something that interests me ... nothing ... that stands out, that you want to do or ... a statement that you want to make. Why some people study law to say that there's a way of life that he can further, for instance, political agenda, human rights ... It's just something I want to do ... a general career choice that you want to make.

Terreblanche believed that the law was a means of securing justice: "I believe in the law system of South Africa ... . Yes, [I] always [did]. And I always thought I could make a difference, and I think in my daily life I did try."

For a further significant group of older magistrates, employment in the public service was clearly a route out of poverty and a way of obtaining a higher education:

during the depression years, say 1935, just before the war, 1939 ... money wasn't always readily available so a lot of chaps joined the public service. Their fathers couldn't afford to send them to university ... . So they joined the public

service and through that they studied law ... took law exams ... I was one of those. (Cartwright)

For those who had grown up in a small town, poverty was accompanied by the absence of employment options. After stating that "[t]here was no money for me to go to university", Neet, a former Director-General, Justice, continued: "At the time when I left school, work was scarce ... and in a small town ... you had very few options. Either go to the bank or go into the government service, or go into the farms ... . My father didn't have a farm, so I joined the public service" (28/9/99). Similarly, Viljoen emphasised the need to find a job because of rural poverty before stating, "No, I don't think there was any other option ... . There was no place to start working at. When I approached the magistrate and said, 'do you have a job for me', he said, 'come on the 18th, I'll take you'". Any desire for a legal career was framed by the horizons of this rural world:

if you're born in a small town, that time there was no television and you saw a newspaper perhaps over the weekend ... . And, you look at what can you do. And I felt [pause] the magistrate's office had some, um, I think its also my religious upbringing, something of justice in me. My father was a really person for justice. He treated everybody fairly and I think it was part of my education. And, um, I felt a longing to become involved in the law. I remember when we had our matric farewell, we were only twenty four. They said there's going to be a lawyer here. You know, but I only know the Magistrate's Court. (Neet 28/9/99)

Two other magistrates, Kruger and Mashudu, mentioned the availability of state bursaries for studying as a reason for joining the Department of Justice. The need to repay such bursaries often tied people to public sector employment and instilled a culture of loyalty. A further financial reason for becoming a magistrate according to one interviewee was that the state was the only employer that paid its employees while they were doing their military service: "So I grew up on a farm and I went to the nearest town and I decided that I will go ... to the magistrate's office, to the railways, to the post office, and see whether I can get a job in the state ... so that I can get paid for the 9 months. The first office that I walk into was the magistrate's office, and they offered me a job. And here I'm still today"<sup>14</sup> (Louw).

### **Education and Training**

The main legal qualifications obtained by magistrates and mentioned in interviews were the Diploma Juris, B Juris and, more rarely, a BA in law or an LLB. White magistrates had studied almost exclusively at former Afrikaans universities – the University of Pretoria, University of the Free State, Potchefstrom University, Rand Afrikaans University, and in the majority of cases UNISA. A common educational pattern was for such magistrates to start working with the Department of Justice after matric and then to study part-time, and/or with a bursary from the state, while in the employment of the Department of Justice. There were variations from these educational patterns. One magistrate, Mills, had studied at the University of the Witwatersrand; Terreblanche had a degree in drama and also obtained a teaching qualification before returning to university to study law; Muller, attached considerable significance to the fact that he had a first degree in the behavioural sciences from the University of Pretoria: "Which I think is important for any magistrate to have ... you are dealing with people on a daily basis." Some of the black magistrates had similar

legal education histories to their white counterparts. Others had studied at universities in the former homelands, such as the University of Zululand (Mashudu, Malaudzi). Magistrates also received training at Justice College (along with interpreters, prosecutors and others).<sup>15</sup> Educational qualifications were linked to promotion.

Two further comments are worth making on the legal education of magistrates. Firstly, what little comment there was on the style of legal education indicated that as with legal education in South Africa more generally it was positivist in nature. A lecturer at the Justice College described the approach at the college prior to 1994 as: "very formalist ... very acontextual ... we were not supposed to be empathetic, you were supposed to be an objective, independent magistrate" (Du Plessis). This former magistrate and one other also stressed the importance of informal education and training by peers, more senior magistrates. Du Plessis stated, "as a prosecutor in a very small office, my magistrate was my only guidance", indicating that in this way the legal system perpetuated a positivist legal culture. Van der Walt claimed that it was at the informal level that the "proper ... practical" training of magistrates took place:

But I must say that most of the proper training ... practical training ... for magistrates [is] done by other magistrates. When you are a young magistrate, or an attorney or a prosecutor, and you appear before a magistrate you look ... you basically see what they do and how they ... give judgements and how they behave themselves basically.

Training for the work that magistrates did visiting detainees and prisoners appears to have been similarly informal. In relation to briefing or preparation for visiting detainees, Muller stated, "well, yes, the Chief Magistrate basically did train me." A similar process appears to have operated with regards to visiting criminal prisoners: "No it was not, we didn't have, um, formal training. It was discussions we [she and the former Chief Magistrate] had." (Van Zyl). This ad hoc approach to training was obviously susceptible to the perpetuation of bad practice and prejudice. Other magistrates felt isolated and that any education had to be self-education. Commenting on the taking of statements and visits, one interviewee stated, "um, I had to learn myself" (Kruger), while another remarked: "No. No training, no briefing, no". He went on to say that he felt there should have been training, "I think they got to train you how to deal with these people [in prison], and how to confront them ... [pause] because most people, they don't know how to ..." (Van Rooyen). When asked what he meant by "confront" the magistrate's response was "speak to".

Clearly there is a need for the training of magistrates to go beyond both positivism and the ad hoc reliance on peer guidance and self-education. As will be discussed later in the section on 'Law and Justice' a key requirement is training that will enable magistrates to subject the law to critical analysis and interpretation.

### **Professional Histories**

The typical career path for white magistrates progressed from clerk to prosecutor to magistrate. This quote is emblematic: "first I was a clerk in the department and worked myself up until I become a magistrate" (Louw). Black magistrates followed a similar career progression, but with the post of court interpreter often as an extra rung in the professional ladder. Another important facet of the professional hierarchy was the distinction between

district and regional courts. Often magistrates had started working for the government straight from school and completed all their legal qualifications while working for the Department of Justice. Such a professional history was obviously instrumental in forging a strong professional culture.

It should also be noted that a number of interviewees indicated that the stages of promotion were not simply linear. One magistrate's career history read as follows: (district court) prosecutor, district magistrate, regional court prosecutor, district magistrate, regional magistrate (Prinsloo). Another stated, "after I had been promoted to the bench, I did a little prosecuting" (Smit). As this citation indicates, there was often a blurring of the distinction between and/or an overly close relationship between prosecutors and magistrates, particularly in rural areas, which undermined magisterial independence. Three interviewees had studied law prior to joining the Department of Justice and as a result joined at the level of prosecutor (Eloff, Ramokoebo, Mills). Only one magistrate had been an advocate prior to becoming a magistrate (Nel). Finally, a number of those interviewed had worked in other professions before joining the Department of Justice, including working for the state in other capacities (Muller, Wiehahn, Mulaudzi, Van Zyl), employment as a farmer (Viljoen) and in acting (Terreblanche). Particularly among the younger magistrates there was some variety in background and a certain amount of experience of other worlds.

It is also important to register that racism pervaded the magistracy, profoundly affecting professional histories. By law up until 1985 only white people could hold the post of prosecutor and above in the state legal hierarchy:

I assumed duty there in 1969 as a court interpreter, mainly because I had a passion to be involved in legal practice ... . But then it was made clear by the magistrates under whom I served as a court interpreter when they realised I was studying law through correspondence and they asked me why do I study law? What do I want to do with it? I said I wanted to be a magistrate and it was really made very clear to me there is no place for a black magistrate in this country. (Rasafarti, testimony to the TRC legal hearing)

It was official policy that no black person should be appointed in a position where s/he would be senior to a white person and black prosecutors/magistrates could not serve in courts where whites appeared. According to the Director-General of Justice in his submission to the TRC, racial distinctions for posts were abolished in 1985 but due to the application of merit criteria there was little change to the status quo. Excluding the former homelands, there were 7842 posts in the Department of Justice in 1991, of which 18% were occupied by African, Indian or Coloured people. There were 3 African magistrates and 41 African public prosecutors (pp. 61-5). Two quotations, one from an interviewee, the second from a written submission to the TRC's legal hearing, illustrate enduring problems concerning race:

we never liked the system, we wanted it changed. This was in 19... [pause] ... 1990/91... I had the feeling that the person in charge at that time was an extremely racist sort of person. I had him investigated. He was then transferred. I re-organised the whole set up ... I had a black prosecutor as well, who today is a magistrate. Um, many complaints, I received many complaints about him. Basically from white people. And I proceeded and I trained him to my

satisfaction. And today he's a magistrate ... the then Attorney General came to see me ... and wanted to withdraw his powers as prosecutor. So I said 'no. Leave him to me. He's under pressure in a system which I do not like'. Today he is a magistrate. I feel I did something good there. (Muller)

I had also received reports of colour based promotion of personnel. Certain white prosecutors with less than 3 years experience were appointed as magistrates while persons of colour with 5-6 years experiences were not even considered for the posts. (Hendrickse)

What follows on from this section on background is a discussion of various aspects of the work of magistrates, beginning with their stewardship of the complaints and safeguard system for detainees.

### **A System Designed to Fail**

And one has to understand that very often it was not the individuals working within the system who were the cause of the problems of the [pause] what's the word [pause] ... abuses. The system was intended to have abuses. So when you say, we have the power to detain you forever and ever and ever. And you shall never have access to any independent person. Then that system will not have a flaw ... . So you choose persons, such as a magistrate, who is not independent. Your system remains in tact. And, I think one has to look at it from that point of view. It's ... not that the magistrates failed. The magistrates were never designed to succeed. Because if they wanted success, they wouldn't have sent magistrates ... magistrates behaved exactly as expected. So the system carried on very successfully. (Satchwell, 25/8/99)

As already mentioned, magistrates presided over a safeguard system for detainees that was designed to fail. On the occasions when it worked, it did so as an exception to the norm, because individuals contested the dominant intention of the system they operated within. The main reason why the system failed was that it was a closed collaboration between the state and its officials and, therefore, deliberately, flawed in structure and design. Three main characteristics of the system illustrate this point:

- 1) magistrates were public servants and therefore their independence was inevitably compromised and questioned,
- 2) magistrates' reports circulated within the closed-off state world of government employees and departments and did not reach the outside world (for example, the detainees' lawyers or families), meaning that they went directly to the very people who were the cause of the complaints and abuse while not going to those who were a more likely source of protection and succour, and
- 3) magistrates lacked control over the environment in which they worked as they were denied, for example, freedom of access and often did not know what, if anything, happened in response to their reports.

This report will deal with these three points in more detail below.

### **Dual Obligations**

Numerous individuals and studies have testified to the fact that, for detainees, magisterial independence was questioned or simply categorically rejected, with the result that magistrates and the system over which they presided were treated with distrust, suspicion and even contempt. This study, however, is mainly concerned with how magistrates themselves perceived and dealt with the dilemma of dual obligations and its consequences for independence in their work with detainees.<sup>16</sup>

When asked if they experienced the tension of dual obligations, the majority of magistrates answered with variations on the theme that they had not experienced problems. The following attempt by Van Zyl to normalise their role and relationship with detainees is typical:

No, I didn't. I just did my work normally ... I acted normally as I would have acted towards you. This was a person ... I was sent there to monitor what was being done to him. We had such a good relationship ... I'm sure if something went wrong, he would have told me. We talked about everything ... . We didn't only talk about his being held and all the grim things ... . You know, we had a normal discussion.

Others provided answers suggesting that the behaviour and attitude of magistrates was individually rather than structurally determined. Fourie, for example, stated, "No. Myself, not really. But as I said, that will differ from person to person. That is regarding attitude". Ramokoebo asserted in a similar vein, "[w]ell it depends on individuals. You know, if you feel your allegiance to the state, some would conspire, some ... wouldn't sleep with the conscience if they would conspire. So, um, I cannot say, that it was a general thing ... . It would vary from individual to individual."

There were also dissenting views. When asked about dual obligations a magistrate who had worked in the homelands during apartheid stated: "Yes, it was a fact we were civil servants ... we were not independent as we are now ... when I say no, I say no. It was very difficult to say no then" (Mlambo). While there were other responses that acknowledged the compromised position of magistrates – when asked whether he felt a professional tension Van Rooyen replied "yes, yes, sometimes ..." – this comment goes further by suggesting that such a position had significant practical implications.

Many interviewees appeared to struggle to conceptualise the dual obligations dilemma and did not see being employed by the state as necessarily a problem in relation to detainee supervision or viewed it as a structural compromise from which individual magistrates could detach and distance him/herself. The dominant self-perception was that they had had good relations with both the detaining authorities and the detainees and/or that they secured a position of impartiality between the two. Mlambo, for example, said: "Personally, I was not assisting the police [when visiting detainees]. I was doing my job ... I think I was impartial ... it would be wrong to associate myself with either the state or the detainee." But insight into dual obligations could also be gleaned from questions about magistrates'

relations with and perceptions of the state and detainees and indeed from lines of questioning not specifically about the issue of dual obligations at all.

### **Relations with detainees**

For many respondents their relationship with and reception by detainees was cast in a positive light, for example: "um, in a good spirit, there was no problems" (Van Rooyen) and "myself, they always trusted. I had no problems" (Muller). For others it was more a question of denying that they were treated with distrust and hostility:

Well, they respond courteously. I did not have any detainee that was really, you know, angry or emotional or anything like that. (Fourie)

Um, [pause] I never experienced any, um, what do you call it, antagonism, or anything like that ... I never got the impression that, um, [pause] they don't want me there. (Louw)

Two magistrates even stated that they were on occasion specifically called on by detainees. Mlambo claimed that detainees were "never" suspicious or hostile towards him, and further, "in some instances, [they] even called upon [him] ... [t]o come and visit" by asking the head of the prison to contact him. Another, similar claim was made by Fourie in the context of a prison disturbance just prior to the 1994 elections: "the detainees asked to see the magistrate ... they refused to speak to anyone else ... I think that is a good example of the feeling that there was ... . And I was the only one, it seems to me, who could calm them down at that stage."

