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**Faculty of Humanities  
University of Cape Town**

**A critical analysis of magistrates' experiences of the peer learning initiative  
in the kwaZulu-Natal courts: Transcending apartheid judicial education?**

A minor dissertation submitted in partial fulfillment of the requirements for the degree

**Master of Education in Adult Education**

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April 2010

**COMPULSORY DECLARATION**

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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**UNIVERSITY OF CAPE TOWN**  
**GRADUATE SCHOOL IN HUMANITIES**

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## **Abstract**

This dissertation investigates the peer learning activities initiated by the Joint Education and Training Committee (Jetcom) of the kwaZulu-Natal district court magistrates. A core aspect of the study considers how magistrates relate their understandings of peer learning to their professional development, particularly in view of the continued influence of the legacy of apartheid-era judicial education.

A brief analysis of the history of the magistracy in the context of the development of South Africa from colonisation, industrialisation, and apartheid to democracy is the basis for a characterisation of judicial education before 1994. The study draws on literature in the sociology of professions, professional development and peer learning in order to construct a conceptual framework to interpret the peer learning initiative.

Data collection involved mainly semi-structured individual interviews and focus group discussions with magistrates. Field notes recorded observations of interactions with and between magistrates and reflections on the research process generally. A thematic data analysis informed the interpretive phase of the analysis. The conceptual framework developed in the literature review informed the critical analysis of the experiences and understandings of the peer learning initiative.

Until 1993, the executive controlled and provided the content of the 'apartheid' judicial education of magistrates, compromising their judicial independence. The findings show that some magistrates have used peer learning to try to build equal, reciprocal peer learning relationships; others have used peer learning to retain existing distinctions and inequalities. The Jetcom has succeeded in embedding the peer learning initiative into the authority structures of the magistracy, thereby strengthening its sustainability. Magistrates have used peer learning to respond to various professional development needs. 'Race' and gender have influenced the conception and the implementation of the peer learning initiative.

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**Note: Racial terminology**

Despite the repeal of laws on 'race' classification, the use of racial terminology in official and everyday contexts in South Africa continues. 'Race' is a social construction and the use of racial terminology in this document does not mean that I accept the validity of any distinctions based on 'race'.

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## **Chapter One: Introduction**

This study stems from my engagement in 2004 and 2005 with the members of the kwaZulu-Natal Joint Education and Training Committee (Jetcom) who implemented a peer learning initiative. At the time, I interpreted their enthusiastic promotion of peer learning as indicative of their commitment in two, related areas. Firstly, the need to clarify and assert interpretations of their education and training needs in a manner that accorded with a sense of their professional roles and identities. Secondly, I understood that the magistrates, through their work in the courts, were intent on enhancing the quality of justice.

This study examines magistrates' interpretations of the initiative and then critically discusses the peer learning initiative in the light of particular theoretical concepts and issues. The study therefore does not focus on the learning process as such. A core aspect of the study considers how magistrates relate their understandings of peer learning to their professional development.

The study posed the following research questions:

- What are magistrates' experiences and understandings of the kwaZulu-Natal Jetcom's peer learning initiative?
- How should the peer learning initiative be understood in light of the legacy of apartheid-era judicial education?

This chapter will sketch the origins of these questions by providing background to the establishment of the Jetcom and locating the peer learning initiative in the context of the history of the magistracy and the professional development of magistrates in South Africa.

## 1.1 Background to the KZN peer-learning initiative

Today magistrates are pressurised to become proficient in different areas of law, traversing complex fields such as the organising frameworks and processes of transnational crime syndicates, information technology and biotechnology. KwaZulu-Natal continues to experience high levels of poverty (Roberts, 2000), HIV/AIDS infection and gender-based violence. Magistrates need to consider all these issues in the light of the Constitution and the Bill of Rights. Former Constitutional Court Judge, Yvonne Mokgoro (2003) explains that the new constitutional dispensation places new demands on all South African judicial officers and suggests that these pressures could manifest differently in the jurisdiction in the magistrates' courts where gender and race-sensitivity is critical, especially in domestic violence and sexual offences.

A combined meeting of the fifty-five kwaZulu-Natal district courts formed the Joint Education and Training Committee on 6 July 2003, nominating the six founding members (Sardien, 2005 a, pp. 4 - 6). The committee aimed, amongst other things, to have a uniform training mechanism in the province; to assist the cluster heads in discharging their training and development responsibilities in relation to magistrates; to coordinate training programmes with Justice College; to nurture facilitators; and to interact with the transformation process with respect to capacity building.

The Jetcom members, in the context of the kwaZulu-Natal district courts, represent a significant proportion of the leadership of the magistrates in that province. Their sources of power include their positional power associated with their individual ranking in the hierarchy of the 'magistracy', that is, they are predominantly senior magistrates, responsible for 'sub-clusters' in which they may supervise the work of up to thirty other magistrates. The cluster structure is part of the post-1994 reforms in the justice system. Magistrates were removed from the control of the executive and the Department of Justice. Each province

was divided into one or more regions and constituted into clusters. A chief magistrate heads each cluster. In kwaZulu-Natal, the Durban cluster is region 6 and the Pietermaritzburg cluster is region 7. The clusters are further divided into area or sub-clusters headed by a senior magistrate.

All the Jetcom members are highly experienced. Some of the Jetcom members have served successively as clerks of the court, prosecutors and magistrates for more than thirty years. The institutional culture in the Department of Justice values practical court experience extending over many years as central to claims of competence. The Jetcom members, certainly those responsible for the peer learning initiative are all men, and with two exceptions, are all white. The subsequent expansion of the Jetcom to approximately seventeen members (Jetcom, 2007a) to include senior magistrates who are sub-cluster heads has diversified the representation in terms of 'race' but not gender. These demographic and institutional characteristics cumulatively mean that the Jetcom is powerful in relation to the ordinary magistrates in the district courts and there is therefore a basis for claiming that, within the context of the kwaZulu-Natal district courts, they constitute the elite.

In March 2004, the Jetcom launched the peer learning initiative in collaboration with the Independent Projects Trust who provided funding and technical support. In July and September of 2004 and in April 2005 I facilitated the training workshops on peer learning during which the Jetcom members consolidated their understandings of peer learning. The peer facilitators who had participated in the training workshops introduced peer learning to all KwaZulu-Natal district court magistrates and coordinated peer learning activities on aspects of substantive and procedural law.

Magistrates have been subject to intensified public scrutiny since the transition to a democratic South Africa for two main reasons. Firstly, the Jetcom initiative took place after public debate on the role of the judiciary in South African history at the

Special Legal Hearings of the Truth and Reconciliation Commission in October 1997. The Special Legal Hearings aimed, “ ... 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” (Truth and Reconciliation Commission statement, 19 October 1997). Secondly, the increased levels of crime in the context of the transition to democracy in South Africa provided another reason to scrutinise the work and roles of magistrates (Cameron, 2000, p. 141).

How should the kwaZulu-Natal Jetcom peer learning be seen against the background of the history of magistrates in South Africa? How is the peer learning initiative located within the historical development of the professional training of magistrates? The response to these questions is in three parts. First, a necessarily limited sketch locates magistrates and magistrates’ courts in the context of the broader processes in South Africa’s transition from colonialism and apartheid to a constitutional democracy. Second, an outline of the development of the professional training of magistrates attempts to provide the background to the Jetcom’s peer learning initiative.

## **1.2 Historical sketch of magistrates in South Africa**

This historical sketch of magistrates in South Africa begins with the development of the ‘Council of Justice’ and the *landdrost* courts under Dutch rule at the Cape of Good Hope from 1652. The second part discusses the establishment and operation of the magistrates’ courts under British rule from 1806. The third part considers the development of magistrates’ courts since the declaration of the Union of South Africa in 1910 and the fourth part indicates developments under apartheid.

### **1.2.1 *Landdrosts* in the Dutch Cape Colony, 1652 - 1795**

In 1602, the Netherlands States-General issued a charter that established the Dutch East India Company. The charter empowered the DEIC; amongst other things, to name 'Officers of Justice' and to issue proclamations and instructions that provided for the hearing of criminal charges on board ship (Heese, 1994, p. 2). The 'Council of Justice' and the *landdrost* courts established from 1685 onwards therefore mediated the conflicts and relationships that arose. The DEIC established the settlement at the Cape of Good Hope in 1652, initially to supply fresh vegetables and meat to passing Company ships sailing to and from the 'East Indies'. In practice, the Dutch colonists established a "brutal policy of hegemony and inequality in the relationships between whites and people of colour" (Devenish, 2005, p. 551).

The Council of Justice and the *landdrost* courts entrenched the power and the authority of the DEIC at every level because the Cape Dutch colonial system of justice did not separate judicial and executive functions. The system relied upon Free Burgers and DEIC officials who were not necessarily qualified in law. Officers of the court functioned in both judicial and prosecutorial roles.

### **1.2.2 Magistrates under British Rule, 1806 - 1910**

In the Second British Occupation, the courts functioned to extend the area of effective administration and to bring diverse people under a common authority (Sachs, 1973, p. 33).

In 1827, the Cape Colonial Government appointed full-time employees known as Resident Magistrates who replaced *landdrosts*. Magistrates combined the task of hearing all but the most serious civil and criminal cases with the administrative tasks of receiving taxes, collecting information, issuing licences, publishing government notices and performing marriages (Sachs, 1970, pp. 22 – 23). The

magistrates usually had minimal training. These courts were integral to the extension and consolidation of British colonial administration and the protection of property rights (Sachs, 1973, p. 33).

In the course of the nineteenth century, the jurisdiction of the magistrate's court in the Cape was steadily increased (Hahlo & Kahn, 1960, p. 216).

Magistrates faced pressure from local communities to punish cases of work refusal or desertion. The Cape colonial administrators revived the pass laws in the second half of the nineteenth century to deal with "native foreigners" (Sachs, 1970, p. 31).

Sachs (1970) views this period of the development of the legal system as "white justice". Although the British government upheld the technical equality of all before the law, there were no measures in place to ensure the participation of all groups in the administration of justice. With the possible exception of court interpreters, all the magistrates, prosecutors, judges and police were white men. These men were either British immigrants or their descendants, retired colonial officials or anglicised Afrikaners (Sachs, 1970, pp. 29 – 30). The exclusively white and male judicial system was, in this respect identical to the system under Dutch rule. In the 1970's Sachs commented that, "... judges, magistrates, lawyers, police and prison officers use[d] methods of organisation and styles of work which are derived almost entirely from their predecessors in the Cape Colony" (1970, p.9).

### **1.2.3 Magistrates after declaration of the Union South Africa in 1910**

The discovery of diamonds and the rediscovery of gold in the second half of the nineteenth century shaped the development of the South African economy and infrastructure. Urbanisation followed the growth of the gold mining industry in the Orange Free State and Transvaal. A migrant labour system, with workers housed

in male-only military-type compounds developed at first on the Kimberley diamond fields in the 1870s (Trapido, 1971, p. 312) and later on the Witwatersrand goldfields.

In 1910, the Union of South Africa was declared, uniting the territories and people in South Africa under one political authority. The 1913 Land Act completed the dispossession of black people from their land. The legal system was increasingly used in the latter part of the nineteenth century to control the lives of black people in most of Southern Africa. The Magistrates' Courts, along with the Native Commissioners' Courts were at the core of the regulation and control of black people's lives.

The Magistrates' Court Act 32 of 1917 established a uniform system of magistrates' courts (Hahlo & Kahn, 1960, p. 270).

#### **1.2.4 Magistrates under Apartheid: 1948 - 1993**

Submissions to the Truth and Reconciliation Commission indicated that the legal system was an integral part of the operation of the apartheid system (Chaskalson *et al*, 1997; Nadel, 1997; Goldstone, 1997). Black and white court officials routinely humiliated black people at the courts administering the pass laws (Langa, 1997). Magistrates decided cases under the 'influx control', 'group areas', 'public violence' and 'terrorism' laws and laws governing sexual intercourse between women and men classified as belonging to different 'race groups' (Chaskalson *et al*, 1997). Apartheid resulted in "poverty, degradation and suffering on a massive scale", denying work opportunities, education, land ownership and family life to those who were not white (Chaskalson *et al*, 1997, pp. 23 - 25).

In an earlier analysis of the writing of South African legal history Channock argued that in order to fully understand the nature of the apartheid legal system,

it is necessary to consider how law was interpreted and applied in the Supreme Courts and the Appellate Division<sup>1</sup> (1989, p. 272). Few cases involving prosecutions under the apartheid laws came to the Supreme Court but when they did, judges usually regarded the provisions of these laws as “normal law,” seldom commenting on the racist nature of the law (Chaskalson *et al*, 1997, p. 25). Judges tended to focus on interpreting the intention of Parliament in relation to a particular law, leading to the assessment of their decisions as executive minded. With most judges of the Supreme Courts and the Appellate Division following legal positivism, they provided legitimacy to the apartheid government. In setting the standards for the rest of the judiciary through the appeal and review processes, they influenced the approach to the interpretation of laws in the magistrates’ courts.

In 1952, the system of magistrates’ courts was modified with the addition of the regional courts (Hahlo & Kahn, 1960, p. 270) and subsequently the Lower Courts were divided into two tiers: the district courts, which have criminal jurisdiction in all matters except treason, murder and rape and the regional courts, which have jurisdiction in all matters except treason.

One view of magistrates that emerged at the Special Legal Hearings of the Truth and Reconciliation Commission was 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 prior to our Constitution, 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 ...

(Nadel, October 1997, Oral submission to the TRC)

The Nadel submission emphasises that magistrates were central to the violations of human rights because their conduct as magistrates denied people their dignity.

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<sup>1</sup> The Supreme Court, now known as High Courts and the Appellate Division as the Supreme Court of Appeal under the Constitution of 1996.

Magistrates would proceed with cases where defendants did not have legal representation. Some magistrates intimidated the defence attorneys, denying them their dignity as officers of the court. The Magistrates Commission acknowledged that magistrates participated in implementing oppressive policies but did not apologise for their actions, explaining that as civil servants, magistrates had to implement policies without question (Karth, 2007, pp. 63 – 64).

Shortly before the first democratic elections in 1994, Parliament passed the Magistrates Act of 1993 (Karth, 2007) which provided the formal legal framework for the judicial independence<sup>2</sup> of magistrates. Opposition politicians at the time interpreted the Act as a last-gasp attempt to bolster the position of magistrates. The Nationalist Party anticipated that magistrates would be vulnerable to manipulation by the soon-to-be-elected government of the African National Congress (Karth, 2007).

The Magistrates Commission now had the responsibility for the selection and appointment of magistrates.

### **1.3 Historical development of the professional training of magistrates**

This discussion of the development of the judicial education of magistrates contextualises the motivations of the Jetcom members with respect to introducing peer learning in the kwaZulu-Natal district courts.

Under both Dutch and British rule, most magistrates in the *landdrost* and magistrates' courts were criticised as untrained and having inadequate

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<sup>2</sup> Judicial independence means, amongst other things, the formulation and delivery of judgments that are free of undue influence or pressure, fair and in accordance with the Constitution and the law. A number of conditions are necessary for an independent judiciary: judicial control over the budget of the courts; an independent complaints mechanism under the control of the judiciary; and a system of judicial education under the control of the judiciary (Froneman, 2007).

knowledge of law and procedure (Hahlo and Khan, 1960; Sachs, 1970). Their dependence on the executive and their location within the initially slave-holding society at the Cape of Good Hope deeply compromised the *landdrosts* and resident magistrates. Accountability to and dependence on the executive compounded the effects of inadequate professional training. *Landdrosts* and resident magistrates, in general interpreted their functions consistent with the racist and sexist beliefs of the European colonists, implementing the regulations controlling the movements of slaves and indigenous people and providing legitimation for the coercive and exploitative labour practices.

As indicated above, the Act of Union unified territories and populations. In turn, political unification gave rise to legal reforms. Act 32 of 1917 (Hahlo & Kahn, 1960, p. 273) stipulated passing the Public Service Law Examination as the minimum qualification for a magistrate. Candidates who had passed the Public Service Higher Law Examination or held a university degree would be given preference in appointment (Hahlo & Kahn, 1960, p. 273). Professional training for magistrates was only provided in 1953 with the first official course for criminal court magistrates at the Johannesburg Magistrate's Court. In 1957, training for criminal court magistrates was generalised after the Department of Justice established a permanent training facility called Justice Training (renamed Justice College in 1989). Training for civil court magistrates started in 1981 (Kruger, 2002). Interviewing magistrates who had overseen the system set up to monitor the treatment of people held in detention without trial before 1994, Gready and Kgalema (2000) found that most of their interviewees had obtained the Diploma Juris, B Juris or "more rarely" a B A in law or an LLB. White magistrates had mostly studied at former Afrikaans universities or UNISA, typically, starting work at the Department of Justice as matriculants, and then registering for part-time studies on a government bursary. Professional training at Justice College before 1994 "entrenched a positivist legal culture" while senior magistrates provided practical training (Gready and Kgalema, 2000, pp.12 - 13). From the second half of the twentieth century, white Afrikaans-speaking men were encouraged to seek

employment in the public service as a route out of poverty. Government bursaries were a means to transform the public service, staffing it with Afrikaans-speaking men (Gready and Kgalema, 2000).

The 1993 Magistrates Act charged the Magistrates Commission to promote the “continuous training of magistrates in the lower courts” and stipulated that the head of Justice College be an *ex officio* member of the Magistrates Commission. Today, magistrates have the same educational qualifications as judges (Omar, 1999). The Magistrates Commission devolved responsibility for the “continuous training” of magistrates to Justice College (Kruger, 2002). No magistrate can be appointed unless she or he had successfully completed a Justice College-approved course.

