

The South African Judiciary's Homeless Majority

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Abstract

The overwhelming majority of the South African judiciary is located in the lower courts with magistrates comprising over ninety per cent of its judicial officers. Until their separation from the public service in line with constitutional command that all courts are judicially independent,ⁱ magistrates were employees of the executive government's Department of Justice. However the move to the judiciary proper and subsequent acknowledgement of their status as public office bearersⁱⁱ alongside judges did not translate to substantial and material autonomy either as a special category in the judicial hierarchy or integration with the existing higher court judicial system. This paper examines the anomalies, paradoxes and difficulties giving rise to the extraordinary circumstances of magistrates more than 20 years after being moved out of the public service to judicial service without a "home".

Introduction

The Migration from Executive Authority towards Judicial Placement

The word 'migration' when it applies to people connotes a process of movement over a long period of time. Indeed there is a long history that the South African justice system inherited from the United Kingdom's institution of lay magistrates and Justices of the Peaceⁱⁱⁱ leading to the present status of judicial officers for magistrates presiding over lower courts. The judicial system in South Africa, as those of a number of other Commonwealth countries^{iv}, adapted the institution of the magistracy according to local political circumstances over a period of time after gaining sovereignty. Gradual but substantial changes occurred in the lower court judiciary of England itself which saw the incorporation of paid magistrates into the traditional judicial hierarchy^v. Similar developments took place in Australia.^{vi} The integration of magistrates into lower courts in the mainstream judicial hierarchy internationally is representative of the professionalization of the occupation of magistrates associated with their legal qualifications, judicial skills and the need for the judicial sector as a whole to be judicially independent. Whilst the parallel evolution, development and integration of the magistracy and the judiciary took place in most developed jurisdictions naturally and largely seamlessly, the transition in South Africa has been halted and there it remains in a state of inertia from 1993 when the Magistrates' Act 90 of 1993 was passed. The justifiable expectation of magistrates to be incorporated into the mainstream judiciary after severance of ties with the executive with the concomitant benefits was denied fulfilment as not only are lower court judicial officers not accorded substantially better benefits in keeping with those of judicial officers of high courts but all benefits and entitlements that they previously enjoyed as public servants were forfeited. Hence in the present odd position of belonging in judicial territory but not welcome in it they suffer considerable discrimination on an individual level and compounded at institutional level by their adjudicative independence constantly exposed to threats internally and externally.

This article first tracks the progress of magistrates both at district and regional levels as they migrate from their public - servant home where they do not or no longer belong towards their gradual ascendancy to the status of judicial officers in the generic category of public office bearers but

stopping short of arriving at their judicial destination. Further the article examines the evolution and developmental path to professional judicial status with qualifications and skills similar to, sometimes even exceeding, those of newly appointed High Court judges. The professionalization of lower court capability enabled magistrates to competently manage the considerably greater judicial responsibility they were tasked with as their criminal and civil jurisdiction limits were increased many fold. The increased judicial responsibility also implies more exacting standards of accountability of judicial officers throughout the judiciary. The article further offers an evaluation of the equitability or lack thereof of the strenuous conditions that have been created out of the demand for uncompromising independence, high standards of accountability and great judicial responsibility but without the accordingly just and suitable reward. The conclusion entails a discussion of the foreseeable challenges to affording all judicial officers the status and concomitant benefits of judges. But it argues that after the decades - long journey of development in judicial dispute resolution and judicial decision – making there should be no lawful impediment in principle for magistrates to be incorporated into a single judicial system and given recognition and appropriate ranking as judges in the judicial hierarchy especially as the Constitution envisaged such a development^{vii} at the time of its adoption. The fact that the judiciary in South Africa for the most part is the magistracy, the non- recognition of judicial officers of the lower courts as judges ultimately undermines its legitimacy in the democratic state.

Historical overview of the Path to Acceptance as Judicial Officers

Lower courts are internationally judicial majorities for a host of reasons, the main ones being economy, accessibility and speed of the processes in lower courts. The case loads in the lower courts are voluminous; hence the summary nature of its processes is suited to resolving most criminal and civil disputes speedily and efficiently within the constraints of legal jurisdictional limits.

The trajectory of development of magistrates from civil servants to fully fledged judges demonstrates that democracies around the world responded to the needs of civil society to make justice not only much more accessible but also for the courts to be seen to be impartial and unbiased. While lay magistrates administered justice on behalf of the government of the day resolving all manner of simple disputes speedily and inexpensively and their case loads continued to expand, concerns arose about the impartiality and neutrality of these arbiters of justice administration deployed by executive governments. The issue of judicial independence, ubiquitous throughout the history of judicial development was the impetus for the migration of magistrates from the civil service towards their judicial destination.