In contrast, several magistrates described a situation where it was necessary to overcome initial distrust and put detainees at ease. One, for example, stated "I agree [that you had to work at building trust] ... . You have to work at it" (Muller). There were two main strategies outlined by interviewees as a means of achieving this end:

- explaining who they were, what their role was, and distancing themselves from the state by, for example, stating that as magistrates they were there to help and that they had nothing to do with the police or politicians (Bekker, Van der Walt):

you put them at ease and they realise that you're not there to prosecute them or whatever, you're there to try and help them, in trying to solving their problems. (Louw)

No he didn't trust me. Not from the beginning. He thought I was one of the policemen ... I said ... this is the reason why I'm here ... to hear if there is anything I can help you with, I can assist you with. I'm independent. I've nothing to do with the police. (Van Zyl)

- by a process of familiarisation: opening visits by asking how the detainee was and with general topics of conversation (Cartwright, Fourie, Louw) and over several visits spending time with and getting to know the detainee:

And you sometimes spent four to five minutes, sometimes longer, just

speaking to him. Obviously you can never discuss politics ... . And, um, eventually they would come with little requests. (Bekker)

Some of them were detained for a long time ... by the third or fourth time you visited the person he got to know you ... when you arrived we were greeting each other ... you got to know them. (Bekker)

Magistrates also talked about normalising the relationship and humanising the detainee him/herself, in what was probably an attempt to overcome unease they felt. Cartwright stated "you looked at [the detainee] and you thought, well, he looks like a human being. I didn't think, what they've got against him ... what evidence they've got" and when asked about his attitude if he had found somebody who had been tortured, he responded: "you're human ... your humanity would have come into it. You would have forgotten about everything else ... these people are human beings, and there to be treated like that." This approach could also involve distancing oneself from what a detainee had, or was alleged to have, done: "I didn't know why he was there ... I wasn't interested. Um, but you knew he was a detainee" (Van Zyl). Magistrates, therefore, talked of trying to distance themselves from both the state and from certain aspects of the identity of detainees. The depoliticisation of detainees, while it may have allowed magistrates to do their job in a minimalist sense, reporting complaints, may also have constrained a broader agenda that would have seen detention itself as unjust and immoral.

Generally, there was a sense from the magistrates interviewed that any initial mistrust and suspicion on the part of detainees could be overcome. A related belief held by some interviewees was that they had developed a kind of understanding of detainees and an insight into their plight. Bekker, for example, stated "well I've been in court for a long time, so I could see if they were speaking freely" and "you would spend a minute asking how he is ... so you could see he is fine". In a similar vein, Muller remarked: "Myself, they always trusted. I had no problems with that ... that's why I mentioned I also have a degree in the [behavioural] sciences. I know people, and I know how to deal with them. I know their fears". Interestingly, however, Kruger acknowledged that attempts to build trust did not always succeed:

Yes [detainees were generally suspicious and hostile], especially the blacks, yes ... . You know, you will [pause] um, when you go in ... you, um, introduce yourself, and what I tried to do is sit with the chap next to me and, um, [pause] to talk to him first in a general way. And, um, many times you see that this person he doesn't trust you ... . You know [he sees you as] a part of the government ...

a person who is in that position [having been tortured] wouldn't speak very easily. And you are dependent on such a person, what information he is giving to you. Um [pause], many times if you visit the person he is in tears, he's crying. Then you try to calm him down and ask him what's the problem. And explain to him, I'm the magistrate. I'm not the policeman. I will not harm you ... but you know, I think, um, many times, I mean, especially the blacks, they still not trust you. (Kruger)

A negative framing of relations and reactions was usually done through admissions that

magistrates were seen as part of "the system": "yes, probably [they did] see us as part of the system" (Nel), while Prinsloo talked of being seen as "the enemy".

#### **Relations with the security police and other state officials**

Magistrates overwhelmingly described themselves as having good relations with other state officials. Comments such as the following were typical: "It was quite a good relationship we had with them" (Cartwright); "they were always, um, [pause] helpful" (Louw); "very much co-operative, I did not encounter problems" (Mashudu); "um, it was sufficient. It was sufficient ... obviously as time progressed ... you got to know them as well ... . It was a working relationship" (Bekker).

But magistrates also reacted against the perception, common among detainees and opponents of the apartheid government, that they were simply part of 'the system'. Two quotations from key informants illustrate this perception. Jack Moloi, President of the Black Lawyers' Association, stated that "magistrates saw themselves ... as extensions of the government" (24/8/99) while the human rights campaigner, Max Coleman, commented: "But of course they were government employees ... their livelihood depended upon the relationship with their employers" (1/9/99). The strongest retort to this view of magistrates came from Bekker who said, "the general impression that magistrates were in cahoots with the security police ... and with the politicians of the day ... that is nonsense." While the relationship with the officials of the state was described as "good", "co-operative" and "professional", several interviewees stressed that it did not extend to being friends (Muller, Kruger, Bekker).

Interesting, and rather different, reflections on interactions with the police, include this observation about social ties which appears to contradict the above assertion:

in our office ... we decided ... it was not in the best interest of justice that we have these ties with the police. So we start[ed] to break formal social ties with them. We don't attend any more of their social functions ... we sever[ed] our ties with them on the social basis. (Nel)

This magistrate went on to agree that previously the relationship between magistrates and the police had been close: "Yes ... we used their canteen and we used their facilities ... . But that was normal in the whole of South Africa." Clearly such social ties would have had implications for magisterial independence. Other illuminating observations about relations with state officials shed light on expectations of and responses to the way in which magistrates managed the safeguard system:

If a magistrate, at that stage, did his job properly, he was not popular at the police. My experience is that if a magistrate was popular amongst the police, then there was something wrong. (Kruger)

you could add your dissatisfaction. But then, again, there was frustration because it was not expected of you to do so ... it was most definitely not [a popular thing to do]. (Muller)

Although relations with detainees and with other state employees were generally described

in a positive light, enough insights could be gleaned into the contradictions and difficulties faced by magistrates to see that dual obligations and the compromised independence of magistrates were, however unconsciously, profoundly problematic in this context, and indeed the root cause of many of the other ills within the complaints and safeguard system. One concern, which will be returned to in more general terms later, is the narrow, distorted way in which a concept like independence is understood by magistrates. It often appears as a claim and self-description without substance. A related issue to that of dual obligations was that the reporting process was also flawed in structure and design, similarly part of a system designed to fail.

### **The Reporting Process**

the detainee made no complaint to the magistrate ... the detainee, with absolute justification, would say ... 'What was the point ... I know darn well magistrates aren't independent. The magistrate would have told the police and they would have come back and beaten me up some more, for making a complaint.' Alternatively, 'I just didn't think there was any point' ... . You would make the complaints ranging from protest at being there ... through to protest about the conditions such as dreadful food, dirty blankets. And the magistrate's attitude was very much, there's nothing I can do about any of that. Firstly, on the one hand, that's the law, and secondly, on the other hand, I don't run police stations or police cells ... . So in that sense magistrate's visits I think achieved absolutely nothing ... [they were] meaningless. (Satchwell, 25/8/99)

Here again they were not in an environment that was conducive to the detainee making his complaint ... they would go back into detention after having this interplay with the magistrate. And, um, they had been warned. I mean, it comes up repeatedly, they were warned by their interrogators that any word out of place and they would increase the pressure on them. So they were really highly intimidated. (M. Coleman, 1/9/99)

Claims made about the kinds of information documented in reports varied from the cursory - "And you ask him whether he's got any complaints ... if he said yes, you note it down, if he said no, you also note it down, no complaints ... that's all you had to ..." (Van Rooyen) – to the rather more comprehensive:

I always filed a report, um, on what I saw, what I heard, what the person in the cells ... told me. How he looked ... whether there's something out of the ordinary that you've encountered ... there was a list of issues that you would ask him about. About his health about, um, the food that he gets ... I normally also reported what the interpreter told me. (Van der Walt)

You ask if he has any complaints. You look at the cell that he's kept in. You must satisfy yourself that ... sanitation is clean ... . You also specifically ... must look at if there was any assault on him. (Muller)

Claims that reports were filed were made in both a specific, personal sense and more generally. In the former category Bekker stated "I certainly would have reported anything that I found that was wrong [and] it's my view that my colleagues would have done the

same" and Van Rooyen, "I never turned a blind eye. I mean if I found a person that's tortured, then I will immediately report it." In the latter, more general, category of response were Van Zyl's "I know that there's stacks and stacks of reports at head office", Bekker's "but I'm sure that ... [torture] was reported, that's just how the system was", and, finally, Neet: "magistrates did definitely report ... I saw some of those reports ... the complaints ... torture ... definitely these were sent" (28/9/99).

From the responses of magistrates it is clear that copies of their report went to all or some of the following: the Station Commander or Head of the Prison where the detainee was held, the Commissioners of Police and Prisons, the Department of Justice, and even relevant Ministers. Jasper Neet, a former Director-General, Justice, stated that reports filed by magistrates went to the Internal Security Division of the Department of Justice (28/9/99).<sup>17</sup> In relation to police stations, interviewees made reference to "a register" in which requests and the report for the more senior officials at the police station were recorded (Kruger); to an "investigation diary" that was left in the detainees file (Louw); while Van Zyl talked of writing requests/complaints "in a book at the police station". Three magistrates stated that the magistrate and/or the Chief Magistrate's office kept a copy of the report on file (Fourie, Van der Walt, Prinsloo). All recipients of the reports, therefore, were state employees. Although some magistrates claimed that reports did or could circumvent the police,<sup>18</sup> other interviewees questioned this and testified to the fact that the closed nature of the system rendered it ineffective:

Those magistrates who did take down the statement [pause] do with it what they were meant to do. Which is, they would give it to the persons responsible for the custody of the detainee, who were usually the very people against whom the complaint was made. I don't actually know of any magistrates who would say something like, 'I'm taking the statement, I will not give to those against whom you're making the complaint, I will take it elsewhere'. And I suppose in the magistrate's defense, it's difficult to think of where else they would take it ... . There wasn't much room for maneuver ... the legislation said ... that no person shall release any information concerning the detainee ... [if information was revealed to the detainee's family or lawyer] they'd lose their job and they could, in theory, be prosecuted ... . So as I say, I don't know of a magistrate ever doing anything useful. (Satchwell, 25/8/99)<sup>19</sup>

A crucial question is where the locus of decision-making and intervention resided within this complex reporting system and circulation of paper. There were claims that magistrates had some success facilitating action on issues that could be dealt with on the spot. Bekker, for example, stated generally "if there [were] any complaints, um [pause], that was always attended to immediately" and more specifically: "sometimes the police were just a bit nasty, they would give them a bible in a language they didn't understand" but that he would insist that detainees had a bible in an appropriate language "and the next day, at the most, they would have it":

One thing that sticks in my mind is the one chap said to me please can't I get him a Coca Cola. I said, 'you must be mad' ... . He said, 'you don't know what I'm asking ... I sit here day and night I can't sleep. I'm thinking about a Coca Cola. All I need is a Coca Cola'. I went out and I said right there, 'give him a

Coca Cola'. And they gave him a Coke before I left. (Bekker)

Similarly Van Zyl talked of complaints "immediately remedied" at a local level, Kruger of the police "many times ... [adhering] to your request," and Muller of persistence being required, "and then it was done."

But clearly major decisions would have been made higher up the state hierarchy. The Director-General of Justice submission to the TRC stated that complaints were followed up by the Internal Security Branch/Directorate of Security Legislation and Attorneys-General, while in an interview for this study Neet, one of the authors of the above submission, confirmed that reports were submitted to the Internal Security Branch but also said both that the Commissioners (of Police and Prisons) investigated and acted on complaints and that it was the role of the Minister of Justice to give directions or delegate the task to the Commissioners (28/9/99).<sup>20</sup> Extraordinarily, for someone who had occupied his position and worked for many years within the Department of Justice, even he claimed to be unclear about how the reporting and complaints system worked or, indeed, failed to work. De Bruin, a former Director of Security Legislation stated at the TRC legal hearing that less than 5% of complaints were investigated further and prosecuted. When asked if there were there many complaints of assault, he replied "quite a lot". When asked whether he was aware of any investigation within the department because of reports submitted of assaults, he replied "no". It appears that within the state labyrinth any drive towards addressing complaints and safeguarding detainees was lost.

The magistrate says ... 'I was to listen to the detainee, take hold of his complaints. I did that and I sent it to the authorities in charge. But I couldn't rectify it because I wasn't in charge of the jail, I wasn't in charge of the police cells' ... I think they've got a valid complaint. Enough wasn't done ... . But at the end of the day, I think if you go deeper into the system ... you'll find that the political system, somewhere [pause] the thing stopped ... it went to the Minister ... but he signed the order that this person should be detained and now the person ... complained and everybody told them how difficult this person was ... he's complaining about nothing ... I think that's the sort of argument. (Neet, 28/9/99)

The central problems with the reporting system, therefore, were:

- a) that it was restricted to officers of the state,
- b) that reports went to the custodial authorities who were often the very people against whom the complaint was made, the source of the problem rather than any potential solution, and from whose custody detainees came and would return, and
- c) that complaints invariably failed to initiate any action to remedy grievances or alleviate suffering as somewhere in the political system "the thing stopped".

These structural flaws in the complaints and safeguard system, and the resulting detainee mistrust and lack of openness, provide a rather different insight into the relationship between magistrates and detainees to that cited earlier which claimed that relations were

good and that such obstacles could be overcome.

While some magistrates acknowledged that they received few complaints, or the same, trivial issues kept being raised, one group interpreted this as an indication of lingering mistrust, implicitly acknowledging that the system of magisterial visits could not adequately protect detainees, while another took the comments at face value as providing the detention system with a clean bill of health. Comments in the former category included these observations by Fourie and Cartwright respectively:

I had received complaints ... . But one must also remember that those detainees were in custody and they did not trust anyone ... . No-one can blame them for that. So, um, I don't want to ... say, yes they complained to me because I'm a magistrate. I know they did not lodge all their complaints ... we very prominently always asked them did anybody assault you, and things like that. But ... one must be a fool not to realise that they would not openly speak to you.

