The future of the magistracy

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Since 1957 the author has rubbed shoulders with magistrates; for a number of years as articled clerk and attorney and later for twenty years as advocate (though infrequently as a senior), and the last twenty years as a judge. He was involved with them professionally on a daily basis through the automatic review procedure interspersed with bursts of criminal appeals and for the five years prior to 1999 intimately with their aspirations, administration and ethical conduct as chairman of the Magistrates Commission.

I have been asked by Jeremy Gauntlett SC to set out my thoughts on selecting and regulating magistrates and on a future dispensation for them. I shall recall some history, point to pitfalls, attempt to predict the future and propose some changes.

The main criticism against the judiciary in the years prior to 1994 was that it was not independent of the executive. It was pointed out that magistrates were public servants and as such were under the control of the government. This criticism was valid. I know of no direct instruction pertaining to the outcome of cases and doubt that there was one. Indirectly there would, however, always have been the consideration that a too negative view of government policy might jeopardise promotion or trigger a transfer.

Even before the advent of the new South Africa the validity of this criticism was recognised. The Magistrates' Act 90 of 1993 effectively aimed to curb the control of the Department of Justice over the magistracy. A commission was established to ensure that the appointment, promotion, transfer or discharge of, or disciplinary steps against, magistrates take place without favour or prejudice and to ensure that there would be no influencing or victimization of magistrates. Henceforth disciplinary proceedings were conducted by the Magistrates Commission, which also screened candidates for appointment or promotion and heard complaints by magistrates. The commission of eleven members was chaired by a judge and consisted of two regional court presidents, two chief magistrates, a representative of the Magistrates' Association (also a chief magistrate), an advocate, an attorney, an academic, the head of Justice College, and the Director-General of the Department of Justice. There were therefore no politicians and the control of the magistracy was in the hands of the profession itself, as it should be.

The status of the Magistrates Commission was thereafter assured in the Interim Constitution 200 of 1993 which determined in section 109 that there shall be a magistrates commission established by law to ensure that the appointment, promotion, transfer or dismissal of or disciplinary steps against magistrates take place without favour or prejudice, and that the applicable laws and administrative directives in this regard are applied uniformly and properly, and to ensure that no victimisation or improper influencing of magistrates occurs.

As Act 90 of 1993 was a RSA act the Magistrates Commission at first only had jurisdiction over the (white) magistrates of the old RSA. I perceived at close hand the difficult process of integration of the judicial administrations of the former "homelands" and TBVC states with those of the old RSA. After the integration of the eleven departments of justice existing at the birth of the new South Africa the total judiciary of the lower courts fell under the jurisdiction of the Magistrates Commission.

Pandora's boxes

This opened up new vistas and many Pandora's boxes. Decades-old grievances by magistrates of the former black areas about promotion or the lack thereof were brought to the commission. In disciplinary proceedings others, fearful of a negative decision, used as shield the allegation that the commission was not representative of the racial and gender composition of the country as a whole.

The criticism of its composition was true of course. (Only one chief magistrate was black and there was only one woman and that only later.) Therefore the commission itself requested the minister to reconstitute it in order to make it more representative of the demographics of South Africa and to give more junior magistrates representation. This entailed some legislative amendment to the Magistrates' Act. The politicians, however, grabbed the opportunity and brought about a drastic reconstitution of the commission, against the advice of the commission itself. They put themselves on board and whereas one representative of each of the advocates' and attorneys' professions had been more than adequate, there now had to be two of each because the National Association of Democratic Lawyers (NADEL) and the Black Lawyers Association (BLA) also clamoured for representation. Thus the dictates of sound administration were overshadowed by political considerations. The commission became a body dominated by politicians and so bloated as to be unmanageable. It now has 29 members of whom only six are magistrates. As against that there are 13 politicians or political appointees. This was a retrograde step. The administration of justice was not served thereby.

I drafted a code of conduct for magistrates and battled for its acceptance, as without it misconduct proceedings would flounder. Many magistrates held the view: judges do not have a code, why should we? Now judges are about to get a code and most of the ethical rules laid down in the code of conduct for magistrates are incorporated in it. This point of difference, which was in any event illusory as judges had an unwritten code, will fall away. Some regional magistrates complained that the existence of a code of conduct and discipli-

nary procedures impinged upon their independence. I failed to see their point.

The Association of Regional Magistrates (ARMSA) was unco-operative towards the Magistrates Commission. It could see no need for both a Judicial Service Commission and a magistrates commission because those concerned were all judicial officers. They overlooked the fact that the commission was the watchdog of their new- found independence and needed their full support.

