

**Royal Holloway**

University of London

June 2011

**MAGNA CARTA AND THE JUDGES - REALISING THE VISION**

by

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*ABSTRACT*

*Magna Carta laid the corner stones of England's unwritten constitution. It placed great trust and authority in the judges. This article discusses the significance of Magna Carta from the point of view of the judiciary and the legal system. Furthermore Magna Carta cast a spotlight on the appointment and identity of judges. Clause 45 of Magna Carta provided:*

*"We will appoint as justices ... only such as know the law of the realm and mean to observe it well."*

*Thus, Magna Carta identified the qualities that it was important for judges to have: knowledge of domestic law and loyalty to the rule of law. But what other qualities are needed today? This article discusses two qualities in particular: (1) the need for social awareness; and (2) the need for an understanding of the case law of courts outside the United Kingdom, particularly elsewhere in Europe. It is no longer enough that judges know "the law of the realm" in the sense of purely domestic law. They may also be required to apply law developed outside the realm – such as European Convention human rights law.*

**INTRODUCTION**

In this study of Magna Carta, I wish to focus on the role of the judges, the vision which Magna Carta had for them and how it is to be realised today – 800 years on. This is a topical subject because, since the last centenary of Magna Carta in

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1915, we have had, all within the last half century, at least three statutes of great significance to the constitutional framework of the UK – the European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005. In addition, we currently have two major high-level inquiries of particular interest and importance in relation to the judicial function, namely, the Commission on a UK Bill of Rights and the inquiry of the House of Lords Constitution Committee into the judicial appointments process. I do not propose to discuss what these two inquiries may show or may recommend. What I wish to examine is the context in which these inquiries arise. They are building on the foundations which Magna Carta laid.

796 years ago King John, acceding to the demands of the Barons, set the Great Seal of England on the Charter of Liberties we now call Magna Carta "in the meadow which is called Runnymede, between Windsor and Staines."

In the years which followed, Magna Carta was confirmed over thirty times by royal charter; it was directed to be read out twice yearly in the great cathedrals of the land; archbishops and bishops were directed to pronounce sentences of excommunication on those who by word, deed or counsel went against the Charter; and Kings were expected to confirm Magna Carta at the start of their reign. This gives us some idea of Magna Carta's importance in mediaeval England. Not all of the provisions of the document signed by King John were reconfirmed but most were and indeed some of the clauses remain the law of the land.

In this study, I propose to examine an aspect of Magna Carta which, as far as I know, has not been examined before, at least not in the course of this series of Magna Carta lectures. I propose to examine the role which Magna Carta

assigned to the judges, and ask whether the features of the judicial role envisaged by Magna Carta have changed and how they are being realised today.

To do this, I have to start by exploring the significance of Magna Carta from the point of view of the law and the administration of justice by the judges. I propose to concentrate on the following clauses:

"(17) Ordinary lawsuits shall not follow the royal court around, but shall be held in a fixed place.

...

(39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

(40) To no one will we sell, to no one deny or delay right or justice.

...

(45) We will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well."

Clause 45 did not appear in later versions of Magna Carta after 1215, and clause 40 was renumbered as clause 29 in at least one later version, but nothing turns on that for present purposes.

## **WHAT WAS THE SIGNIFICANCE OF THESE FOUR PROVISIONS OF MAGNA CARTA?**

Magna Carta is a monumental affirmation of the rule of law. It proceeds on the all-important assumption that disputes are to be decided in accordance with the law. This was not a new idea but an important confirmation of it. As Lord Irvine LC put it, "[t]he primary importance of Magna Carta is that it is a beacon of the

rule of law."<sup>2</sup> Laws LJ has described Magna Carta as a "proclamation of the rule of law".<sup>3</sup> The King was not above the law and he could not displace the due application of the law by his judges. Moreover, by providing for the judicial determination of disputes according to the law of the land, Magna Carta laid the foundations of what we know today as due process of law. It also gave judges what has been their traditional and vital role of acting as a bulwark for the individual against arbitrary action by the state. The concept of due process is an element within the concept of the rule of law.