Mogwera (cited in Sardien, 2005 b, p.13) reflects on her experience at Justice College. In 1995 she went for the training as a prosecutor when according to her, “transformation was in its early stages”,

Training at Justice College is generally of a classroom situation or teacher–student style, which is a repetition of the first and second years of university, namely being schooled on the theoretical part of the law. Although some discussion is permitted or even encouraged, some lecturers would sometimes see an expression of different points of view as contempt or defiance.

Just to illustrate what I mean here, I'll cite the example of Mr X ... He would assure students that they will be getting a question on the part of the work with which he was busy. He would then dictate *verbatim* how the question should be answered during the examination, 'Failing which', he would say, 'I will give you nought'.

In summary, there was no formal training for magistrates until long after the recognition of the need. The Department of Justice directed and shaped the professional development of magistrates once formal training started. Therefore, if control over the education and access to the profession on the part of the members of the profession is taken into account (Froneman, 2007), then magistrates were not independent. The executive dominated the judicial education of magistrates until 1993 and set parameters for all other aspects of the profession. Mogwera (in Sardien, 2005 b) provides an indication of how that 'executive control' featured in the curriculum and influenced magistrates'

experience of the learning programmes, specifically through a form of 'banking education (Freire, 1993).

The promulgation of the South Africa Judicial Education Institute Act 14 of 2008 (Republic of South Africa, 2008) means that a Judicial Education Institute will in future meet the education and training needs of all magistrates and judges. The Act stipulates that the judiciary and teachers of law have to staff the governance structure of the Judicial Education Institute. A judge has to chair the governance structure on which the Minister of Justice has representation. Therefore, the control and shaping of the professional development programmes for magistrates will be in the hands of magistrates and judges. These transparent institutional arrangements clearly speak to issues and relationships of power in the professional development of magistrates and judges.

This chapter located the research question in context by providing the background to the implementation of the Jetcom's peer learning initiative, and briefly discussed the history of the magistracy in South Africa in order to provide a basis for posing the question as to whether the peer learning initiative can be seen as an attempt to transcend to legacy of apartheid-era judicial education.

The significance of the research questions lie also in how the KZN peer-learning initiative can be interpreted within/against the broader literature on professional development and peer learning. The following chapter will explore this.

#### **1.4 Structure of the dissertation**

**Chapter Two** discusses the literature informing my analysis.

**Chapter Three** discusses the methodology I used in relation to the research question, outlining my assumptions, methods of data collection and analysis and ethical and validity issues.

In **Chapter Four** I provide an account of the findings regarding participants' experiences of the kwaZulu-Natal peer learning initiative and my initial interpretations of these experiences.

**Chapter Five** extends upon the contextual analysis of the kwaZulu-Natal Jetcom's peer learning initiative and returns to the broader question of its meaning in light of concepts considered in the literature review.

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## **Chapter Two: Literature Review**

From the seventeenth century in South Africa, *landdrosts* and magistrates were continually criticised as being untrained and for having inadequate knowledge of law and procedure. However, the criticisms did not result in the provision of professional development programmes until 1953. In light of the history of *landdrosts* and magistrates, discussion of the literature on professional development can contribute to the interpretation of the information collected in this study on peer learning of magistrates.

Literature on the sociology of the professions provides tools to interpret the professionalisation of magistrates. Educators have used peer learning methods in formal schooling (Topping, 2005) and the kwaZulu-Natal magistrates' use of peer learning is one example of the application of peer learning in a context beyond schooling (see Boud, 2005; Borglund, 2006). Therefore, this review of literature on the disparate fields of the sociology of the professions, professional development and peer learning identifies concepts, findings, arguments and methods (Maxwell, 2006, p. 29) to inform the design of the study and the analysis of the findings.

### **2.1 Sociology of the Professions**

This discussion of the development and formation of professions aims to locate the magistrates in the kwaZulu-Natal district courts as part of the professions. I am assuming that the interest in peer learning, the dedication of resources, on the part of donors and of the courts, is partly explained by considering the activities of the Jetcom members as members of a profession. This discussion considers a definition of profession and outlines the concept of the 'professional project' and related concepts such as 'market monopoly,' 'cognitive exclusivity' and 'collective mobility'. The establishment of professional identity; the role of ideology in establishing and maintaining the status and privilege of a profession;

the role of alliances with elites in the establishment and maintenance of a profession are critical issues.

Professions provide a range of services including teaching, healing, building, and research and arguing cases in court. Professionals tend to be involved in “non-routine mental operations on the job”. In the context of the United States of America, (Brint, 1994, p. 3) professions have extended their influence in all areas of public debate because they are presumed to have knowledge and skills necessary for the solution of critical social problems. There are similar public expectations of professionals in South Africa if the high visibility of judges and doctors in popular radio and television programmes is used as an indicator. A profession is an “occupation based on advanced, or complex, or esoteric, or arcane knowledge” (Macdonald, 1995, p. 1). Members of an occupational grouping engage in a range of social practices to project their knowledge as ‘complex’, ‘esoteric’ or ‘arcane’.

There are three broad approaches in the sociology of the professions (Tobias, 2003). Instrumentalist or technicist approaches focus on the ‘traits’ distinguishing professions from other occupations. Liberal–functionalist approaches emphasise the conceptual, performative and identity–forming processes of achieving professionalism. The third approach draws on Weber’s discussion of the important exclusionary role of education and especially the growth of credentials, whereby professions become a way of controlling an occupation. Power and privilege drives professionalisation in the labour market and in universities. Proponents of the third approach consider the instrumentalist approach as elitist and essentialist. The liberal–functionalists are considered unable to critically question the political nature of professionalisation and share functionalist assumptions with the instrumentalists (Tobias, 2003, pp. 445 – 449). Freidson (*The Profession of Medicine*, 1970) and Larson (*The Rise of Professionalism*, 1977) are writers associated with this third approach, also known as the ‘power approach’ (Macdonald, 1995, pp. 4 – 6).

According to Macdonald (1995, p. 8) the sociologist Freidson in *The Profession of Medicine* argued that the distinctive autonomy of a profession depends upon the power of the state. The privileged position of the profession is secured by the influence of the elite that sponsors it. The cognitive and normative features of professions usually used in defining professions are not fixed or stable features. Members of the profession use these cognitive and normative features to define membership and the boundaries of the profession. Professions strive to gain autonomy and once having achieved autonomy, begin to establish a position of social prestige independent of their original sponsoring elite and with their own distinctive niche in the social stratification system. Finally, Friedson traced the processes where a successful profession produced an ideology that enabled its members to define social reality in the area in which it claimed expertise and use their technical expertise as the basis for claiming universal validity for their public pronouncements.

Freidson's discussion of the relationships between the state and the profession raises the question: How should we understand the professionalisation of magistrates in the district courts, given that magistrates are part of the state and there is no identifiable 'aristocratic elite'?

Macdonald (1995) argues that Friedson's analysis of professionalisation provided the basis for Larson's concept of the 'professional project' in *The Rise of Professionalism* (1977). Larson uses the concept to analyse the social practices of professionals in early nineteenth century (western) Europe and the USA.

The increasing centrality of the market in nineteenth century Europe and USA provided the impetus for professionals to act together as actual or potential sellers of professional services to ensure their control over markets (Larson, 1977, pp. 9 – 10). Professionals therefore had to find new ways of attracting buyers and gain their trust in the services provided (Larson, 1977, pp. 10 – 11).

Professionals could no longer rely on community or aristocratic traditions to guarantee credibility therefore the accreditation of professionals became a key consideration, especially because there were now more professionals. There was a need to distinguish the creditable from the unscrupulous practitioner.

The demarcation of an occupation as a profession is pivotal in the 'professional project' (Larson, 1977) and is accompanied by definition of the roles of knowledge, technique and tools. Professional work was becoming a full-time means of earning a living therefore professionals had to ensure a standard means of guaranteeing competence and a means of claiming that they were the only group that had superior knowledge and skill (Larson, 1977, p. 13) to achieve 'market monopoly'.

The professional organisation had to complete a number of tasks to achieve 'market monopoly'. The professional had to be trained and socialised to a level where she or he could provide and sell distinctive, professional services. A professional market needed to be created, mainly through establishing the superiority of the professional services that were now standardised. Professional associations petitioned the state to penalise those who provided similar services without going through the training and entry to the profession that the professional organisation controlled. New recruits to the profession had to accept the sacrifices involved in training, therefore there had to be some guarantee that the investment in training would be protected, with the state sanctioning the "monopolies of competence". The cognitive basis to establish the monopoly of competence (or distinctive professional knowledge) was critical, hence the providers of the service had to be controlled at the "point of production" (education and training) so that the service could be standardised and the 'commodity' identified. Once the cognitive basis was defined, the professions could argue "cognitive exclusiveness" - attained through the issuing of licenses, setting examinations as a requirement for qualifications, issuing diplomas and

prescribing formal training based on a common curriculum (Larson, 1977, pp. 14-15).

In general, the elite of the professions led the professional associations in a process of “collective mobility” to attach status to their changed occupational roles, using ideas such as ‘gentility’ and ‘disinterestedness’ (Larson, 1977, p. 66) to rationalise their wealth and privilege. The profession then used the achieved prestige as a resource to monopolise their markets. Indicators of their success included the elimination of their competitors, a higher ranking in the occupational hierarchy and having the authority to supervise and control related occupations (Larson, 1977, p. 69). Developing close links with the universities was a prerequisite for the achievement of collective mobility in medicine, law and engineering. Academic research and the production of knowledge became central to the establishment and maintenance of cognitive exclusivity. Consequently, professors in law and medicine achieved very high status, sometimes using their acquired status to gain access to positions of power and influence in the broader society.

By the end of the nineteenth century, professionals no longer claimed elite status based on identification with the aristocratic elites but in terms of “educational distance” from other occupations (Larson, 1977, p. 70). The educational system became the primary site for the selection of the candidates who would join the elite ranks of the professionals. The elite leadership of the professional associations understood that power in a profession meant controlling the institutions providing education and work because each member had to pass through these institutions (Larson, 1977, p. 72). There is therefore a structural relationship between the elite leadership of the profession and the ordinary member. Individuals submit to the social control of the professional associations because they control entry into the profession. Ordinary, individual professionals also submit to the social control because collective mobility holds the promise of even greater economic rewards, security and status especially if monopoly

of the market is achieved (Larson, 1977, pp. 72 – 76). The promise of greater rewards, security and status is the basis for cooperation in the collective professional project and is designed to protect and upgrade specialised activities and to emphasise the relationships between educational and occupational hierarchies (Larson, 1977, p. 219).

The knowledge and skills of professionals are socially produced but privately appropriated (Larson, 1977, p. 212) and this is the basis for the 'individualism' that characterises the ideological outlook of professionals. An important part of the professional project is the elaboration of ideals of 'expertise' as identified with the person recognised as professional. 'Excellence' is held up as the expected standard of performance and so is 'service' to the whole of society. Work autonomy, individualism and the ideals of 'excellence', 'service' and 'expertise' are the constituent parts of the image professionals present to society. Ideologically, the professional image is used to set standards of 'peer esteem' (Larson, 1977, p. 226) and to control the members of the profession. Furthermore, the professional image is also used in the individual and collective transactions with, for example clients and the state. In the event that the work jurisdiction or work autonomy of a profession is threatened, then a professional association might engage in an exercise in ethics as a defensive - offensive strategy designed to distinguish the members of the profession from competitors or discipline members.

Macdonald (1995) acknowledges that Larson's *The Rise of Professionalism* is groundbreaking, primarily because the concept of the professional project is a powerful lens that enables researchers to identify the relationships between apparently disparate actions and construct a coherent and consistent interpretation (Larson, 1977, p. 6). In a review of a broad range of writings on the sociology of professions, before and after Larson (1977) Macdonald chooses to base his own theory of professionalisation on her work (1995, pp.1 - 35). Macdonald (1995) reworks the Weberian theory of professionalisation, while

distancing himself from the Marxist analysis Larson develops in relation to professional labour as a commodity and the location of professionals in the class structure of capitalism in its monopoly phase. Macdonald (1995, pp. 10 and 16) considers Larson to have made a major contribution to the sociology of the professions, because she showed that social mobility and market control are not to be taken simply as reflections of skill, expertise or ethical standards, but are the outcome of the professional project. The professional project implies continual effort on the part of an occupation to “defend, maintain and improve its position”. While Larson’s emphasis in *The Rise of Professionalism* is to theorise the “structures” that inform professionalisation, she recognises the significance of the role of individual aspirations and the links with collective action (Macdonald, 1995, p. 12). Larson’s theorisation of the sources of professional prestige can be criticised for leaving out the content and importance of the nature of professional knowledge bases whether ‘inherent’ or ‘contrived’ (Macdonald, 1995, p. 11).

Larson’s analysis of the processes involved in the ‘professional project’ raises interesting questions about the Jetcom peer learning initiative in kwaZulu-Natal. Firstly, is it possible to interpret the peer learning initiative as part of the ‘continual efforts’ on the part of an occupation to ‘defend, maintain and improve its position’, that is a ‘collective mobility’ project, particularly if magistrates have been considered to have low status? Secondly, if magistrates share the same initial education with other legal professionals, on what basis can magistrates claim ‘cognitive exclusivity’ in judicial work? Thirdly, is the peer learning initiative part of an effort to upgrade and protect the skills of magistrates and if it is, what are the implications for the relationships between the elite and other magistrates? What are the processes involved in the relationships between the elite and other magistrates?

Finally, Larson offers the following caution in the use of the concept of the ‘professional project’:

“As the term is currently used in sociological analysis, it does not mean that the goals and strategies pursued by a given group are entirely clear or deliberate for all the members, nor even for the most determined and articulate among them” (1977, p. 6).

## 2.2 Illustrative Case Study - Israeli Judiciary

Rosen-Zvi (2001) uses the concept of the ‘professional project’ to discuss the situation of the Israeli judges. I have selected this study<sup>3</sup> to illustrate the use of the concept of the ‘professional project’ because it focuses on the judiciary, rather than other professions<sup>4</sup>. I will describe the study and identify issues and insights that could illuminate the situation of magistrates in the kwaZulu-Natal district courts.

Under British colonial rule, the 1922 Advocates Ordinance professionalised legal practice in Palestine and imposed English common law. English became the medium of instruction for advanced legal studies. The British ideology of legal formalism<sup>5</sup> shaped the legal culture in Palestine (Rosen-Zvi, 2001, p. 768). The

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3 Serron (1988) analyses the efforts of the then-recently appointed magistrates in the U S Federal District Courts to demarcate specialised areas of judicial practice, participate in the joint professional development activities involving Federal Court judges and attorneys. Serron, like Rosen-Zvi (2001) uses the concept of the professional project.

4 Several studies on the legal profession have used ‘professional project’ as a framework. Abbott, A. (1988) *The System of Professions; An Essay on the Division of Expert Labor* (Chicago, University of Chicago Press); Abel, R.L. (1988) *The Legal Profession in England and Wales* (New York, Blackwell); and Abel, R.L. (2003) *English Lawyers between Market and State: The Politics of Professionalism* (Oxford, Oxford University Press).

5 “The British ideology of legal formalism was deeply embedded in free-market economic philosophy and emphasised the private role of lawyers. In this context legal formalism [is understood] as the belief in a closed and autonomous system of rules in which outcomes are dictated by demonstrative (rationally compelling) reasoning “and in which every case has a right answer” that can be deduced from higher legal rules or principles’. This approach prioritises the formal characteristics of the law based on second order procedures and rules, and prefers it to consideration of content and substance. Legal formalism is rooted in political and economic philosophies that consider the stability and certainty of the law as an important tool for securing the functioning of the free market and the state’s bureaucracy. The role of lawyers in such a system includes mediating between private parties and legal institutions by using their professional knowledge to translate their client’s claims into professional language. This legal

close ties between lawyers and judges continued in the first twenty years after the proclamation of the state of Israel in 1948, Twenty-seven of the forty-four district court judges and magistrates appointed to the new Israeli judiciary were lawyers and almost all of the thirteen government officials who were appointed had a legal education (Rosen-Zvi, 2001, p. 771).

According to Rosen-Zvi (2001) after 1948 lawyers and judges shared an individualist ideology while the government and Israeli citizens followed a collectivist version of Zionism, focused on the 'redemption' or occupation and settlement of Palestinian land. Lawyers and law as an occupation were associated with the Jews of the Diaspora, not the pioneers who were building Israel. Consequently, lawyers and judges were not well regarded. The government starved the judiciary of resources. In the first twenty years of the Israeli Parliament, lawyers constituted less than six per cent of the representatives. Lawyers sought to support judges, tying their own efforts to enhance their prestige and chances of accessing resources to those of the judiciary (Rosen-Zvi, 2001, pp. 771 – 774).

Between 1970 and 1990, Israeli society experienced profound economic, social and cultural changes. Under the influence of the United States of America, the liberal values of individualism and self-fulfillment supplanted the earlier collectivism (Rosen-Zvi, 2001, p. 775). Government promoted 'free market' policies - decreasing employment in agriculture and increasing the number of managers and professionals. By the 1990's law came to play a very prominent role in Israeli society: many people went to court, more than in most other societies and; most policy questions soon became matters for the courts. The number of lawyers in Parliament tripled. The values of lawyers now agreed with that of the rest of society. The judiciary ranked as the institution most trusted next to the military (Rosen-Zvi, 2001, p. 778).

