

MAGISTRATES DESERVE A SEAT AT THE TABLE RESERVED FOR THE JUDICIARIES OF AFRICA WITHIN THE COMMONWEALTH.

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## INTRODUCTION

The Judiciaries of Africa within the Commonwealth have a decentralized judicial system. The two main layers are the Superior Courts which ordinarily are comprised of the Courts of Appeal (sometimes called the High Courts) as well as the Supreme Courts of Appeal and the Constitutional Courts on one hand, and Magistrates' Courts on the other, which ordinarily are comprised of the Regional Courts and District Courts. In other jurisdictions, like Botswana and South Africa, there are Traditional Courts as well. The Magistrates' Courts have limited appellate jurisdiction and are ordinarily courts of first instance. In countries like South Africa, district courts hear appeals from the judgments of the traditional courts. The main difference between the Regional Courts and the District Courts are that Regional Courts are intermediate courts dealing with slightly more serious matters with a higher penal and monetary jurisdiction. In some jurisdictions, Regional Courts have the same jurisdiction as the High Courts in divorce matters. The main distinguishing feature is that they have no appellate jurisdiction. They have jurisdiction similar to the High Courts in imposing life sentence and can do all cases that can be dealt with by the High Courts of Appeal except treason in criminal matters.

## AFRICA'S COLONISED JUDICIAL SYSTEM

The greatest, most prominent and outstanding colonial heritage for Africa's courts and judicial system is that the courts have different statutory and operational controls. The Superior Courts have significantly more control over their own matters including

procedural, administrative and judicial. On the other hand, magistrates were not truly recognized as part of the judicial authority and were largely dealt with as an extension of the public service, regrettably including by the Superior Courts. The constitutional provisions for the administration of judicial functions of all courts may be set out as the responsibility of the Chief Justices. These provisions pale into insignificance when they fail the litmus test which reveals the exclusion of Magistrates in governance issues, with no reasons provided for such omissions.

The bodies established for the governance of the Judiciaries ordinarily have functions which include making representations to Parliament on matters which affect courts and the Judiciary. These significant policy making powers and functions are generally exercised without the representation of the Magistrates. The representative thrust in those bodies is made doubtful thereby. It is impossible to then talk about a single Judiciary of a country under the circumstances. There is no representation from all levels of the Judiciary (*Comments of the Democratic Governance and Rights Unit, University of Cape Town to JOASA (2019) on the Report by the Committee on Institutional Models* commissioned by the Office of the Chief Justice, South Africa). By extension, it is difficult if not impossible to locate the Magistrates within the Judiciary.

There are often various Fora established by the Chief Justices, but conspicuous by absence is a Forum of the entire judicial system for all the courts of a country. Put differently, whereas one may find fora within the horizontal layers of the courts, there is generally no Forum for the vertical decentralized hierarchy of the courts of the judicial system. There is often no committee of the judicial system to establish guidelines for the response of all the courts and the judicial system to and during a national challenge or even a disaster. For instance, Covid-19 disaster caught a significant number of the Judiciaries in their silos and unprepared.

What is in essence the Superior Courts Fora, are often deemed and called Heads of Courts meetings. These fora established Committees that make decisions for the entire Judiciary and determined the interactions between the Judiciary on one hand and Court

Administration, Parliament and the Executive on the other on matters which affect all courts. These are significant policy making powers and functions which are exercised without the representation of the magistracy and are not responsive to the needs of magistrates and the challenges they experience. It must be said that the bulk of cases are dealt with in the magistrates' courts. The magistrates' courts are the port of entry for most cases, and generally deal with the poorest of the poor within a country who seek access to justice.

The results of the neglect of magistrates as part of the Judiciary manifest and show clearly in resource provisioning within the Judiciaries. Judges of the Superior Courts have secured parking, security conscious buildings, ushers and personal secretaries, functional libraries and researchers. The system is conducive for their production of quality judgments and the development of their jurisprudence and constitutional ideals of their countries. Magistrates on the other hand, often struggle to get the appointment of key and critical court support personnel like court interpreters and clerks of the court including often on already approved and funded court establishments. The libraries are often obsolete because of editions that are out of date and virtual libraries inaccessible because of unpaid subscription fees to service providers.

## AFRICANISATION OF AFRICAN JUDICIARIES

The governance and administration of all courts which excluded Magistrates severely compromised the value of the achievement of equality by Magistrates within the courts and judicial systems of these countries. The establishment of the office of the Chief Justice meant nothing for the magistracy as magistrates have been left behind in consideration as the Judiciary. This mischief need to be remedied by a deliberate decision and action to include the Magistracy in governance issues in the administration of the judicial functions of all courts and the judicial systems of Africa. In this way, our courts and judicial systems would give recognition of the Magistrates as part of the Judicial Authority.

The concept of a single judiciary, on one hand, denotes the implementation of policy and legislative measures that are necessary to establish a unitary court system that consists of courts with appropriate jurisdiction to enhance access to justice. On the other hand, this notion denotes measures that are necessary to unify the judiciary, in particular, to bring the magistracy which was historically part of the civil service, under a single unified judiciary. (Discussion Paper prepared and presented by Advocate Lunga Siyo, a member of the Johannesburg Bar, titled *Institutional Independence of the Judiciary: Towards a Single Judiciary*, on 27 July 2019 to the Annual Conference of the JOASA (Siyo, 2019)). A single judiciary would enhance and advance judicial independence of magistrates in Africa. It would help magistrates, as part of the Judiciary, to uphold the rule of law.

The Executive Authorities, generally vested in the President of a country, would continue to exercise their authority together with other members of Cabinet by implementing national legislation in line with their country's constitution. They would do this under an environment which acknowledged that the development and implementation of national policy and co-ordinating the functions of state departments and administration, must respect the independence of the Magistrates as part of the courts in which the judicial authority is vested and whose independence should be protected.

## CONCLUSION

The voice of the current generation of magistrates in the commonwealth in Africa is calling for the true recognition of magistrates as part of the judicial authority of all these countries. Magistrates cannot continue to largely be dealt with as an extension of the public service. Those called to the Office of Chief Justice in these countries at this time, should uphold the mandate of their generation, and not betray it, by decolonizing Africa's courts and judicial systems, and to Africanise them.

This include taking responsibility for the administration of judicial functions of all courts in a country, and extends to allowing participation of the Magistrates in the life of and as a constituent part of the Judiciaries of their country. They have a responsibility to deliberately and unapologetically set an agenda for a single judiciary in their term of office or during their lifetime. Africa deserved nothing less from its sons and daughters. Magistrates are at the coalface of the delivery of judicial services. They ensure that the greater population of these countries in the commonwealth has access to justice. Magistrates need a sense of identity and a reality of belonging to the Judiciary. Africa, within the commonwealth countries, deserves a judicial authority vested in all courts, whose judicial officers are independent and whose courts uphold the rule of law.