This is not the place for a detailed exposition of the concept of the rule of law, which may be found instead in Lord Bingham's remarkable book, *The Rule of Law*.<sup>4</sup> In a speech which he gave on Magna Carta,<sup>5</sup> Lord Bingham summed up its achievements in these terms:

“Conditioned as we are today by our own knowledge of political and constitutional development over the last nine centuries, it calls for the exercise of real historical imagination to appreciate the enormity, the grandeur of what was done at Runnymede. King John entered the meadow as a ruler acknowledging no secular superior, whose word was law. He left the meadow as a ruler who had acknowledged, in the most solemn manner imaginable, that there were some things even he could not do, at any rate without breaking his promise. This, then, is the enduring legacy of Magna Carta: the lesson that no power is absolute; that all power, however elevated, is subject to constraint; that, as was to be said by Dr. Thomas Fuller some centuries later, "Be you never so high, the law is above you".”

In addition, there is significance in the fact that clause 17 provided that the judges were to sit in a fixed place. This court became the Court of Common Pleas, as

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<sup>2</sup> *The Spirit of Magna Carta continues to resonate in Modern Law* (2003) 119 LQR 227.

<sup>3</sup> *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 at [36].

<sup>4</sup> Allen Lane Publishers, 2010.

<sup>5</sup> To be published in a collection of Lord Bingham's essays by Oxford University Press.

opposed to the Court of the King's Bench, which followed the King around the country, and as opposed to the Court of Chancery. The Court of Common Pleas existed down to the end of the nineteenth century. The fact was that, before Magna Carta, the King often took the decisions in disputes between his subjects as he went around the country, without involving his judges, or his judges made the decisions but applied the *lex regni*.

Putting the judges into a fixed place, away from the King, achieved two ends in particular. First, it laid the foundation for the doctrine of separation of powers. Judges were to be separate from the King, who made laws by royal decree. The doctrine of separation of powers has been much debated and developed in the eight centuries since Magna Carta. The separation was only gradual: at least until the end of the eighteenth century judges could be members of Parliament as well as holding judicial office. Most recently, the doctrine was invoked as the principal reason for setting up the new Supreme Court of the United Kingdom pursuant to the Constitutional Reform Act 2005. The Supreme Court replaced the House of Lords, which had been the highest court in the land since 1399, although the concept of the Lords of Appeal in Ordinary only came about pursuant to the Appellate Jurisdiction Act 1876. Secondly, the separation of judges from the King's court made clear that judges were to operate independently of the King. This led to the development of the concept of judicial independence.

Clause 45 provides that the judges were to apply the law of the realm. What was the significance of that? It was the law of the realm as opposed to the law of the King, canon law or local law. I have already explained that some judges were attached the royal court. Other judges were people in the locality who were

trusted by the local inhabitants to try disputes or to hear criminal cases. There were, of course, no professional judges. The judges were often priests and so they were very familiar with canon law, which was derived from Roman law.<sup>6</sup> The significance of requiring judges to apply the law of the realm was that they would have to apply the law that was built up by tradition and accepted by the population. So the law of the realm was the law of England, including the law applied by local custom in different areas of England. Significantly, the law of the realm was the law of the people or, as it was and is called: the common law. As it was put in a work known as *The Mirror of the Justices* published in about 1290, it is called common law "because it is given to all in common".<sup>7</sup> This emphasis on commonality suggests that the common law is a system of law in which all members of society are to have a share.

Moreover, Magna Carta, by requiring judges to apply the law of the realm, authorised the judges to apply the common law. This was an enormous shift of power away from the King and to the judges. In the fullness of time, the authority to apply the common law was taken to include the authority to develop the common law, but the judges had to exercise restraint. They adopted a theory known as the declaratory theory of the common law. They were loath to admit that they were developing the common law, and instead expressed themselves as simply declaring common law which had previously lain hidden. This theory continued for many hundreds of years: only comparatively recently has it been said that judges "do not believe in fairy tales anymore, so we must accept that for

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<sup>6</sup> Roman law and canon law may also have had an influence on the drafting of Magna Carta: see R.M. Helmholz, *Magna Carta and the ius commune* (1999) 66 *University of Chicago Law Review* 297.

<sup>7</sup> Book I (*Of Sins Against The Holy Peace*), Chapter 1 (*Of the Generation of Holy Law*).

better or worse judges do make law."<sup>8</sup> It is, therefore, no longer denied that judges are developing the law but this is always subject to Parliamentary sovereignty. The judges cannot develop the law so that it contradicts a statute; nor do they develop the law in an area that ought properly to be left to Parliament, for example, because to lay down the law needs more than the judges can do by judicial decision in a particular case.