They just sort of closed up ... I always got the impression that they regarded you as sort of, um ... lackeys of the government ... they weren't going to tell you anything in detail ... 99% of them never had any complaints. If there were complaints, it was really just about the food ... afterwards ... I met [a former detainee] and he said, well, they just took up the attitude, we're not going to tell these people ... anything ... no use complaining ... they won't take the matter any further ... that was the attitude they adopted. That it was not going to be particularly helpful.

Cartwright also stated: "No as I say, they never complained about any torture or any ... . Those that I saw, never complained about anything." Mashudu concurred: "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."

Other respondents were rather less perceptive about the kinds of responses they received from detainees. Prinsloo, for example, stated, "[b]ut they had no grievances, no complaints, um [pause], as far as I can remember, the didn't want anything" while Bekker claimed with regards to complaints against the police, "I never had such a complaint", that he saw "dozens" of detainees and "not one" complained of ill-treatment, and that he never came across anything he thought was torture ("I may have been fortunate"). Furthermore, he commented:

I never had any problems that I really needed attended to. But there's always small things that the people want. Sometimes they wanted reading material ... and the only thing they were allowed was a Bible ... I must stress that I never, not once during the time I visited detainees did I have any complaint of, that really required specific attention. We were always very careful to check on assaults. (Bekker)<sup>21</sup>

As the remarks above illustrate, magistrates, conveying varying degrees of understanding,

were often very candid about the fact that detainees did not usually complain to them about torture. None of the detainees Van Rooyen visited, for example, had complained of torture, while Muller stated, "perhaps the person, or the detainee, not perhaps, most definitely, would be afraid to tell you [about torture], they never told me in any event if that happened".

Not only do these comments cast the relationship between magistrates and detainees in a rather different, less positive, light, indicating that it is perhaps best understood through answers to less direct lines of questioning, but they also indicate that the safeguard system and detainee attitudes to it rendered even conscientious magistrates powerless to fulfil their mandate and effect change. Louw commented: "That might be the case [that detainees were less than totally open], not that I experienced it. You know, that sense that ... . But, if they want to withhold something from you, well [pause] I can't force them to tell me anything."

How would the magistrate know what's in the mind of a person if he is not expressing himself ... [pause], perhaps there's a good reason for that, he kept quiet [pause] because he, perhaps he was afraid to go back to be under the supervision of the police again. To be taken in detention [pause] ... . But I think the problem was that [long pause] ... blacks and whites, they didn't trust each other. [pause] And, if you haven't got a proper conversation with the person ... you won't know what's he thinking and what's going on in his mind. (Kruger)

The sense of powerlessness came from both directions, from the detainee who would not confide in the magistrates and also from the state and its officials who conspired to render the safeguard and complaints system ineffectual:

what I have experienced, is tension in the sense that we know some things were wrong and you were unable to change that. (Fourie)

you had this feeling that something is wrong. Something is wrong that you can't do anything about ... it was very frustrating. (Muller)

as a magistrate, you haven't got the power or the authority to, to improve anything. You can only put your request. (Kruger)

Some judicial officers did take steps after certain discoveries made during visits to prisoners and detainees. However such steps were frustrated mostly because reports emerging therefrom had to be submitted to the very perpetrators against human rights. (Submission by the JOASA to the TRC, p. 8)

After admitting that some detainees probably had been tortured, Van Rooyen was asked how it made him feel to preside over an ineffective protection mechanism "it makes me ... feel that you couldn't have reached these people. My hands were tied, basically." He felt magistrates were not in position to do what they had been supposedly tasked to do - "Yes ... our powers were not sufficient" – but that there were no other options available to magistrates other than that of reporting.

It is important to remember, however, that it was the detainee who was really the one

rendered powerless by the failure of the safeguard system:

I showed you the injury to my eye when you visited me last week, I also told you of the injury to my ear. I requested that you bring this to the attention of a judge and you said you were not in a position to do so. You said you could only report to the Director of Security Legislation. I find myself in a helpless position in the hands of the police. (Billy Nair in a statement made to a magistrate, cited in NADEL's oral submission to the TRC's legal hearing)

It is impossible not to conclude that the reporting system generated an enormous amount of paper but little in the way of action. The closed system, the exchanged of information that blurred distinctions between protectors and perpetrators, and the absence of detainee trust in the system and its operators, meant that this crucial aspect of the safeguard system was designed to fail. The final facet of the flawed structure of the safeguard and complaints system is again related the previous two and stems from the fact that magistrates did not control the environment in which they worked.

#### **Lack of Control and a Context of Unknowing**

A lack of control over the custodial situation in which detainees were held manifested itself most obviously in magistrates operating in a context of not knowing. In a range of areas, of which this study will concentrate on access and the reporting procedure, magistrates did not know what they needed to know in order to be effective.

#### **Access to Detainees**

On the question of access, magistrates did not know who was detained or where they were held unless or until the authorities informed them. Detainees were usually visited in police cells to which access was mediated by police and security police personnel. Max Coleman talked of access "under controlled conditions ... the interrogators didn't like that [visits by magistrates and district surgeons] to take place. In other words they controlled the times and the access ... . It wasn't free access at all. That was the problem" (1/9/99). Information about detainees appears to have come to magistrates in a variety of different ways, including directly from the head of the prison (Mlambo), police station (Van Rooyen), or from the security police (Bekker) as well as filtered through the Department of Justice (Bekker) and the Chief Magistrate's office (Cartwright, Louw). The safeguard system was therefore dependent on the free exchange of information between and good faith of a range of state officials working for the police and the Department of Justice. It emerged during interviews that while a few magistrates had thought through the potential implications of this scenario, the possibility that detainees were hidden from them was something that had not occurred to some (Mlambo) while others, were reluctant to countenance it as a possibility.

Of the interviewees it was Bekker who asserted most vociferously that magistrates enjoyed free access to detainees. He stated, "yes, always, not once was there the slightest possibility of interference" and, more generally: "I heard allegations that there was direct political interference, indirect political interference. And what I'm saying to you there was none." Some laid claim to freedom of access as a right: "Yes ... there was actually no [pause] way that they can ... withhold you to go in a, um, the right to go in a certain area. They must

take you there ... its your duty to go and visit each and every person in the prison" (Prinsloo). Other interviewees acknowledged that interference did occur and that access was sometimes obstructed.

Some interpreted difficulties in gaining access in a benign fashion: "sometimes, it might happen that you came there and the detainee is not even there, he's out on investigation, or something, and you will have to go back again" (Louw). Others took a different view. Kruger, for example, stated that magistrates did have free access to detainees but also made two comments which significantly qualified this assertion: "Most of the time it was difficult to get access, you know, you have to approach the Station Commander first. And then he must get somebody to accompany you to the cells ..." and, "sometimes you found that they informed you ... that the detainee is with the investigating officer, or the security police, he's not available ... I recorded it ... Sometimes [I suspected foul play]. Sometimes you got [that] impression." These comments were echoed by Van Rooyen:

it was very difficult to, um, visit these people because I think, the police ... they don't want you to contact them actually and speak freely ... they made it difficult for you. You had to find them and ask them ... they [were] not ready for you, and they said you must wait and come back later, and [pause] not all of the time, but sometimes.

When asked whether he had a sense that the custodial authorities felt he was interfering, Van Rooyen replied, "Yes." These magistrates thus appear not to have believed unquestioningly in the good faith of the police.

The most concrete allegation made in relation to obstructed access, was the claim made separately by two black magistrates that those detainees who made complaints were moved. Mashudu, a magistrate who had worked in the former homeland of Venda, testified: "It was not easy in my case to make a follow up, because ... I will see that person once. The next moment when I go there ... I don't find him at the very same police station." When asked whether he felt this frustrated him from fulfilling his mandate, he continued, "Yes, of course. Because I did not know whether the complaints which I wrote down, the police tried to help them or not ... last time you mentioned this and this to me, did they attend to it?" Ramokoebo also reported similar problems, not from his own experience but from that of friends detained:

they told us when they came back, that once you make a complaint, it gets out to the authorities. The next morning the security police were there. Then you will be moved to another police station, where you wouldn't be given a chance to see a magistrate ... the complaints couldn't have been followed up because if you made a complaint you were moved ...

Finally, magistrates also admitted that they simply did not know if they had access to detainees. Van Rooyen acknowledged that they wouldn't have known people were detained if the head of the police station hadn't told them. Cartwright went further to imply that detainees were kept from magistrates:

I don't know if they always let us know about everybody that had to be visited.

Because ... there were, I think, hundreds of people being held in detention ... I don't think we saw more than about 8 or 9 on one particular day. And they were holding very many more people.

Perhaps the most intriguing commentary on this issue was provided by Bekker who was clearly aware of what would have needed to happen for the system to fail but retained a reluctance to believe that this could have occurred in reality:

For that system to fail ... you would have, first of all, required not to have known about the person. Now to my mind, there was ample provisions that you knew about who was detained. It would have required the very high ranking people in the security police, and in the police force itself, to try and hide the detention from the magistrate.

If this had occurred he conceded, "[o]bviously if that was hidden from you, you could not visit the person. You wouldn't even know about his existence", and also: "Yes ... I suppose if the whole lot conspired together and Pretoria [the Department of Justice] didn't report to us that someone was detained, the whole system would have failed" (Bekker). In another exchange similar observations were made:

If there was a weakness in the system, and I don't know how that could have been addressed, [it] was that we were dependent on being told by, I suppose, the security police, that there's a detainee before we got to him ... if they didn't want you to see someone, they could have failed to report ... If the security police didn't inform [us] ... there's no possible way, to my mind, a magistrate could have got to [the detainee] ... And that's why I don't know, 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. (Bekker)

Magistrates did not have free access to detainees because ultimately access was mediated and managed by others, and therefore susceptible to agendas other than that of safeguarding the well-being of detainees.

### **Reporting**

The second area where control was lacking and not knowing was prevalent, relates to the already-mentioned reports and what happened to them by way of follow up and action. Magistrates often did not know what happened to their reports and if complaints or requests were addressed. Some interviewees were very candid about this issue, for example stating, "I don't know what happened to them after that [after they went to Head Office]" (Cartwright) and "I never heard anything" when asked if requests were implemented (Muller). It appears that magistrates also did not know where the main locus of decision-making in the complaints and safeguard system was located – although suffice to say it was not located with them.

As the above discussion of dual obligations, reporting and control clearly illustrates, the complaints and safeguard system was fundamentally flawed in design and, by implication, intended to fail. If these were the only shortcomings of the system then magistrates could

make an argument for being relatively blameless: they had been handed a poisoned chalice, placed in an invidious position, whatever they did would not have protected the detainee because the system overall was not designed to do so. They were, in a range of key areas, powerless. But this is not the whole story. As a result of the way in which magistrates administered the safeguard and complaints machinery they made an already flawed system worse. Three main ways emerged from the interviews, through the routinisation of visits, the use of visits and reporting as a means of disengaging rather than engaging with their mandate, and the conduct of visits in the presence of police personnel. Each of these factors will be address in more detail below. It is important to register before moving on that these are clearly not the only, or necessarily the most serious, ways in which magistrates rendered a bad system worse, they are merely those types of conduct that interviewees were prepared to admit to or talk about.

## **Rendering a Bad System Worse**

### **The Routinisation of Visits**

When asked about the practicalities of visits, magistrates talked in terms of routine and sanctioned access: "we would go on a particular day" (Cartwright), "you let them know you're coming" (Van Rooyen), "one must make an appointment" (Prinsloo), "I arrange before-hand with the Station Commander, I'm coming to visit ... that time and that time" (Van Zyl). In an important corroborative statement, Cartwright stated:

Well I don't think we had free access, in the sense that I couldn't just go ... say I want to see so and so, because you wouldn't know if they were being held in detention or not. The Chief Magistrate's office used to get a list of people who were being held ... and then they would, um, tell you, you've got to go and visit these people. Today so and so is at this police station, and so and so is at that police station. And you'd have the list ... you couldn't have gone to any police station at any time and just say, I'm a magistrate of the Department of Justice, I want to see so and so. I don't think they would have allowed you to do that.

This comment says as much about the degree of magisterial engagement with the protection mandate as it does about restrictions on access to detainees. Through the routinisation of visits, both in terms of making appointments and keeping to set days and times as well as in terms of visiting named detainees rather than hunting down the hidden and the nameless, magistrates collaborated in rendering the safeguard and complaints system ineffective. Why could visits not have been unannounced? Why in a variety of ways were magistrates so passive and reactive? The only way a custodial safeguard stands any chance of working is if those overseeing it have free access and can make unannounced visits to those whose well-being is placed in their hands.<sup>22</sup>

### **Moral Disengagement**

The visits and reporting procedure appear to have been seen by many magistrates as an end in themselves, as a means of facilitating moral disengagement from rather than engagement with the safeguard system. Once magistrates had conducted visits and filed a report they had done their bit, it did not matter if any improvement in conditions or alleviation of suffering resulted as any actual action or intervention was someone else's responsibility.

Magistrates, in other words, did not engage proactively with their mandate. Prinsloo, for example, stated "there was no follow up on my part" and Van Rooyen, "you report [torture] to the police ... you just report them, you don't know what happened then ... no, you don't follow [up]". Here the imperfections of the system about which the magistrates could do little – interference, the context of not knowing, powerlessness - were accentuated by the indifference of the magistrates themselves. Not knowing or having power blurred into not caring.

Again, it should be noted that there were those who claimed to have followed up requests and complaints and thereby more pro-actively engaged with their task: "I'm satisfied I did" (Kruger). As well as those who claimed to have made successful local interventions with the police, some magistrates talked of pursuing proactive protection by seeking out feedback from either the detainee or the authorities:

I followed it myself ... if I gave a report which has to be done, I asked him when I go back ... 'listen, are you satisfied, is that OK now?' (Van Zyl)

It was followed up in the sense that when you visit for the second time, then you inquire about his complaints from the first time and whether they've received attention. (Louw)

If there was any possibility that there was some substance to the complaint, I would report it to the, um, police and then I would expect them to report back to me ... at the next visit, you would ask what's happened. (Bekker)

Bekker also stated that he would expect a report back from the Department of Justice when complaints were made against the police. Another strategy was not to be put off by the stated unavailability of detainees: "If I arrived there and somebody was out on investigation, 'when is he likely to be back?' ... Some would say they don't know. And then you simply go back ... They knew that's the way we would do it" (Bekker).<sup>23</sup>

### **Police Presence**

Although detainees invariably saw magistrates as part of the system, it is stating the obvious that they would be more likely to speak, and speak more openly, if magistrates visited on their own rather than in the company of police personnel. Some magistrates said that no other people were present when they registered complaints (Muller, Kruger, Bekker), while others claimed that if a second party were present, such as an interpreter, they were not police personnel. Magistrates asserted, for example, that they used departmental or court interpreters (Bekker, Muller). There were, however, indications that such practices were not universal.