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ideology is, by its nature highly individualistic. The lawyer's duty is to pursue their client's interests and the collective good emerges structurally from the system" (Rosen-Zvi, 2001, 768 – 769).

Rosen-Zvi argues that after 1970 the Israeli lawyers continued to focus on the “market monopoly” dimension of the professional project that is, to negotiate the boundaries of an area in the social division of labour and establishing their control over it. The Israeli judges on the other hand, changed their emphasis, and concentrated on the process of “collective mobility”, whereby professions attached status to their changed occupational status (2001, p. 779). The Supreme Court judges attempted to convert their professional authority into moral authority. The judiciary, working from its reserve of public trust, replaced legal formalism with values rhetoric, claiming for the judiciary the ability to not only interpret and apply the law but leading the efforts to transform society (Rosen-Zvi, 2001, p. 781). In order to pursue collective mobility, judges loosened their ties with lawyers, distinguishing judging from lawyering.

The Israeli judiciary already had a monopoly over the market for its services, because it was part of the state. However, to achieve collective mobility the judges sought to restrict access to the judiciary, its knowledge, education and training. Social closure has different, complementary and interconnected elements, namely, the exclusion of non-professionals; control over the production of professional producers or control over entry into the profession and the socialisation of new professionals; and the production of exclusive professional knowledge and expertise (Rosen-Zvi, 2001, p. 788).

The Israeli judiciary instituted a number of measures to achieve collective mobility. Israeli judges promulgated the Judicial Ethical Rules in 1993, which prescribed professional secrecy and disapproved of judges socialising with lawyers (Rosen-Zvi, 2001, pp. 788 - 792). The judges established their own journal in the 1980s to strengthen their separate professional identity (Rosen-Zvi, 2001, p. 793). Control over the education and training of judges was achieved with the establishment of the Institute for Judicial Training of Judges in 1984 (Rosen-Zvi, 2001, p. 794). Israeli judges sought to control entry into the

profession, effectively ending the practice of appointing lawyers to the district court, reserving these offices for presiding judges and favouring prosecutors for appointment as magistrates (Rosen-Zvi, 2001, p. 798). Lastly, Israeli judges laid claim to exclusive knowledge in three areas, namely 'reasonable discourse', 'judicial discretion' and 'judicial disqualification' (Rosen-Zvi, 2001, pp. 803 - 805).

Rosen-Zvi demonstrates that the professional project can include a range of measures, implemented over several decades. Researchers are therefore required to draw out the complexity of any one professional group's attempts to achieve market monopoly and collective mobility. Secondly, in tracing the development of the relationships between Israeli judges and lawyers, Rosen-Zvi shows that a central aspect of the judges' professional project is the establishment of cognitive exclusivity over the area of adjudication. Cognitive exclusivity, in turn requires the fulfillment of a range of pre-conditions, ranging from the institutional, for example the establishment of a judicial institute and professional development programmes in judging, to the elaboration and claiming of 'new' fields of knowledge, for example, the reasonableness discourse. Thirdly, Rosen-Zvi's work re-emphasises Larson's focus on the relationship between the elite of a profession and the "ordinary" members and the formative role that professional development initiatives have in connecting the elite and the ordinary members.

The Rosen-Zvi study means that researchers need to identify the evidence for a professional project, and having done so, attempt a comprehensive treatment of the conceptualisation and implementation of the project. Secondly, researchers need to reflect on the meaning of assertions of the superiority of judicial officers' experience and practice-based knowledge over university-acquired legal knowledge.

### 2.3 Professional Development

Professional development refers to planned programmes engaging professionals who have completed their initial qualification and are in practice. A common purpose of professional development is to share new developments in a field. Continuing professional education is ephemeral and changes in response to social pressures and to the demands of 'global market change'. The learning of individuals engaged in professional development and the providers of that learning vary enormously (Cervero, 2001, p. 19). Not surprisingly, there is great variety in the claims made for (continuing) professional development. There are claims about lifelong learning for professionals; personal development; a strategy for individual professionals to maintain some control and security; assuring the public that professionals are up-to-date given rapid technological change; and a way of verifying and maintaining professional standards (Friedman, Phillips and Davis, 2001 cited in Friedman and Phillips, 2003, p. 362). These varied claims for professional development seem to indicate conceptual vagueness but also point to disagreements about the nature of work and learning (Friedman and Phillips, 2003, p. 362) that speak to the different approaches that exist in the study of the professions (Tobias, 2003).

Several writers share Tobias' concern with developing a "sociologically informed view of the professional journey" (Tobias, 2003, p. 454) and have explored themes connected to the purpose and dynamics of professional development. Slotte & Tynjälä (2003) discuss industry–university relationships in the design of professional development programmes, exploring issues such as the reciprocal flow of knowledge. While interested in contributing to collaboration between industry and universities, they are aware of the possible dominance of industry in such relationships. Usher and Bryant (1987) reconceptualise the relationship between theory and practice, distinguishing between formal theory and practitioner theory in professional activity. Formal theory is concerned with representation, explanation, and practitioner theory with judgement and

understanding. Practise is therefore reviewed through theory. Using the insights of Bernstein the sociologist, Beck and Young (2005) explore the implications for the disciplinary knowledge of various professions and the professional identities of market-driven government restructuring of research and higher education in Britain. Beck and Young note the challenges to professionals in relation to the validity of their claims to professional ethics, their exclusive possession of specialised knowledge and their privileged social and economic positions.

In common with other professional development programmes, judicial education programmes are implemented for diverse reasons, with Armatyge (2004) arguing that they are generally associated with ensuring judicial independence accountability and service delivery. Participation in such programmes could be a requirement before confirmation of a first appointment as a judge or magistrate (Oxner, 1999). The South African Justice College's six-week Aspirant Magistrates' Course and the Pakistani Federal Judicial Academy's seven week pre-service course for Additional District and Sessions judges are two such examples (Sardien, 2005 b, p. 17). Morocco and the Yemen present three-year mandatory courses at their national judicial institutes for law graduates selected to work as judges (Sardien, 2005 b, p. 17). The needs of judicial officers change at different times in their working lives. The Canadian Judicial Institute offers one programme for newly appointed federal judges and another for judges with ten or more years of experience, covering the decision-making process, judicial fact-finding and the impact of lengthy service in this particular professional role (National Judicial Institute, 2004). Storberg-Walker (2006) documents the implementation of the model of peer-led judicial education programmes pioneered in Canada and the USA.

The commentator, Sanjoy Ghose (2000) notes that the USA has not benefited from judicial strengthening projects even though its judiciary is "blinkered" because its leadership has on occasion refused to take into account relevant judicial decisions of other countries. Instead, the World Bank's Legal and Judicial

Reform Unit has financed and presented judicial education in several third world countries to groom their judges to be “market friendly”. The courses tend to focus on bankruptcy, foreign investment, securitisation of assets and capital market laws rather than poverty alleviation laws, affirmative action or housing.

The dense and multiple networks of the ‘new economy’, operating through the medium of information communication and technology provide the substantive content of professional development programmes for magistrates who now have to deal with the global implications of laws previously considered part of national legal systems (Williams, 2003, p. 57). It is in this sense that South Africa’s location in the globalised economy subjects magistrates to specific pressures as professionals and imposes stringent demands on them as adult learners (Mokgoro, 2003).

In summary, there is great variation in the learning of professionals, in the providers of professional development programmes and in the claims made about professional development. The variation encountered in the field of professional development is related to the ideological divisions in the study of the sociology of the professions. Globalisation; the place of theory in professional practice; the nature of professional knowledge and the conditions of its production; and strong calls for the accountability of professionals are issues central to understanding professional development programmes in general and to understanding judicial education as a sub-field.

## **2.4 Peer learning**

As noted earlier, this study focuses on the sociology of the peer learning initiative and not on the learning processes as such. However, it is necessary to review some of the literature on peer learning because the Jetcom members consciously set out to implement peer learning as the preferred form of professional development. This discussion of peer learning examines Boud's (1999; 2005) definition of peer learning and comments on the relation of peer learning to professional development.

### **2.4.1 Peer Learning Definition**

Boud, a widely published adult education theorist who has written extensively on experiential learning and peer learning argues that in the development of academic staff, peer learning involves participants learning from and with each other in both formal and informal ways (1999, p. 6). Learning is reciprocal because learners share knowledge, experience and skills. Learning rather than teaching is emphasised, as is the support learners offer each other. There is a blurring of the role of teacher and learner in peer learning and the roles may shift in the course of the relationship. Peer learning can take place spontaneously or be deliberately organised. In reciprocal peer learning, participants work together to develop skills of collaboration, teamwork and involvement in a learning community in which they have a stake (Boud, 1999, p. 6). Peer learning increases the possibility to engage in reflection, when not in the presence of a teacher. Participants can practise communicating and applying their knowledge within their own discipline or profession, through the process of articulating problems and getting critique from peers. Boud (1999, p. 6) identifies academic development as reciprocal peer learning, which he argues can be useful because it is part of collegiality and can be linked to traditions of peer review. An explicit focus on peer learning enables the process of becoming an academic to be open (1999, p. 6).

I interpret Boud's recognition of the reciprocal nature of the peer learning relationship as distinguishing his approach from a "linear, transmission model of learning" (Topping, 2005, p. 631) because there is the recognition of the potential contributions of all peers to the learning of others.

Several inferences can be drawn from Boud's discussion of reciprocal peer learning in relation to magistrates.

Magistrates, as adult learners, already have considerable life and professional experience and bring in-depth, specialised knowledge of substantive and procedural law to peer learning interactions. Secondly, Boud (1999, p. 6) clarifies that in reciprocal peer learning participants have a stake in the community of learning. Thirdly, reciprocal peer learning enables participants to practise communicating and applying their knowledge within their own discipline or profession and to be able to articulate issues and get critique from peers. Fourthly, Boud's view that reciprocal peer learning is consistent with collegiality and the traditions of peer review is equally valid for the work of magistrates. Finally, Boud's view that an explicit focus on peer learning enables the process of becoming an academic open to critique and discussion applies equally to magistrates.

However, Boud also points to the limitations of peer learning especially in relation to culture, professional image, identity, leadership and strategic priorities in an academic context. Boud argues that an exclusive focus on working with peers can reinforce parochialism, helping to avoid the challenges of research on teaching and learning beyond the bounds of the individual discipline. Dysfunctional local traditions would need to be confronted (1999, p. 9).

## 2.4.2 Professional development and peer learning

Peer learning can enhance professional development (Boud, 1999; Eisen, 2001; Boud and Middleton, 2003; Boud and Lee, 2005; Storberg-Walker, 2006; Phelan et al, 2006; Secomb, 2007; and Borglund, 2007). The writers who have considered peer learning in relation to professional development have approached peer learning from the vantage point of their practical and theoretical concerns. Typically, peer learning is understood in terms of other theoretical frameworks used in adult education such as Mezirow's transformative learning (Eisen, 2001) or Lave and Wenger's communities of practice (Warhurst, 2006; Boud, 1999, 2003; Storberg-Walker, 2006). Peer learning, when applied in the learning of professionals can be transformative because participants revise their understandings of their practice and begin to transform their practices (Eisen, 2001; Storberg-Walker, 2006; Phelan *et al*, 2006). Peer learning enables professionals to deal effectively with cognitively challenging subject areas (Borglund, 2007; Topping, 2005; Boud 1999, 2005).

Borglund reflects on the experience of teaching two groups of graduate students engaged in studying the difficult field of aircraft design and analysis, which is multi-disciplinary and has tensions between mathematical theory and experimental practice. Borglund (2007, pp. 37 – 38) redesigned a lecture-based course to one that included focused peer group learning discussions of course content and peer review of projects reports. As a result, there was greater student participation and deeper engagement with the content. The number of passes and the number of higher-grade passes increased. In addition, there was much greater student participation in the home team discussions, students raised interesting issues, including some not raised in previous courses and there was increased motivation and creativity (Borglund, 2007, pp. 39 – 40).

Professionals have a range of needs and interests when they initiate and maintain a peer learning relationship. For educators in an academic environment

a typical need is to review teaching practices in order to improve teaching and learning and thereby build self-esteem (Boud, 1999, p. 7; Eisen, 2001, p. 34) and the need to develop skills in writing for publication (Boud, 1999, p. 8). For professionals in the health, caring and judicial contexts, the need to reflect on professional identity, could include considering issues such as engaging with feelings in the context of professional work and exploring professional boundaries (Phelan *et al*, 2007, pp. 419 – 420) and reflecting on practical judgments and situations of breakdown in practice (Phelan *et al*, 2007, pp. 420 – 421)

Eisen (2001, p. 39) elaborates on the dynamics of the reciprocal peer learning relationship and identifies several qualities of the 'peer dynamic'. The 'peer dynamic' refers to the distinctive nature of the peer partnership, notably, trust (feeling safe), non-evaluative feedback, the non-hierarchical status of partners, voluntary participation and partner selection, direction and intensity of the partnership (leading to closeness), mutuality (common goals and reciprocal meaning) and authenticity (openness, honesty). Eisen suggests that trust is perhaps the most important quality and the group of college teachers mentioned trust most frequently in her case study. Power has to be equalised for trust to develop. In the case study Eisen presents there was an absence of hierarchy, absence of evaluative feedback and voluntary participation. The college teachers also promoted trust through time spent on working on common goals. Where power imbalances existed, these were due to differences in seniority, age or values. When participants confronted power imbalances, the bond between them strengthened. Eisen's discussion of the peer dynamic has the potential to illuminate critical aspects of the magistrates' understandings and experiences of peer learning because the concept, 'peer dynamic' describes the key features in the development of the peer learning relationship in professional contexts.

Magistrates, like other professionals have developed specialised knowledge through intensive and extensive study and have to demonstrate their

competence and use institutional symbols and practices to signal and entrench their status as specialists as individuals and as part of a collective (Macdonald, 1995; Larson, 1977; Witz, 1992). Therefore, when a magistrate participates in a peer learning activity, that participation could raise questions about personal competence because of her or his status as a competent specialist. In a peer learning relationship a magistrate may have concerns about the disclosure of information relating to tensions and conflicts around the micro-politics of the court, competence, performance and the relationships with the leadership and management of the courts. In this context, the development of trust is the foundation of the peer learning partnership.

## **2.5 Concluding comments**

This review of literature on the sociology of the professions, professional development and peer learning has identified a range of issues, concepts and arguments to inform the design of the study and interpretation of its findings. Discussion of the literature on professional development indicates that technological, cultural changes brought about by globalisation have had profound effects on professions generally (Cevero, 2001) and on magistrates (Williams, 2003). Knowledge is central to analysing developments within a profession, specifically in relation to disciplinary knowledge and the associated identities of professionals (Beck and Young, 2005). Governments following strongly market-oriented policies on research and education and training have called for greater accountability of professionals (Beck and Young, 2005).

The study of professions should be 'sociologically-informed' and conscious of the divisions that have shaped enquiry in this field (Tobias, 2003). The cognitive and normative features of professions that are usually used in defining professions are not fixed or stable features. Members of the profession use these cognitive and normative features to define membership and the boundaries of the domain of the profession (Macdonald, 1995). Professionals engage in a 'professional

project', more or less consciously, as part of the 'continual efforts' to 'defend, maintain and improve' the position of the occupational group and a professional elite may engage the ordinary members of the profession in a 'mobility project' that has the effect of controlling and disciplining the latter (Larson, 1977).

The peer learning literature, especially in relation to professional development provides useful arguments and concepts. The finding that peer learning, as applied to the learning of professionals can enhance cognitive achievement in challenging fields (Borglund, 2007) points to the power and effectiveness of peer learning. 'Reciprocal peer learning' enables participants to practise communicating and applying their knowledge within their own discipline or profession and get critique from peers (Boud, 1999; 2005). The concept of the 'peer dynamic' describes the key features in the development of the peer learning relationship in professional contexts (Eisen, 2001). Both concepts, that is, 'reciprocal peer learning' and 'peer dynamic' can be used to illuminate aspects of magistrates' experiences of peer learning.

Finally, two critical questions emerge from the review of the literature. First, how successful has the initiative been as a peer learning process? Second, is the initiative an example of a 'professional project'?

## Chapter Three: Methodology

The study focuses on first clarifying and interpreting magistrates' experiences and understandings of the kwaZulu-Natal peer learning initiative and then analyses the initiative from a critical theoretical perspective. Therefore, it is an interpretive qualitative study (Maxwell, 1996, pp. 59 – 60) because it focuses on the meaning, for the magistrates of their experience of peer learning and the accounts that they give of that experience. As researcher, I listened to their views, observed and recorded the actions of magistrates in relation to peer learning. Second, the study explores the reciprocal dynamics between magistrates and their context (Buroway, 1998, pp. 19, 21 – 22) and from this perspective draws on existing concepts and theories to attempt a critical analysis.

This chapter outlines the methods for data collection, thematic analysis of the data, the timeline of the study, the methodological assumptions and relevant validity and ethical issues.

### 3.1 Data collection methods

I conducted semi-structured interviews and focus group discussions in July 2009 and used field notes to record interactions with and between magistrates.

