

The magistracy: secure epitome of the Big Society?

Rod Morgan identifies threats to the future of the lay magistracy

In 2011 the magistracy celebrated 650 years of the office, which in key respects appeared to be in unprecedented good health. More socially representative than ever before, with gender parity and 8 per cent of magistrates drawn from the minority ethnic communities (only slightly less than the proportion in the population as a whole) the office is also, according to ministers, the epitome of the Big Society – local, unpaid volunteers serving their communities, which, as the Prime Minister has insisted, represents the Conservative Party's 'underlying political philosophy' and his 'personal mission' (Cameron, 2011). Magistrates also perform a vital public service, hearing over 90 per cent of the cases coming before our criminal courts. Yet, beneath the surface, virtually unnoticed by political commentators, there is growing disquiet among the ranks of the 26,000 magistrates in England and Wales. Many are considering their position. They feel that the strength and vitality of their office is being sapped by developments that represent the antithesis of the Big Society.

Under attack on three sides

First, from above by the expanding appointment of district judges who at the millennium numbered 96 and now number 149. That district judges are displacing magistrates is unarguable. There are more than 4,000 fewer magistrates today than there were a decade ago and recruitment in many areas is virtually frozen. Unlike magistrates, who sit as panels of three, district judges determine guilt and sentence alone and increasingly do so without consulting anyone (they are

no longer felt to need the expensive support of legally qualified clerks, on whom the legally unqualified magistrates rely). Furthermore, magistrates' lists are being asset-stripped of important, intellectually stimulating and interesting cases which do not necessarily require the professional, legal skills which district judges bring to the task. Why, for example, were nearly all the cases arising out of the August 2011 riots allocated, for the first months at least, to district judges? It could not have been because complex points of law, evidence or procedure were involved, or because public safety or interest immunity or extradition was at stake – the legally relevant factors for allocation to district judges (Auld, 2001) – for this was not usually the case. Nor was it because out-of-normal hours, even all-night sittings, were involved which would have made it logistically difficult for magistrates to preside: those ad hoc arrangements were made for only a small proportion of cases in the immediate aftermath of the disturbances. No – the decision was made because court managers employed by the Ministry of Justice considered district judges to be safer pairs of hands, a decision which many magistrates consider a studied insult.

Second, attacked from below: magistrates' lists have in recent years been stripped of many cases now dealt with out of court by the police and the Crown Prosecution Service – fixed penalty notices for an increasing range of offences, penalty notices for disorder, warnings for

possession of cannabis, etc. (for a general review see Padfield et al., 2012). In 2007, at the height of New Labour's 'offences brought to justice', target-driven, managerialist regime, almost half of all criminalised offenders were dealt with out-of-court. The proportion has since fallen, but as the government's recent White Paper, *Swift and Sure Justice*, makes clear, the coalition plans to remove further business to the out-of-court sanctions arena (Ministry of Justice, 2012). This policy arguably makes good sense if the offences and offenders are diverted in accordance with principles and checks ensuring justice, proportionality, effectiveness and accountability. But magistrates have often doubted that it is so. Their concerns were confirmed by a recent inspectorate report which showed that one third of the examined cases dealt with out of court were determined in that way in contravention of the police's own guidelines (HM Inspectorate of

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Constabulary/HM Inspectorate of the CPS, 2011). The government has suggested that the magistracy might be given an oversight role

regarding the use made of out-of-court sanctions, though it seems more likely that this role will be taken up by the directly-elected Police and Crime Commissioners.

Thirdly, the magistracy has been assaulted from the side, at the very heart of their jurisdiction, by the creation following the *Courts Act 2003* of HM Courts and Tribunal Service. This means that instead of employing their own staff locally, and substantially organising their own affairs, they are now managed by Ministry of Justice civil servants who set targets centrally for the number of court hours available for estimated numbers of cases dealt with per hour by every bench in every courthouse throughout the land. The magistrates' courts committees have gone, replaced by a centralised courts administration. Equally radical has been the scything

court closure programme and the merging of benches. This means that increasingly magistrates are members of ever larger benches sitting with colleagues they don't know in a diminishing number of large courthouses remote from where they live. Moreover, as a result of cuts to training programmes and expenses budgets for attending other meetings their links with their local services and communities are being severed. They are less and less likely to know the local personnel and know about the programmes provided by the youth offending teams, probation service, social services and voluntary sector in their home area. Whatever the merits or demerits of 'local justice' – and there are competing considerations – it has gone or is rapidly going. The latest, centralising step has been to abolish (using authority under the *Public Bodies Act 2011*) the local Courts Boards, established in 2003 to ensure consultation regarding the local impact of these various changes.

The result is Doublespeak on a grand scale. The government asserts that 'magistrates are the key link between the criminal justice system, and the communities it serves' (Ministry of Justice, 2012). The Magistrates' Association, seeking to breathe life into an ailing 'local justice' institution, has published a position paper (Magistrates' Association, 2012) pressing for magistrates' ability to adjudicate in problem-solving courts – focused on drugs, family violence or anti-social behaviour courts, with dedicated teams of magistrates providing continuity of contact with

cases and offenders whenever appropriate – and engagement with local communities in order better to contribute to crime prevention and diversion (ibid). But everything the Ministry of Justice is doing, driven by the need to deliver short-term cuts to the courts budget, spells doom to these hopes. All the best known, effective problem-solving courts, are run by district judges, not magistrates and the government's plans for more flexible courts seem designed for district judges, not magistrates who, note, are, when all the indirect as well as direct costs are added up, arguably as expensive, if not more expensive, than district judges (Morgan and Russell, 2000; Ipsos MORI 2011)

The cuts therefore place an increasingly large question mark over the future of the magistracy which, it should be noted, thrives nowhere else in Great Britain

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(unimportant in Scotland, undone by 'the Troubles' in Northern Ireland and abolished following independence by the Republic) and

has been abandoned in favour of a professional judiciary in most of the Common Law world to which we bequeathed the system.

Matters for debate

These developments should be the subject of a public debate, not determined by default, largely behind closed doors. There is also need for greater rigour and consistency to be brought to bear with regard to the competing arguments. Do we value the magistracy and a degree of local justice? Is it important that there be

public participation in our justice system, in the form of magistrates in the lower courts and the jury in the Crown Court? Is public participation important for the legitimacy of the system? Do we favour adjudication by panels as opposed to judges sitting alone? And if the answer to any or all of these questions is yes, what price are we prepared to pay to safeguard our longstanding arrangements? ■

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