Sometimes, clearly, police interpreters were used: "we usually got the sergeant on duty ... to interpret ... they would say there's a sergeant who's going to accompany you, that's all" (Van Rooyen). Mashudu talked quite openly about being accompanied by members of the police whilst conducting detainee visits: "the station commander is the one who would accompany me to the cells, where I would go and visit ... the third person can be the charge office sergeant". When challenged on this, he acknowledged the implications of the police

presence:

Yes, in the company of the police they were not actually prepared to mention complaints ... They did not speak freely ... They normally used to say they need some books, they need some newspapers to read ... those were the types of complaints I used to receive.

**Q: Was there any law saying that policemen had to be with you while visiting prisoners?**

Well, unfortunately I did not inquire why they had to be in my company ... they would just accompany and I did not even query it.

The routinisation of visits, the eagerness to disengage from their task, and a kind of willed blindness to the implications of police presence provide some indication of the way in which magistrates became complicit in human rights abuses. These examples should be seen as the more visible 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 provide an insight into the kinds of patterns of behaviour, alliances, assumptions, ignorance, obedience and passivity that generated far worse abuses, by both magistrates and others during the apartheid era.<sup>24</sup>

The next section of the paper examines the confession-taking process, which it is argued, mirrors the safeguard system. It too was and still is both structurally flawed and has been made to work in the interests of the state, in part by magistrates.

**Confessions/Statements**

The principle that confessions and admissions had to be freely and voluntarily made to be admissible as evidence in court was given statutory force in Sections 217(1) and 219(A) of the Criminal Procedure Act of 1977. However, if a confession or admission had been made before a magistrate, the onus was on the deponent to prove on the balance of probabilities that it was not freely and voluntarily made. There were very few cases in which courts found that conditions of solitary confinement or interrogation procedures constituted sufficient grounds to render evidence inadmissible. Although it was argued repeatedly by apartheid's opponents that the very nature of detention compromised detainee evidence, the courts were not prepared to hold that a confession or admission was inadmissible unless there was clear evidence that it was made as a result of coercion or physical assaults during interrogation. The legal significance of a confession, which often was enough on its own to secure conviction, placed a huge responsibility on magistrates:

the security police had ... a number of options. The first option was don't get an admission or confession. Just say ... we've done our jobs as policemen and we've got the evidence. That was beyond them ... The second option would be to have, what was called, an admission. And an admission is an admission of a fact that is not necessarily a confession to a crime. OK. And an admission does not have to be made before a magistrate, because it's not so prejudicial. But it doesn't add up to that much. The third option is a confession made before

somebody who is not a magistrate. But then the onus is on whoever receives that confession to prove it's really voluntarily made. So again, using the system, why not rely on the law which says if it's made before the magistrate the onus is on the detainee to prove its not freely and voluntarily made. Because how on earth do you prove it ... It is your word against that of all the policemen who've ever had control of you. (Satchwell, 25/8/99)

in court ... the magistrate would come. He would confirm that he had hand written [the confession], or he would ... confirm that nothing was told him because if he had been told of an assault, he definitely would have written it down. And very infrequently would a judge reject a confession statement made to a magistrate ... Very seldom were judges disbelieving of magistrates [or] critical of magistrates. (Satchwell, 25/8/99)

The first quotation illustrates the way that magistrates became part of a system that was used against detainees and the second that they were far from being alone in their culpability. Satchwell continued: "if one is criticizing magistrates ... one must equally criticise the judges. And they are more [culpable]. Because unlike magistrates, they have always been independent ... judges had every protection ... room for manouvre ... and seldom used the inquiring critical mind" (25/8/99).

The process of taking a confession was described by interviewees as follows:

what you would have is a magistrate sitting in an office. An arrangement is made. The police arrive. There is usually a discussion in Afrikaans between policeman and magistrate. So, the point always was ... there is clearly a bond. They are white Afrikaners together ... persons in authority. There was no indication of independence or separation. Sometimes the policemen would remain in the room, although on most occasions they left. The magistrate would read a form ... Who are you? Why do you want to make a confession? ... Have you been threatened or tortured? ... Went parrot-like through the form. (Satchwell, 25/8/99)<sup>25</sup>

some rules must be followed if we are taking a confession. You must be alone with the person and ... try to get him calm and comfortable ... I was aware that the police were very strict to such persons ... before you are taking a statement ... you follow a lot of questions ... about three or four pages ... So you are making sure that there is no pressure and there is no force on him to make a statement. (Kruger)

That's correct [the detainee was brought] to my office, in camera. And you put them at ease, [pause] at his leisure ... you have formal questions, but when he starts to tell his story ... I ask no questions ... they can tell me if they want to tell something ... he can tell his story in his own way ... I want their statement to be a true version of his capacity at that stage ... so that ... later in court, they can see what was his state of mind: did he speak logically? did he repeat himself? ... Because there was duress from the police for sure, that's for sure. (Nel)

The magistrate therefore took down answers to a list of formal questions and a confession/statement, and both documents were then submitted to the appropriate authorities. The responses from interviewees revealed their belief that procedures were in place to ensure that confessions were freely and voluntarily given, while the comment from Satchwell depicts the supposed protections as a meaningless bureaucratic exercise. This report argues that the compromised nature of the confession-taking process in many ways mirrors the structural flaws already described in connection with the complaints and safeguard system. The circulation of documentation is an illustrative example:

The detainee, knowing that his captors were sitting outside the door and knowing that that document was going to be given back to them, would say, no, of course not [he had not been abused]. It's been tea and cakes all the way. And the magistrate would not go further ... I have done a lot of political trials [and] I don't know of a single magistrate who ever said ... 'if you tell me of any abuse, I will not report that abuse to the people who have done so, I will take it to another authority' ... The magistrate never said that because he couldn't. His job was to give it back to the policeman. (Satchwell, 25/8/99)

This is a familiar scenario: compromising documents, notably any potential complaints regarding torture and ill-treatment, going straight back to the detainee's captors, circulating within the state system rather than to outside actors, with the inevitable result that detainees, due to distrust and fear, did not speak openly and the system of detention, interrogation, torture, and prosecutions, carried on undisturbed. Satchwell said of magistrates that they "protected the integrity of the abuse."<sup>26</sup>

Several magistrates acknowledged the consequences of the fact that confessions went straight to the police in whose custody detainees had been and would return. While Cartwright talked of "undue influence", Kruger admitted that the handing of a statement to the investigating officer would make the detainee careful about what s/he said ("perhaps, perhaps, yes ...") and Nel in an exchange about detainee caution, stated: "Yes ... It's a very difficult position ... there's a lot of questions you asked them, but you know they are under duress [...]" . Bekker agreed that the system was, and indeed still is, inherently flawed by the submission of confessions to the police. Similar issues were raised by confessions made by criminal suspects.

The taking of confessions was therefore intrinsically flawed for many of the same reasons that the complaints and safeguard system was flawed (the lack of magisterial independence, the nature of the recording and reporting procedure, the fact that magistrates lacked the control, knowledge and power to properly carry out their task). Kriek, for example, stated that if a person stated that he wanted to confess and was not doing so under duress, "I'll take his word for it, not knowing that there could be somebody who threatened him, just that he is too afraid to tell me. That's why I tell you, I never sensed anybody in front of [me], making a statement, actually making the statement, being pressured or whatever. Because I don't know this."<sup>27</sup> Again, as with the safeguard system, a sense of powerlessness arising from the design of the system, operated in both directions. When asked whether he felt detainees made confessions freely, Bekker replied:

in taking a confession there is always the possibility that there's a hidden threat.

And to say that I feel the person, not even speaking now about detainees, speaking about confessions in general, for me to say that I attend on this person who's making this confession freely and voluntarily, depends entirely on the answers he's given me ... the honesty ... depends entirely on his motives. If there is a motive, he's going to lie to me, and I won't know it of necessity.

But a flawed system was again made worse by the lacklustre way in which magistrates engaged with their mandate. It is interesting, for example, to note the measures that magistrates described taking, which in their eyes secured protection for those in custody. Bekker, for example, commented in relation to one incident: "The content of his confession was such that ... I handed it in to a senior officer ... If the confessions were such that they should not be handed back to the investigating officer, we didn't." Nel agreed that people were under pressure ("yes, for sure, for sure") and that he had seen people who had been ill-treated, but saw no scope for action beyond documentation: "And we make notes of that here and we reported it." This is Kruger saying what he did when confronted with a person who had obviously been assaulted but nevertheless denied it: "you recorded it as well ... Many times they say that somebody else hit him or somebody else hurt him ... Not the police. But then I recorded it. All of it on that form." Such actions are not likely to have protected those in custody. A related allegation is that complaints of abuse made to magistrates, here as in their custodial visits, made no difference, changed nothing. In this context, magistrates carried on taking down the confession, in a setting where the locus of action was much more obviously with them:

Where the magistrates really fell down, would be the detainee would say, 'yes I was assaulted' ... And there were like two lines on the form ... so it would get summarised by the magistrate. And then the magistrate would carry on and say, 'now tell me your confession'. Not, 'well I'm not going to take your confession because it cannot have been freely and voluntarily made'. So he would carry on anyway. And I don't know of a magistrate [who said], 'well I'm not going to take your confession'. And I also don't know how many detainees would have wanted that. Because it was very much, let me make a confession to get them off my back. But I also use the opportunity. (Satchwell, 25/9/99)

[the way in which magistrates took down confession statements] was one of the worst things I've come across ... I have seen instances in my own practice where an accused person came there bruised and swollen ... one of the questions ... would be whether the accused has been assaulted or not. They would have the audacity of writing 'no'. When the person has lost teeth and all sorts of things. Within his sight. He would be looking at that person and just write ... 'No assault'. (Moloi, 24/8/99)<sup>28</sup>

Magistrates, contesting the above observations, were unanimous in claiming that if abuse had taken place or seemed to have taken place they would refuse to continue with the confession. Responses included: "And if I sense [duress], then I won't take the confession" (Kriek), "if ... I have a doubt when I ask him questions ... and [pause] I realize he has difficulty ... is not at ease ... I refuse to take the confession" (Mulaudzi); "I would refuse to go on with his confession and I would take it up with the station commander ... because I'm very against torturing" (Van Zyl); and:

There's a strict procedure that ... was being followed. And you questioned the deponent very carefully before you take a confession from him. If there's any indication that he does not voluntarily want to make a statement, you just refuse to take [it] ... if there was somebody like that, I would not have taken a statement from him. (Eloff)

One or two [when asked about confessions by criminals under duress]. I, um, [pause] can remember one especially where I've said to the man, 'listen you're not supposed to tell me anything more because I think you are a little bit [pause] um, under duress'. I think he was influenced by threats. And eventually when I carried on, you know we have a form, a list of questions ... eventually I got to a stage where I said to him, 'I'm not going to listen to you any more. All I'm going to do is report to ... the district commander ... that you told me this. And he must investigate and see to it that nobody does anything further' ... he really didn't want to tell me that he was assaulted and there were further threats of assault ... in those circumstances where I thought it was obvious, I thought, no, it's no use. Because it will be a fight in court later and it's going to waste everybody's time. (Liebenberg)

Interestingly, magistrates often described a hypothetical situation - if this situation had arisen they would have refused to take down a confession - rather than something that had taken place and that they had actually done.<sup>29</sup> One magistrate also described the way in which the police could bypass obstructive magistrates:

the police brought this person to me for their confession. And [he] told me ... that he didn't want to confess to anything. All he wanted was an attorney ... And I then said, 'under those circumstances I'm not going to record anything you say that can be used against you. So you may leave' ... [I] return[ed] later to see that my colleague has been asked by the police to take that confession. So then I was contacted by the attorney who was later instructed on behalf of that person, and I was prepared to give evidence against the, um, prosecution, that that confession wasn't taken freely and voluntarily, because on that day he did not wish to confess before me. What would change his mind to make a confession a few minutes later? ... The magistrate didn't know, she did not know that that person was with me previously. (Kriek)

Here not knowing for the second magistrate included not knowing that the person had been with Kriek previously or what had happened to induce him to make a statement.<sup>30</sup> Magistrates not only said that they refused to take confessions if there was any evidence of abuse but also made other even more expansive claims. For example: "many times they mentioned that, [pause] that they wanted to inform their relatives where they are. I made a telephone available to them" (Kruger, talking about detainees).

The ways in which magistrates failed to tackle the question of custodial violence and contributed to the production and circulation of coerced confessions in this context are strikingly familiar: a routinised and bureaucratic approach, a lack of engagement with or easy disengagement from their potential to protect and safeguard, and a trust in and association with the custodial authorities that undermined their effectiveness.<sup>31</sup>

Where there were differences between the system for taking confessions and that designed to address complaints and provide safeguards through custodial visits they, like the similarities, were primarily the result of the design of the structures concerned. Satchwell suggested that the nature of any record was influenced by the likelihood of it ever being taken from the closed state system into the light of the court room:

this is why I think there is a difference between the magistrate who is visiting the detainee and the magistrate taking a confession. When you visit the detainee in the cell ... nothing may ever come of it. When you take a confession, there is a strong possibility that that confession will be used in a trial, and that you as a magistrate will be called to give evidence. And so you know that you will actually be tested, you will be cross-examined, you will be held up to some kind of judgment. And I think it would be difficult to say, no complaint was made to me. It's almost easier to record the complaint. Which is what most magistrates did. How well ... and with what degree of diligence is another matter. (25/8/99)

Both the safeguard system for detainees and the process for recording confession/statements can be seen as cogs in the machine of apartheid oppression. Magistrates were used to give the systems a respectability and legitimacy but ultimately they were operated by the state for the state. In order to understand why magistrates became complicit in rendering faulty systems oppressive, and thereby in human rights abuses, it is necessary to examine magistrates' reflections on broader issues, specifically independence and the relationship between law and justice.