Furthermore, by providing that any interference with an individual's liberty had to be authorised by the law of the land,<sup>9</sup> which was to be applied by the judges, Magna Carta expressly recognised something that it is today easy to take for granted but which is utterly fundamental, namely that every person should have the right not to have his liberty taken away other than in accordance with a decision of a court and due process of law. Clause 39 outlawed detention by order of the King or, in more modern terms, mere executive detention, not prescribed by law, for whatever reason.

And, by providing for the judicial determination of disputes, Magna Carta laid the foundations of certainty and consistency in the law and for the law to be administered in a public place, thus laying the foundations of open justice for all.

The provision in clause 40 that justice would not be sold or delayed was also a vitally important guarantee in all courts, even in the King's Bench and the Court of Chancery. However, in parenthesis, it should be noted that this clause was never applied to the sale of writs, which was an important source of revenue for

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<sup>8</sup> Lord Reid, *The Judge as Lawmaker*, (1972) 12 Jnl Soc Public Teachers of Law 22.

<sup>9</sup> The only exception in clause 39 was for "the lawful judgment of his equals", which is considered below.

many Kings. This is an opportunity which has not escaped elected governments in recent times as court fees have been substantially increased for the Treasury's benefit. However, it has been held that court fees cannot be such as to bar a person from obtaining access to a court.<sup>10</sup>

As to the barons who caused King John to apply the Great Seal to Magna Carta, it is of course impossible to believe that they had any idea of the epic nature of the act on which they were engaged. They were, almost certainly, seeking to protect their own rights and interests against excessive royal power, and possibly even to put themselves above the law. It is now generally accepted that when clause 39 refers to the judgment of a person by his peers, it is in fact referring to the judgment of the barons by the barons, and not to trial by jury. But, once it became accepted, as it did, that it was not just the barons but every free person who was entitled to the protection of Magna Carta, the parallel with trial by jury was obvious. It is also to be noted that clause 40 was not the source of *habeas corpus*, which was a remedy developed by the judges.

Magna Carta was originally called the Great Charter, not because of its contents, but because it was executed contemporaneously with a shorter document called the Charter of the Forest. Its execution did not mean that all was sweetness and light afterwards. Kings continued to err. In addition, the legal system did not meet all the high ideals which Magna Carta suggested that it should. Thus, for instance, the Tudors established the Court of Star Chamber<sup>11</sup>, which acted as an

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<sup>10</sup> *R (on the application of Witham v Lord Chancellor* [1998] QB 575.

<sup>11</sup> Established by the Act of 1487 (3 Henry VII. C.I.), the Act of Pro Camera Stellata.

immediate agent of the King's prerogative<sup>12</sup>. The tyrannical proceedings of the Star Chamber under the Stuarts, especially Charles I, in political cases led to its abolition in 1641 by an Act of Parliament that referred to Magna Carta and stated that cases "ought to be tried and determined in the ordinary courts of justice, and by the ordinary course of law".<sup>13</sup> Trial methods in ordinary courts did not meet modern standards either, since trial by ordeal and trial by battle were for many years the order of the day. But, over time, the ideals of Magna Carta became embedded.

Of course, no mention is made of the relationship of the common law to statute law. That Great Council of the nation, known as Parliament, had not yet been convened.<sup>14</sup> When it was, it became accepted that the common law should be subject to the will of Parliament. The doctrine of Parliamentary sovereignty, as it is now known, is explored by Lord Bingham in a speech which he gave in King's College, London in October 2007.<sup>15</sup>

I pose the question: why was Magna Carta so significant for the role of judges and the administration of justice in England? Quite simply, the Magna Carta laid the foundations for some of the most fundamental concepts of our legal system. These concepts echo two major themes, which overlap. The first theme may be called the constitutional theme, and it involves:

1. The separation of powers;

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<sup>12</sup> Sir William Holdsworth, *A History of English Law* (7 Ed., 1956), Sweet & Maxwell, Vol. 1 at p 495.

<sup>13</sup> 16 Charles I. C. Ss 4 and 5.

<sup>14</sup> This occurred later in the thirteenth century, particularly with the convening by Simon de Montfort of Parliaments in 1264 and 1265: see generally, K Mackenzie, *The English Parliament* (Pelican, 1950).

<sup>15</sup> Lord Bingham of Cornhill, *The Rule of Law and the Sovereignty of Parliament*, King's College, London, 31 October 2007, available at:

[http://www.kcl.ac.uk/news/news\\_details.php?news\\_id=672&year=2007](http://www.kcl.ac.uk/news/news_details.php?news_id=672&year=2007)

2. The birth of the judiciary as a separate arm of the constitution of England;
3. The independence of the judiciary;
4. The incorruptibility of the judiciary; and
5. The development of the common law, based in theory on long tradition but in reality representing judge-made law.