It transpired that in the former black areas departments of justice had acted dictatorially vis-a-vis subordinate and subservient magistrates – leaving a festering distrust on their part. Auxiliary services were weak, sometimes non-existent. Magistrates had a lack of motivation, court proceedings lacked discipline, and the work rate and its standard was unacceptable. This was the general picture. Of course there were exceptions of well-motivated and capable magistrates doing their judicial work under difficult conditions.

This legacy of our past will not disappear overnight. The remedy lies in rigorous enforcement of professional and administrative discipline and vigorous, intensive and sustained on the job training programmes. This will be costly and will have to be an ongoing effort. Expertise is not acquired cheaply. There must be the political will to invest in the future of our judicial system and no baulking at the cost. The problems are in the lower courts. That is where our attention should be directed.

Training

Who is to do the training? We do not have the manpower in the magistracy for this daunting task. The capable serving magistrates have their hands full with their day-to-day tasks. Academics are incapable to give this eminently practical instruction. So are foreign jurists. But we have a forgotten and hitherto untapped reservoir of very experienced retired magistrates who left the bench too early because the financial package offered upon early retirement was attractive, or because they were fed up with the incessant accusations that the judiciary had no legitimacy, or because their legitimate promotional expectations were thwarted. Many of them will be more than willing to share their expertise with those in need of training, provided we make it clear to them that they are still needed and are respected for their expertise.

They must be employed on a part-time basis where there is need for practical training, preferably in the area where they reside in order to curtail expenses. They must sit in court and advise the presiding officer on whatever crops up: admissibility of evidence, to keep his cool and shut up , how to handle difficult practitioners, how to evaluate evidence, how to write a judgment, how to deal with a judge's query on review, etc. In short, for say a fortnight, the trainee will have his or her personal mentor. In addition this mentor can give lectures to the rest of the judicial staff on practical legal subjects.

This exercise must be controlled and monitored by Justice College, which can provide additional lectures or printed material where required.

We must grasp this opportunity to advance the administration of justice. The return on this investment will be a vast improvement in the quality of justice and an increased confidence in our system.

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Qualifications

The appointment of magistrates is a contentious issue. The subject can be divided into eligibility criteria (qualifications) and merit criteria (competence, fitness and affirmative action). I shall only touch upon qualifications and affirmative action.

The legal qualifications are set out in sections 9 and 10 of the Magistrates' Courts Act 32 of 1944. They are for regional magistrates a *baccalaureus legum* degree or the Public Service Senior Law Examination or its equivalent and for district magistrates the Civil Service Lower Law Examination or its equivalent. The *baccalaureus legum* degree has recently been reduced from a five year to a four year course. There has thus been a lowering of standards. There is a body of thought that is not content with this but seeks to scrap the regional court qualification and equate it with that of a district magistrate. Their reasons are not professional aimed at retention of standards, but political aimed at the upliftment of black magistrates. This is not the forum to debate the wisdom of the approach. I must, however, point out that the regional courts have attained their present eminence through rigorous adherence to high standards attained after a difficult course at Justice College and intensive trial period for prospective candidates. The standard of our regional courts was not raised overnight. It took many years and the excellent input of Justice College to attain it. It would be irresponsible and shortsighted to squander what has been attained. A recent decision by the Magistrates Commission to support the scrapping of this requirement is to be deprecated.

Even the minimum legal qualification for district magistrates is under attack. Some argue for the adoption of a vague qualification ambiguously called "appropriate qualification". At a recent meeting of interested parties convened by the Magistrates Commission these proponents were not prepared to spell out what an appropriate qualification is. It must be emphasised that a clear minimum qualification set out in the statute is a sine qua non for the avoidance of arbitrary appointments that compromise the standards of our judiciary. The fallacious argument that the Constitution in section 174(1) merely refers to appropriate qualification when dealing with judicial officers and that a statute that goes further and lays down a minimum qualification is therefore unconstitutional, conveniently forgets that the Constitution merely lays down the ground rules for more specific statutes on the topic. The section also requires that appointees be fit and proper persons. This does not mean that this precludes further more explicit statutory definition.

Section 174(2) of the Constitution requires that the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial appointments are made. This provision has to be complied with. But it does not require or even envisage a lowering of standards to attain that end.