### **Magisterial Independence**

At that stage, magistrates were exclusively drawn from prosecutors ... magistrates were public servants. And, um, [pause] everything in the public service pertained, or was applicable to, magistrates. It was sort of funny, because you can't be a public servant and a judicial officer. It's impossible. (Mills)

A certain amount has already been said about magisterial independence in the context of dual obligations. What is striking in the light of magistrates' status as public servants is that generally, across the whole span of their work, the majority of those interviewed for this study regarded themselves as independent. Comments were made such as "I certainly don't know of anybody who was not independent" (Bekker). Independence was described by some as a kind of unofficial badge of honour - "If I'm not independent I should not be here. And then I must go somewhere else ... the people I worked with, they were all independent people" (Prinsloo) – and as intrinsic to being what one interviewee described as a "proper magistrate" (Mlambo).

Interference with and compromise to the independence of magistrates, however, was predominantly understood in very specific and narrow terms: as politicians telling them what to do. For example, "um [pause] never in my life did any politician tell me what to do" (Prinsloo); "I was never influenced in any manner to pass a judgement to suit either the government, or whatever party" (Mlambo, who also claimed that being in a homeland like the Transkei made a difference because "its leaders there didn't want to interfere with the

judiciary at all"); and: "Now on that I have very strong views ... Not once, was there even the remotest attempt [pause] by politicians to interfere" (Bekker, who went on to give the example of a funeral that he allowed to take place in the face of security police and political opposition: "despite the fact that I gave the permission the way the government of the day didn't want it, there was not the slightest attempt [pause] in any sort of interference ... I wouldn't have tolerated it"). Bekker also stated: "And the next thing that I need to say is, magistrates ... speak to each other about things. I'd not even heard during that time, or any other time, of an attempt of political interference ... We would have reacted very strongly." This very overt, political understanding of interference, which even critics of magistrates would probably agree was not the most pervasive violation of their independence, allowed magistrates to believe that it did not happen and therefore that they were free agents.<sup>32</sup> As has already been discussed, however, pressure could be applied in a variety of more subtle ways to compromised the independence of magistrates.

The inherently compromised position of magistrates resulted from their status as public servants and legal officers who were required to implement the laws and policies of the day. In response to a question about whether he had ever experienced any interference or pressure from any party, Muller replied: "Not directly, but indirectly you had the feeling that things like the Director General of Justice, you know ... he's basically in charge. You had to do what he says via circulars and that type of thing ... you were basically a servant of the state, it came down to that perception." Fourie stated, in a similar vein: "you must also remember all the propaganda that we received. It was not easy to distinguish between propaganda and facts." There were, therefore, magistrates who said they regarded the inherently compromised position of magistrates as unsatisfactory: "But that was not right ... for a magistrate or a judge to be, um, linked at all to the state, is totally unacceptable" (Muller). Muller also said that whereas in the past he had not felt free to criticise the state, now he did and had done so on many occasions.

For magistrates interviewed for this study pressure from the state manifested itself in two main areas, transfers and promotions, each of which compromised independence:

- promotion

Now, I must quite frankly say ... I've never seen any direction going out to magistrates [saying] you must try a person in this particular way or that particular way. But I'll also be honest to say to you, subjectively, people probably ... had in their mind when they made their decision ... I must give a decision which will favour the government because then I'll get a promotion. I don't say that's what happened. But that's a possibility ... they were subject to their promotions to the Department of Justice. (Neet, 28/9/99)

- transfers

Fourie referred to the use of transfers to "manipulate magistrates ... magistrates were very afraid of transfers, and very often it happened", while according to Mlambo, transfers were the most common form of sanction used against magistrates. Van Rooyen concurred - "It was very

easy. The moment they found you do something wrong, they transferred you. Any place, far away ... That was the main [sanction]" – as did Nel: "If you spoke out against the system, you were in big trouble, they transferred you." The severest sanction was to lose one's job (Fourie).<sup>33</sup>

Magistrates identified some of the symptoms and structural causes qualifying their independence, while claiming that it was still possible for an individual to be independent despite such symptoms and within such structures. Muller, for example, stated with regards to visiting detainees and more generally that he "always regarded [himself] as being independent" and continued: "No, I won't say because I was a magistrate, I'd rather say because I was myself. I know myself. I'm that sort of person." He described the relationship between the individual magistrate and the structures within which s/he worked as "a battle ... you were bound by certain walls and you had to battle." Similarly Fourie stated that he felt the perception that magistrates were "part of the regime" was an unfair generalisation as "there were a lot of magistrates that tried their best within the system not to be part of the wrong - doings as far as they could determine and know of what happened."

This sense of an individual capacity to be independent while occupying a compromised structural position was most clearly articulated in magistrates' discussions of the relationship between law and justice and the possibility of security justice within an unjust legal framework.

### **The Law and Justice**

So at the Legal Hearing two not unrelated questions were put to those who staffed the legal order. How was it that you implemented without protest, and often with zeal, laws that were so manifestly unjust? And how was it that when you had some discretion as to how to interpret or apply the law, you consistently decided in a way that assisted the government and the security forces? (Dyzenhaus 1998:27)

Questions were asked about law and justice to ascertain whether magistrates had a sense of justice that was independent of apartheid laws or whether they saw the two as necessarily synonymous. A second string of interest concerned whether magistrates were troubled by feeling they had to implement laws they regarded as unjust, and if so how they responded to a sense of moral unease. These issues feed into a final set of concerns about the relationship magistrates outlined between themselves and the law – did they simply apply or interpret the law? - and related reflections on the issue of discretion: how much did they have and how was it exercised?

### **The Law as Justice**

It is perhaps appropriate to start this discussion with a description of the relationship between law and justice from one of the study's key informants:

The fact is, justice is one thing ... law is another. Law and justice are not synonyms. Because laws are ... made by politicians. They have an agenda to pursue, and those laws ... may not always be just. And the watchdog is the

magistrate, is the judge, is the lawyer ... If you interpret the law simply because it's law ... without looking as to the effect it has on the people, then you are misguided ... laws are always made to regulate the relationships in society ... and with a certain aim ... in the past regime ... the programme was quite clearly to disadvantage other people and to exclude them from mainstream ... life ... if magistrates and judges] pronounced themselves as vigorously as they should have done, apartheid would not have lasted. (Moloi, 24/8/99)

Magistrates on the whole provided a very different view of the relationship between law and justice. The first couple of comments are of note because the law and justice are seen as one, unquestioningly and automatically, and because of the analogy made with a cricket umpire, which serves to divorce the work of the magistrate from the moral terrain and place it within the realm of rule-bound adjudication:

your functions as a magistrate is to try the matters that's placed before you ... even if you, if you don't always agree with it, you've got to comply [with] the provisions of the Act. You must mete out the justice as the Act provides [pause] ... that's all you can do ... I mean, it's the same as your umpire in a cricket match ... the rule provides so and so ... And he will see that these rules are complied with. (Smit)

if I say, in a cricket match for instance, the man who is given out LBW ... he wasn't out ... the man was never out, but the umpire said he's out, he's out. All you can say after all this is, I'm sorry, you shouldn't have been out. But, um, there were the rules and laws and that was your function as a judge or as a magistrate, you had to mete out the justice. And the justice is meted out, according to the laws and the Acts that are placed before you. And, you know, if it was an unfair Act or a law or a provision, there's nothing I can do, because you know, it's my work, my work is to see that justice is done ... according to the provisions ... But I can't apologise, and say, I'm sorry I convicted you, because ... the Act provides, look if you did so and so and so and so, you're guilty of an offence, and my function was to try the matter and to find out whether the man was guilty or not guilty. (Smit)

Below is another reflection on the relationship between law and justice and the possibility of securing justice despite unjust laws, this time from Prinsloo:

Now, if you prosecute a person for public violence, for instance, you must not expect that person to come and greet you as if you are his friend ... you are sitting as a white magistrate ... and there is a person in the midst of the struggle, of course he will see you as the enemy ... as part of the whole apartheid system. Um, nobody can tell me that will not be the case ... a lot of us ... we were doing our jobs, we were just working, trying to see that justice is done to everybody.

I can't say to the government I don't agree with that law, I'm not going to follow it ... You can't say to the accused, 'you did not commit this offence because I don't believe in the law' ... because the law is there, you must comply with [it] ... What do you think will happen [if I do otherwise]? They will kick me out of

the door ... You want all the magistrates to stand up and to say, 'hey, I don't believe in this law you're making' ... 'I'm not trying any pass book cases today'. How long do you think you will last as a magistrate?

Alongside this clear articulation of legal positivism and the constraints and pressures felt by magistrates, Prinsloo also stated "I must ensure ... that the people are treated fairly ... that justice is done" and: "Now the question is, um, how can you ensure that justice is done?" While acknowledging that there was limited room for manoeuvre, Prinsloo was challenged on the idea that justice could be done given the laws he was applying. He responded: "What I mean by justice is done, is seen to be done, is you must ensure that justice is being done within your framework", that framework being one governed by parliamentary sovereignty: "it doesn't matter what you do, if you don't like the law ... they will just alter the law." This statement is an assessment of magisterial powerlessness but also an abdication of responsibility of the kind that served to oil the workings of the apartheid state. Interestingly, Prinsloo also commented, "Can you go back and say to them, but in principle, I'm opposed to what you're doing. Because as soon as you do that, you start playing politics in court. You see, and as a magistrate, we're not here to play politics." This observation resonated with the attitudes of other magistrates: to challenge, and even perhaps question, the law is to play at politics, which is not the role of a magistrate. The artificial divide between law and politics, even in the context of discussions about legislation relating to public violence and the pass laws, provides another way of voiding law of its moral content and alleviating magistrates of the responsibility for their actions. Magistrates made claim to a considerable, possibly contrived, political naivety. In relation to the criminalisation of youth political activity in the Vaal triangle during the 1980s States of Emergency, Nel stated: "we had only that mind that it was a criminal activity. We didn't quite understand at that stage ... the political motivation."

The final consideration of the law-justice equation, relates the issue very explicitly to magistrates' status as public servants and the position this placed them in vis-à-vis the government. Van Zyl, when asked how she felt implementing laws she considered unjust and how she dealt with any sense of unease, responded:

Yes it was difficult ... we were government employees. And, as, also today with the government of today, I'm supposed to be loyal to the government of today, irrespective of what my political views are. Um. [pause] and that was the same. I was employed to do a certain job, according to certain laws and, um, regulations.

Such a stance was not seen to interfere with professional independence:

Well it doesn't touch my independence. Because, even now, um, I mean you can't just work on your own and decide your own things. You must work according to certain Acts and certain laws ... It doesn't touch my independence ... Nobody tells me you must, um, [pause] um, find this person guilty or not, its my own decision. (Van Zyl)

Again interference is seen in very overt, political terms. Implementing unjust laws out of loyalty to the government of the day is not seen to have implications for ones independence which, it is argue, could be maintained from within such a position. The other interesting

aspect of this exchange is that it uncovers a public service mentality, but one which fails to distinguish between the governments of today and yesterday and their respective legitimacy. The belief that the role of a civil servant is to serve the government of the day has some weight, but only if the government is democratically elected and accountable.

One of the important themes that comes out of the interviews is the distinction made by magistrates between structural authority (law, government ...) and the individual, and a belief that it was possible for an individual to inhabit and serve the structures while remaining independent, to secure justice, for example, within an unjust legal and state machinery. This set of attitudes needs to be seen as a retrospective device enabling magistrates to distance themselves from and even criticise the apartheid regime for which they worked, while maintaining their individual credibility.

### **Moral Unease**

A few magistrates acknowledged feeling a sense of moral unease when applying certain laws – particularly the pass laws ("pass laws, yes ... we did a lot of harm to other people"), but also the Group Areas Act, Mixed Marriages Act, and a number of magistrates stated that they disagreed with detention without trial or lengthy pre-trial detention (Kruger, Nel) - but magistrates overwhelmingly felt they had to do their job and implement the laws. The disincentives that existed relating to speaking out against unjust laws have already been outlined: "I did feel some of these laws were unjust in the sense that we were denied most of the rights ... you feel uncomfortable with the law. But you wouldn't say it openly, because once you say that in being the Department ... there'll be trouble" (Ramokoebo).

On the question of morality Prinsloo stated "of course in court you had to distinguish between right and wrong", thereby providing a clear profile of the morality of the courtroom. But he continued: "And you see there's a difference between what I'm doing in court and my moral views ... between your moral views on a certain situation and the fact that you must ... I must follow the law, I must implement the law":

I'm sitting in court today ... I'm not here to talk about legal theory. I'm not talking about moral values, political moral values. I'm here, that accused is standing in front of me, and he's saying I plead guilty, or I plead not guilty, because I didn't possess my pass book ... Then you must convict him because the law says I must convict ... The only other options I had was to say I don't want to be a magistrate. (Prinsloo)

These observations suggest an enormous privileging of the moral authority of the state. This magistrate is effectively saying, 'yes, we deal with right and wrong, but my moral values don't matter, what matters is that the moral guardianship of the state be respected and preserved.' The perceived authority, moral and otherwise, of the state is also reflected in the relationship magistrates outlined between themselves and the law.

### **Creatures of the Law**

Overwhelmingly, interviewees described themselves as creatures of statute, by which they meant that their job was to apply and implement the law rather than interpret and analyse it. Several magistrates observed that they do not make or change the law.

The self-perception of magistrates as creatures of the law is married to their public service status and mentality: they were, in the way they were seen by themselves and others, legal bureaucrats. One interviewee talked of "processing" cases like pass law offences (Prinsloo) while another commented: "You know, as magistrate you have to apply the law, that's your duty" (Kruger). This attitude does not appear to have changed:

I suppose we will always be applying the law. I know, according to other people, the law can be interpreted in different ways ... But as far as I'm concerned, I'm applying the law. Whether it's the law of 1990 or whether is the law of 2000 ... I'm not making the law. (Louw)

Van Rooyen stated similarly: "The law is the law. The law is there and you've got to apply it. So there's no change ... You can't change the law as a magistrate". He did go on to acknowledge that one improvement is that the laws currently being applied are more just, but the legal mindset remains the same.