There is a second, equally important, theme based on the role of the individual in relation to the state, involving:

1. The judiciary as the bulwark of individual liberty against arbitrary action by the state;
2. The rule of law;
3. Equality before the law;
4. Due process;
5. Open justice; and
6. Certainty and consistency in the law.

The second theme then is all about liberty and, it might be said, the first theme is the framework which allows the second theme to flourish. Liberty begins historically with liberty of the person in the sense of freedom from arbitrary arrest. It has been developed over the centuries to include other freedoms, such as freedom of expression and freedom of self-realisation. Most recently, it has been developed in terms of respect for one's home and private life.

Magna Carta thus gave us fundamental law. It is little wonder that we call this the Great Charter of our Liberties.

It is not within the scope of this study of Magna Carta to explore the ways in which the provisions of Magna Carta, which I have set above, have found their way into the written constitutions of many democracies around the world but I will give one example, where it finds particularly clear expression: the Fourteenth Amendment of the Constitution of the United States, which reads:

"XIV. Section 1. ... [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Magna Carta also finds clear reflection in the International Convention on Civil and Political Rights,<sup>16</sup> the Universal Declaration of Human Rights,<sup>17</sup> and the European Convention on Human Rights.<sup>18</sup> Magna Carta belongs today, not only to England, but to the world.

However, Magna Carta's high ideals depend on there being a plentiful supply of persons capable of acting as judges and enforcing the rights which it guaranteed, including the rights conferred by the common law. That leads naturally to the question to which I next turn, which is: what are the qualities required of judges?

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<sup>16</sup> See, for example, article 9(1), which provides: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

<sup>17</sup> See, for example, article 9, which provides: "No one shall be subjected to arbitrary arrest, detention or exile."

<sup>18</sup> See, for example, article 5(1), which provides: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court..."

## **QUALITIES REQUIRED OF JUDGES TODAY**

To start with a very basic point, the office of judge is a public office, which must be discharged in the public interest. It is thus important continually to review the qualities that judges require in order to discharge their role.

It is obvious that certain qualities are required of all judges. These include utter integrity, legal skill and knowledge, sound judgement, courage, an independent cast of mind and an ability to act fairly.

There are also additional qualities required of judges according to the nature of their case load. Criminal judges, for example, need to be able to sum up to juries clearly and correctly, and to deal with problems arising within a jury trial. Nowadays, many judges also need to have administrative skills. Others have responsibilities in connection with the organisation of the legal system and keeping the rules of procedure under review, dealing with judicial discipline and so on. Judges play an important part in ensuring the efficient delivery of justice, at a reasonable price, to litigants and society. But not all judges are required to have administrative and organisational skills. Some will be thinkers and concentrate on developing the law and seeing the big picture.

These are judicial qualities that are well understood and regularly discussed. The Judicial Appointments Commission website sets out many of the important qualities. But there are two other qualities which are not so often mentioned and which, it seems to me, need to be brought to the fore:

- (1) The need for judges to have an awareness of the background to the problems they are likely to have to deal with, which one might term “social awareness”; and

(2) The need for senior judges to have an understanding of the case law of courts outside the UK, particularly elsewhere within the Europe.

### **Additional Quality One: Social Awareness**

The first additional judicial quality I wish to discuss is consciousness of the social context in which decisions have to be made today. This is often said to be necessary because of the Human Rights Act 1998 and the fact that, to determine rights such as the right to respect for private and family life, courts need to make value-laden judgments. As I pointed out in a recent judgment, however, this sort of decision may need to be made in other contexts where the court is required by an Act of Parliament to form a view as to whether an act was, or was not, reasonable. In that case, the question was whether a testatrix had not made reasonable financial provision for her child in her will.<sup>19</sup> A decision as to what constitutes reasonable financial provision cannot be taken in a social vacuum.

The need for social awareness arises for reasons independent of the changes in the law wrought by the Human Rights Act 1998. It is required because society has itself changed. There has been a substantial increase in the number of women now earning and contributing to the economy. The percentage of women active economically has grown from 56% in 1971 to 70% at the end of 2008, while the percentage of men active economically has decreased over a similar period from 92% to 78%.<sup>20</sup> Women have achieved success in many areas: in both Houses of Parliament, approximately 22% of the members are women, and 34%

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<sup>19</sup> *Ilott v Mitson* [2011] 2 FCR 1.