Affirmative action

This raises the issue of affirmative action in the appointment of magistrates. When this is discussed the steam of the debate around com-

petence versus potential tends to obfuscate the true point of departure. It is that the public are entitled to and demand justice of sound quality, irrespective of the race or gender of the judicial officer. An appointee who has the potential to make the grade in five years time is not fit and proper to hear cases here and now. One does not allow a first-year medical student to extract one's appendix. One should not be required to submit one's liberty to the judgment of an underqualified judicial officer. It is clear, therefore, that before the potential of a candidate can become relevant a minimum competence must be demonstrable. That is the competence to function adequately as a magistrate. It follows that potential can only become a makeweight where a choice is to be made between competent candidates. Thus stated, there is no tension between the two concepts.

Review system

A peculiar feature of the judicial office in the high courts is that the left hand has no knowledge of what the right hand does. Sitting alone one may act like a monkey or deliver a moronic judgment without one's colleagues knowing about it. We act in sound-proof compartments and only those judgments that go on appeal are subject to criticism by our peers. And even then there is little feedback. There is therefore no constructive criticism and therefore no self-improvement. A bombastic and illogical judge will remain so, obliviously enclosed in a bubble of self-esteem.

In this respect the magistracy has an invaluable advantage above the High Court. It has the automatic review system of section 302 of the Criminal Procedure Act 51 of 1977 whereby the more important criminal judgments of district magistrates are reviewed by high court judges. Thousands of reviews are scrutinised annually by high court judges who regard this daily diet as an irksome but necessary duty. It must be stated unequivocally that without the surveillance and control of the automatic review procedure the constitutional principle of a fair trial will be jeopardised. The knowledge that the High Court will review the proceedings acts as a brake upon judicial extremism and the High Court judgments and comments (not always disapproving) act as on-the-job training which in my experience is indispensable to junior magistrates.

This procedure is under attack from two sides. Magistrates for whom the bell tolls (often those who need it most) object to the control and surveillance, saying that judges are not subject to the same restriction. The answer is that judges have (presumably) more experience than magistrates.

The strongest attack is launched by the Department of Justice from time to time. The last one was in 1999. The argument is always that it is costly to transcribe the records and that by scrapping the system that cost can be saved. This argument is fatuous. It ignores the fact that training is provided to junior magistrates gratuitously by highly experienced High Court judges at only the cost of the record and that by this means the constitutional right to a fair trial is enshrined. In fact the automatic review system is the most cost effective system imaginable. It has been in place for decades. It started in 1856.* It is functional. Except for some regional delays in transcription it functions adequately. It has brought about the release of many who were unjustly or incorrectly convicted. It may not be diluted or abolished. It is one of the pillars of our criminal justice system of which we are justly proud.

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Independence

There is a further attack upon the magistracy. It is an insidious one directed at its independence. This is nothing new. The judiciary is often the prey of the administrative or legislative arms of government who wish to bend the judicial process to their liking. A recent example is the substitution of section 14 of the Magistrates Act 1993 by section 7 of the Magistrates Amendment Act 66 of 1998 which provides that the minister may after consultation with the Magistrates Commission make regulations conferring on or assigning to magistrates administrative powers and duties (which do not affect their judicial independence). The Magistrates Commission proposed (and was supported by the minister) that this section provide that such regulations be enacted in consultation with the commission. This would entail that the magistrates (through the commission) at least had control over the duties imposed upon them by the department. This the parliamentary committee expressly refused to do. The effect is that the Department of Justice can now impose duties upon magistrates contrary to their wishes and to the wishes of the Magistrates Commission. The latter does not even have the final say whether such duties do or do not affect the judicial independence of magistrates. It is against such attempts at control and inroads upon judicial independence that the legal profession should be vigilant.

A unified judiciary?

Should there be a unified (single) judiciary? The magistrates have been clamouring for this for years. Their view is that should every judicial officer be called judge they will attain the status of a judge and their salary structure will have to be linked to that of judges.

The call for a unified judiciary is therefore not one for the abolition of lower and higher courts and the creation of one type of court but as I see it a call for unity in name, administration and control. This entails that the Magistrates Commission has to be abolished with the Judicial Service Commission undertaking its tasks. When regard is had to the fact that there are more than 1 580 magistrates, the Judicial Service Commission will be faced with a daunting task. For example, during my period of office we dealt with 479 complaints against magistrates of which 124 proceeded to misconduct inquiries. We made recommendations in respect of four regional court president and special grade chief magistrate posts, 17 chief magistrate posts and 64 senior magistrate posts. Innumerable applications for appointment as district magistrate were processed. In the first semester of 1998 alone 2 994 profiles were prepared for the Departmental Utilization Committee and 266 applications for promotion posts and 82 applications for appointment as regional magistrate were dealt with. In the light of

* Cf 1962 *SALJ* 267; *S v Letsin* 1963 1 SA 60 (O) 61B-H; *S v Mboyany en 'n Ander* 1978 2 SA 927 (T); *S v M* 1989 2 SA 798 (W); *S v Mafikokoane* 1991(1) *SACR* 597 (O) 598j-600c; Hiemstra *SA Strafproses* 5th ed 770.

these statistics it is clear that the Judicial Service Commission will be flooded should it undertake this task as well.