This mindset directly impacts on whether magistrates felt they had any discretion in the way in which they carried out their duties, ranging from detainee visits to court room conduct. While a positivist attitude to the law exaggerated the belief that magistrates operated in an arena devoid of choices - "a magistrate is a creature of statutes, you know, if the laws of the country says this, you cannot, at the time you cannot do anything" (Malaudzi) - there were interviewees who acknowledged that there were areas where discretion could be exercised:

to help people, to alleviate problems. I think, many of us did use their discretion. And they should have done so. Perhaps many did not. Which is unfortunate.

**Q: And can you think of any particular areas which allowed you to use discretion.**

Well, basically returning visits ... You visit the prison. You have to take down complaints ... And you make a point that that be rectified. And you use your discretion. Because you go to the head of the prison ... you ask him please correct this, it's not right ... That was something that I did ... With success. (Muller)

**Q: in the past ... if you'd felt a law was unjust, were there any avenues open to you to express your unease? ...**

No, you can't express your unease, no.

**Q: Couldn't you [say] something in a judgment that you felt that the law you were applying wasn't just?**

[pause] No. I don't think you're supposed to say that in your judgment ... you can sentence him less ... That's the only thing you can do ... in proportion to [the offence]. (Van Rooyen)

In relation to the pass laws, Prinsloo commented: "But there was also some way that you tried to, um, [pause] you know, alleviate the hardships ... and in my limited capacity, I must try to, um, um, you know, try to contain the damage." But the scope for discretion must not be equated with securing justice, it merely offered the possibility of lessening the degree of injustice. Justice was simply not possible with many apartheid laws. JOASA's written statement to the TRC, although confusing in its depiction of the relationship between law and justice, appears to recognise this fact: "In a number of instances judicial officers adhered closely enough to the rule of law and equitable justice but this approach would be undermined by the bad quality of the laws they had to apply. Their adherence to the rule of law at times got overshadowed by the harsh effects of the said laws" (p. 8).

It is important, therefore, to acknowledge the limits to discretion, the range of areas where the law left no or very little room for manoeuvre. Due to the nature of many laws, parliamentary sovereignty and precedents set by higher courts, "in the Magistrate's Courts you cannot really go and alter the whole heart of the law ... I'm not ... in the position to alter the moral principle of the law" (Prinsloo). Similarly Louw, when asked whether it was not the case that there was always a certain amount of discretion when applying laws, observed: "within the norms laid down by, say, the Supreme Court, etc., but you can't go outside them, not as a magistrate because this is a lower court." Others provided more specific examples, for example, those detained without charge could not be granted bail: "So the court's hands was cut off, it can do nothing" (Nel).

Some of the more progressive magistrates also registered the limits to discretion. Talking about the need to reflect on the past, one interviewee commented: "And there were days when, um, you had to [pause] apply certain laws which you didn't like to do ... And, and, um, you reflect on that ... Um, I really had no choice. But, [pause] then I thought there must be something to do to do it different" (Muller). Another more enlightened magistrate argued that discretion was a personal issue: "Yes, but is also a personal thing. There's two ways magistrates act[ed] ... a legalistic way ... and there's the other way that I'm more inclined to, and that's to equity and justice ... So you interpret the law and you impose sentences in regard to that ... But that's personal" (Nel).<sup>34</sup>

This analysis of law and justice indicates that magistrates need to rethink the nature of each and the relationship between the two. One way of doing this would be to move from being creatures of statute to being creatures of the constitution, saturated in the latter's 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. Legal positivism encourages its advocates to escape their responsibilities but it is also very disempowering. This approach to the law, in contrast, not only empowers but also brings with it responsibility as well as rendering it more transparent. One key informant, Ilze Olckers, from the Law, Race and Gender unit at the University of Cape Town, described this as potentially "very enlarging" for magistrates (17/9/1999).

The paper will conclude with an examination of magistrates' reflections on and moral engagement with their individual and collective pasts, beginning with the issue of torture.

## Reflection and Moral Engagement

### Torture

The majority of magistrates appear to have a relatively sophisticated understanding of torture, usually including both physical and mental components. Mlambo, for example defined torture as "in many ways physical. But ... solitary confinement ... that's torture ... detentions ... that's torture. Even if I'm not assaulted." Both Van Rooyen and Kruger agreed that sleep deprivation and solitary confinement constituted torture, while Van Zyl observed, "you can torture a person in many ways ... by interrogating ... on and on and on, that's torturing." She also, however, made a distinction between torture and what she termed "punishment":

Now you must remember that in Mr X's case, he was in our eyes a terrorist. He was involved with killing innocent people. So he was in a cell all on his own ... I knew ... it was not nice for him to be in solitary confinement. I wouldn't have liked to be in his shoes. But I didn't quite see it as [...] [torture] ... it's more punishment than torturing.

This quotation provides an interesting insight into one magistrate's world-view, in that the detainee is categorised unquestioningly as a "terrorist", whom it is appropriate to punish even before any crime has been proved in a court of law. For a magistrate to be making, and indeed approving of, such a distinction between torture and punishment provides a significant insight into how she saw the detainee and her role.

Not only did magistrates on the whole have a clear idea of what constitutes torture, they also condemned it with a single voice: "I would never say that is a good thing" (Louw); "absolutely unacceptable" (Nel), "I'm quite against it" (Van Zyl), and "very wrong, completely wrong" (Ramokoebo). Rather surprisingly, however, given their work on the custodial front line, many of those interviewed stated that their knowledge about torture was a result of hunches - "There was no real evidence. Only the feeling that it happened." (Muller) - or rumour and allegation:

I heard of methods they used ... I never saw it myself and I wasn't involved in any cases like that. But I heard [and read]. (Van Zyl)

I heard [torture] took place. I don't have first hand experience ... there were many policemen who were, um, put to trial because of torturing people ... I don't know whether they were detainees or not. But it was all over the papers. I mean, I should have known about it. (Nel)

I don't know ... Look there are always allegations. But it is possible, I don't know. Because, as I say I haven't got first hand experience, so I can't, um, say anything about it. I never visited any people who were in detention at that stage for crimes and that sort of thing. So, what I know about is the allegations. Because I read in the papers. (Eloff)

As well as general comments that complaints were registered and allegations made, some magistrates had personally received such complaints or allegations relating to torture.

Mlambo stated "I think [detainees] did [complain of torture]. They used to report it ... it was frequently [alleged]"; according to Kruger about half the detainees who made confessions complained of assault; while Eloff affirmed that criminal suspects were tortured for confessions, adding "no, you could never see it, but, um, obviously from time to time you got those allegations"; and Muller concurred: "Some did, yes ... I'm speaking about regular prison visits. They would complain ... Not security detainees. They didn't complain. But criminals did."

Very few interviewees admitted to encountering people who had been tortured first hand. The exceptions to this rule were from the courtroom rather than custodial visits. Nel said that people were being tortured, "yes, electric tortures ... beatings, yes".

Trials were conducted before him, in civil matters, involving "serious misconduct", while in the same area Eloff asserted: "Yes ... there were a number of cases [in the mid-1990s] where it was alleged that, um, the police tortured the people". In a different location, Van Rooyen commented, "yes, as a prosecutor I came across things. When you prosecute these people for break-ins, robberies, then they complain about torture ... you can see they've been tortured [pause] marks ... the police cannot give any explanation." He also stated that he did not come across political people who had been ill treated, and a common factor to these courtroom encounters with torture is that they concerned criminal rather than political suspects.

Despite the claim to lack unequivocal first hand knowledge, there was near unanimity among the magistrates interviewed that torture did take place. Answers on this question included the following: "most definitely" (Muller), "I would say so yes" (Kruger), "yes, for sure" (Nel), and "things like torture, we all know it happened" (Ramokoebo). Nel observed, "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." There was also a consensus that it was the police and security police who were responsible.

The main argument used by magistrates to shield themselves from responsibility for these abuses was the lack of and/or difficulty of establishing verifiable proof. Often, magistrates claimed, there were no visible wounds or injuries, and, as already mentioned, detainees did not talk openly about their treatment and complaints:

as far as I can remember, the people I saw who were held in detention ... you never saw any signs of anything [that] indicated that they had been assaulted or tortured. (Cartwright)

It was difficult because a person could have been assaulted by the police in such a manner that ... you can't see any signs that he was assaulted ... you couldn't detect it ... You perhaps got the idea that he may have been ... but it's difficult ... 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. (Muller)

Another line of argument queried the origin of injuries. One magistrate was asked if detainees ever had injuries that backed up what they were alleging: "Yes ... it's difficult not to believe when the person shows you injuries ... [although] ... I met a number of cases where a person would say I was hit by the police. You would find that ... he was hit by a member of the community. It has happened" (Mlambo).

This section will conclude with a series of observations by Bekker who was the most strident in his denials. He claimed that "not one" detainee he saw complained of torture and that he never saw any evidence of torture. This, despite a proactive approach to his task:

and I want to go further. If a man was sitting there with wound marks on his head and bruises and things, and he tells me I wasn't assaulted, I'm not going to be a child and say, OK, now he says he wasn't assaulted ... I would walk in there while the man was taking showers ... I would not be put off ... on one occasion there was a chap that ... was violent ... And I spoke to him through the bars. But I still satisfied myself on what I needed to satisfy myself on.

When asked whether in hindsight he thought some of the detainees he saw may have been tortured, he replied: "No ... Certainly none of the ones I saw." In contrast to these observations, several magistrates were prepared to admit that detainees they visited could have been tortured (Cartwright, Kruger, Van Rooyen).

In general, however, the scenario outlined by magistrates was as follows: 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?

#### **Understandings of Complicity**

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. Some felt criticism was unfair given the scope of their powers, others were uneasy about generalisations, while all were able to give themselves a clean bill of health even if unsure about the conduct of others:

I don't think its fair to generalise. Um. Once again, you must remember the circumstances under which the magistrates had to visit these detainees ... because the police, if they want to, and I want to generalise and say all of them did that, but if they want to and really conspire to conceal the facts, you as a magistrate will not find the true facts ... they will tell [the detainee] just one thing, and that is, remember you will come back to the same police station ... and we will get you ... that will stop him from talking. So to blame the magistrate because he can't find the true facts, I think that is unfair. (Fourie)

I can only judge for myself and what I did. And, if anybody would say that you became involved ... then I would say, 'No, you're not right'. But what others did, I can't say ... I don't know ... But on general terms, look they became involved in so and so, that's a bit unfair. (Smit)

Perhaps the most persistent advocate of magisterial blamelessness was Bekker:

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 ...

**Q: Surely part of what failed must have been the magisterial system of visits?**

No, I don't think so ... the people that were caught coming in across the border, for example, no magistrate ever visited those people ... the way I heard the TRC, no magistrates were ever involved ...

**Q: So you don't think torture took place in the past and that magistrates would have known?**

I can't accept that ... I can't imagine that the magistrates visited someone, found them to have been tortured and kept quiet ...

Here Bekker acknowledges that the system failed but denies, on the basis of ignorance and exclusion, that magistrates contributed to that failure. After stating "the system that was in place ... applied properly, should have worked, but listening to the TRC hearings, [pause] it certainly appears that some people were manipulating the system," he was asked:

**Q: But you wouldn't blame that on the, you wouldn't say that was the magistrates?**

No, I feel very strongly about that. And, [pause] I'm the last one to say that there could not possibly have been ... magistrates ... who did not do what they should have done. But what I am strong about is, [pause] that if they did so, I certainly don't know about it ... [there could have been magistrates] who, without interference, [were] politically in agreement with certain, um [pause] views ... kept quiet when they should have spoken, or preferred not to have seen what they should have seen. I don't know. Certainly from the TRC hearings many things went wrong. And I'm not saying it happened. It could have happened, I suppose. It could have happened to anybody. Any group of people.

In this exchange Bekker does acknowledge the possibility of magisterial misconduct, but such a problem, were it to exist, is depicted as the result of individual political alignments or the kind of aberration that could affect any individual or group, rather than state interference or structural weaknesses in the system. The system failed but it is claimed that magistrates as a group were not to blame. Bekker also stated, "All I can say is where I visited it was certainly successful ... no, I don't agree [that the system was designed to fail]. I strongly disagree."<sup>35</sup>

There were magistrates who believed that the safeguard and complaints system worked, at least on some occasions – like the magistrate from the former Transkei who believed that a report of his led to the release of a detainee (Mlambo) – but there were others who commented critically on it, acknowledging its shortcomings. Relevant observations in this regard included "whether it achieved very much, I don't know, I don't think [...]" (Cartwright), and this already-quoted passage from Kruger: "I wouldn't say I was successful. As I said, as a magistrate, you haven't got the power or the authority to, to improve anything. You can only put your request." Van Rooyen and Muller agreed that the system was designed to fail. Muller was asked whether his perception of this system was of an enormous generation of documentation, but nothing actually happening or changing, of the system really being just a paper chain, and he responded: "I think that's good, paper chain, I agree with that."

It is interesting to note that there were only two magistrates whose reflections included an element of self-criticism. Kruger stated, "I only tried to do my job properly, but perhaps I didn't do enough." During a meeting to feedback preliminary analyses, Van Zyl said, "I am sorry that I did not do more in the past". Otherwise magistrates, even when admitting that the safeguard and complaints system had failed to achieve its purported ends, 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 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 clear-cut 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 felt in retrospect 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. (Cartwright)

Magistrates acknowledged, both explicitly and implicitly, the TRC's contribution to revealing the deficiencies of the old system of incarceration, the failure of the complaints and safeguard system, and the inefficiencies and brutality of its officials, including themselves (see Kgalema and Gready 2000). Cartwright went on from the above quotation to talk about individuals claiming they didn't know what was happening or that they merely carried out orders. The strategy of claiming ignorance and blaming others appears to be a typical response from those accused of human rights violations. This section on reflection and moral engagement will conclude with an analysis of magistrates' observations about the issue of apologies: is an apology from magistrates needed? what conduct would merit an apology?

