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The Future of the Magistracy

Justice Worldwide

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Some lessons from New Zealand? Noel Cox writes

Origins and Development of the Magistracy

In 1195, Richard I appointed *custodes pacis* ("keepers of the peace") to deal with those accused of breaking the "King's Peace". Their primary task was to maintain civil order. They eventually gained the authority to try the people they arrested and the office of justice of the peace was established by the Justice of the Peace Act 1361. Although the lay magistracy is unlikely to disappear its future is increasingly uncertain.

Stipendiary magistrates (now District Judges (magistrates' courts)) began to be appointed from about 1740 onwards in London and other areas where the system of lay justices seemed deficient. [See, generally Seago, Walker and Wall, "The Development of the Professional Magistracy in England and Wales" (2000) Crim LR 631-651. For an interesting account of the early history of stipendiaries see Bartle, "Historical origins of the stipendiary magistrate" (1995) 159 JPN 126]. As the calibre of lay justices improved in the 19th and early 20th centuries, fewer stipendiaries were needed. This trend was reversed in the late 20th century. Between 1970 and 2000 the number of full-time provincial stipendiaries rose from 11 to 47. A related development was the emergence of acting stipendiaries (now deputy District Judges (magistrates' courts)). The number of acting stipendiaries rose from 66 in 1991 to 148 in 2000.

Although lay magistrates have always greatly outnumbered their professional colleagues, the work done by the latter is extremely important. The 1996 Venne Report claimed that stipendiaries made a particularly valuable contribution in relation to cases involving procedural issues, public safety, extradition, public interest immunity applications, complex points of law or evidence and other matters. The Report then went on to recommend that such work should not be done by lay justices when stipendiaries are available. Research commissioned by the Home Office and Lord Chancellor's department suggests that their caseloads are skewed towards the "heavier work" and that "many lay magistrates are wary of what they see as the asset-stripping consequences of employing stipendiaries. Why, they ask, should they volunteer to give so much of their unpaid time to this public office if they are deprived of the opportunity to hear interesting cases likely to engage their intelligence?"

Recent Changes

The jurisdiction of magistrates has expanded considerably over the past few decades. In essence, crimes have been downgraded. Offences such as burglary which were once triable only on indictment are now triable either way. Former either way offences such as common assault are now triable summarily. New offences tend to be summary only or triable either way. The increased use of fixed penalties for minor summary offences is a related development. There has been a radical shift of work to magistrates' courts (a shift that is likely to continue). These courts therefore have to deal with an increasing number of serious and complex cases. At the same time, civil jurisdiction has been weakened -- magistrates had significant civil jurisdiction, such as licensing applications, although these functions were mostly removed from them under the Licensing Act 2003 and transferred to local authorities. The magistrates now act in licensing matters only as an appeal court from the decisions of the local authority.

Professor Andrew Sanders has argued for a three-tier criminal court system.

"In the bottom tier, stipes would deal with the least contentious business. In the second tier, mixed panels [of Judges and lay justices] would deal with contested cases and either-way sentencing cases. The third tier would remain, as now, Judges and jury, with defendants being able to choose jury trial in either-way cases. In this system JPs would rarely, and perhaps never, sit without a stipe. Thus, like juries, JPs would need little or no training. Also, if stipes were to hear most cases, JPs would sit far less often than now". [Modernizing the Magistracy' (2001) 165 JPN 57.]

A different three-tier system was proposed almost 10 years ago by Sir Robin Auld:

"The Crown Court and magistrates' courts should be replaced by a unified Criminal Court consisting of three Divisions: the Crown Division, constituted as the Crown Court now is, to exercise jurisdiction over all indictable-only matters and the more serious 'either-way' offences allocated to it; the District Division, constituted by a Judges ... and at least two magistrates, to exercise jurisdiction over a mid-range of either-way matters of sufficient seriousness to merit up to two years' custody; and the Magistrates' Division, constituted by District Judges or magistrates, as magistrates' courts now are, to exercise their present jurisdiction over all summary matters and the less serious either-way offences allocated to them" [Review of the Criminal Courts of England and Wales (2001) ch.2, Introduction, para.5.]