#### *Semi-structured interviews*

I conducted seven semi-structured interviews with members of the Jetcom and one senior magistrate, an experienced judicial educator. Semi-structured interviews facilitate the gathering of detailed narratives, reflections and interpretations (Whiting, 2008, p. 36) once the researcher has succeeded in establishing *rappport* with the research participant, and asking direct, open questions that in turn open up the possibility of exploring in-depth descriptions

(Whiting, 2008, pp. 36 and 37). The intense and generally critical media and public scrutiny of the work of magistrates and their strong historical associations with the administration of the mechanics of apartheid-era discrimination means that individual magistrates are often stressed. In my engagement with magistrates, stress and stress management were frequently mentioned. One of the kwaZulu-Natal workshops on peer learning included a psychologist's presentation on stress management. Magistrates' perceived levels of stress can lead to defensiveness in discussions about their professional work with "outsiders" such as adult educators and researchers. In this context, the semi-structured interview is an appropriate method.

The semi-structured interviews looked at the reasons for using peer learning and the interpretations and the consequences of peer learning and engaged participants in describing and reflecting on experience and clarifying and comparing (Janesick, 2004, pp. 72 - 73). Participants raised different but also similar issues related to peer learning in the professional development of magistrates. I tried to follow the issues that the participants raised in response to the questions I posed and tended to ask questions which would enable them to explore certain issues in more detail.

I had chosen the "long interview" as the major method of collecting data. I had been concerned about how to conduct myself in the interview. I understood the interview as a unique event in which the interviewer and the research participant construct meanings that hold for "that time" (Holstein and Gubrium, 1995, pp. 16 - 18). I then began to appreciate the contingent qualities of the construction of knowledge entailed in interview-based research (Schostack, 2006, pp. 1 - 6) and that I had a role in the construction of the meanings produced in the interview. In one of the interviews, I did not react to the attempts to recruit me to support racist beliefs about the abilities, perceived competence of "those appointed as magistrates more recently", and instead chose to ask research participants to elaborate on their statements.

### *Focus group discussions*

Morgan (1988) discusses the origins of focus group discussions as a method initially used in the USA in the context of market research. Morgan explains that there was an initial reluctance and scepticism, amongst social scientists concerning the focus group method because of the reliance on skilled moderators, trained to structure and control the responses of participants to visual materials designed by businesses. In the late 1960's when social scientists began to study dynamics within groups, the focus group method gained respectability in social science circles.

The method crossed over into the consciousness-raising activities of popular movements in feminism and civil rights. Morgan (1988) explains that the approach towards and the use of focus groups in social research shifted to the interaction between the participants, rather than their responses to the moderator's shaping and control of the interaction.

Focus groups afford qualitative researchers the opportunity to access information that would not be as easily accessible without the group interaction; combine qualitative research elements of both individual interviews and participant observation; and facilitate the observation of a lot of interaction in a specific time on a particular topic (Janesick, 2004, p. 81).

I conducted four focus group discussions with the magistrates who had participated in the peer learning activities. The focus groups provided another set of interpretations of the experience of the peer learning activities. These focus group discussions took place in different kwaZulu-Natal courts. The focus group discussions were also potentially a source of insights into the shared culture, assumptions and expressions of professional identity and "being peer" that a one-to-one interview would not be able to provide.

Questions on the experience of peer learning and the interpretations of the consequences of peer learning framed the focus group discussions. Following Morgan (1988), I limited the number of topics because I had indicated beforehand that the discussion would take no longer than fifty minutes and could therefore take place during the lunch hour. Each topic contained a number of “discussion prompts”, essentially questions that invited participants to elaborate where necessary and appropriate. I selectively introduced these discussion prompts in the discussions. I attempted to apply the “low moderator involvement” approach (Morgan, 1988) explaining to each group, amongst other things, that the most important issue was to get an understanding of their experiences and perspectives on peer learning activities in a section. As with the individual semi-structured interviews, the focus group discussions varied, seemingly shaped by the interests and concerns of the individual participants, the relationships between them, the shared assumptions and their locations within a particular court and the hierarchy of the magistracy and their specific roles and responsibilities.

I made audio recordings of the interviews and the focus group discussions and sought the permission of the research participants. I recorded my thoughts and feelings before, during and after the interviews and discussions.

#### *Field notes*

During the data collection phase of the study in kwaZulu-Natal, I wrote field notes each day, understanding this practice as a means to implement reflexivity. At a general level, I wrote about what I saw and heard; how I behaved; and how I was treated (Silverman, 2005, p. 158).

In the course of the transcription of the interviews and the analysis of the findings, I considered more detailed questions (Silverman, 2005, p.178) such as, “What are people doing? What are they trying to accomplish? How exactly do they do this? What specific means and / or strategies do they use? How do

members talk about, characterise and understand what is going on? What assumptions are they making? What do I see going on here? What did I learn from these notes? Why did I include them?"

#### *Rationale for choice of participants*

I interviewed those members of the Jetcom who had been central to the conceptualisation of the peer learning programmes and active in the implementation and sustaining of the peer learning activities. I was aware of the preponderance of white men on the Jetcom and I was keen to hear the experiences and the views of women and black people. However, I wanted to listen to the views of the Jetcom members on the representation and participation of women in the activities of the Jetcom.

I was also interested in meeting with magistrates who had *not* been part of the initial Jetcom processes related to the adoption of peer learning initiative as an approach to professional development. I wanted to explore whether the Jetcom members' sense of purpose, goals, common understandings and practices regarding peer learning was communicated to other magistrates.

I formally requested the assistance of the Jetcom members to identify magistrates who would be able to reflect on their experiences of peer learning. I sent individual email requests to the magistrates, along with the consent form and asked them to confirm their participation.

I conducted the first focus group discussion with senior magistrates who were not members of the Jetcom and had not participated in the training workshops on peer learning that were presented in 2004 and 2005. The group of five senior magistrates was responsible for managing the work of civil, criminal and family court magistrates. Their duties included the organisation of peer learning discussions.

I also conducted three focus group discussions with other magistrates. The first group of three experienced magistrates worked in the civil and family courts. A second group of sixteen magistrates had varied levels of judicial experience and engagement in peer learning. A third group of two experienced magistrates worked in a large court.

## **3. 2 Data analysis**

### **3.2.1 Thematic analysis (Interpretive phase)**

The interpretative phase of the analysis focused on the stories of peer learning magistrates told. I interpreted the magistrates' story telling as them expressing their sense of their identities (Benmayor, 1991; Benhabib, 2002) and, where relevant their organisational-social location and orientation on critical ideological and political issues. Benmayor (1991) notes in her research with Puerto Rican adults who had migrated to New York that the participants would tell the stories of their experiences differently each time, depending on the issue, the time and the audience. In this sense, Benmayor's research participants were using the telling of their stories to explain their understanding of themselves and the way that the world works.

From this perspective, the magistrates' accounts of their understandings and experiences of peer learning were 'already-theory'. The accounts, descriptions, expressions, and displays of emotions as collected through the fieldwork were part of their assertions of their identities and their explanations of the way that the world works. For example, a research participant's description of the role of a clerk of the court, while intended to provide information, is encased in, amongst other things, an interpretation of the history of the magistrates' courts, a theory of justice and a model of the effective management of the magistrates' courts. The researcher stands in a similar relationship to the data yielded because of her

enquiry. It is in this sense that I agree with Alvesson and Sköldbberg (2000, pp. 79 - 80) that all facts are theory-dependent.

Because I considered the accounts of the participants as 'already theory', I attempted to identify patterns that may be evident in their accounts. I recognised that my proposed process of 'identifying patterns' is interpretive and analytical and attempted to clarify my pre-suppositions involved in this process in the course of the analysis of the data. I acknowledged that my initial research question may or may not be useful in the "pattern identification processes".

Aronson (1994) defines thematic analysis as focusing on "identifiable themes and patterns of living and / or behavior". The definition has value because the activity of participants is placed at the centre of the research. However, my concern is that the definition does not incorporate the dimension of the interpretations that research participants might have of their "patterns of living" and could direct the researcher away from engagement with the "already-theoretical" accounts of the research participants. I prefer Braun and Clarke's (2006) definition that is, a method for identifying, analysing and reporting patterns or themes within data (2006, p. 79) because it leaves open the kind of themes or patterns that could potentially become the subject of further analysis. Braun and Clarke's definition does not make assumptions about the status of the interpretations that research participants might express about their experiences. Braun and Clarke (2006, p. 82) characterise a theme as capturing, "Something important about the data in relation to the research question, and represents some level of patterned response or meaning within the data set." Judging the importance of a theme depends on the "prevalence" of the theme within the data set, that is, the frequency with which references to the theme occur within the data set. A second criterion is that of "keyness". Braun and Clarke do not define "keyness" and their discussion on "prevalence" is heavily qualified because they emphasise that a quantitative approach ought not to be followed when applying prevalence as a criterion. Braun and Clarke emphasise that the judgment of the researcher is

critical on deciding on a theme. In this connection, I interpret Braun and Clarke to mean that prevalence and keyness should be used in combination and in relation to the research question.

Braun and Clarke (2006) further argue that the researcher needs to make several choices in the use of thematic analysis. My use of thematic analysis is contextualist (Braun and Clarke, 2006, p. 81) because I acknowledge that the magistrates make meaning of their experience and in turn, there are limitations placed on their efforts to make meaning by their material conditions or context (see section 3.2.2 below). Secondly, I have chosen a semantic approach in the analysis of the data, focusing on the explicit or surface meanings of the data and have attempted to describe and summarise the data to show patterns in meaning (Braun and Clarke, 2006, p. 84) assuming a “simple” relationship between meaning and experience and language (Braun and Clarke, 2006, p. 85).

In doing the thematic analysis, I followed a number of steps (see Braun and Clarke, 2006, p. 86 – 87). Familiarisation with the data was achieved through transcription<sup>6</sup> of the interviews and discussions. I listened to the sound recording of each interview or discussion for the first reading of the transcripts and then re-read each transcript several times, noting ideas. I identified features across the transcripts that became the “initial codes” and then collated the codes into possible themes. After further development of the views and concepts in the historical review of the *landdrosts* and magistrates and the literature on professionalisation and peer learning, I developed three themes relating to the design and implementation of the kwaZulu-Natal peer learning initiative; the interpretations of peer learning; and the influence of ‘race’ and gender in shaping the peer learning initiative. I then reviewed the themes and re-read the transcripts

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<sup>6</sup> Research participants tend to use the standards of written language to evaluate *verbatim* transcriptions of their contributions (Lapadat, 2000, p. 207). I started indicating mid-sentence changes, repetitions, pauses, laughter, coughs and other contextual information. In the end, I sent “tidy” transcripts to the participants, mindful of Lapadat’s point and anticipating that the participants might feel that the transcripts could cast them in an “unprofessional” light.

to check whether the themes are both prevalent and key in relation to the data and the research question.

### **3.2.2 Thematic analysis (Critical phase)**

As noted earlier, this study is more than an interpretive surfacing of themes in magistrate's accounts of the peer-learning initiative. In addition, I chose to identify and develop themes theoretically (Braun and Clarke, 2006, pp. 83 – 84), drawing on the history of *landdrosts* and magistrates and the literature review on professionalisation, professional development and peer learning to attempt a critical analysis of the initiative, in order to determine its broader significance.

In the critical phase of the analysis, I assumed that engaging in empirical research meant considering the implications of taken-for-granted assumptions and dominant views and what these mean for relationships of power and hierarchies and assumptions about competence. I also attempted to contextualise the Jetcom's peer learning initiative in relation to the dynamics of South Africa's transition from apartheid to a constitutional democracy (compare Buroway, 1998) considering the inter-play between individual – totality or societal context, the taken-for-granted assumptions and the sources and expressions of power.

### **3.3 Validity issues**

I attempted to reflect systematically on the biases and assumptions contained in my questions and practiced reflexivity in the conceptualisation, data collection and analysis phases of the study. Reflexivity involves monitoring and demonstrating an awareness of how biases may emerge, reflecting on my impact on the data collected and systematically analysing and reflecting on the research methods, the decisions made and the limitations of the study (Whiting, 2008, p. 36; Järviuoma *et al*, 2003, p. 22). Reflexivity and its practise is critical because the study will include the construction of explanations and therefore develop

theory, understood as a set of concepts intended to model an aspect of the world (Maxwell, 1996, pp. 28 – 32).

### **3.4 Ethical issues**

In the design of the study, I anticipated two main ethical issues partly relating to what Boud (1999, p. 9) signals as one of the limitations of peer learning in professional development. Firstly, a magistrate's participation in a peer learning activity could raise questions about personal competence. Secondly, as a research participant reporting on peer learning experiences, a magistrate may have concerns about the disclosure of information relating to tensions and conflicts around the micro-politics of the court, competence, performance and the relationships with the leadership and management of the courts.

I attempted to address these possible concerns through the arrangements made with regard to informed consent. At the beginning of each individual interview or focus group discussion, I asked the participants whether I could record the discussion and produced a copy of the consent form. I had emailed the consent form (see Appendix 1) to each participant before the interview and asked him or her to read and sign the copy I presented. I indicated that the views expressed will be confidential and I will report direct quotations or statements anonymously. In reporting the views of the participants I have chosen not to identify magistrates by 'race' and gender who took part in the individual interviews. However, I identified participants by 'race' and gender in the focus group discussions in order to contextualise the contributions. In cases where it might be necessary to identify a particular participant, then I explained to participants that I would seek that person's permission first.

### **3.5 Limitations**

I had had significant exposure to magistrates and discussions about their work in my role as a judicial education designer and facilitator between 2000 and 2005.

This research project made it possible for me to re-connect with the magistrates responsible for the kwaZulu-Natal peer learning initiative in 2009 to review the magistrates' concerns and contexts from a different perspective. Because of these experiences, I was able to develop a good understanding of the social, political and professional development issues facing magistrates.

However, the study is limited.

Firstly, as an adult educator not trained in law, I am not able to adequately appreciate the legal significance of judicial independence, the separation of powers, criminal procedure, sentencing, the appeals and review process to mention a few of the issues that are explicit or implicit in this study. Secondly, the study is limited because I chose to interview some of the initial six members of the Jetcom who had been most engaged in the design and implementation of the peer learning initiative and did not include the other eleven Jetcom members. The focus groups did not include all possible groups of senior magistrates responsible for the professional development of magistrates, neither were all magistrates who had participated in peer learning activities interviewed.

The kwaZulu-Natal peer learning initiative is in another province to where the researcher is based. Limited funds precluded extended periods of observation of magistrates in court settings, in peer learning workshops or interacting in informal situations such as tearooms.

The limitations of space in the thesis did not allow for the consideration and analysis of written materials such as email records of peer learning interactions, case flow management manuals, articles in the *Emantshi* newsletter and peer learning materials.

## **Chapter Four: The kwaZulu-Natal peer learning initiative**

### **4.1 Introduction**

This chapter presents a thematic interpretation of the key findings of the study of the magistrates' experiences and understandings of the kwaZulu-Natal peer learning initiative. An outline of the Jetcom members' reasons for initiating peer learning introduces the discussion of the findings. The findings are then discussed in relation to three themes namely, different interpretations of peer learning articulated by research participants; second, issues in designing and implementing the peer learning initiative; and third, the influence of 'race', gender and culture in the design and implementation of the kwaZulu-Natal peer learning initiative.

The focus of the presentation is on the meaning, for the magistrates of their experiences of peer learning and the accounts that they give of those experiences. Where relevant, I will comment on the responses of the research participants from the point of view of the history of *landdrosts* and magistrates, their professional development, and the concepts discussed in the literature review. I will analyse the peer learning initiative from a critical theoretical perspective, considering the broader implications of questions such as the relative success of the initiative as a peer learning process and whether the initiative be considered as an example of a 'professional project'.

### **4.2 Jetcom members' reasons for the peer learning initiative**

The discussion on the motivations for using peer learning focuses on the responses of the Jetcom members to the question, "Why did the members of the Jetcom decide to use peer learning?" The question raises further questions on whether Jetcom members wanted to deal with problems in the courts, the community and society, in the profession or with problems concerned with the

conceptualisation and implementation of judicial education.

### *Implications of judicial independence*

Nash<sup>7</sup> a Jetcom member raised judicial independence as one of the reasons for implementing the peer learning initiative in kwaZulu-Natal.

Then your question as to what problems or issues did the members of Jetcom want to address through peer learning. [It] was in particular the situation in which we were in under a new constitutional order. ...previously we were part of the executive if you like, accountable to the Department of Justice as such. So training and everything that went with it was lying within that structure. Then with the notion of judicial independence, there was a vacuum in that we had to lead ourselves and create internal structures.

Interviewer:

Could you explain a little bit more what judicial independence means in terms of ...

Well organizationally, it meant that the magistracy was now independent of the executive arm of government and ...One of the items that fell for consideration was a corporate training facility and it was important for uniformity's sake to do this through the cluster structure, which had been created as a governance structure for the magistracy. ...

(Interview, Nash)

Nash notes that in the “new constitutional order” the notion or principle of judicial independence meant that magistrates experienced a ‘vacuum’ or lack of clarity in relation to leadership and authority. In clarifying their position, magistrates needed to identify their leadership because they no longer resorted under the authority of the executive and the Department of Justice. The issue of leadership appears to have been resolved through the formation of the “cluster structure” to govern the magistracy.

In addition, magistrates needed to establish their own training institution or “corporate training facility” because previously the Department of Justice had controlled the training of magistrates. The principle of judicial independence required that magistrates achieve control over their own training or professional development. Nash therefore puts forward two of the requirements for judicial independence, that is organisational separation from the executive and judicial control over the professional development of magistrates.