## On the Need to Apologise

Of the magistrates interviewed, Prinsloo was by far the most pre-occupied with the question of apologies and what merited and what did not merit an apology. He was clear about conduct that falls into the latter category: "Must I apologise to that accused because I followed the law. No"; "I often convicted the people. I mean, I was part of the system. But what you want me to do is to say ... that what we've been doing is wrong"; "[t]hen you actually want me to apologise for the fact that I've been a magistrate in the apartheid era ... Its not my fault":

to generalise, to say that all the white magistrates ... must apologise because they were white in the apartheid era, is as good as you saying to me I must apologise because my father and my mother had a white child.

I've done nothing wrong ... What I can say to you, that I think everybody will agree, that the whole system of apartheid was wrong. But must I apologise for the system of apartheid, um, just because I lived in that era ... Must I apologise for the fact that I had certain benefits under apartheid, for which I'm not responsible.

Prinsloo will not apologise for implementing the law, doing his job or for living within a particular regime, for being white and a magistrate. What then does merit an apology? "I will apologise if I did something wrong to a person by, um, implementing the apartheid laws so strictly ... then I will say, right apologise for it." Smit mapped out the terrain of moral responsibility similarly:

Well, [pause] I cannot apologise, but ... I know that some people did suffer hardships and I can say I'm sorry for that. But, um, you know ... if I say, in a cricket match for instance, the man who is given out LBW, I mean ... he wasn't out ... but the umpire said he's out, he's out. All you can say after all this is, I'm sorry, you shouldn't have been out ... and, you know, if it was an unfair Act ... there's nothing I can do, because you know, it's my work ... But I say, in retrospect now, if you hear and you listen to what happened to certain people, I say, I'm sorry what happened to them ... But I can't apologise, and say, I'm sorry I convicted you, because, [pause] that, you know, the Act provides, look if you did so and so ... you're guilty of an offence.

Apologies are acknowledged to be necessary only where magistrates exercised their role harshly or made errors, presumably of fact. Prinsloo was challenged on the fact that magistrates are unlikely to be trusted more nor will things move on until they reflect more honestly on their past:

all I want to ask you, if you've done something wrong in your life, and they come to you and they will say ... you must apologise for what you've been doing ... what you've been doing is morally wrong ... standing on the moral high ground. What is your personal view of a person who's coming back to you day after day, month after month, year after year, telling you, you must apologise for something you've been a part of. Even if you did not assist it actively ... And you say to him ay, I'm sorry. I'm sorry I was part of the system.

The next question you will pose to me, is but you're not really serious when you say you apologise ... And [pause] at a certain level, you as a human being will say to yourself, listen, I've apologised enough. I'm prepared to apologise without any conviction really. To say, hey, I'm really sorry for apartheid ... You see, if the people are hammering the same tin every time, then that tin will get bent and broken. Um. What's the use, and that's what I always say, what's the use of apologising. If I'm saying to you now, hey, I'm sorry for apartheid. Will you believe me? You won't believe me. (Prinsloo)

These comments by Prinsloo communicate a kind of apology fatigue, the credibility problems that exist on both sides of the apology divide, and the way in which distinguishing between playing an 'active' role in and being a part of a system is used to circumvent the need for an apology.

One black magistrate reflected critically on the attitudes of some of his colleagues in the context of the training instigated by the Law, Race and Gender unit at the University of Cape Town – but again he addressed the conduct and attitudes of others:

they asked what we did in the past and we should look at things differently. And the question was answered in this way, that they feel that there's nothing wrong with what they did. And there's nothing to apologise for ... Um, until somebody says, I as a person did wrong, nobody will ever say, nobody will ever admit that he was wrong ... there was a time when people in Marabastad ... for pass laws, you don't have your identity book you were bundled into a van, taken to court. Fifteen of you lined up there. 'How much do you have?' R10, 'you?', R30, 'you?', R20. 'Alright, guilty as charged, and you're fined whatever you have' ... That's not justice, that's not right, that's not fair. But those presiding officers who did that will not come forward ...

**Q: So are you critical of your colleagues for not reflecting more on what they did in the past? ...**

Certainly, I mean if I did something wrong I must come out. If I wronged my wife, I must just say I'm sorry. (Ramokoebo)

There have been isolated examples of magistrates and institutions catering for magistrates that have felt the need to apologise for the past. Two apologies are quoted below, both from written submissions to the TRC and both of a very general nature.

I wish to apologise for any action by which I may have unintentionally supported apartheid or which could possibly have been perceived to have been support for apartheid. In difficult circumstances I tried to uphold my oath of office to the best of my ability although I accept that I could have been more forthright in my opposition and expressed that opposition in stronger terms. (Travers, Submission to the Truth and Reconciliation Commission (Judiciary Hearings) p. 22)

It is in that regard that we in (JOASA) therefore wish to apologise unreservedly

for both conscious and unconscious acts and omissions ... 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. (Submission by JOASA to the TRC, p. 3, also see p. 8)

In conclusion, it is clear that, despite isolated and partial exceptions, magistrates in general lacked and still lack a moral vision to condition or evaluate their conduct. As a result their reflection on and moral engagement with the past is selective and self-interested. Magistrates were clearly not responsible for all of the ills that characterised, for example, the custodial system. As this report aims to have shown, these ills were the result of a complex relationship between unjust laws and government, politico-legal structures (such as magistrates being public servants) and a professional culture (magisterial allegiance to the state and its employees and the equation of the law with justice). However, magistrates do need to examine, individually and collectively, the ways in which they made a bad system worse and how they could have acted differently. The gap between these two modes of conduct, across a range of spheres of influence, can be seen as the area of magisterial complicity with the human rights abuses that took place. This complicity needs to be acknowledged and apologised for thereby providing the cornerstone of reconciliation.

Magistrates need to confront, for example, the fact that the system of complaints and safeguards for detainees failed, and that as the operators of that system they failed too. The failure cannot be completely blamed on ignorance and others. A series of questions have not begun to be asked, let alone answered: what did magistrates know about torture and when did they know it? what should magistrates have known that they claim not to have known? what options were available to magistrates when confronted with human rights abuses? Only one magistrate addressed this latter issue directly:

I know one chap ... he was very much against the detention business, he was very much anti-government. And, um, he just absolutely refused [to visit detainees] ... he wasn't going to do it. They didn't give it to him in writing, otherwise he could have perhaps been charged under the Public Service Code, if he refused to carry out an order, if it was given to him in writing. So they just sort of let, by-passed him, and never asked him to go and do that sort of work. (Cartwright)

This answer reveals both the possibilities and potential dangers of resistance given the status of magistrates as civil servants. It seems likely that exercising discretion in favour of the oppressed would have had repercussions, for example in relation to promotion and possibly transfers, and that refusing to implement laws and disobeying orders would probably have cost a magistrate his or her job. What action should be expected in such circumstances, as just and humane for all concerned?

The work of Dyzenhaus suggests one possible answer to this question, which will be outlined in relation to magisterial supervision of the detainee safeguard system, but has wider application. Given that protection was their mandate while being rendered impossible, should magistrates have participated in the safeguard system at all? Through their participation magistrates legitimised the system of safeguards, and thereby legitimised

detention without trial and the broader apparatus of oppression it served. Magistrates could have confronted the government with a version of what Dyzenhaus has described as the "rule of law dilemma" (1998:159-60, also 162-4,168-70,172), clearly establishing that the rule of law and apartheid practices, in this case detention and torture, were incompatible, and thereby either forcing the government to subject apartheid to the rule of law or unmasking its lawlessness. They could, in other words, have exacted a higher price for the legitimacy that their participation in the system bestowed upon it and/or have profoundly challenged the legitimacy of the system by questioning its legality and morality. While everything should have been done to further this agenda, the reality was that not only was it never pursued, it was barely even conceived. It should also be noted in fairness that such an approach would have required that its advocates could distinguish between law and justice, and would have been more likely to succeed if pursued collectively, with institutional support, rather than on an ad-hoc, individual basis.

## **Conclusion**

In many ways the content of this report suggests that magistrates and their critics continue to inhabit different worlds and realities. Their accounts of what happened under apartheid, even of encounters they shared, provide few points of convergence. But the process of narrative and moral convergence is bound to be a gradual, contradictory and incomplete. The agenda of truth-telling and reconciliation embarked upon by the TRC is in part about bridging this divide and enabling South Africans to lay claim to a more shared history and moral world. This research project indicates that only the first tentative steps have been made by some magistrates to enter this territory of shared meaning which necessitates an imaginative engagement with the views and experiences of others and a critical engagement with one's own actions and responsibilities. The paper does, however, reveal some of the psychological and political processes that produce the bureaucrats of oppressions, such as apartheid's magistrates, and that apparently small, relatively benign acts of omission and commission from such actors can have a profound impact, positively and negatively, on human rights abuse. The research, nevertheless, indicates that much of the work towards self-reflection and more general understanding remains to be done. While the move to an acknowledgement that abuses took place has generally been made, an acknowledgment of personal complicity in such abuses is completely lacking. With a view to facilitating this shift from general acknowledgement to self-acknowledgement the paper concludes with a number of recommendations.

## **Recommendations**

- to facilitate the development of a new and different legal, professional culture among magistrates:
  - the magistracy must be drawn from a wider range of backgrounds than public prosecutors, and be more balanced in terms of race and gender
  - magistrates need to develop a different approach to the law, one which enables them to critically analyse, interpret and apply the law in accordance with the South African Constitution and the values it enshrines

- magistrates need to learn to interrogate key concepts and develop an understanding of them which is more in line with the Constitution and a culture of human rights (examples of such concepts include independence, accountability, law and justice and the relationship between the two)
- custodial supervision must be based on the following principles: independence, transparency (in terms of the process and the reporting procedure, involving both state and non-state actors), accountability, and the system must be fully controlled by those who operate it (free access; the ability to follow up requests and complaints)
- problems associated with confession/statements would be addressed to a considerable extent by genuine independence for magistrates. A complete solution, however, also requires that a range of broader issues be tackled (for example, police investigations and forensic evidence need to be used instead of or alongside confessions in criminal prosecutions).
- the Magistrates' Commission and other relevant institutions should convene a mechanism of institutional introspection such as an Internal Reconciliation Commission (IRC), to discuss with magistrates and a range of relevant stakeholders the role magistrates played in the past and ways of ensuring that mistakes are not repeated in the future. It is possible that a symbolic act of acknowledgement and apology might be appropriate. Through such an institution, magistrates will recover the lost opportunity of the TRC by being publicly able to engage in a process of story telling about their past role, sharing responsibility, and acknowledging what went wrong. Addressing the past and moving forward into the future are closely intertwined, the one is dependent on the other. Unless or until such an event occurs, it is unlikely that the magistracy will achieve reconciliation and be able to move on, either internally or in its relationship with South African society

#### **Notes:**

<sup>1</sup> To consult the major written presentations to the TRC, see the South African Law Journal (SALJ) 115(1) (2) and (3) 1998.

<sup>2</sup> Studies of the South African legal system under apartheid also concentrate on judges, as those deemed primarily responsible for setting the standard of justice under apartheid (see Abel 1995, Dugard 1978, Ellmann 1992, Lobban 1996, Parker and Mokhesi-Parker 1998). The authors of this report know of no substantial analysis of the work of magistrates.

<sup>3</sup> The Magistrates' Commission made a written submission to the TRC after the hearings, as did the Judicial Officers' Association of South Africa (JOASA), a voluntary association of judicial officers at the district level. Both of these submissions were short, and while not uncritical, cannot be said to have engaged fully with the past of the magistracy. Their tone, for example, was extremely general. One magistrate described the submissions to the authors of this report as "window-dressing". For more comment on the Magistrates' Commission and JOASA submissions, and the considerable differences of opinion that emerged during the course of this study about the role of the Magistrates' Commission in

facilitating or blocking magisterial engagement with the TRC, see Kgalema and Gready (2000, also footnote 4).

<sup>4</sup> 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."

<sup>5</sup> Further, related, criticisms of the legal sector hearing were that many professional organisations and functionaries were less than candid about their role in the past and betrayed a lack of real reform of individual attitudes as well as professional conventions and institutions. Apologies were very general in nature rather than linked to specific acts or incidents. No lawyer applied for amnesty and few testified about their own collusion in violations of human rights. For transcripts of the TRC legal hearings see the commission's website, <http://www.doj.gov.za/trc/index.html>; for the TRC's report and findings on the legal community, see TRC, 1998 Vol. 4, pp. 93-108; for a critique of the hearing, see Dyzenhaus 1998.

<sup>6</sup> 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).

<sup>7</sup> 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, pp. 68-9).

<sup>8</sup> 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 (pp. 9-10). Acting as implementers of government policy clearly compromised magisterial independence.

<sup>9</sup> JOASA's written submission to the TRC stated: "Some judicial officers at the district level were given to a rather discomfiting 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 – also see footnote 16).

<sup>10</sup> Magistrates also sat on various Department of Justice committees with security related briefs (see Director-General of Justice, Submission to the Truth and Reconciliation Commission).

<sup>11</sup> Judges were also empowered to visit detainees (under the Prisons Act both magistrates and judges were empowered to visit prisons). NADEL's written submission to the TRC stated that detainees' "only protection lay in the mechanisms of judicial visits and, where the opportunity arose, judicial consideration of the legality and conditions of their detention. And yet it is in this area that judges failed most dismally to counter rampant police abuses ..." (SALJ 115 (1) 1998, p. 91). In her oral submission to the TRC's legal hearing, Priscilla Jana echoed these observations:

in my experience very few judges who could, visited detainees ... and if they did I'm not sure if anyone really came out ... made public their report and made efforts to come to the assistance of such detainees.

<sup>12</sup> It is important to note that magistrates are not a homogenous group. There are documented instances where magistrates acted in an exemplary fashion in their work with detainees and elsewhere. There were, however, some very clear-cut examples of the shortcomings of the safeguard system. In a study sample of 176 detentions between 1974 and 1984, Foster et al. (1987) found that only 66% of detainees had had contact with magistrates. Further, "A surprising feature of the results was the low frequency of claimed contact with inspectors of detainees, particularly in the light of state rhetoric which has stressed the importance of inspectors as protective mechanisms against abuse within the system of detention" (p. 100). The figures being 20% between 1979 and 1982, and 34% between 1983 and 1984 (also see 142-6, 156-7, 187, 202-3). By way of an individual example, the Aggett inquest revealed major shortcomings in the system of detainee protection (see Bizos 1998, pp. 101-32, and Lawyers for Human Rights 1983).