<sup>20</sup> *Women in the Labour Market*, March 2009, Office of National Statistics; and *Labour Market Trends*, March 2002, Office of National Statistics.

of the Senior Civil Service are now female.<sup>21</sup> There has been an increase in the percentage of the population who are ethnic minorities. The last census for which figures are available, the 2001 census, showed that 8.7% of the population of England and Wales was composed of ethnic minorities, a 53% increase from the 1991 census figures. Approximately 13% of businesses in London alone are Asian-owned<sup>22</sup> and, despite accounting for only 4% of the population, persons of Asian origin account for approximately 10% of the UK's economic output.<sup>23</sup>

Equally, changes in the commonly-accepted meaning of the family mean that we have moved away from the traditional idea of a nuclear family. Relationships are now much more varied and complex. There have also been made immense technological developments and advances in medical and other sciences. There have been many other changes as well.

Many decisions, especially those made by the High Court and above, resolve issues which have consequences far beyond the particular case in which the judgment is given. At the appellate levels there are many cases in which "the law runs out" and the judges have to exercise their judgement as to how far, if at all, to extend the law. The law has an important function to play in society, and law should, in general, be developed to meet changing conditions. In other words, it must connect with society. Legal developments must, obviously, be in accordance with the law but they should not focus on the theoretical at the expense of the socially relevant.

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<sup>21</sup> Civil Service Statistics Bulletin, November 2010.

<sup>22</sup> That is, owned by a majority of persons of Asian origin. Source: *Spotlight on Asian Business - Their contribution to London*, December 2007, published by the Mayor of London's Office.

<sup>23</sup> Speech of Sir Edward George, Governor of the Bank of England, 19 March 2002.

Changes in society increase the complexity in decision-making. Judges must be able to explain their reasons for their decisions in accessible language so that the important parts can be read and understood by laypeople, and not just by other lawyers. Judges have to balance their technical or theoretical reasoning with the practical so that the law can be applied without difficulty. What I am saying here chimes in with a point made by Justice Kate O'Regan, formerly a Justice of the Constitutional Court of South Africa.<sup>24</sup> In the context of constitutional law, her thesis is that, as a matter of judicial craftsmanship, judges must balance functional factors against normative factors, meaning by "functional factors" the considerations surrounding the question how the public office can be discharged if a particular remedy is given and by "normative factors" she refers to the values contained in the provisions of the Constitution of South Africa. A judge must balance those two sets of factors, one against the other, to come to a properly calibrated decision. Otherwise, put bluntly, there is a risk that the law will not respond to society's needs or that it will be unworkable in practice. An awkward judgment can block what may be socially desirable progress.

Judges must be able to demonstrate that they understand the context in which their decisions are being made. The judiciary, therefore, needs to understand people in different walks of life and in different cultures. Where possible, they should have an understanding of what solutions are likely to work best. This is an aspect of developing the law with which I am very familiar in a different context, having been the Chair of the Law Commission of England and Wales for three

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<sup>24</sup> *Political Questions, the Social Question and other Quandaries*, Chorley Lecture, London School of Economics, 14 June 2011.

years, and having been thus involved in making recommendations as to how best to reform the law.

The judiciary also needs to have an awareness of social concerns so that their judgments can respond to them. To some extent, of course, social awareness may be gained by reading up about these issues but awareness gained in this way is rarely a substitute for that obtained by experience, and so it is most likely to be found in those who have different backgrounds. I am not suggesting that judges should decide cases other than according to law, but they do need to know about social issues so as to be able to respond to them. In the past the judiciary has been able to decide issues using its own inner resources but there is presently very little diversity in the judiciary, and to compensate for this, greater weight needs to be given to this sort of awareness. It is a quality of which the judiciary has need. The Neuberger Report on Judicial Diversity proposed that there should be a requirement within the merit criterion for judges to show that they have social awareness.<sup>25</sup>

The view has been expressed over several decades that there ought to be a more diverse judiciary, that is, a judiciary which is more diverse in terms of gender, ethnicity and sexual orientation.<sup>26</sup> No one suggests that the judiciary should be

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<sup>25</sup> *Report of the Advisory Panel on Judicial Diversity*, 2010, chaired by Baroness Neuberger, D.B.E., see Recommendation 20. On 30 June 2011, the Judicial Appointments Commission made an important announcement that, in line with Recommendation 20, it had amended the definition of merit used in selecting judges to include an explicit reference to understanding diversity. This would apply by September.