The accelerated movement of magistrates from civil service to judiciary in South Africa was necessitated by the political regime change from parliamentary sovereignty to constitutional democracy. The Magistrates Act 90 of 1993 which created the Magistrates Commission^{viii} was the first legislative provision giving the magistrates courts, in principle, judicial status and lower court judicial officers independence in accordance with the principles of constitutionalism and separation of powers set out in the Interim Constitution of 1993 and the final Constitution of 1996. In practice and in reality though magistrates' courts and magistrates as judicial officers remained civil servants in effect and still under the control of the executive institutionally and personally. The Magistrates Commission was vested with powers, inter alia, to ensure that magistrates' conduct on and off the bench was monitored and misconduct disciplined^{ix}. However no substantive measures were enacted

or implemented to tangibly protect the judicial independence of magistrates or guard against its threats. Act 28 of 2003 (Judicial Officers' Amendment of Service Conditions Act) ended the status of magistrates as civil servants when they were given recognition as public office bearers and entitled to be remunerated, as opposed to salaried, in terms of the Independent Commission for Remuneration of Public Office Bearers Act 92 of 1997. This move held much promise for the final separation of ties with the executive for the magistracy in terms of independence and concomitant benefits on a scale related to the remuneration of High Court judges. However, not only did the break from the civil service fail to produce any material benefit for magistrates it placed them in the invidious position of being unable to access the improved benefits of civil servants since they now were public office bearers, no longer civil servants. An anomalous situation, also arguably a constitutionally untenable one, has been allowed to arise ironically after the "elevation" of magistrates to status of public office bearers but now bereft of representation on any forum established in their interests in addition to denial of the security of tenure guaranteed to judges. A failure or neglect of the various Ministers of Justice to promulgate the necessary regulations related to remuneration, benefits and service conditions has severely disadvantaged magistrates over a prolonged period, portending negative implications for judicial independence. The issue of remuneration, other benefits and service conditions of magistrates will be dealt with further in a following paragraph. It suffices to mention here that non - integration and non - acknowledgement of magistrates as judges goes beyond denial of title and status and continues to substantively prejudice magistrates, threaten independence and ultimately weaken judicial legitimacy.

The Magistrate/Judge Dichotomy

The South African judiciary having inherited its court structure in the main from the United Kingdom continues to grapple with the issues of the distinction between the Magistrate's Courts and the High Courts even though any semblance of the historical link between South African magistrates with lay magistrates of England has all but disappeared. The on – going, persistent debate gains added momentum as the differences between judicial function in the Magistrates Courts and High Court becomes narrower and the jurisdictional capacity of Magistrates courts increases steadily. The perception generally in legal circles and society at large is that of the relative inferiority of magistrates to judges as Morne` Olivier observes:

Today magistrates are still not regarded as highly as judges. This lack of esteem is due in part to a perception that magistrates perform less important work than judges, have lesser qualifications and experience and are less competent...^x

The ingrained perception of inferiority may be traced back to the time when no professional legal qualification was required for appointment to the lower court bench. Magistrates were appointed mainly from the ranks of public prosecutors who served as such for several years and in addition received training through Justice College administered by a government department which was also responsible for the training of all other court personnel. The association of magistrates solely with the public service without experience working in private legal practice advanced the perception that magistrates were executive minded even if some were legally qualified. Shaking off negative perceptions proved to be additionally difficult owing to the fact that magistrates were indeed public servants appointed and employed by the executive government until recently.^{xi}

The constitutional era ushered in a transformational phase throughout all functions of state: the judiciary was no exception in being required to change radically. Constitutional recognition of magistrates' courts as a part of the judicial system with judicial authority signalled institutional separation from executive authority in so far as adjudicative functions of magistrates were concerned.^{xii} Since then such significant changes came about in the character, function and values of the lower courts that it can be argued justifiably that the magistrates courts have not only embraced transformational principles in day to day judicial functioning, but developed and evolved as a professional and powerful entity representing the judiciary at the level where most court users interact with it. Morne Olivier's view of the status and value of the magistracy is expressed in this statement;

But in fact as a result of the continuous expansion of the jurisdiction of the magistrates' courts magistrates are increasingly performing more complex adjudicative functions that are on par with those of judges. Magistrates wield significant power and hear an estimated 95 per cent of cases that come before the courts. Indeed the administration of justice would collapse without them.^{xiii}

Therefore to describe the magistrates courts as the backbone of the judiciary will not be an exaggeration not only because of the sheer volume of the case load at these courts of first instance but also the high levels of judicial responsibility magistrates are expected to shoulder every court session as presiding officers. There are considerable demands on judicial officers in lower courts to issue orders, make rulings and hand down well-reasoned judgments quickly, correctly and fairly. A fact that is often overlooked and taken for granted when assessing the value of magistrates in the efficient operation of the judicial system is the constitutional role they constantly engage in to ensure that no miscarriage of justice results for litigants, accused persons, complainants or victims especially when the legal representatives, conducting cases in the lower courts are inexperienced as they often are. In these instances the weight of responsibility of the magistrate increases to even more onerous levels.

The notion of magistrates in South Africa being less qualified than judges is neither in theory or practice based on facts. All magistrates are required to have basic professional legal qualifications and training in legal practice for a number of years before being considered as properly qualified for appointment to the lower courts as judicial officers. In this respect in theory at least there is parity between qualifications of magistrates and judges in that section 174(1) of the Constitution, requiring that all Judicial Officers be fit and proper and appropriately qualified for appointment at any level of the judicial hierarchy.

Any argument that seeks to differentiate between the magistrates and judges of the High Court on the basis of lesser or greater complexity required in the nature of cases, judicial skills or general required, is likely to flounder for several reasons. These reasons differ between the district magistrates' courts and the regional magistrates' courts.