<sup>13</sup> Various factors contributed to creating a window of opportunity for research of this kind at this time. The TRC has created a certain amount of investigative and self-critical

momentum which needs to be mobilised before it is lost. The expressed resolve of various role players in the legal sector (the Ministry of Justice, the Association of Law Societies, the General Council of the Bar) to participate in building a human rights culture has far-reaching practical and policy potential, as does the reform of the role and responsibilities of magistrates and the system of custodial supervision. Finally, the terrible ongoing prevalence of torture and custodial deaths in South Africa underlines the importance of understanding how similar abuses took place in the past so that concerted action can be taken to prevent them in the present and future.

<sup>14</sup> The patterns described above were part of broader social and political processes. Significant numbers of Afrikaners joined the public service during the early years of National Party rule in South Africa. Poor whites were employed by the state as both a solution to the problems of white poverty and a reward to an important political constituency. Barber, for example writes: "The culture of civil service neutrality was abandoned, and between 1948 and 1960 the number of Afrikaners in public service doubled" (1999, p. 137).

<sup>15</sup> See the Director-General of Justice, Submission to the Truth and Reconciliation Commission, pp. 96- 100, also B. Nkala and T. Thipi's submission to the TRC from the Campus Law Clinic (University of Natal).

<sup>16</sup> There was near unanimity among the magistrates that visits to detainees were conducted by the head of office or by another magistrate appointed at his or her discretion. This indicated that it was regarded as important work (Bekker). According to Travers, all heads of office were subject to security clearance (Submission to the Truth and Reconciliation Commission (Judiciary Hearings), p. 15, also 20). Moloi stated that magistrates were also selected to take confessions (24/8/99).

<sup>17</sup> The submission to the TRC by the Director-General of Justice stated: "Reports received from magistrates, inspectors of detainees and district surgeons, who visited detainees in terms of security legislation were monitored and followed up by the [Internal Security] Branch. Where, for instance, complaints of assault were received, the reports were submitted to the Attorney-General for a report and decision as to prosecute or not. Where the detainee was in a bad state of health, district surgeons, inspectors of detainees and magistrates were requested to pay frequent visits to such a detainee and submit reports" (p. 17, also pp. 44-45 – the Internal Security Branch was replaced in 1982 by the Directorate of Security Legislation, located within both the Ministry of Justice and the Ministry of Law and Order. Relevant government ministers were also kept informed).

<sup>18</sup> Mlambo claimed that in the Transkei he reported straight to the Minister of Police and copies did not go to the police holding the detainee ("No, it was confidential, they had no right to ask for that report") while Bekker stated both that, "If there was any possibility that there was some substance to the complaint, I would report it to the police" and that if he had received a complaint against the police "we certainly would not have reported that to the police ... we would have reported it to much higher authority immediately ... to my national head office".

<sup>19</sup> Travers states, "Magistrates could not speak out because [of] the Public Service Act and

Regulations and the Official Secrets Act, which were applicable to them" (Submission to the Truth and Reconciliation Commission (Judiciary Hearings), p. 15). Satchwell also described the difficulties encountered trying to locate copies of a detainee's statement to a magistrate in the event that s/he decided to institute civil proceedings against the police, claiming damages for assault. The detainee, for example, would often not know the magistrates name ("He never introduced himself"):

how do you start? You don't know who the magistrate is ... and nobody is going to be helpful ... As far as I recall, the magistrates did not actually keep a copy themselves ... How we would usually get [the statement], is actually through the police detainee file ... We would know who the magistrate was because we would look at the cell books and occurrence registers ... there was a register of who had visited ... we would get hold of the magistrate and then we would find out what he had done, if anything, with the statement. (25/8/99)

This quotation illustrates very clearly some of the very deliberate limits to the protection provided by the complaints and safeguard system. Where reports could be located and contained evidence of abuse, they could be used in the interests of the detainee in court, for example during cross-examination.

<sup>20</sup> Interestingly, in a comment suggesting that practice varied from place to place, Travers stated: "a colleague told me that the practice in Durban was that [detainee complaints] were reported to the chief magistrate who then together with the security police, followed up the complaint. As both the police and the chief magistrate were probably members of the State Security Council apparatus this rendered the whole complaints procedure ineffective" (Submission to the Truth and Reconciliation Commission (Judiciary Hearings), p. 15).

<sup>21</sup> It is worth noting that Bekker was the magistrate for a large township in one of South Africa's main cities throughout the 1980s states of emergency.

<sup>22</sup> It should also be noted in fairness that other interviewees claimed they would "arrive unannounced" or "unexpected" thereby retaining an element of "surprise" (Bekke, Muller) and specifically stated that they did not visit "on a specific day or a specific time" (Kruger). But, judging from the interviews conducted for this study, this was not the norm.

<sup>23</sup> While these claims to conscientiousness may be exaggerated, some even more clearly went beyond the bounds of the possible. Van der Walt claimed that if there was a complaints about ill health he would not only phone the district surgeon but also invite the detainee or his/her family to bring a private doctor, When asked whether such a provision to call a private doctor existed, he responded: "It was my privilege ... whatever circumstances you know that prevailed, it was my privilege to address the situation." There is no evidence that magistrates enjoyed such powers.

<sup>24</sup> Some admissions have been more forthright: "In certain instances judicial officers in districts visited political and other detainees in their cells and other places of incarceration. They would in the process notice evidence of torture and intimidation but would fail to take appropriate steps to either stop or to expose such atrocities" (Submission by the JOASA to

the TRC, p. 5).

<sup>25</sup> As another example of the way in which links are perceived to be forged between magistrates and the state in this context, Meyer has argued that magistrates should not take confessions, which frequently obliges them to appear as witnesses for the prosecution in trials: "This may create the perception to the public that magistrates are part of the prosecutorial mechanism. We feel that it impinges upon the independence of the magistrates to require them to take confessions" (p. 141).

<sup>26</sup> On confession/statements also see Satchwell's written submission to the TRC.

<sup>27</sup> Indicating a lack of trust in the custodial authorities, Nel stated: "Yes. And we kept a copy of [the confession] ... ourselves ... because if it's not favourable to them, they lose it or tear it up. And later ... he testify in High Court, and he said that no, he made a confession before the magistrate, and it happened that they asked us and we produced the one we kept here for ourself. So that was also one security measure."

<sup>28</sup> JOASA's written submission to the TRC stated: "At times forced confessions would be induced through illegal means from suspects. Some judicial officers did not only fail to act against this practice but they would go ahead and obtain such confessions under conditions of duress and then go further to testify in defence of such confession at subsequent trials" (p. 6). There is evidence that confessions were even elicited by magistrates (TRC 1998 Vol. 3:574,616).

<sup>29</sup> The assumption behind all of the responses cited above is that it was possible for magistrates to intuit or discover if abuse, threats or fear were motivating confession. As with detainee visits, some interviewees felt that they had developed sufficient understanding and insight. Liebenberg, for example, asserted: "So usually you can see when they [criminal suspects], when they speak freely, or whatever". Kruger was asked if he felt that people brought to him to make a confession were uncomfortable: "Perhaps, yes. You know, but you can see if a person is not calm or he is not comfortable. And, you know [pause] um, some of the persons who were brought to my office ... you can see that some are tense. But, all those, um, remarks you put it down on the confession form. Because there's also provision to indicate what was the [state of mind]".

<sup>30</sup> Travers recounts a not dissimilar incident in his Submission to the Truth and Reconciliation Commission (Judiciary hearings) (p. 21).

<sup>31</sup> A comment made by Satchwell about the use of interpreters illustrates another dimension of the problem of not knowing, the need to work through interpreters, but also a way in which magistrates rendered a flawed system worse by using police interpreters: "The other thing that was frequently a problem was the interpreter ... firstly the interpreter was very seldom a court interpreter. The interpreter was usually a policeman ... so you didn't feel very free. Secondly, you had no knowledge as to what he was actually saying ... wouldn't know if [he was] translating it exactly ..."

<sup>32</sup> More overt forms of interference certainly did occur. Mills stated, "no, the Minister

oughtn't to be able to order a magistrate to do anything". He then described a case in which an apartheid minister intervened to secure bail: "I mean, that is the type of thing, and, um, it got worse" (also see Laka's oral submission to the TRC's legal hearing).

<sup>33</sup> For first hand experience of sanctions, see Travers, Submission to the Truth and Reconciliation Commission (Judiciary Hearings), and Laka's oral submission to the TRC's legal hearing (also Skosana, Submission to the TRC Pertaining to the Administration of Justice in the Former KwaNdebele during 1986-87).

<sup>34</sup> JOASA's submission to the TRC states that "the magistracy saw itself operate without choice under a system of parliamentary sovereignty characterised by an imperfect rule of law ... As a result magistrates were instruments wielded by the authorities in pursuit of apartheid motivated ends. It was therefore not easy to apply any discretion whatsoever to questions of the moral conscientiability or otherwise of given statutes" (p. 2, also p. 3 and p. 8). It is worth recording, however, that discretion works both ways, and magistrates appear to have had little problem exercising their discretion to the disadvantage of detainees, accused persons and other opponents of the apartheid government. This would seem to indicate that discretion was there for those who wanted to find and exploit it.

<sup>35</sup> These arguments are not untypical of a more general attempt by magistrates to claim that they were not complicit in abuses, while placing the blame elsewhere:

but if you look at the police evidence today, how they lied and how they fabricated evidence ... you can only judge on what's before you ... This is the story, the man jumped off the 7th story ... Um, looking at it collectively one should have said to yourself that there were too many of these ... all these people couldn't have jumped out ... But now one magistrate did one case, he didn't get all 80 cases ... As I said, you're much wiser today. I mean, I couldn't believe, myself, that what I heard before the Truth Commission. (Neet, 28/9/99)

I think, you must distinguish ... the person actively supported apartheid. Now, all the white people, the normal, the general, um, [pause] white males, or white female, of course they supported apartheid in the sense that they lived in the apartheid era. Not everybody was actively opposing apartheid ... I'm a normal person ... You know, if you take the general view of the people would say, all I want to do is I want to go on with my life. (Prinsloo)

Here the claim is that the magistrate simply lived within the apartheid era, all he wanted to do was get on with his life, thereby linking him with "normal people" rather than those who actively supported apartheid.

## **Appendix 1**

### **Key Informants**

1. N. Melville, Independent Complaints Directorate (23/8/1999)
2. J. Moloï, President of the Black Lawyers Association (24/8/1999)
3. Du Pressis (pseudonym), Justice College (24/8/1999)

4. Claassen (pseudonym), Justice College (24/8/1999)
5. K. Satchwell, anti-apartheid lawyer, now a judge (25/8/1999)
6. R. Sutherland, Chair of the General Council of the Bar of South Africa (26/8/1999)
- 7/8. A. and M. Coleman, Johannesburg (1/9/1999)
9. I. Olckers, Law, Race and Gender unit, University of Cape Town (17/9/1999)
10. H. Suzman, former parliamentarian (21/9/1999)
11. J. Neet, former Director General, Justice (28/9/1999)
12. J. D. de Bruin, former Director, Security (6/10/1999)
13. F. Botha, Law, Race and Gender Unit, University of Cape Town (15/2/2000)

## **Bibliography**

Abel, R. (1995). *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994*. New York, Routledge.

Barber, J. (1999). *South African in the Twentieth Century*. Oxford, Blackwell.

Bizos, G. (1998). *No One to Blame? In Pursuit of Justice in South Africa*. Cape Town, David Philip/Mayibuye Books.

Chaskalson, A., Corbett, M., Van Heerden, H., Langa, P., and Mahomed, I., (1998). The Legal System in South Africa 1960-1994: Representations to the Truth and Reconciliation Commission. *South African Law Journal*, 115(1), 21-36.

Corbett, M. (1998). Presentation to the Truth and Reconciliation Commission. *South African Law Journal*, 115(1), 17-20.

Dugard, J. (1978). *Human Rights and the South African Legal Order*. Princeton, Princeton University Press.

Dyzenhaus, D. (1998). *Judging the Judges, Judging Ourselves: Truth, and the Apartheid Legal Order*. Oxford, Hart.

Ellmann, S. (1992). *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency*. Oxford, Clarendon Press.

Foster, D. (with Davis D. and Sandler D.) (1987). *Detention and Torture in South Africa: Psychological, Legal and Historical Studies*. Cape Town, David Philip.

Kgalema, L. and Gready, P. (2000). [Transformation of the Magistracy: Malancing Independence and Accountability in the New Democratic Order](#). Johannesburg, CSVSR.

[Lawyers for Human Rights](#) (1983). *Any Hope for Detainees? The Aggett Inquest and the Rabie Report Compared (Bulletin No. 2 Special Issue)*. Johannesburg, LHR.

Lobban, M. (1996). *White Man's Justice: South African Political Trials in the Black Consciousness Era*. Oxford, Clarendon Press.

Meyer, C. P. M. (1999). Comment: Classification of Judicial Functions vis-à-vis Administrative Functions. *The Judicial Officer*, 1(4), 139-42.

NADEL (1998). Submission by the National Association of Democratic Lawyers to the Truth and Reconciliation Commission on the Role of Lawyers and the Legal System in the Gross Human-Rights Violations of Apartheid. *South African Law Journal*, 115(1), 86-100.

Parker, P. and Mokhesi-Parker, J. (1998). *In the Shadow of Sharpeville: Apartheid and Criminal Justice*. Basingstoke (Hampshire), MacMillan.

Truth and Reconciliation Commission (1998). [Truth and Reconciliation Commission of South Africa Report - Volumes 1-5](#). Cape Town, Juta.

#### **Written submissions to the TRC**

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.

M. A. Hendrickse, Submission to the Truth and Reconciliation Commission.

JOASA, Submission by the Judicial Officers Association of South Africa (JOASA) to the Truth and Reconciliation Commission (September 1998).

Magistrates Commission, Submission of the Magistrates Commission to the Truth and Reconciliation Commission.

B. Nkala and T. Thipa, Submission to the Truth and Reconciliation Commission from the Campus Law Clinic (University of Natal).

K. Satchwell, Submission to the Truth and Reconciliation Commission.

J. B. Skosana, Submission to the TRC Pertaining to the Administration of Justice in the Former Kwa-Ndebele During 1986-87.