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7 Psuedonym

Young, another Jetcom member clarifies a third aspect of judicial independence, namely that each magistrate, "... has got to decide issues in terms of the law and taking into account the Constitution". These circumstances motivate magistrates to consult with their peers. The research participant, Crosby confirms Young's view, noting that judicial independence meant, "... giving a conscientious decision ... without an outside influence". One could argue that a knowledgeable magistrate is able to give a conscientious decision, which means, amongst other things, observing the Constitution. The necessary conditions for magistrates "giving a conscientious decision" are organisational independence from the executive and judicial control over the professional development of magistrates.

As mentioned in chapter one (section 1.2.4) the new constitutional order had changed the professional status of district court magistrates. According to Omar (1999), magistrates now had judicial independence similar to that of the judges of the High Court and Constitutional Court. The Magistrates Act, 1993 (Act No 90 of 1993) removed magistrates from the control of the executive. The Magistrates Commission now had the responsibility for the selection and appointment of magistrates. Subsequently, however the defendants in the *van Rooyen* case argued that magistrates did not meet the standard of independence prescribed by the Constitution for the judiciary. The Constitutional Court ruled against the defendants and argued that because the Magistrates Commission was independent of the executive, it had the capacity to protect the financial and occupational security of magistrates (Constitutional Court, 2001). Since the *van Rooyen* judgment, Olivier has argued that the appointment of magistrates through the Magistrates' Commission is a positive development. However, the confidential selection interviews for magistrates (2001, p. 173) and the continued authority of the Director-General of the Department of Justice to issue regulations concerning the administrative functions of magistrates raises questions about the legitimacy of magistrates (2001, p. 171) and therefore the judicial independence of magistrates.

### *Need to improve service delivery*

The second reason for introducing peer learning in the professional development of magistrates raises questions about their performance in court and the relationships between magistrates and the public. There is greater public scrutiny of the decisions of magistrates in the context of the increase in serious and violent crimes (see chapter one, section 1.1). The research participant, Crosby explains:

... The background to this [introduction of peer learning] is the fact that magistrates needed to be transformed to change their mindsets and more importantly to improve in terms of justice delivery. ... [there were] accusations that related to poor caseload management as well as other accusations about the late arrival of some judicial staff which all impacted negatively on court and caseload management. There was a sense of desperation among the role players as to how magistrates could be engaged in regard to the issues raised against them. It being alleged that whenever attempts were made to engage them in regard to the said issues, they would defend themselves by saying that they were judicially independent and not answerable to the role players in the justice system. ... It was therefore necessary to deal with the issues of judicial independence and judicial accountability. It was necessary to remind them that whilst they are accountable to the Constitution and the Law, they are also accountable to the public. We needed to stand up and be counted as magistrates especially in view of the unprecedented high crime rate in our country. ...

(Interview, Crosby)

Crosby's explanation shows a keen appreciation of the importance of developing and managing the relationship between the judiciary and the other roleplayers. There is recognition of the 'sense of desperation' concerning the conduct of some magistrates who argued that they were not answerable to other roleplayers because they were independent. Magistrates needed to 'change their mindsets' and develop an understanding of the connections between judicial independence and judicial accountability. Magistrates needed to understand that accountability included an accountability to the public for improved "justice delivery".

McRae and Turrentine, participants in the Braamfontein focus group discussion indicate a similar awareness of the need for public accountability of magistrates. McRae explains that, "... maybe the bigger picture is that it's in the interest of justice that we, in the end, try to have as many well-informed, experienced

magistrates on the bench”. Her colleague, Turrentine agrees, “Especially when your colleagues [are] doing something wrong or when you read about it. And so we help our colleagues”. However, helping colleagues takes place under particular conditions, and the research participant, Nash argues that because magistrates’ courts are “extremely busy ... [and] ... does not leave much room for individual lateral research” therefore, peer learning was a “perfect vehicle for sharing information” (Interview Nash).

Crosby and the participants in the Braamfontein focus group discussion express a concern with the performance of magistrates that is in alignment with the restructuring of the Department of Justice to enhance service delivery, efficiency and cost-effectiveness. In kwaZulu-Natal, the restructuring meant enabling magistrates and prosecutors to focus on adjudicating and prosecuting cases and thereby reducing case backlogs in the fifty-eight courts (Department of Justice, 2004).

It can be argued that the term ‘justice delivery’ may also be identification with the South African government’s shift to a market-orientation in public services. The Department of Justice, along with other government departments have adopted customer charters, using the *Batho Pele Guidelines* according to which ‘customers’ are to be consulted about service levels and quality. Customer charters are an integral component of the shift to a market-orientation in public services and “managerialism”.

Managerialism emphasises cost cutting and increasing the efficiency and productivity of labour; delegation of management responsibilities; and the use of practices such as standard and target setting and performance measurement. There is the intention to provide public services efficiently and economically (Ruiters, 2007, pp. 119 - 120). Older forms of accountability are disrupted and undermined as citizens are transformed from individuals who accessed politically negotiated public services into consumers of public services, which are now

marketed as products. Now accountability takes place through customer satisfaction surveys and customer relations managers usually stationed in call centres (Ruiters, 2007, pp. 123 – 124). Professionals and civil servants are forced to present themselves as ‘customer focused’ (Ruiters, 2007, p. 122). Even as Crosby and the Jetcom are concerned about strengthening professional competence and encouraging an ethic of excellence, the hallmarks of the professional project, the growing dominance of a market-oriented approach to public service may yet transform the judiciary and threaten the prestige of magistrates in the district courts. Historically, one dimension of professional prestige has been the autonomy and significant control over the work process (Larson, 1977; Serron, 1988; Macdonald, 1995) and a market-oriented approach to the public service implies intensified managerial scrutiny of the work processes of professionals, thereby undermining professional autonomy.

Crosby’s explanation that the decision to use peer learning as an approach was intended to improve “justice delivery”, speaks to the relationship between the judiciary and the public, a relationship that is central, as Rosen-Zvi (2001) establishes. Rosen-Zvi traces the extent to which the Israeli judiciary either confirmed or countered the values and developmental priorities of the state and the broader society in the course of its history. The rapid implementation of free market economic and social policies in Israel informed the convergence of the values and ideology of the judiciary and the Israeli public respectively, to the extent that by the 1980’s the Israeli public considered the judiciary the most-trusted institution next to the army.

#### *Need for a more practical emphasis in judicial education*

The research participant, Stills in providing an explanation for the kwaZulu-Natal peer learning initiative comments on the theoretical emphasis of the Justice College training.

... Institutions like Justice College unfortunately, their emphasis was ...more on the theory than practical application of law. And I think where peer learning comes in is, you are more concentrating on the day-to-day experiences of colleagues, magistrates, on

procedural matters, more than on the law. Anyone can read, learn what the law says, and study the law, because it's available. But nowhere, except from the Law Reports or from your colleagues, when you learn how to apply a particular principle. You can stumble in the dark and make a mistake. But that is foolish way of doing it. Rather go to your colleague, [and ask] 'Have you had experience in this?'

(Interview Stills)

Stills' criticism is respectful in tone, almost regretful of the shortcomings of the Justice College. Echoing Mogwera (cited in Sardien, 2005 a) who criticised Justice College for schooling magistrates and prosecutors in the theory of law at second year university level, Stills then goes on to assert the value of a focus on the procedural aspects of law as more relevant for magistrates. Stills argues that an understanding of procedural law can be developed from reading the Law Reports but also consulting colleagues.

Young, another research participant agrees that the emphasis in the Justice College programme is theoretical.

...the training that was provided by Justice College was more of a ... I won't say more of an academically-inclined ... but it was training provided for guys who do their jobs. But I mean the guys at the College who were training people had been out of practice for some time. Not in the sense that they didn't know what they were talking about but they weren't magistrates sitting daily. Some of the problems that we encountered, we not always sure that they could address them. They probably could, but the point is you can't always go back there and ask them because I mean there [are] so many magistrates that it would be much easier if guys started training each other.

(Interview, Young)

Young is as respectful as Stills and says, "I won't say more of an academically-inclined ... but it was training provided for guys to do their jobs," that is training focused on the professional roles of magistrates. If that is the criterion, then Justice College is found wanting. Young then introduces another criterion that of the qualities of the judicial educator, arguing that the perceived distance from daily practise on the part of the Justice College lecturers is possibly a disadvantage because "...they weren't magistrates sitting daily".

In their reflection on Justice College, Stills and Young confirm the need that the Jetcom had identified, as Nash expressed it earlier, to have a corporate training facility that the district court magistrates controlled. Stills and Young emphasise

the practical, procedural aspects of the law as constituting knowledge that “magistrates sitting daily” are best placed to have.

### **4.3 Interpretations of peer learning**

This discussion focuses on the interpretations of the Jetcom members, the ‘Brussels focus group and ‘The Hague’ focus group. Each of these groups stands in a different relationship to the kwaZulu-Natal peer learning initiative and to the hierarchy within the magistracy and therefore their views of peer learning might differ.

The Jetcom members designed and promoted the peer learning initiative and each has many years of service and a broad spectrum of experience in the Department of Justice. Some of the Jetcom members monitor the work of up to thirty magistrates, located in different towns. The senior magistrates who took part in the Brussels focus group discussion are responsible for monitoring the work of smaller numbers of magistrates in a large town. Some magistrates in The Hague focus group were very experienced and others were recently appointed. A minority had managerial responsibilities.

In addition, I am influenced by the comment of ‘Coltrane’, a participant in the ‘Brussels’ focus group discussion, “Sometimes the Jetcom does not attend [to] the day-to-day issues. Things that occur daily. We [as senior magistrates responsible for a section] are there to ... almost; sort of teach each other immediately”. Coltrane’s comment alerted me to the possibility that the Jetcom members’ views on peer learning, developed during the 2004 and 2005 training workshops on peer learning (chapter one, section 1.1), may not have been communicated to other magistrates currently responsible for peer learning or participating in peer learning activities. Therefore, I will discuss their views on peer learning separately.

### 4.3.1 Jetcom members' interpretations of peer learning

Nash explains how, in his experience, there was an integration of peer learning into the institutional practices of the Department of Justice:

The notion of engaging in peer learning was informed to a certain extent by my own previous experience as prosecutor, senior prosecutor and magistrate where I was involved in actually initiating a form of peer learning. But it was not at that stage underpinned by any elaborate thesis or philosophy. It was more a practical tool that was readily available. ... I set individuals to do presentations on, for example how to prove documentary evidence, the various types, and those prosecutors would impart their input and there would be discussion. And if it was incomplete or there were questions arising which had not been addressed we would for example engage others to join in with this individual and to come up with solutions. And so it was more a facilitation and with me conducting a certain degree of oversight and perhaps making comments, observations criticising constructively. ... It was the peer learning concept that had been experienced by most magistrates who were part of that committee. ...

(Interview Nash)

Nash's account provides interesting information about the use of this 'practical tool'. The senior (prosecutor) asks or instructs an individual to prepare a presentation. The colleagues listen to the presentation. The senior asks the other colleagues to fill in the gaps or respond to questions that arose during the presentation. Once the other colleagues contribute, the senior may comment or criticise constructively and in this way give effect to her or his 'oversight' functions.

Nash shows here that the workplace is a context for learning and that when he engaged with prosecutors and magistrates, there was the construction and refinement of knowledge (Billet, 2007, p. 110). Furthermore, the peer learning Nash describes was not necessarily unplanned or unstructured (even though it "happened quite by circumstance"), but intentional and central to the continuity of the work practice (Billet, 2007, p. 109). Nash as a manager was concerned about the effectiveness of prosecutors, with regard to their levels of knowledge on issues such as the law of evidence. From these comments, knowledge emerges central to the (judicial) work practice.

Stills who supervises the work of a large number of magistrates, located in several offices, provides insights into his interpretation of peer learning.

... We will decide on the topics and then we will ask ... whoever to prepare themselves on this particular topic and to share what he has researched, his findings. ... Then we dish up a plate of questions, then we answer those questions by discussing it amongst the small group. ... We've never been more than eight individuals sitting around the conference table which makes it very personal. There's no *meneer* (mister), sir, senior, junior. We are peers ... we should not regard ourselves as senior and junior. Some of us are more experienced and may be more ... expertise in certain topics of the law than others but you can also always gain something from your less experienced magistrates.  
(Interview Stills)

Stills explains that the group decides on the topics, rather than the senior setting an assignment for an individual. The list of questions that are generated appears to structure the interaction. The senior does not mediate the discussion.

Lennon, a research participant and a senior magistrate who subsequently joined the Jetcom after the implementation of the peer learning initiative, similarly draws on workplace experience to provide an interpretation of peer learning.

Ok, as simple as can be. That the most important thing about peer learning - you come to a colleague and you exchange ideas and say, 'This is what I think but I haven't got a lot of experience. Have you come across this before?' And then you start discussing. If ... there's more than one idea or even if they have the same idea. It sort of confirms why you agree. That's the practical value for us I think at the courts. And they are doing this all over - in the High Courts too. ...  
(Interview Lennon)

Unlike Nash who as a Jetcom member had considered the strategic implications of adopting peer learning as an approach to professional development, Lennon defines peer learning "as simple as can be" without the awareness of an "underpinning philosophy" (Interview Nash). Lennon considers approaching a colleague to 'exchange ideas' as the defining element and therefore of the 'collegiality' that Serron (1988) explains as characterising interactions between USA Federal Court judges. Magistrates generally hold up collegiality as the standard against which to measure the relationships between magistrates in the workplace. Lennon demonstrates an appreciation of reciprocal learning ("... If there's more than one idea or even if they have the same idea. It sort of confirms why you agree."). That is the core of Boud's definition of peer learning (see

chapter 2, section 2.4.1). Lennon also indicates a desire, through peer learning, to achieve a closer identification with High Court judges – an element in the ‘collective mobility’ dimension of the professional project as discussed above (chapter two, section 2.1).

Young, in his definition of peer learning foregrounds the mutual assistance of equals to improve their performance in the workplace and then elaborates on the need to overcome the legacy of hierarchical relations in the magistracy.

Well, I understand it [peer learning] ... as it's people who are on the same level, who have different skills and ... abilities, helping each other so that they ... do their work better. ... to me that makes ... more sense because you don't have a top-down thing. It's people on the same level, they're peers and they, through sharing with each other, each one of us learns, all the time. ...

Interviewer:

... So this idea of working sharing as equals and then using peer learning to do that, is that a very hard idea to get across sometimes?

Young:

I mean, look, maybe in the past it [the relationships between magistrates] was very hierarchical but I mean now, since the introduction of the Constitution in theory, all magistrates are equal. The fact that some are senior magistrates and chief magistrates is merely that they have more management responsibilities. But the fact remains that everyone, when you sit in court, is a court of law. And everyone has got to decide issues in terms of the law and taking into account the Constitution. So, this whole hierarchical thing has actually been broken down by the Constitution and that has also assisted in implementing peer learning. I think because now, everyone had to deal with these issues in court every day. Nobody's going to tell you what to do. You have to deal with these issues. If you don't know, you can go and ask other peers and let them assist you.

(Interview Young)

As discussed previously, while the sharing of knowledge between peers did take place, the role of the senior in the initiation of the structured learning, providing the dynamism within the discussion and then placing the experience within its professional perspective through exercising an ‘oversight’ function that seemed to be central. When asked about the difficulty of getting across the idea of sharing as equals, Young states that the hierarchical relations between magistrates had been broken down by the Constitution. What is interesting, in relation to the focus of the study is whether, in the implementation and

experience of peer learning on the part of kwaZulu-Natal magistrates, the new Constitutional values have had any real influence.

#### **4.3.2 'Brussels' focus group – interpretations of peer learning**

I consider the interpretations of peer learning on the part of senior magistrates who took part in the Brussels focus group discussion. Each senior magistrate was responsible for monitoring and assessing the work of at least six other magistrates in either the criminal, family or civil court sections in a large town. There were two men and four women, mostly between thirty-five and forty-five years old, in contrast to the Jetcom members who are fifty and older. The periods of service in the Department of Justice would therefore be shorter too. These senior magistrates are not members of the Jetcom and had not gone through the training workshops on peer learning that were presented in 2004 and 2005. I was interested in meeting with magistrates who had not been part of the initial Jetcom processes related to the adoption of peer learning as an approach to professional development because I wanted to explore whether the Jetcom members' views on peer learning were communicated to other magistrates.

Participants reflected on an “experience of peer learning in the court and with other magistrates” and were asked to describe their use of peer learning.

Fitzgerald took the first turn to reflect on an “experience of peer learning in the court and with other magistrates”.

Fritzgerald (White female):  
It depends, the people that we have to train or our colleagues?

Interviewer:  
Your colleagues

Fritzgerald:  
Our colleagues on the same level?

Interviewer:  
On the same level.

Fritzgerald:  
It's not really peer learning as such, it's more case law discussions

Interviewer:  
If it's different, that is what I want to hear about.

Fritzgerald:  
It depends on the level and the experience. The inexperienced magistrates obviously need more peer learning and experience.

(Brussels focus group discussion)

The interviewer had indicated that the first discussion topic concerns the “experience of peer learning in the court and with other magistrates”. This, (unfortunately) ambiguous phrasing of the topic, motivates Frizgerald to clarify who are the *learners* and who are the *teachers*. Fritzgerald distinguishes between ‘our colleagues’ and ‘the people we have to train’ in her question of clarification. The interviewer affirms that the question is seeking information about ‘colleagues’. Frtizgerald then makes a further distinction between colleagues, those who are on the same level and those not on the same level. When the interviewer indicates that, the question refers to colleagues ‘on the same level’, Frizgerald then *displaces* peer learning from her field of activity and interaction between colleagues because, “It’s not really peer learning as such, it’s more case law discussions”.