Most civil disputes and criminal prosecutions are dealt with and disposed of summarily in the district courts at the first and only point of contact and experience with the justice system. The summary nature of proceedings in magistrates' courts is its primary and essential characteristic that enables judicial officers in the vast majority of instances to process large volume of cases, promptly, diligently and efficiently. In addition to resolving every matter strictly in accordance with procedural,

substantive and constitutional legal requirements district courts are required to exercise substantial judicial discretion in making most rulings, orders and decisions. Although most cases are disposed of summarily, a large number require full pre – trial and trial hearings as well detailed well – reasoned rulings and judgments.

The jurisdiction of district courts both criminal and civil has increased considerably in recent years. The civil courts money claims jurisdictional limit is currently R200 000. The criminal jurisdiction limits are fines up to R120 000 and imprisonment not exceeding three years for one offence. The severity of the sentence can increase many - fold where offenders are sentenced for multiple crimes by district courts. These basic jurisdictional limits do not factor in the competence of district magistrates to impose longer terms of imprisonment or higher fines for offences committed under specific statutes. For instance the maximum term of imprisonment that can be imposed by a district court for an offence under the National Road Traffic Act is nine years imprisonment^{xiv} and for an offence under the Drugs and Drug Trafficking Act ^{xv}twenty five years imprisonment. District courts hear most bail enquiries including those destined for indictment in the Regional or High Court.

In so far as the regional courts are concerned, criminal jurisdiction was extended to ten years imprisonment more than fifty years ago. Jurisdiction in criminal cases increased at a rapid pace since South Africa became a constitutional democracy. The basic maximum sentence is 15 years imprisonment. However minimum sentences legislation requires regional magistrates to impose minimum sentences for certain crimes where they find no substantial and compelling circumstances. For instance regional magistrates are competent to impose life imprisonment for crimes such as aggravated murder and aggravated rape.^{xvi} Minimum sentences legislation has all but closed the criminal jurisdictional gap that once existed between regional courts and High courts.

Section 309(B) Act 51 of 1977 confers on lower courts the authority to decide applications for leave to appeal of criminal convictions and sentences for all cases except where the sentence is life imprisonment or where section 84 of the Child Justice Act 75 of 2008 applies. In effect this provision means that no general automatic right of appeal lies against convictions and or sentences of lower courts. This authority, initially applicable in terms of section 3 of Act 76 of 1997, suspended for a brief period of time but re – introduced by the Criminal Procedure Amendment Act 42 of 2003 is in the view of Du Toit et al...

innovation which should not only be seen as a vote of confidence in the ability and integrity of the lower courts but also as a necessary precaution to protect the High Court from being burdened by unfounded appeals or presumptuous appellants.^{xvii}

Since the passing of the Jurisdiction of Regional Courts Amendment Act 31 of 2008, civil jurisdiction was conferred on regional courts empowering regional courts to preside over civil cases and divorce matters. Currently civil claims of between R200 000 and R400 000 are dealt with in regional civil courts. This development which was aimed at making justice more geographically and economically accessible has reduced the work load of the High Courts considerably. Thus in terms of jurisdiction and complexity of judicial function there is little to distinguish between the ranks of magistrates and High court judges. The only substantial difference between the lower courts and the High court is that the High court has unlimited and inherent jurisdiction^{xviii} to hear any case and it also has

autonomy to devise and administer its judicial processes while magistrates courts are created and bound by statute. The lower courts also have no jurisdiction to enquire into or rule on the constitutionality of any legislation or conduct of the President.^{xix}

Considering that the structure and processes of the South African judiciary are rooted in the British judicial system of differentiation in rank between magistrates and judges, a comparison of the trajectory of development of the magistracy within the two systems may place the dichotomy debate in its proper perspective. The only remaining similarity between the English and South African judicial institutions of Magistrates' Courts is the name and the fact that magistrates in both countries deal with the vast majority of cases that are decided in the courts of the land. The magistracy in South Africa has evolved and in the process developed in structure and function entirely differently from its erstwhile counterpart. The substantial and significant differences are best illustrated by listing them:

England/Wales Magistrate ^{xx}	South Africa Magistrate
1. Magistrates are lay persons who are unpaid volunteers	1. Magistrates are paid professional judicial officers.
2. Preside mostly together in panels of 3 for each case	2. Magistrates preside alone and make independent decisions
3. Decide least serious criminal cases and maximum sentence jurisdiction is 6 months imprisonment	3. District courts have maximum criminal jurisdiction of 3 years imprisonment. In specific instances district courts may impose prison sentences for much longer terms as prescribed by statute. Regional courts criminal jurisdiction is 15 years imprisonment but are competent to impose life imprisonment for the most serious crimes such as aggravated rape and aggravated murder.
4. Generally do not decide civil disputes, although competent to deal with certain juvenile and family court matters	4. District courts have general civil jurisdiction for claims in money up to R200 000. Regional courts have civil jurisdiction for money claims up to R400 000. Regional courts are now the primary divorce courts in the judicial system.
5. Paid professional judicial officers (previously stipendiary magistrates) presiding in magistrates courts have the title and status of "District Judge" but no extended jurisdiction when compared to lay magistrates.	5. All lower court judicial officers are magistrates with neither the status nor benefits of judges.
6. Magistrates are assisted by legal advisers	6. Judicial decisions are made by the judicial officer alone and independently.