If the intention is merely a change of name to bring about a change of status it must be remembered that status goes with a job as does salary. Junior magistrates will never have the same status as the chief justice. If all judicial officers are henceforth called judge, in practice differentiation will soon evolve with descriptions like high court judge and lower court judge or regional court judge and we will be back to square one. Linkage of the salary structure to that of judges can be attained without jettisoning the name magistrate which has been around for more than hundred and fifty years and, despite what some ignoramuses say, has a status in the community.

Yet there is merit in a call for a unified administration. Our problems and grievances vis a vis the department are generally speaking the same. The cause of the magistrates will be better served should the chief justice be their spokesman.

The magistrates' courts are the interface between the public and our justice system. That is where 90% of the work is done. That is where the mistakes are made. That is where admiration is earned and respect is lost. In my view the magistrates' courts are the most important cog in our judicial machine. Their administration and their grievances call loudly for our immediate attention.

I do, however, advocate an administrative reorganisation on a different plane. In quality and nature the work of the regional court does not differ much from that in the high court's criminal sections. In quantity the work of the regional courts surpasses that of the high courts. The cases of the former are as complex as those of the latter. There is no reason for a differentiation. Some regional court magistrates are as capable and more experienced than high court judges. In my view the civil and criminal courts of our land should be split and regrouped into two main divisions - on the one hand criminal courts consisting of lower, regional and high criminal courts and on the other hand civil courts consisting of lower, regional and high civil courts. Judicial officers will specialise in either criminal or civil law. Criminal appeals must be heard by the criminal division and civil appeals by the civil division.

Prospective judicial officers should choose a career in either the civil or the criminal courts, start young and at the bottom, and, if capable, rise to the top. On the criminal side there will be little if any need for the introduction of extraneous judicial personnel at high court level. On the civil side this will be necessary for many years to come, but will create no problem as the civil division will be much smaller than the criminal division. I envisage no problem in attracting senior civil law practitioners of high standing to the civil bench where the spectre of criminal trials, reviews and appeals for which they have no enthusiasm does not haunt them.

This division between civil and criminal courts will obviate the complaint that magistrates cannot be promoted to the High Court bench because of a lack of experience in civil work. It will also open the door for many black criminal law practitioners who suffer from the same deficiency. There will be specialisation in either the criminal or the civil law. There will be horses for courses, not donkeys in the Durban July. The days are past when it can be expected of judicial officers to be all-rounders and especially of high court judges to have specialised knowledge of the law on taxation, intellectual property, insolvency, expropriation, water, and motion court practice and the criminal law.

This division will be beneficial in the following respects. Magistrates will be promoted from the ranks and will not have an artificial ceiling above them (caused by their lack of knowledge of the civil law and procedure). Judicial officers, experts in civil law, patents, etc will not be under-utilised in criminal courts and on criminal appeals. Civil magistrates who are good at that job will no longer need to switch to the regional criminal court in order to attain promotion. Expertise will no longer be squandered in courts where it is not needed.

At the head of the criminal division must be the most senior judge in that division and at the head of the civil division its most senior judge. Call them president if you like. They will head separate administrations not controlled by the Department of Justice. In those provinces like the Northern Province where a high civil court is not warranted it can notionally be instituted and manned by judges on loan from another division when necessary. Or better still, some provinces can be combined in the same civil division. Overall one supreme court of appeal can be retained to maintain uniformity of the law.

Is the scenario sketched above too far fetched to contemplate? I submit not. Our judicial system is under tremendous stress. Any remedy to alleviate its malfunction must be given serious consideration. 🕮

Other comments by judges

We have also received comments on the White Paper from Judge W G Thring of the High Court, Cape Town. Judge Thring states in no uncertain terms his opposition to the proposed changes in the manner in which judges are addressed, the creation of a single, unified judiciary, and the mooted accountability of judicial officers to the Judicial Services Commission.

In his comments on the Discussion Paper on Transformation of the Legal Profession Judge KR McCall of the Natal High Court, expresses support for the continuing function of the Bar as an independent referral profession, and the placing of the so-called "independent Bar" under the control of existing Bar Councils. He also calls for greater communication between all branches of the legal system, and argues that there is not a great deal wrong with the basic structure of the SA legal profession. 🕮