The *Auld Review* envisaged a subordinate role for lay magistrates in the District Division.

In theory, magistrates would share responsibility when deciding questions of fact. Questions of law and sentencing would be reserved to the District Judges. In reality, the position of justices would easily be marginalised by such a reform.

"The magistrates with the District Judge will help decide on verdict where the defendant pleads not guilty. They will have no say on the procedure or case management of evidence. They will have no role at all where the defendant pleads guilty, which will be in the majority of cases as it is now, and they will have no say in regard to sentencing. What experienced magistrate would volunteer to be a perpetual winger with clipped wings!" [Block, "Trial by Jury" (2001) 165 JPN 165-166. See also the letter of Brian Willett JP, "Sitting alongside District Judges" (February 2001), 57(2), *The Magistrate*, 50. For the response of the Magistrates' Association to the *Auld Review* see, www.magistratesassociation.org.uk/reports/responses.htm]

It seems reasonable to assume that the work of lay justices in the proposed magistrates' division would also be less varied and stimulating than is currently the case in magistrates' courts. It is not difficult to imagine a decline in recruitment to the lay magistracy -- and a corresponding increase in the number of District Judges.

However, the Auld Report was not implemented in regards to the structural role of the law magistracy, which today remains much the same as hitherto.

In Australia, lay magistrates were for long rarely utilized and have now been phased out in some states. [Hon Phil Goff, New Zealand Parliamentary Debates, May 7, 1998.]

They were rarely seen as more than an expedient, necessary because of a shortage of professional Judges, and therefore declined with the growth of the stipendiary magistracy.

The New Zealand "Experience"

Similar pressures have existed in New Zealand, which inherited the tradition of a lay magistracy. In the Victorian period New Zealand's criminal justice system resembled the English one. Lay magistrates dispensed justice at Courts of Petty Sessions. [Spiller, Finn and Boast, *A New Zealand Legal History* (Brookers, Wellington, 1995), 72-73.] Although professional resident magistrates were appointed they did not have to be legally qualified and their judicial status suffered as a result. The Magistrates Courts Act 1893 renamed and reformed the resident magistrates courts and the resident magistrates were renamed stipendiary magistrates. The number and quality of stipendiaries increased and lay justices played a progressively diminishing judicial role.

In 1981, the magistrates' courts were renamed District Courts and stipendiaries became District Court Judges. Although lay justices remained members of the District Court bench, in practice an increasingly small proportion were given the opportunity to try cases. In effect, only some 400 of New Zealand's 7,000 justices of the peace currently conduct judicial work.

The use of lay magistrates in New Zealand has recently undergone a minor revival (largely because of economic considerations and an increasing shortage of professional judicial officers). Fifty-four lay referees are used to staff disputes tribunals (previously small claims tribunals). A comparatively recent development has been the appointment of community magistrates. They resemble justices of the peace, but have a more extensive jurisdiction covering non-defended minor criminal matters. This development was criticized by existing lay magistrates, who felt that it was a slight to them, and unnecessary since their own members were willing and able to conduct more judicial work. The introduction of these officers, initially 16, was justified on the grounds of cost-effectiveness and increasing community involvement in the judicial process. But there had been no attempt to evaluate the effectiveness of the existing lay magistrates, nor of the underlying conceptual justification for lay magistrates. The results of this pilot scheme are still being assessed but the creation of community magistrates, who do not sit with legally-qualified clerks or registrars, is unlikely to stem the tendency to the professionalization of justice.

In New Zealand, the work of most justices of the peace is now largely confined to the witnessing of documents. There was no formal decision to downgrade their functions. They were simply displaced by professionals as these became more numerous.

Conclusion

In England and Wales the work of District Judges is currently expanding and their importance is likely to increase as trial by jury is effectively restricted to the most serious cases. It is also possible that the powers of justices' clerks will continue to expand. They have acquired case management powers that were once reserved to magistrates and the Justices' Clerks Society have argued that its members should sit as chairmen of the bench.

The days of the justice of the peace as an active lay magistrate may be drawing to a close. As a consequence, a long tradition of voluntary community service may be lost. But it would be premature to toll the death knell of the lay magistracy.