England's judicial system with its different hierarchical structures for criminal and civil trials of first instance developed over the centuries and is rather complex compared to South Africa's. However,

the equivalent in terms of jurisdiction of district magistrates in South Africa is not the 'district judge' of England, the former being more akin to the Crown or County court judge of the latter. South African regional court criminal jurisdiction is equivalent to that of England's High Court except that regional courts have no inherent or unlimited jurisdiction or review or appeal jurisdiction.

Impliedly judicial officers appointed to preside in Magistrates courts of South Africa are judges in all but name and status. It is noteworthy that the Constitution refers to the lower courts as Magistrates courts but does not refer to the judicial officers appointed to preside in these courts as Magistrates^{xxi}. The Magistrates' Act 90 of 1993 which perpetuates the nomenclature was passed into law before the Interim Constitution of 1993 came into operation. This chronology of events may lend support for the view that the Constitutions of 1993 and 1996 left open the door for a title and or status change for lower court judicial officers. In addition Section 166(1)(e) of the Constitution which provides for the establishment, recognition or creation of other courts of status similar to High Courts or Magistrates Courts lays the basis to further the transformational goal of a unitary and integrated judiciary envisaged in sections 165 and 166 of the Constitution.

As the lower courts' judicial responsibilities increased exponentially, so too did the demands for strict accountability, exacting standards of judicial conduct and performance but little or no attention was directed towards safe - guarding judicial independence for magistrates since the Constitution was adopted. Some magistrates faced with the persistent under valuing of their important role in the functioning of the judicial system, and left with no alternative redress for the resultant prejudice, resorted to protest action^{xxii} and others brought court action^{xxiii}. Neither type of response advanced their cause but instead only served to increase their levels of frustration. The predicament that all magistrates are placed in is a cause for concern as the potential for destabilisation of the judicial system is the greatest at lower court level where the vast majority of court users interact with the judiciary.

Overview of the Effort to Improve Magistrates' Independence, Conditions of Service and Status

The establishment of the Magistrate's Commission under the Magistrates Act was the first significant and arguably the only meaningful legislative action aimed at protecting the judicial independence of the lower courts.^{xxiv} This was a clear expression of intent to separate the lower courts from legislative and executive controlled institutions and necessary step to advance the constitutional vision of transformation of the whole judiciary into an independent organ of state. The immediate effect of the establishment of the Magistrates' Commission was the introduction of a mechanism to shield magistrates from arbitrary executive action that in the past favoured or punished magistrates irregularly. The Magistrates Act also regularised the process of appointments of magistrates enabling and facilitating the demographic transformation of the lower court bench. The lower courts currently reflect the racial demographic component satisfactorily although the attempt at addressing the gender imbalance is work in progress.^{xxv} The composition of the Magistrates Commission initially was weighted in favour of the judiciary, however that changed when the membership was increased to accommodate more political interest groups.^{xxvi} This resulted in weakening the effectiveness of the institution to secure independence for the judicial component in especially the appointments of new magistrates. The first chairperson of the Magistrates' Commission Justice K van Dijkhorst observed:

The dictates of sound administration were overshadowed by political considerations. The Commission became a body dominated by politicians.^{xxvii}

The founding legislation that established the Magistrates Commission, the Magistrates Act sets out as the first objectives of the Commission:

(a) to ensure that the appointment, promotion, transfer or discharge or disciplinary steps against judicial officers in the lower courts take place without favour or prejudice and that the administrative directions in connection with such action are applied uniformly and correctly; (b) to ensure that no influencing or victimization of judicial officers in the lower courts take place.^{xxviii}

The Department of Justice and Constitutional Development perceives the main objectives of the Magistrates Commission differently. The following are the objects according to its website posting: promoting training of magistrates, advising the minister about appointments of magistrates, advising or reporting to the minister about matters of interest to parliament relating to independence and efficiency of administration of justice, and carrying out investigations and making recommendations about suspension and removal of magistrates.^{xxix} The shift in focus from protection of judicial independence to executive oversight of magistrates is evident in the latter's objectives.

The most significant early effort, albeit unsuccessful, to reduce executive power in the lower courts was the case of *Van Rooyen and Others vs. the State and Others*^{xxx}. The validity of criminal proceedings in magistrates' courts was challenged on the basis that the lower courts did not have institutional judicial independence from the state as required by the Constitution. Southwood J in the Transvaal Provincial Division ruling in favour of the applicants found that some of the provisions in the Magistrate's Act 90 of 1993 as well as the Magistrates Courts Act 32 of 1944 were unconstitutional as they were inconsistent with the principle of judicial independence and the doctrine of separation of powers. This judgment was severely critical of the Magistrates' Commission describing it as the "personal fiefdom of the Minister of Justice". However the Constitutional Court rejected the TPD findings that in the main the impugned legislative provisions were unconstitutional.