I would argue that Fritzgerald’s contribution is a response to the entry of the interviewer into her space. Fritzgerald draws on her knowledge of the hierarchy and the presumed relations of power to frame her response to the question of learning with colleagues. In addition, in her disqualification of the learning she has experienced with colleagues as ‘peer learning’ and her characterisation of the activity as “more case law discussions” she asserts the particularity of the legal field, against the outsider – the interviewer. The interviewer, in the introduction to the group had in any event self-identified as *not* being a legal practitioner but an adult educator.

When the interviewer explains that he is interested in what is 'different', that is in "case law discussion" (as an instance of the learning activity between magistrates), Frizgerald follows through on her earlier distinction between colleagues on "the same level" (and those ranked lower and higher) and now elaborates, adding the criterion of 'experience'. Frizgerald now uses the additional criterion of 'experience' to identify those who are 'inexperienced'. It is this category of magistrates who "obviously need more peer learning and experience".

Frizgerald, in her contribution, appears not to share the Jetcom members' understanding of peer learning. For example, Young's view of peer learning was, " ... it's people who are on the same level ... helping each other so that they ... do their work better" and in his view, *all* magistrates are peers because of their status under the Constitution. Stills agrees with Young, that in discussion amongst peers, "There's no *meneer* (mister), sir, senior, junior. We are peers ..." who relate as equals, irrespective of rank and levels of experience".

At this stage, another participant, Coltrane provided his interpretation of learning in his context.

Coltrane (Indian Male)

... There is ongoing interaction on a daily basis. It's not formally structured ... Sometimes you do it at a level which is less intense. Perhaps it is not a good word, but at a less advanced level because you do have an inflow into sections of people who have different and varying levels of experience .... The one [type of programme] is depending on the extent of the person's experience and what he has to offer.... The other is, depending on how much time you have to actually look into new areas of knowledge and to share those. The third would be case-based experiences. You know things that [we] are actually doing in court and cases that you are actually handling. ..

(Brussels focus group discussion)

Coltrane elaborates three types of learning programmes, namely an "orientation type" programme (that is less advanced, less intense for people who come in with different levels of experience); secondly a sharing of new knowledge, depending on the time available; and thirdly discussions on case-law and issues

currently dealt with in court. Coltrane recognises that his choice of the term “less intense” may not be a good choice of words, perhaps because the term implies that the engagement with another magistrate may not be on equal terms. However, according to Coltrane the term is justified because there is “an inflow into sections of people who have different and varying levels of experience”.

Coltrane’s reflection on learning can be interpreted in the following manner: Coltrane links learning with knowledge, specifically the sharing of knowledge through interaction and the development of new knowledge through individual research. However, while Coltrane discusses the sharing of knowledge, he contextualises that sharing within the processes of the ‘ongoing interaction’ taking place on a ‘daily basis’. Coltrane argues that the sharing of knowledge takes place in terms of the hierarchies of experience and expertise and that senior magistrates continually assess the intensity or level at which they engage with other magistrates. In offering this, elaborated view of learning in the (judicial) workplace, Coltrane appears to agree with Fritzgerald, namely, that peer learning is for the less experienced magistrates. Coltrane does not agree with Jetcom members, Young and Stills who regard magistrates as equals, by virtue of their roles and responsibilities under the Constitution, sharing skills and knowledge when they engage in peer learning.

Coltrane’s contribution appeared to motivate Holliday to describe the learning taking place in the criminal section.

Holliday (Black female):

What we do in the criminal section ...is a bit more structured than ... in the civil section.... everyday we meet here in the mornings at eight o’clock and ... we go through finalised cases... You pick up some common mistakes that magistrates [make] ... and then we just take a topic and then we go and research and we bring it for discussion. ... one ...is the issue of the order that one normally makes [in terms of] the [Fire]arms Control Act to declare a person unfit. [And] ....sometimes you get a recent case that ...could be interesting to all magistrates, especially in the criminal section. ... we would ... make copies of the set decision and then circulate it amongst the criminal magistrates and then discuss it in our meeting ...

(Brussels focus group discussion)

Holliday recognises the importance of the context of learning. As a senior magistrate she is responsive to the challenges of a (judicial) workplace in her approach to the professional development of her colleagues, who could be 'all types of magistrates' and inexperienced, that is magistrates who have not spent years in other Department of Justice roles as prosecutors and clerks of the court. Holliday focuses on procedural issues, such as the making of orders in terms of the Firearms Control Act.

Adderley describes his experience in the criminal section and elaborates on his interpretation of peer learning.

Adderley (Black male)

I want to add onto what she is saying because I am also in the criminal section. If one finds a mistake committed by a colleague we don't actually go and attack the particular individuals we don't even mention that so and so has done this mistake. But we just find that .... [the case] has to be sent on review. It goes to the senior [magistrate] who perhaps then interacts with the particular individual. Also knowing from where we come [from], you know matters of the Constitution, we know how our law has been. The previous law reports we discuss some of the cases and then relate them to what is in the Constitution and bring that to the attention of our colleagues...

(Brussels focus group discussion)

Adderley makes two points about his experience of peer learning as a senior magistrate. First, he discusses the preferred approach to communicating when a colleague has made a mistake. Second, he offers an interpretation of the implications of the "new constitutional order" for the learning of magistrates. Adderley discusses the dynamics of engaging peers in a context where it is assumed that professionals have a particular level of competence backed by a recognised legal qualification. When a less experienced magistrate has made a mistake, then the preferred approach is, "... we don't actually go and attack the particular individuals, we don't even mention that so and so has done this mistake".

It could be argued that perhaps the concern is to avoid public exposure and criticism of a colleague. Public criticism could be construed to undermine the assumed professional competence of the individual. Adderley recognises the

importance of nurturing trust and authenticity in the peer dynamic (see chapter 2, section 2.4.2). In common with other magistrates, Adderley suggests that avoidance of direct public criticism of another magistrate is essential. Eisen (2001, p. 39) specifies that in a reciprocal peer learning relationship that there are several qualities other than trust (feeling safe) and honesty; including non-evaluative feedback, the non-hierarchical status of partners, voluntary participation and partner selection, direction and intensity of the partnership (leading to closeness), and mutuality (common goals and reciprocal meaning). These qualities do not appear to have been 'designed into' the peer learning relationships Adderley and Holliday describe (see chapter 2, section 2.4.2).

The form of Adderley's introduction to his second point on the significance of the Constitution for the learning and work of magistrates is indirect as in, "Also knowing where we come from". I interpret this as a reference to the history of apartheid and the experience of discrimination against black people. However, Adderley is making the comment in a focus group where the participants have different 'race' backgrounds. Adderley is cautious about introducing the racist past. Therefore he starts his statement with the words 'also knowing,' which is an invitation to the participants to acknowledge the starting point for the view that he is about to put forward. He then goes on to specify, although still at a general level, "... you know matters of the Constitution, we know how our law has been". I interpret his comments to refer to the predominantly racist and sexist character of statutory law as discussed above (see chapter 1, section 1.2.4).

In contrast to his colleague, Holliday whose description of peer learning focuses on procedural aspects of judicial work, Adderley's account of his peer learning practices recognises changes in the "context of learning" at a different level. His approach is to consider the previous law reports and then arrange discussions of some cases, relating the cases, "... to what is in the Constitution and bring that to the attention of our colleagues". Adderley therefore demonstrates a sensitivity to the changed constitutional order, that is a change from the rule *by* law in which

Parliament defined what was lawful to the rule *of law* whereby everyone is subject to the Constitution (see chapter 2, section 2.4.1). In this recognition, Adderley's views are aligned with that of Young who argues that the Constitution burdens all magistrates with the same responsibilities. The implication is that the hierarchies between magistrates are undone.

Adderley's discussion of this aspect of his interpretation of peer learning is transformative because he is responding to the predominant legal positivism criticised during apartheid (Dugard, 1982; Kentridge, 1982) and at the Special Legal Hearing of the TRC (Nadel, 1997). Legal positivism argues that when judges decide cases, they need only consider and apply the law as determined by Parliament. Magistrates are now challenged to demonstrate an appreciation of the complex social, political and economic factors and in magistrates' courts, gender and race-sensitivity are critical, especially in the application of the laws on domestic violence and maintenance (Mokgoro, 2003). Adderley's approach of relating discussion of cases to "what is in the Constitution" is taking up the challenge Mokgoro describes as necessary to transform judicial decision making from legal positivism to an approach driven by the values of the Constitution and the appreciation of the complex social factors.

Vaughn, another participant in the Brussels focus group, describes the peer learning practices in the Family Court.

Vaughn (Indian female)

I'm in the Family Court section. There are only six of us and also it's easier for us to interact. ...Contract magistrates, when they come in, they don't have the benefit of Department of Justice experience ... It's a whole new environment, sitting on a bench and coming in as an attorney, so peer learning is important for them ... We show them things that are more practical. For example, in Domestic Violence, we have a practical guideline ... and if there are problems we would discuss it. In Family Court, we have peer review going on twice a week where we actually check the work of our colleagues. If there are problems we would take it up personally with them. And if it is something that is ongoing we will have a group discussion.

(Brussels focus group discussion)

Vaughn, identifies with Adderley's practice of the avoidance of public criticism of a colleague whose professional competence has to be assumed and not undermined that is, "... we take it up personally with them". In her contribution, Vaughn elaborates on two issues.

Firstly, Vaughn describes the practical implications of the changing composition of the 'magistracy', in terms of which there is an increasing use of attorneys who, "...don't have the benefit of Department of Justice experience" and therefore may not have had a grounding in the practical aspects of dealing with the provisions of the Domestic Violence Act (1998). The provision of a "practical guideline in domestic violence", is very possibly intended to 'bridge' the gap between the assumed professional, formal legal knowledge and the acquisition of practical knowledge that is best achieved through peer learning (Interview Stills).

Secondly, Vaughn describes the practical arrangements and the intentions related to "peer review". The terminology is not accidental, given the alignment of the peer learning practices, in both the Criminal and Family Court sections, with the imperative to improve "justice delivery". Only a few of the qualities Eisen specifies as characteristic of reciprocal peer learning apply because Vaughn's interpretation of the peer learning relationship contains evaluative rather than non-evaluative feedback, mandatory rather than voluntary participation and proceeds from hierarchy rather than relations of equality.

This discussion of the peer learning practices of a group of senior magistrates can only be "indicative" of the extent to which the Jetcom members' views on peer learning influenced the senior magistrates in the Brussels focus group and cannot be the basis for generalisations about the efficacy of the Jetcom's promotion of peer learning in kwaZulu-Natal. What is clear is that Fritzgerald and Coltrane do not agree with the view that peer learning means the engagement of equals as argued by Jetcom members Nash and Stills. Fritzgerald and Coltrane appear to prefer carefully factoring rank and experience into their engagement

with colleagues. Secondly, the senior magistrates appeared to draw on their own experience in the design of peer learning or peer review exercises and do not access the peer learning principles and practical guidelines, which the Jetcom has accumulated.

One observation appears relevant in concluding this discussion of the interpretations of peer learning of the senior magistrates who participated in the 'Brussels' focus group discussion. The senior magistrates who are directly responsible for monitoring the performance of magistrates in the district courts argued that the motivation for the introduction of the peer learning initiative was primarily because their less experienced colleagues lacked knowledge, skills or relevant exposure. There appeared to be agreement on a deficit model of judicial education. Adderley is possibly an exception because he integrated an orientation towards the transformation of judicial decision-making. There was not necessarily agreement on the reasons for the deficit. Vaughn did indicate that some magistrates appointed in contract positions were attorneys. Previously, most magistrates first worked as prosecutors and were therefore familiar with the Department of Justice and with court procedures.

#### **4.3.3 The Hague focus group's interpretations of peer learning**

Sixteen magistrates participated in 'The Hague' focus group, six women and ten men. Nearly half of the men were about fifty years or older, most of the women were forty or younger. Almost all the magistrates in this group presided in court every day. About four of the male participants were "heads of court," supervising the work of other magistrates. Some magistrates were relatively recent appointees while some of the older men appeared to have as much experience as the Jetcom members. The magistrates in this focus group had participated in several peer learning workshops since 2004. The Jetcom members had stated that they encouraged using first names but forms of address such as "mister"

persisted, possibly indicating the power of “formality” in the institutional culture of the Department of Justice.

The reasons for choosing to explore The Hague group’s experience of peer learning are the same as in the selection of the Brussels group. I was interested in exploring whether the Jetcom members’ views on peer learning influenced other magistrates in kwaZulu-Natal.

The magistrates start discussing their experiences of peer learning, comparing the experiences in bigger offices.

Gershwin (White male):

What I experienced about peer learning is that in the bigger offices it was very useful when the magistrates would get together for tea in morning and discuss matters. Every court has certain cases more than the other people do and the law is very, very wide, so it’s always useful to get somebody else’s opinion about legal points and things like that

So in the bigger offices it worked very if well people gathered at tea and discussed things. In the smaller offices some people are on their own and they don’t have somebody to discuss with, and sometimes they just don’t want to make a judgement before they just, they hear a second opinion. They just don’t want to make a judgement and in those cases the best way of peer learning is to phone someone who’s got lots of experience in that particular field and just ask him for his opinion and normally that gets you through the day much easier and you, you are not prone to making mistakes.

Petersen (White male):

Sometimes just by ‘sounding’ somebody up, by the time you verbalize what you are thinking that person can say, “But is it ...” or you can say, While I’m speaking to you I’m actually now gathering what I should do” or just get the sound board. But I mean sometimes by just verbalizing to somebody else and getting the response “You’re on the right track” or “I would also suggest this ...” but just by verbalizing to somebody else.....

(The Hague focus group discussion)

Gershwin is defining the “field of law” in a way that requires consultation with colleagues to develop and maintain a level of competence. The “very very wide” scope of law means that no one practitioner can perfect her knowledge of the entire field and in each jurisdiction certain types of cases tend to predominate. Therefore accessing the experience of other colleagues can improve effectiveness and efficiency. This is the basis for the reciprocal peer learning that Gershwin describes, enabling magistrates to practise communicating and applying their knowledge within their own discipline or profession. In addition,

they are able to articulate issues, get critique from peers and devise new solutions for existing problems (Storberg-Walker, 2006). Reciprocal peer learning is consistent with collegiality and an explicit focus on peer learning can be positive in the professional development of magistrates.

Petersen agrees with Gershwin and describes one of the mechanisms whereby magistrates practise reciprocal peer learning, that is, using another colleague to 'sound out' an approach before formulating a decision. Petersen clearly believes that talking, as such is part of the process of formulating a decision. Petersen uses the term 'verbalize' three times in his contribution and on two occasions, he places the word 'just' in front of 'verbalize'. That could be interpreted to mean that the act of talking, of 'sounding out' does not undermine the requirement for a magistrate to exercise 'independence'. Therefore, Petersen qualifies the consultation with a peer as 'just verbalizing'.

Evans, in response, points out some of the negative perceptions of peer learning.

Evans (White male):

.... on the other hand some colleagues look at peer training as a criticism against what you actually know . And the method, I think the method it's conducted in some offices....They take the judgment of the magistrate, a colleague and they criticize you openly with all the other magistrates there. Now that is in fact an impediment in peer learning. It shouldn't be done like that. In the smaller offices, if you deal with it on a one-to-one basis. I mean irrespective of your experience, your rank, we all have the same basic knowledge but sounding something off on somebody else obviously gives you a better insight into what you are actually going to do at the end of the day. But I think in the bigger offices where they have discussions every morning it's become like a routine. You take ten cases ... you must sit there with a senior magistrate and they take the stick and they whip ... . I think that's totally a wrong method of doing things... it shouldn't be seen like that.

But picking up the phone ...or emailing somebody ... it saves us time. Obviously, sometimes we may be looking at the wrong case law, the wrong text or the wrong text books. ...

(The Hague focus group discussion)

Evans agrees with Gershwin and Petersen that peer training can be positive but then raises two points to qualify his agreement. Evans claims that some colleagues view peer learning as a criticism of their knowledge. The second issue is that of 'the method'. As discussed above (chapter 2, section 2.4)

magistrates, have developed specialised knowledge through prolonged study and have to demonstrate their competence and use institutional symbols and practices to signal and entrench their status as specialists, as individuals and as part of a collective (Macdonald, 1995; Larson, 1977; Witz, 1992). In a peer learning relationship, a magistrate may have her or his competence questioned.

Evans' objection to the open criticism of magistrates accords with the practice that magistrates have developed to establish trust in peer learning relationships. According to Adderley, the senior magistrate in the 'Brussels' focus group discussion, "...we don't actually go and attack the particular individuals".

In situations where the criteria of non-evaluative feedback, equality of status, voluntary participation and authenticity do not apply, then the foundational criterion of trust does not exist in the peer learning relationship (Eisen, 2001, p. 39). Power has to be equalised for trust to develop.

At the end of his statement, I would argue that Evans appears to prefer peer learning relationships that are equal, voluntary and authentic when he refers to "picking up the phone ... or emailing somebody".

Horne draws the attention of the group to the practices in the "field of law" that are associated with the development of knowledge, pointing out that there are limits to what can be achieved through consultation with peers.

Horne (White female):

But I think for the drunk driving case we needed some kind of guideline because the Act is not clear exactly as to which cases should have that enquiry done. Now that there is a judgment as such, because when I read the judgment as well I thought that it was most certainly very welcome. Now that we know that we just shouldn't do that enquiry, you know across the board, because it doesn't make sense as well. But now obviously it makes sense as well. ....