The struggle for judicial independence and improvement of remuneration, benefits and service conditions of lower court judicial officers is inextricably linked in view of the fact that security of tenure and reasonable reward are regarded universally as key features in safe – guarding judicial independence^{xxxi}. The growing disparity in the remuneration and benefits of lower and higher court judicial officers has for some time been a source of discontent especially as magistrates had to rely on the executive and legislature to adjust their salaries each year after public servants' salaries have been determined. The idea of negotiating remuneration with the Minister of Justice is inconsistent with the notion of judicial independence but if they did not they risked taking continued reduction in remuneration. Until the Amendment of Remuneration of Public Office Bearers Act which removed Magistrates from the public service and gave recognition to their status as judicial officers and to remunerate them as public office bearers like judges, magistrates had no independent representative forum. The cause for concern about the substantial differences in the basic salaries between magistrates and judges remains as the anticipated linkage of all judicial officers to a single scale did not materialise. The continued down – grading of the lower courts as their responsibilities and work load increased prompted the latest litigation by judicial officers. The Association of Regional Magistrates of Southern Africa (ARMSA) challenged the State President and the Minister on

the legality of salary determinations.^{xxxii} Once again magistrates failed to make a breakthrough as the state treasury confronted by mounting fiscal and economic challenges is unable to prioritise increased spending on judicial service.

The reduction of remuneration of judicial officers is generally perceived as inconsistent with the promotion of judicial independence^{xxxiii}. The salary of judges and security of tenure of judges in South Africa is guaranteed in the Constitution. The level of protection of the remuneration of other judicial officers is pegged lower than that of judges as magistrates' salaries can be reduced by an Act of Parliament. The state's financial circumstances sometimes makes salary reduction of judges unavoidable in which case it would be clear that the judiciary itself is not the sole target of treasury's cost cutting. Magistrates in South Africa unlike other judicial officers not only risk having their remuneration reduced by an act of parliament, there is also no mechanism in place to address the financial prejudice that results in their inability to decide their pension regime at retirement. Magistrates are all compelled by law to participate in a Government Employees Pension Fund in which they have no representation and which arguably is constitutionally untenable. Magistrates' pensions and other benefits are administered by regulation under the Magistrates Act. Since the commencement of this Act no regulation has been passed with respect to pension terms and conditions which then substantiates the argument that the laws governing Magistrates' pensions may be unconstitutional.

At the time of writing magistrates' organisations, Association of Regional Magistrates of Southern Africa (ARMSA) and Judicial Officers' Association of South Africa (JOASA), are still engaging with the Minister of Justice to address the persistent inequities that magistrates have been expected to bear with over a long time. In view of the history of unsuccessful and costly litigation magistrates have been more cautious in their approach choosing to further informally engage with administration to achieve the desired outcome efficiently. Magistrates are faced with making the difficult decision whether to pursue, piecemeal, the somewhat simpler but more urgent concern surrounding the lack of regulations on service conditions and benefits or the holistic broader long term goal of seeking complete integration into a single judicial system entitling magistrates to similar benefits as judges. Whatever the intended course of action it is likely that the elected organs as well as the higher court judiciary may raise concerns associated with complexities of securing judicial independence for the largest segment of the judiciary.

Impediments to Advancement and Recognition of Magistrates as Judges

Various factors and circumstances have prevented the integration of the magistracy into the mainstream of the judicial hierarchy not least is the notional divide between inferiority and superiority prevalent in the legal system and within the judiciary in the superior courts. The entrenched, pre – constitutional, practice of appointing judges from the ranks of practising advocates and magistrates from the ranks of public servants has created distinct classes among judicial officers and divisions that appear difficult to bridge. The constitutional call for transformation in the whole democratic state has not readily moved the judicial sector to pay sufficient heed to its largest segment, the magistracy. Pius Langa, the late former Chief Justice urged the judiciary to participate actively in the judicial transformation project.

With all this change around us, the judiciary and the courts could not remain unaffected. Since 1994, they also have had to meet the challenge posed by the demands of a

transforming landscape; they had to adjust to new imperatives, not least of which is the need for more effective delivery of justice, equally, to every person in South Africa and in a manner that is infused with the values of the new constitutional order. Quite clearly, the judiciary cannot stand aside or remain in a past that has been comprehensively disowned by the people of South Africa. The rest of the community is marching on ahead to a future 'based on democratic values, social justice and fundamental human rights'. The judiciary must not only keep pace; it must be part of the march as members of the community they serve... The judiciary is an indispensable part of democratic government and can never disengage itself or have a separate life of its own...The judiciary is a structure of the community serving a specific function within it...Quite clearly members of the judiciary may not operate as if they were in some ivory tower.^{xxxiv}

Judges' Objections to Unification

Certain judges expressed their concerns about a government initiative to align the lower courts with the higher courts when a draft discussion paper (White Paper) was issued by the Department of Justice: Judicial Policy Unit in 1999.^{xxxv} The Cape High Court judge WH Thring's comment on the 'White Paper' is particularly critical of the purported intent of executive government to establish a 'single, unified judiciary'. Judge Thring negative opinion of the 'single judiciary' plan is clearly expressed in the following statement.

Unless I misunderstand this passage, it means that the unknown author or authors of the document seek to break down or blur the distinctions between the inferior and Superior Courts of the country in as many ways as possible. This interpretation is confirmed by the statement at Page 6 of the White Paper that "There is no longer good reason for the dichotomy between judges and magistrates."... These proposals are also intrinsically subversive of the Constitution. The Constitution clearly envisages and provides for a hierarchy of courts...It is abundantly clear therefrom that magistrates' courts are to be constitutionally inferior to High Courts.^{xxxvi}

Other judges offer more measured responses to the concept of a unitary judicial system. Constitutional Court Judge Edwin Cameron points out that the system of processing of reviews and appeals and also the application of the principles of judicial precedent makes judicial hierarchy universally a common feature and practically inevitable. Indeed neither the lower court judiciary nor the Department of Justice have made any statement or claim to the contrary. Judge Cameron's further comments on the abovementioned White Paper is noteworthy.

In my view the most compelling reason for preserving the distinction between magistrates and judges derives from the independence of the judiciary. Judges are currently drawn overwhelmingly, if not exclusively, from the ranks of advocates and attorneys in private practice, and from legal academics. This serves to enhance the independence of the judiciary in two ways. First, it creates a diversity of background and experience that without doubt strengthens the Bench in the performance of its functions. Secondly, it assists in creating a frame of reference or thinking (a 'mindset') which is not government-orientated or executive-minded.^{xxxvii}

The first point by Judge Cameron about diversity in bench composition is an eminently desirable and much sought after quality in progressive judicial systems. However diversity in bench composition is a much deeper issue than the historical experience of the individual judge or the legal sector from which she or he hails. Next to ensuring institutional protection against executive interference and political control in the selection of judicial officers is the need for the judiciary to be diverse in composition. Kate Malleson emphasises the importance of diversity thus;

A more immediate and pressing rationale for change is the need to tackle the lack of diversity in the composition of the judiciary. The narrow background from which the judiciary is drawn, particularly at senior levels, has become its Achilles' heel. Almost the only fact that many people know about judges in England and Wales is that they are generally elderly, white, male barristers educated at private schools and at Oxbridge. Irrespective of whether or not the inclusion on the bench of under – represented groups such as solicitors, women, minority lawyers and disabled lawyers will have a significant effect on the decision making of the courts, the corrosive impact of their absence on the legitimacy of the judiciary is now too great to ignore.^{xxxviii}

On this matter of diversity it is important to bear in mind that in the pre – constitutional era the South African higher court judiciary was remarkably similar to the English one in bench compositions. Clearly the remarks of Kate Malleson are in substance applicable here. The point is that the High Court bench is not all that diverse yet although the Constitution envisions it. The argument that drawing for appointment to the High Court from the ranks of the magistracy will somehow threaten its diversity is not persuasive now even if it were so a decade ago. The same goes for the second point about executive – minded public servants being appointed to the magistracy. It can be said that the claim may have had merit at that time when the Constitution was still very new and the transformation process was just beginning. Now twenty years after the adoption of the Constitution the character and functioning of the lower court bench is significantly different. Magistrates are not appointed routinely and exclusively from the ranks of public servants. All magistrates are legally qualified and many come from the ranks of attorneys and advocates. Therefore it is submitted that the main cause for the concerns expressed by Judge Cameron about diversity have been, for the most part, addressed.

Judge Kees van Dijkhorst, the first chairperson of the Magistrates Commission in expressing some reservations about the need for a change of title from Magistrate to Judge, opines that the hierarchical nature of the judicial system necessitates the different titles and disagrees that magistrates do not hold significant standing in the community. Judge van Dijkhorst however is more accepting of the idea of a unitary judiciary as evident in the following comment.

Yet there is merit in the 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.^{xxxix}

The primary concern of Judges about wholesale incorporation of the lower courts into the higher court judicial system is that the weaker defence of judicial independence prevalent in the lower courts increases the likelihood of weakening institutional judicial independence higher up in the hierarchy. It is true that lower courts' independence is not as strongly protected as that of higher courts and that the higher court judiciary needs to be especially vigilant to perceptible compromise of judicial independence at upper levels. Judicial Independence though is an intrinsic element of judicial legitimacy and has universal application across all levels of courts. In principle higher courts' claim to legitimacy cannot be based on the strength of judicial independence prevailing at upper levels of the judicial system as the vast majority of the judiciary consists of the lower courts. It follows therefore that institutional weaknesses in the lower courts have significant impact on the legitimacy of the judiciary as a whole. The continued dissociation of the High Courts from Magistrates' Courts on account independence concerns since the advent of constitutional democracy lacks cogency. Judicial authority for the judicial system in its entirety will enjoy a greater degree of legitimacy by reducing the extent of executive influence over the lower courts in line with

the prevailing levels of executive involvement in High Court administration rather than insulating the higher courts from the affliction of executive influence over lower courts.

The Executive's Interest in a Unitary Judicial System

Complaints of executive control and interference in judicial functioning are ubiquitous and not unique to South Africa. Tensions between and among state organs are unavoidable and some may argue normal in the operation of a constitutional state. Judicial independence and judicial accountability are constantly counter – posed to ensure that the judiciary acts within its own domain without excessive overreach. By the same token the executive and the legislature are enjoined constitutionally to refrain from interfering in court functioning.

The initial approach to a “single judiciary” by the Department of Justice via the “White Paper” raised the spectre of an executive desirous of gaining control of the superior courts through the magistrates’ courts where vulnerability to executive influence is institutionalised.