(The Hague focus group discussion)

Horne qualifies the scope of action of district court magistrates, arguing that, "... for the drunk driving case we needed some kind of guideline because the Act is

not clear exactly as to which cases should have that enquiry done” and only a (High Court) judgment could provide that guideline.

Corea, returns to a theme discussed earlier, namely the importance of voluntary participation.

Corea (Black male):

And also an important factor is that peer learning exercise should not be forced on the people; it should be something voluntary. Because once you start forcing it and then people develop negative attitudes towards you.

Brubeck (Black male) :

... the attitude of the person who wants to do the peer learning [is important]. [He] must do it in a way that he doesn't want to doesn't enforce his opinion on somebody else.

...but on the other hand, for people to receive peer learning, their attitude is also important because they must also realize that, "I must be willing to learn from even a person who is much less experienced than myself", because there is always something you can learn from another person no matter how inexperienced that person is.

(The Hague focus group discussion)

Brubeck responds to Corea's emphasis on voluntary participation in peer learning relationships. Brubeck draws attention to the importance of a positive attitude to learning opportunities in the (judicial) workplace. In this way, Brubeck foregrounds the agency of the individual magistrate that will shape how that individual will learn and engage in learning at work. Individuals will engage with workplace learning opportunities (affordances) in particular ways, conceiving of these opportunities (affordances) and evaluating whether s/he should participate in terms of their life history and experiences (Billet, 2007, p. 117).

The Hague focus group discussion group members' reflection on their experience of peer learning shows that there is significant agreement with the views of the Jetcom members in three areas. Firstly, there is agreement on the centrality of reciprocal learning in the peer learning relationship. The two groups also agree on the reasons for using peer learning as a professional development approach. The Hague focus group members shared the Jetcom concern on the need to develop their knowledge, competence and effectiveness as magistrates. In this, there appeared to be support for the goal of improving (service) delivery of justice (section 4.2.2). The Hague discussion group qualified their agreement on the need to improve service delivery. One magistrate distanced himself from

peer learning methods in which senior magistrates instituted mandatory review and open criticism of the decisions of individual magistrates, characterising these methods as an “impediment to peer learning” and against the established practice of confidential, face-to-face criticism of individuals. Thirdly, The Hague focus group agreed with the Jetcom members who prioritised the importance of developing peer relationships based on equality and trust. However, a participant did qualify this agreement, indicating that it is important to recognise that the sharing of knowledge between magistrates takes place in the context of hierarchies of experience and expertise. In this view, the participant was closer to some of the senior magistrates who had taken part in the Brussels focus group discussion. Neither of the two Jetcom members who dealt with this issue in their interviews agreed with these formulations. Finally, the issue of the new constitutional order and the implications of judicial independence for the (judicial) workplace were not dealt with in the discussion group at any stage. This was in contrast to the approach of the Jetcom members and of the senior magistrate, Adderley in the Brussels focus group discussion.

#### **4.5 Design, implementation and content of the peer learning initiative**

This discussion of the kwaZulu-Natal peer learning initiative will consider how the Jetcom members designed the peer learning initiative, focusing on its location within the structures and relations of authority in the district courts, the ways in which the Jetcom members envisaged it functioning and the content of the learning programmes.

##### *Design and implementation of the peer learning initiative*

Nash, a research participant had indicated (see section 4.3.1) that the principle of judicial independence meant that it was necessary to establish a, “... corporate training facility and it was important for uniformity’s sake to do this through the cluster structure, which had been created as a governance structure for the

magistracy”. I understand Nash to mean that a corporate training facility is an institution that is separate from the executive and under the control of magistrates. Nash explains that establishing the corporate training facility through the cluster structure means that uniformity can be achieved in the province.

Young, another Jetcom member, in response to a question about the magistrates being required to attend sub-cluster meetings said, “Well, yes normally they would. Any sub-cluster meeting. ... [And] normally the situation would be that we would designate a date and the magistrates were asked to keep their courts clear on that day and everyone was to attend that”. Young confirms that sub-cluster meetings are compulsory and in the smaller towns, magistrates who sometimes work on their own in a court would travel to a sub-cluster meeting at least twice a year. In the larger towns, senior magistrates responsible for a family or a civil court section have approached the issue in different ways. Crosby explains, “Everyday, in the morning, there is a peer learning meeting every day. They come here at quarter to eight .They even sign a register because it’s a meeting”. Macartney, a senior magistrate responsible for a section in a large court explains a different practice, “We time our training sessions for the last Friday of each month. ... . We normally meet from two to half past three”.

Nash mentions that the reason for the introduction of the peer learning initiative through the cluster structure was to ensure uniformity. While that might have been a consideration the cluster structure, as the governance structure for the magistracy has the authority to hold individual magistrates to account, whether through compulsory sub-cluster meetings twice a year or more frequently. The senior magistrate in the sub-cluster or section is responsible for maintaining certain standards in the judicial work and therefore has the authority to monitor the performance of individual magistrates. The peer learning initiative was designed with these formal relations of oversight and authority in mind.

Jetcom members were sensitive to the formal authority of the sub-cluster heads and the chief magistrates. Young explains,

Well, that's where we started off. ... The first workshops we had, we targeted the cluster heads. To explain to them exactly what peer learning is about and how it is supposed to work. ...because if they don't buy into it, you are not going to get anywhere else with it. So we initially started off with the chief magistrates and with the senior magistrates....And when they bought into it, then only after that did we have follow up workshops...

(Interview Young)

Young's emphasis on achieving the "buy in" of the chief magistrates and the senior magistrates who headed sub-clusters recognises the formal relations of oversight and authority of these managers in relation to other magistrates. A condition of the effective and sustainable implementation of the peer learning initiative was the "buy in" of the chief and senior magistrates.

The combination of the formal authority of the chief and senior magistrates and the practice of compulsory attendance of either sub-cluster or section meetings provided the Jetcom with the basis for implementation of the peer learning initiative and its sustainability in the longer term. Jetcom members had particular objectives in mind with regard to the numbers of magistrates they hoped to reach.

It is through critical reflection on the earlier mentoring project that Young explains the goal of reaching "every single magistrate". Young, in his interview elaborates on the assessment of the Justice College mentoring project implemented between 2003 and 2004. In summary, Young argued that the mentoring project was an improvement, to the extent that there was a greater reliance on the expertise of experienced and skilled magistrates whose court experience was current and extensive. However, the magistrates who potentially needed their guidance did not necessarily know the mentors. Secondly, the systems put in place to monitor and evaluate the mentoring project were not effective and it was hard to determine how and whether magistrates used the mentors (Interview Young).

The problem with mentoring was that it was a countrywide thing. Peer learning we tried to implement on a provincial level. The other thing was that mentoring was a voluntary thing... Whereas, what we were trying to do with the peer learning was that we were trying to get the guys, all of them, everyone, every single magistrate, we tried to involve in the peer learning....Because in every single area cluster, you would have a meeting where mostly every single magistrate, would attend where you discussed a certain issue. So it was more structured, it was more aimed at getting every magistrate involved and by doing that you could tap into more resources. Because now, you wouldn't only have one or two guys who are experts but there's lots of magistrates who know a lot of things ... which they could teach other people.

(Interview Young)

### *Content of the peer learning initiative*

Jetcom members envisaged that the peer learning initiative would deal with particular aspects of judicial work. Although the members raised different aspects, there was some measure of agreement on the priorities, notably practical aspects not taught at universities such as judgment delivery and preparation (Interview Stills), sentencing (Interview Crosby) and case flow management (Interviews Crosby, Nash and Harrison).

Stills prioritises 'judgment delivery' as a core aspect of the work of a magistrate and then explains that formal lectures are not the appropriate method through which to learn the skill. Instead, experienced peers, having achieved recognised positions in the hierarchy of the magistracy or judiciary are the appropriate facilitators of such learning. The emphasis, in contrast to the approach followed at Justice College is on the 'practical' and the learning is facilitated by practitioners who have achieved their expertise primarily because of their accumulated *institutional* knowledge and experience as signalled by their status in the hierarchy.

University education and training is recognised to the extent that it is theoretical however, another essential aspect of becoming a magistrate is "being taught the ropes" (Interview Crosby). Magistrates therefore need guidance to sentence an offender and avoid the sentence being declared incompetent. In singling out sentencing, Crosby follows an approach similar to Stills who prioritises 'judgment

delivery'. Where that guidance or socialisation process is lacking, there is a possibility that despite a magistrate applying the procedure correctly, the sentence may be 'incompetent' and therefore invalid.

Crosby, as indicated above (section 4.2), focused on the need for magistrates to improve service delivery as a reason for the implementation of the peer learning initiative. According to Crosby, effective caseload management is central to the ability of magistrates to improve service delivery and therefore, "When we address various roles, this has to do with case flow management. But in case flow management we also need to be judicially-educated" (Interview Crosby). Harrison and Young, confirm Crosby's view of the centrality of case flow management while Nash indicates that formal training in case flow management was new for 'most magistrates' who did not believe that they needed training on how to manage a court. Nash appears to be sympathetic to the magistrates holding this view, explaining that in order to persuade these magistrates to agree to participating in the training on case flow management, he and the other Jetcom members had to 'utilise those individuals' by saying that they were not the targets of the training but the facilitators.

Case flow management, like sentencing and writing and delivery of judgments falls within the sphere of judicial work and is distinct from the work that other legal practitioners perform. The production of caseload management manuals (Interview Crosby) and workshops in all the regions of kwaZulu-Natal (Interview Harrison) imply a formalisation of an area of judicial competence that magistrates previously understood as developing through experience. Jetcom members or senior magistrates tend to facilitate workshops on case flow management thereby strengthening the authority of the Jetcom and the hierarchy within the magistracy.

Crosby describes one form which the peer-led socialisation of newly appointed magistrates can take:

Sometimes we even ask newly appointed magistrates to sit with an experienced magistrate in court, just to observe because in a few days, down the line, you will be all alone, facing the audience there with experienced attorneys who will quickly realise this person doesn't know what he's doing and once you lose confidence, you will not deliver justice. You must always have that confidence. You have to make rulings during the proceedings when people object. Either you uphold an objection or you rule it out. ... It is quite lonely but you must do the right thing. So, through peer learning you build this confidence in him and the knowledge and the skill that goes with it. That's what it should be.

(Interview Crosby)

In emphasising the emotional and psychological dimension of the performance of the judicial role, Crosby goes beyond the content of the peer learning initiative, touching on the dimension of the professional identities of magistrates. However, the example raises questions about the understanding of peer learning as a reciprocal relationship, in terms of which peers engage critically one their practices. The example does not indicate when and how the newly-appointed magistrate would engage with the 'old timer' and indeed whether there is the possibility of critiquing the 'old timer's' practices and assumptions.

Jetcom members tended to confirm the centrality of case flow management in relation to the content of the peer learning initiative. However, Young and Harrison indicated that the peer learning initiative was designed and implemented with a broad range of professional development needs in mind. Harrison explains, "I've had a magistrate addressing the management [within the sub-cluster] on childcare issues, on domestic violence". Young elaborates, "... there's really nothing outside of peer learning. New legislation, other issues that become a problem, old issues can be raised again".

The presentation and reflection of the views of participants on the design and implementation of the peer learning initiative in kwaZulu-Natal has illustrated the centrality of knowledge in analysing developments within a profession, specifically in relation to disciplinary knowledge and the associated identities of professionals (Beck and Young, 2005). With the peer learning initiative, the Jetcom demarcated specific judicial competencies as critical for 'service delivery'

namely, “confidence”, judgment writing, sentencing and case flow management (compare Rosen-Zvi, 2001). The Jetcom members reflect, in part, the potency of market-oriented government policies on research and education and training that have called for the greater accountability of professionals (Beck and Young, 2005) because, in this instance they prioritised the service delivery dimensions of judicial work.

In concluding this discussion of the content, design and implementation of the kwaZulu-Natal initiative, it is noted that the peer learning initiative emerged because of a critique of the Justice College Short Courses and the more recent mentoring project. The Jetcom members criticised the theoretical emphasis in Justice College courses, noting that the courts were dynamic with new knowledge constantly produced in practice. The Justice College lecturers were not in practice and their knowledge was not up to date. Some participants considered the recent Justice College mentoring project an improvement to the extent that there was a greater reliance on the expertise of experienced and skilled magistrates whose court experience was current and extensive. However, one problem was that the magistrates did not necessarily know the mentors. A second problem was that monitoring and evaluation procedures of the mentoring project were not effective and it was hard to determine how and whether magistrates used the mentors. Jetcom members thought that peer learning afforded them the ability to reach “each and every magistrate” in the province and to do so more frequently and intensively in comparison to other forms of professional development provision.

#### **4.5 The influence of ‘race’, gender and culture in the design and implementation of the kwaZulu-Natal peer learning initiative**

The history of the magistrate’s courts in South Africa sketched in chapter one showed that the identities, skills and judicial decision making of *landdrosts* and magistrates have been shaped by their role within the broader social and

historical processes of modern South Africa. Historically, *landdrosts* and magistrates tended to make decisions that protected the interests, successively of slaveholders and the owners of farms, mines and factories. Therefore, the peer learning initiative is discussed from the perspective of the legacy of apartheid-era judicial education. This part of the findings explores the influence of 'race', gender and culture in the Jetcom peer learning initiative.

Jetcom members, in their reflections on the peer learning initiative sometimes referred to the historical legacy of the imposition of cultural and religious beliefs. Crosby, in the next extract describes how one magistrate imposed his religious beliefs through his judicial work.

...I learnt that a certain magistrate, he was an old magistrate, would go to criminal court, ... and then when he reached the conclusion of the case, he would quote from the Bible. Now, as you know, some people don't believe in Christianity. They may be Muslims, this might sound as an insult. ... Some people want to pray on certain days. We try to accommodate that, you see. Some people want to go to circumcision schools. You must organise leave for them because it's their culture. So social context issues are very important, not only in terms of our interaction with each other but also in court.

(Interview Crosby)

According to Crosby, quoting from the Bible in court is exclusionary because it does not acknowledge beliefs other than Christianity. Crosby continues his reflection on the implications of the history of racism for the implementation of the peer learning initiative.

We've got decided cases in which judges took judicial notice of certain factors, wrongly in our view. For instance, to say that black people can see in darkness. It's wrong. Coloured people drink and stab one another for no apparent reason. It was wrong but it was the view of the judge. You know, he had taken judicial notice of it. ... We can take judicial notice of things around us but that was a wrong one. And regarding Indian people as fraudsters. So then, if he appears before you, you already feel ...it looks like this on ... he must be convicted. It teaches you, in other words, social context, which is diversity. It teaches you to begin on a clean slate. Don't have stereotypes about people. ... Your race is not a problem anymore because we teach this social context programme to people.

(Interview Crosby)

Crosby refers to the practice where judges in the Supreme Courts (now High Courts) would make rulings on social and cultural assumptions pertaining to people categorised in particular ways. These rulings would then become authorities for magistrates in the district and regional courts. The practice of "judicial notice" originates in the English common law system and in its

application in the racist context of South Africa produced the injustices that Crosby describes, injustices that were compounded by the influence of “legal positivism” on magistrates and judges. Crosby then explains that education on social context issues is part of the peer learning initiative. Macartney, a senior magistrate who is not a Jetcom member explains that with regular peer learning activities there is an integration of diversity and cultural issues with the application of substantive law (Interview Macartney).

As indicated above (section 4.2) the initial Jetcom members were all men. Three of the Jetcom members responded to the question, “How or why has this mainly male group of magistrates engaged so energetically with peer learning as an approach to the professional development of magistrates?” The extracts below indicate their responses.

I don't think the issue of gender is really a problem for most of us. ... Maybe we would all like it if there were more female magistrates but there aren't. We don't appoint them. They are appointed by the Magistrates' Commission. We don't really have any say on who gets appointed and who doesn't. A lot more have been appointed since then but I think we all realised that the whole situation has changed. You can't work with this top-down thing anymore. ... And to get away from that, this whole idea of peer learning was sort of an answer to an existing problem that nobody really wanted to address...

(Interview Young)

Young confirms that “the issue of gender” is not really a problem for most of the Jetcom members, that is, the Jetcom members are not opposed to gender equality. Young explains that Jetcom is not responsible for the lack of female magistrates instead, the Magistrates' Commission appoints magistrates and, “A lot more have been appointed since then ...” Young then re-states his view on how peer learning was introduced to replace the “top-down” approach because the new Constitution breaks down the hierarchical relationships between magistrates. In fact, peer learning, “...was sort of an answer to an existing problem that nobody really wanted to address”.

Perhaps the wording of the question, in referring to the composition of the group as “mainly male” produced a defensive response because of the heightened sensitivity to public scrutiny and criticism of magistrates and their work (see

chapter one, section 1.2). Young defends the record of the Jetcom. In all this, the intention of the question, which was to explore the enthusiasm and energy of the Jetcom members in their design and implementation of the kwaZulu-Natal peer learning initiative, was lost.

Harrison was the second Jetcom member to respond to the question, “How or why has this mainly male group of magistrates engaged so energetically with peer learning as an approach to the professional development of magistrates?”