Justice Thring’s interpretation of the White Paper on Single Judiciary strongly suggests that at the time the document was issued by the Department of Justice it was aimed at bringing the superior courts under the control of the executive.

it all smacks unmistakably of a desire to control the courts in every aspect of their work. If that is, indeed, the thinking which consciously or unconsciously underlies it, the White Paper must be approached with even deeper suspicion: for the laudable objectives which it professes to pursue, such as 'administering justice in a skilled and efficient manner' (page 3), may not be its true objectives. Its true motives may well be ulterior to these.^{xi}

Justice Thring quotes with approval the sentiment expressed by the late former judge of the Constitutional Court Justice Didcott in 1980 about the introduction of an ‘intermediate court’

It is the suspicion, rife in the ranks of both the judiciary and the legal profession, that such is indeed the case; that the establishment of intermediate courts is not envisaged as an end in itself, that it is intended to be but the means to an end; and that the end is to cut the Supreme Court down to the size the planners want it to have.^{xii}

The Supreme Court in 1980 shunned the idea of an intermediate court when South Africa was not a constitutional democracy and some superior court judges strongly opposed executive interference in judicial policy and function. Constitutionalism has since 1993 however ordained separation of powers among and between the three organs of state to the extent that tendencies to exert undue influence beyond limits of respective vested authority have been curtailed. Much has changed in how the judiciary is structured and how it is perceived by the citizenry since the advent of the Constitution and the establishment of the Constitutional Court. P M Mtshaulana General Council of the Bar 2008/2009 opined on the matter of a restructured judiciary:

We need to consider whether the country should not consider merging all the courts at the bottom (High Court, Regional Court, Magistrate's Court and so on and so forth) so that the court which emerges from that merger is a court of first instance. That court would have both civil and criminal jurisdiction and all matters, civil and criminal... The advantage of a model like this one is that it improves delivery of justice to the millions of people who appear before the lower courts and it shortens the chain for those matters which have to go to the Highest Court. From the legal profession perspective, this would put an end to the artificial distinction

or division between practitioners who appear in the Magistrate's Court and those who appear before the High Court. It would put an end to the multiplicity of rules before the Magistrates' and High Courts. It would revolutionarise the whole justice system.^{xlii}

One substantial and significant change that strengthens democracy is that magistrates' courts are vested with judicial authority in the same clause of the Constitution as that which vests judicial authority in other courts.^{xliii} It is submitted therefore that presently there is no evidence to suggest that either the executive or the legislature desires to exercise control over the High Courts in their judicial function. At this point in the evolution of the magistracy, any argument that attempts to justify the marginalisation of the lower courts from the mainstream of the judicial system is unlikely to be persuasive.

The Chief Justice Mogoeng has recently expressed his views about a unitary judicial system as follows:

the Constitution institutionalises a single judiciary but so much more needed to be done to address several concerns that affect the magistracy. The dignity of magistrates must be enhanced, their remuneration packages and employment benefits must match the enormous responsibilities they bear and significant improvement is required in the provision of the resources necessary to raise their performance levels.^{xliv}

The Chief Justice's statement leaves no doubt that in his view the Constitution envisions a single unified judicial system headed by the Chief Justice and that the Superior Court Act 10 of 2013 aims to integrate all courts under a single judicial system.

The following statement of Deputy Minister John Jeffreys during an address delivered at a Magistrates' convention suggests that the Department of Justice holds a similar view about the future of the magistracy.

'As we celebrate 20 years of democracy this year, let us reflect on the role of our judicial officers, particularly our magistrates, in bringing about change in our society, upholding the values of our Constitution and making justice a reality for our people.'... 'The term "single judiciary" would commonly refer to a process through which the magistrates' courts and magistrates are integrated to form part of a unified court system. This is what is envisaged in our Constitution. This unification is informed by the history of the judicial system which provided for a hybrid system in terms which judges enjoyed a larger degree of independence, compared to the magistrates.'^{xlv}

With the Chief Justice and Deputy Minister of Justice apparently in agreement on the notion of an integrated judiciary for similar reasons viz. to improve the administration of justice at all levels of the judiciary without compromising judicial independence, the long standing divide between these powers of state may be on the threshold of being bridged.

Shaping the Unitary Judiciary

A significant amount of restructuring of the lower courts will be required to integrate the lower and higher courts into a single unit. New legislation in conformity with the relevant constitutional provisions would need to be enacted. The primary considerations that will inform the drafting of new laws include the following:

- Judicial authority is vested in all courts

- All courts are independent
- The functions of the present Magistrates' Commission will be performed by the Judicial Service Commission including its role in appointments, judicial education, conduct and removal of all judicial officers.
- The judicial administration of all courts will be headed by the Chief Justice.

In effect the lower courts will be distinguishable by their particular geographical jurisdictions as District/ Local Courts and Regional/Provincial Courts and no longer Magistrates' Courts. Neither the hierarchical system nor the respective limits of jurisdiction needs to be altered in the new act although the Magistrates' Courts Act and The Magistrates' Act that created the Magistrates' Commission will have to be repealed.

The most marked effect will be felt in the magistracy itself. The historical association of magistrates with the executive and public service will come to an end together with the perception of bias of magistrates in favour of the state. Remuneration, benefits and security of tenure of magistrates will be brought under the control of the judiciary thus eliminating or considerably reducing executive involvement in these matters. The long term significant benefit for the judiciary in the unification of all courts is the enhancement of the legitimacy of the judiciary as the third arm of the constitutional state.

Conclusion

Magistrates in South Africa are fully qualified, trained professionals whose occupation is to decide disputes and hand down judgments. In most other jurisdictions internationally, both Common and Civil law, they are judges, given the recognition and their independence is protected as such. Judicial Officers in the magistracy in South Africa have been denied the benefits, status and independence associated with the profession of judge.

After over twenty years of being vested with judicial authority along with judicial officers of the higher courts, there is no impediment to the incorporation of magistrates as judicial officers into the mainstream of the judiciary and being given recognition for the same occupation as High Court puisne judges. Neither the civil service nor the quasi – executive Magistracy is any longer home for lower court judicial officers. The Judiciary is.

Endnotes:

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- ⁱ Constitution (SAC) S 165
- ⁱⁱ The Magistrates' Act 90 of 1993 and the Independent Commission for Remuneration of Public Office Bearers- Act 92 Of 1997 were amended to include Magistrates and Judges in the definition of 'Public Office Bearers.'
- ⁱⁱⁱ Lowndes J 'The Australian Magistracy from Justices of the Peace to Judges and Beyond' Part 1 (2000) 74 *Australian Law Journal* 509 – 581
- ^{iv} Lowndes J See note iii above at page 511
- ^v Smith B, See generally 'The role and influence of District Judges in Magistrates courts' which was a thesis submitted for the degree DPhil. University of Leicester in November 2004.
- ^{vi} Kirby M Generally 'The Ongoing Ascent of the Australian Magistracy' 2009 9 *The Judicial Law Review* 147
- ^{vii} SAC S 165 and 166
- ^{viii} Section 2 Act 90 of 1993
- ^{ix} Section 16 stipulates regulations under the Magistrates Act and provides for a code of conduct and procedures for misconduct enquiries.
- ^x See Hoexter C and Olivier M 'The Judiciary in South Africa' at page 319.
- ^{xi} See note ii above
- ^{xii} SAC S165
- ^{xiii} See x above
- ^{xiv} S 89(1)(a) National Road Traffic Act 93 of 1996
- ^{xv} S 17(e) Drugs and Drug Trafficking Act 140 of 1992
- ^{xvi} S 51 Act 105 of 1998
- ^{xvii} Du Toit et al 'Commentary on the Criminal Procedure Act' 30 – 54 2006.
- ^{xviii} SAC S 173
- ^{xix} SAC S170
- ^{xx} "Courts and Tribunals Judiciary" www.judiciary.uk.gov
- ^{xxi} SAC S 166, 170 and 174 all bear reference to Magistrate's Courts but the office of magistrate does not appear in these sections. The title judicial officer is used to describe the office of magistrate in the Constitution.
- ^{xxii} Monama Tebago *Daily Despatch* 26 September 2011 page 4 'Magistrates threaten strike action'
- ^{xxiii} See *ARMSA vs. President of Republic of South Africa and others* 2013 ZACC 13
- ^{xxiv} S 4 sets out the objectives of the Magistrate's Commission which is primarily intended to protect the independence of judicial officers in lower courts.
- ^{xxv} The magistracy in 2012 consisted of approximately 57% Black males and 38% females according to a *Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African state* issued by the Department of Justice and Constitutional development in February 2012.
- ^{xxvi} Van Dijkhorst "The Future of the Magistracy" *Advocate* 2000 First Term at page 39
- ^{xxvii} Note xxvi above
- ^{xxviii} S 4 (a) SAC
- ^{xxix} <http://www.justice.gov.za/contact/mcomm.htm>
- ^{xxx} *Van Rooyen and others vs. State and Others* 2002(5) 246 CC
- ^{xxxi} UN Basic Principles on the Independence of the Judiciary: Section iv. These principles were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of offenders held at Milan on 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
- ^{xxxii} Note xxiii above
- ^{xxxiii} Mount Scopus Standards of Judicial Independence 2.22 provides that judicial salaries, pension and benefits cannot be decreased during judges' service except as part of an overall public economic measure.
- ^{xxxiv} Langa P 'The Vision of the Constitution' 120 *SALJ* 2003 670 – 679 at 671
- ^{xxxv} White Paper on the Judicial System: Chapter on the Judiciary produced by the Policy Unit, Department of Justice, first Draft for discussion purposes only, August 1999.

^{xxxvi} Thring WH 'Comment on the White Paper on the Judicial System: Chapter on the Judiciary produced by the Policy Unit: Department of Justice. 116 *SALJ* 1999 858 - 864 at 861.

^{xxxvii} Cameron E 'A Single Judiciary? Some Comments' 117 *SALJ* 2000 141 – 151 at 150

^{xxxviii} Malleson K *Appointing Judges in an Age of Judicial Power : Critical Perspectives from around the World* at page 42

^{xxxix} Note xxvi above at page 42

^{xl} Note xxxiii above at page 863

^{xli} See note xxxiv above at page 863 where Justice Thring quotes with approval Didcott J in a 'Memorandum to the Commission of Inquiry into the Structure and Functioning of the Courts in 1980 at Pages 10 and 11 of the typescript.

^{xlii} Mtshaulana PM SC 'Changes to the Structure of the Judiciary' *Advocate* December 2008 at page 2

^{xliii} SAC 166 (d)

^{xliv} Manyati – Jele N 'Single Judiciary discussed at Judicial officer's Association of South Africa AGM' *De Rebus* March 2014 at page 8.

^{xlv} See note xl above at page 9