*Ja*, the fact that we're predominantly male has nothing to do with us, hey. It's because we really really and truly were unable to get any females aboard. But we have now succeeded in getting some of them on board. Not on Jetcom as such but in actions initiated by the Jetcom, like for instance the provincial civil committee that's been brought to our .... We've got two ladies there. ...I don't know whether we've had a lot of success but we ... If I listen to what people in the rest of the country have to say about Jetcom ... to a certain extent we did have success. The thing that we certainly have had success with is our publication *Emantshi* and there once again ...we are all males. But that is because there were simply no females available ...

(Interview Harrison)

Harrison is immediately defensive in his response to the question, and like Young, explains that the predominance of males was not by design.

Discussions of group representation in public institutions such as the magistracy can be difficult and emotionally charged, especially when the participants are directly involved. Perhaps Harrison's response is indicative of these difficulties. There are difficulties on other levels too. In South Africa, the drive to transform public institutions is a constitutional requirement. The requirement has to be met in the context of extending and enhancing “service delivery” through public institutions that are dependent on competent professionals such as magistrates. The level of competence of professionals is a result of advanced education and training and relevant exposure and experience. Historically white men were the chief beneficiaries of such educational and career development opportunities (see chapter one, section 1.4). Therefore, when Harrison explains that they, “... were unable to get any females aboard,” he brings into focus the historical factors accounting for the composition of the Jetcom.

The minutes of the meetings of the kwaZulu-Natal Jetcom between February 2007 and April 2009 (Jetcom 2007 a; Jetcom 2007 b; Jetcom 2008; Jetcom 2009) indicate that one female magistrate attended the meetings. Most of the magistrates attending the Jetcom are senior magistrates and sub-cluster heads. This means that there are no women who are sub-cluster heads and it is probable that no women have been appointed to such a position in kwaZulu-Natal since 1996. Therefore, to the extent that the Jetcom leadership followed the formal hierarchical lines of authority, they were unable to increase the participation of women on the Jetcom.

In the next extract, Nash in response to the question, “How or why has this mainly male group of magistrates engaged so energetically with peer learning as an approach to the professional development of magistrates?” explores the significance of greater representation of women in the professional development of magistrates.

I'll address the male dominance which in itself was part of the historical challenge. ... And incrementally there was a more visible appointment of women magistrates through the Magistrates' Commission. .... that of course lent itself to a more diverse type of approach or focus on training. There was a ...how could I say, an immediacy of understanding of vulnerable groups such as children and women, domestic violence, maintenance, children in conflict with the law ....

(Interview Nash)

Nash, in contrast to Young and Harrison does not react defensively to the question about the predominantly male composition of the Jetcom. Nash notes the Magistrates' Commission appointed more women and that, “lent itself to a more diverse type of approach” that resulted in, “an immediacy of understanding of vulnerable groups such as children and women”.

‘Race’ and gender appear to have shaped the peer learning initiative in different ways. Jetcom members are sensitive to the continued racism and sexism of their colleagues and the potentially destructive effects of racist and sexist practices in judicial decision-making. At least one Jetcom member has recognised the importance of continual professional development activities to deal with overt and

covert racism and sexism, focused on the principled recognition of the values of diversity and equality. Jetcom members are aware of the importance of women magistrates participating in the design and implementation of the peer learning initiative but appear not to have integrated the full implications of such participation in the development of judicial education that is representative and expressive of many different voices and views.

This chapter has focused on the meaning, for the judicial officers of their experience of the peer learning initiative. I have attempted to interpret their understandings of the rationale for implementing the initiative, the Jetcom members' design of the initiative, their views on peer learning as a means of professional development and the 'race' and gender implications of the initiative. Chapter Five attempts a critical analysis of the peer learning initiative, concentrating on whether the kwaZulu-Natal peer learning initiative transcends apartheid-era judicial education.

## **Chapter Five: Transcending apartheid-era judicial education?**

Chapter Four discussed the findings of the study in terms of the motives of the Jetcom members for the peer learning initiative and three themes, namely the design, implementation and content of the peer learning initiative; the interpretations of peer learning; and the influence of 'race' and gender in shaping the peer learning initiative.

Jetcom members gave three different reasons for initiating the peer learning initiative, namely improving service delivery; re-orienting district court magistrates, now recognised as having judicial independence; and providing appropriate and effective professional development for magistrates.

Participants articulated two interpretations of peer learning. The first interpretation regards peer learning as sharing between colleagues who are at the same level and have the same responsibilities under the Constitution. The second interpretation of peer learning equates peer learning with training for less-experienced magistrates.

In their design and implementation of the peer learning initiative, the Jetcom members reflected on the provision of judicial education through Justice College and identified several limitations, including the relatively academic approach of Justice College. In addition, one Jetcom member commented on the unsystematic nature of the recent Justice College mentoring project. The Jetcom identified the comparative advantages of the peer learning initiative, considering peer learning applicable across a range of topics and areas of skills development, particularly problems that directly affected performance of magistrates such as case flow management and judgment writing.

'Race' and gender are implicated in the motivation, implementation and response to the Jetcom peer learning initiative. The discussion of the findings on 'race' and

gender explored research participants' accounts of the contemporary relevance of diversity in judicial work. Secondly, participants described attempts to engage magistrates on how to integrate an appreciation of social and contextual issues in judicial decision-making. Thirdly, Jetcom members explained their approach to the representation of women in the magistracy and the participation of women in the peer learning initiative.

In this chapter, I will respond to the question posed in chapter one:

Has the kwaZulu-Natal peer learning initiative transcended the legacy of apartheid-era judicial training?

In doing so, I will reflect on the peer learning interpretations and practices that emerged; analyse the significance of the design and content of the peer learning initiative in its contemporary and historical context; and evaluate the professionalisation implications of the peer learning initiative.

### **5.1 Peer learning interpretations and practices**

Until 1993, the Department of Justice shaped and controlled the professional development of magistrates. Through Justice College as the provider of judicial education, the Department of Justice reinforced legal positivism. It could be argued that the inscription of “banking education” (Freire, 1993) into the design of the learning process could have had the effect of forestalling and suppressing critical thinking about the implications of discriminatory and oppressive laws. The didactic methods in the Justice College short courses were the foundations of apartheid judicial education. In their embrace of peer learning as reciprocal learning and sharing between equals, the Jetcom members are directly or indirectly rejecting apartheid judicial education.

Chapter Four showed that the Jetcom members have interpreted peer learning, overall, to refer to sharing between equals. The new constitutional order requires each judicial officer to consider all matters in the light of the Constitution and this implies that all magistrates and judges are equal. Jetcom members recognise and uphold the value of collegiality. They have been concerned about building the relations between colleagues based on sharing and producing new knowledge.

In some cases, there are indications of transformation in educational practice with regard to the role of peer facilitators. For example, Stills recognises that the group has to decide on the content of the learning and that they have to participate in shaping the process of the discussion and the generation of knowledge while Harrison explains that he is the facilitator and not the content expert. In contrast, most of the senior magistrates in the Brussels focus group assume that they impart knowledge to their less experienced colleagues. Few, if any of the Brussels focus group appeared to understand the concept of peer facilitation, but what is evident from their contributions is that they perceive that power is unequal. There is an assumption that the senior magistrate is not on the same level because of her different status and greater experience.

Several participants in The Hague focus group indicated a preference for “soundboarding” either face-to-face or at a distance. Central to some of the contributions was the question of trust. Participants were clear that they were involved in reciprocal peer learning relationships. I think that they fully expected magistrates to switch roles in terms of alternatively seeking and providing advice.

When I relate these findings to the literature on peer learning, it seems that magistrates involved in the kwaZulu-Natal peer learning initiative still need to explore the full range of theoretical and practical resources available on peer learning. The Jetcom members have not used the notion of the reciprocal peer learning relationship to design essential aspects of the peer learning initiative.

For example, I believe that it is entirely possible to motivate for the extension and elaboration of the already-existing peer learning relationships that currently exist in the form of “soundboarding” as The Hague focus group members described.

The magistrates involved in the peer learning initiative have also yet to consider and integrate ideas on peer learning as collegiality (Boud, 1999) into their practice. Emphasising peer learning as collegiality could build the culture of positive critique that appears to be lacking. Related to collegiality, are the resources on professional identity, engaging with feelings in the context of professional work and exploring professional boundaries with peers (Phelan *et al*, 2007, pp. 419 – 420). All these processes could enhance the capacity of magistrates to reflect on practical judgments and situations in which there is a breakdown of foundational assumptions, frameworks and professional tools in practise (Phelan *et al*, 2007, pp. 420 – 421).

Research participants such as Stills, Young and Nash explicitly recognise the power dynamics between magistrates but argue that magistrates are equal. Most of the senior magistrates in the Brussels group hold the opposite view. The Hague focus group is opposed to peer learning activities in which senior magistrates engage in public criticism of the work of colleagues. The strategic use of perspectives on the “peer dynamic” (Eisen, 2001, p. 39) might enable magistrates to address these issues more effectively in the implementation and support of peer learning groups because of the emphasis on voluntary participation and the absence of hierarchy and evaluative feedback in the peer learning relationships that Eisen (2001) promotes.

In conclusion, the kwaZulu-Natal peer learning initiative appears to have the potential to disrupt the didactic traditions of apartheid judicial education and transcend that legacy if magistrates focus more closely on the processes and quality of peer learning relationships and deal frankly and honestly with the power differentials implicit in peer learning relationships.

## 5.2 The significance of the design and content of the peer learning initiative

The Jetcom members' reasons for introducing the peer learning initiative speak to the apartheid past and to the present situation. Firstly, the constitutional requirement of judicial independence of magistrates provided the Jetcom with the space to develop the peer learning initiative. The kwaZulu-Natal Jetcom understood that judicial independence meant the development of a form of judicial education that the magistrates shaped and controlled. Secondly, the Jetcom members critiqued the Justice College as a judicial education provider because of the perceived distance of its lecturers and its curriculum from courtroom practice. Thirdly, a concern with "service delivery" has meant a focus on the performance of magistrates.

These motivations informed the design and content of the kwaZulu-Natal peer learning initiative. The Jetcom used the structures and relationships of authority that held magistrates accountable for their performance to design the peer learning initiative because they ensured the "buy-in" of the chief magistrates and the sub-cluster heads. The rhythms of the magistracy, specifically the regular sub-cluster or section meetings informed the process and content of the peer learning initiative. Having located the peer learning initiative within the rhythms and accountability structures of the magistracy, the Jetcom was able to access the resources available to magistrates in terms of meeting venues and time-off from court work.

The content of the peer learning initiative focused on judgment delivery and preparation, sentencing and case flow management. Each of these aspects is focused on the performance of magistrates, and tasks specific to this judicial role and not shared by other legal practitioners. However, several participants pointed out the broad applicability of peer learning in dealing with diverse topics. The facilitators of the peer learning activities tended to be experienced magistrates or judges of the Constitutional Court or Court of Appeal (Interview Crosby).

The design and content of the kwaZulu-Natal peer learning initiative is significant because the Jetcom members have forged judicial education practices that depart from the Justice College / Department of Justice “template”. First, magistrates shape and control the peer learning initiative, rather than politicians or bureaucrats. Second, the magistrates (and judges) design and facilitate the peer learning activities, rather than lecturers who are “not sitting in court daily” (Interview Young). Third, the peer learning initiative has enabled Jetcom members to focus on the specific judicial role and respond to the broader and diverse professional developmental needs of magistrates. In these respects, it appears reasonable to suggest that the peer learning initiative has transcended the legacy of state-controlled, theoretically inclined apartheid judicial education.

### **5.3 The kwaZulu-Natal peer learning initiative: A professional project?**

Larson (1977, p. 6) explains that the goals and strategies implemented by a particular group need not be entirely clear or conscious for all the members or even the leadership. Historically, magistrates have been considered to have low status (see chapter one) while judges enjoyed considerable prestige under apartheid. Judges were considered well-educated and their competence was unquestioned. By 1990, only two white women had been appointed as judges in South Africa and the rest were white men, drawn from the foremost advocates who were generally appointed at a time in their careers when they were established and usually very wealthy. Judges were esteemed under apartheid even though there was significant evidence that they were complicit in the operation of discriminatory laws (see section 1.2.4) partly because of their ability to use their wealth, knowledge and their social status within the racist and patriarchal social system as resources to leverage influence, honours and material rewards. Judges continue to enjoy considerable prestige in democratic South Africa and the study has shown that some of the research participants (Nash, Lennon, Macartney and Crosby) are aware of the need for magistrates to emulate judges. It could be argued that the kwaZulu-Natal peer learning initiative

is a critical component of the emulation of judges and the achievement of a “parity of esteem”. The study has shown that peer learning emphasises collegiality as a value and as a practice. Collegiality is associated with judges both in South Africa and in the USA (Serron, 1988). Peer learning generates many and varied opportunities for professional development and can play a critical and formative role in the development of an informed and well-educated magistracy. Therefore, it is possible to interpret the kwaZulu-Natal peer learning initiative as part of the ‘continual efforts’ on the part of an occupation to ‘defend, maintain and improve its position’, that is a ‘collective mobility’ project that has as its aim the emulation of judges.

Secondly, the Jetcom members’ focus on judgment delivery and preparation, sentencing and case flow management appears to provide some evidence that Jetcom members are making a claim for ‘cognitive exclusivity’ in judicial work though not in terms as explicit or categorical as that of the Israeli judiciary in the 1980s and 1990s (Rosen-Zvi, 2001). However, the limitations of space in thesis requirements did not allow for an examination of a range of materials relating to the kwaZulu-Natal peer learning initiative. These materials include the minutes of the Jetcom meetings, official circulars on peer learning activities and judicial education more generally, records of email and other correspondence between magistrates taking the form of peer exchanges and outlines of peer learning workshops. Research on the peer learning curriculum design and implementation could be a potentially productive line of inquiry in future.

Thirdly, the study has shown that the peer learning initiative is part of an effort to upgrade and protect the skills of magistrates in the context of the critical public scrutiny of magistrates and their work. The Braamfontein and The Hague focus groups agreed with Crosby, the Jetcom member on the improvement of service delivery as a motivation for the peer learning initiative. This suggests that there is a readiness for the “ordinary” magistrates to engage in peer learning activities and thereby forge relationships with the elite or leadership of the kwaZulu-Natal

magistracy. As an elite, the Jetcom members have positioned themselves to reach and connect with “every single magistrate” (Interview Young) in order to lead other magistrates and to raise and protect standards of professional work.

In closing, the study has provided some basis for the view that the kwaZulu-Natal peer learning initiative represents at the very least a disruption of the traditions associated with apartheid judicial education and the forging of new, potentially transformative practices.

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## Appendix 1

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Faculty of Humanities

### CONSENT FORM

Title of research project: The understandings and experience of peer learning in the professional development of magistrates / magistrates in kwaZulu-Natal district courts

Student researcher: Name: Anthony Sardien

Supervisor: Dr Linda Cooper

Department/research group address:  
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Name of participant:

Nature of the research

This is a qualitative research study on the understandings and experiences of peer learning in the professional development of magistrates / magistrates in kwaZulu-Natal district courts. The researcher interview members of the Joint Education Committee and arrange focus group discussions with magistrates who have participated in various peer learning activities. The research study is in partial fulfilment of the requirements of the M. Ed. degree in Adult Education.

Participant's involvement:

What's involved:

- a) The researcher will interview the participant for seventy-five minutes about her or his understanding and experience of peer learning activities in the context of her / his work as a magistrate (magistrate). The researcher will ask the participant's permission to make a sound recording of the interview and take notes during the interview.

OR

- b) The participant will join some of her or his colleagues in a focus group discussion for sixty minutes on their understandings and experiences of peer learning activities in the context of her / his work as a magistrate (magistrate). The researcher will ask the participant's permission to make a sound recording of the focus group discussion and take notes during the group discussion.

Risks:

The anticipated ethical issues partly relate to one of the limitations of peer learning in professional development. Firstly, a magistrate's participation in a peer learning activity could

raise questions about personal competence. Secondly, as a research participant reporting on peer learning experience/s, a magistrate may have concerns about the disclosure of information relating to tensions and conflicts around the micro-politics of the court, competence, performance and the relationships with the leadership and management of the courts.

**Benefits:**

Participants will have the opportunity to reflect upon her or his own learning and professional development and contribute, through the publication of the research findings, to the development of judicial education in South Africa.

**Costs:**

There are no costs involved.

**Payment:**

The participant will not receive any payment.

- I agree to participate in this research project.
- I have read this consent form and the information it contains and had the opportunity to ask questions about them.
- I agree to my responses being used for education and research on condition my privacy is respected, subject to the following:
  - I understand that my personal details may be included in the research
  - I understand that I am under no obligation to take part in this project.
  - I understand I have the right to withdraw from this project at any stage.

Signature of Participant: \_\_\_\_\_

Name of Participant: \_\_\_\_\_

Date: \_\_\_\_\_

Signature of student researcher: \_\_\_\_\_

Name of student researcher: \_\_\_\_\_

Date: \_\_\_\_\_

## **Appendix 2**

### **Interviews**

'Braamfontein' Focus Group, 20 July 2009

Magistrate 'Young', Jetcom member, 20 July 2009

Magistrate 'Lennon', Jetcom member, 20 July 2009

Magistrate 'Stills', Jetcom member, 21 July 2009

Magistrate 'Crosby', Jetcom member, 22 July 2009

Magistrate 'Nash', Jetcom member, 22 July 2009

Magistrate 'Macartney', senior magistrate, 22 July 2009

'Brussels' Focus Group, 22 July

'The Hague' Focus Group, 24 July 2009

Magistrate 'Harrison', Jetcom member, 24 July 2009

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