<sup>26</sup> The Report of the Judicial Diversity Taskforce, established pursuant to the Report of the Advisory Panel on Judicial Diversity, published its first report *Improving Judicial Diversity* in May 2011 in which it states that as at 31 March 2010 the percentage of women and BAME (that is, black and minority ethnic persons) in the courts-based judiciary was 20.6% and 4.8% respectively. This figure includes both salaried and fee-paid members of the judiciary, and the equivalent figures for the salaried judiciary are lower, namely 18.9% and 2.8% respectively.

precisely representative of the population but people are bound to have more confidence that their concerns have been properly and fully considered if the judiciary includes people from their section of society among its own members and the judiciary's own composition reflects the fact that those groups too play an important role in society. This is consistent with the ancient idea to which I have previously referred that the common law is something common to all, and is thus something in which all members of society have a share.

Additionally, if the judiciary is more diverse, it is obvious that different ideas will be brought to bear on the development of the law. This will inevitably lead to a richer body of case law with more voices heard in the development of the law. Diversity of contributions in judicial deliberations tends to act like grit in the oyster which can produce a pearl of great price. In addition, diversity brings with it the added advantage of enhancing everyone's self-awareness and knowledge of their own subconscious prejudices.

One of the objectives of the Constitutional Reform Act 2005 was to promote diversity in the judiciary, so far as consistent with appointment on merit. Thus, the Constitutional Reform Act 2005 imposes a duty on the Judicial Appointments Commission, the new independent body set up to make selections of candidates to be judges in the courts of England and Wales, as follows:

64 Encouragement of diversity

- (1) The Commission, in performing its functions under this Part, must have regard to the need to encourage diversity in the range of persons available for selection for appointments.
- (2) This section is subject to section 63.

Section 63 provides that selection must be solely on merit. But is merit a criterion which means that no weight is to be given to diversity? As I see it, there

is little point in Parliament imposing a duty on the Judicial Appointments Commission to encourage diversity in the pool of persons eligible for appointment if it did not also intend that the selection criteria should be suitable to ensure that a diverse group of candidates achieved the selection on merit. The new “tie-breaker” provision in the Equality Act 2010 supports this conclusion since it appears to provide that where the representation in public office of a particular section of society is disproportionately low, and two candidates are equally well qualified, the selecting body may select the candidate from the under-represented group.<sup>27</sup>

Nevertheless, the pace of change has been very slow. The composition of the senior judiciary has not changed significantly even in recent years. In the High Court, the approximate percentage of women is 15.5%, in the Court of Appeal it is 7.9%, the Supreme Court it is 8.3% and there are no women heads of division.<sup>28</sup>

The figures for women in the higher judiciary in England and Wales do not compare well with the percentage of women achieved in other common law apex courts which is much higher: in the United States of America Supreme Court it is now 33% and in the case of the High Court of Australia it is now 42% and in the Supreme Court of Canada it is now 44%. So the achievement of greater diversity

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Section 159 of the Equality Act 2010.

<sup>28</sup> The percentages of women and ethnic minority judges in post in the High Court and in the Court of Appeal of England and Wales as a percentage of the posts available were as follows as at 1 June 2011, with the figures in brackets showing the position as at 1 October 2000: *High Court* : Women – 15.5% ( 7.7 %); BAME - 4.5%(0%); *Court of Appeal (excluding the Lord Chief Justice, and the Heads of Division (HoDs))*; Women - 7.9 % ( 8.6%) BAME - 0% (0%); *HoDs (excluding Lord Chief Justice)*: Women – 0% (25%); BAME - 0% (0%). The welcome appointment of Rafferty J to the Court of Appeal with effect from 5 July 2011 will increase the percentage of women judges in the Court of Appeal to 10.5%, thus showing a 2% increase approximately over the percentage as at 1 October 2000.

may also be relevant to the courts' international standing. It may be that the Constitution Committee will reach a conclusion as to why the courts of England and Wales should have achieved so little in terms of judicial diversity. One of the reasons may be that, at the higher levels, the existing judiciary has a strong influence over the system of appointments and that the judiciary is not well equipped to apply what have been the traditional criteria for judicial appointment to the task of diversifying itself. If this is right, then the provisions of the 2005 Act may need to be strengthened to produce the results that were envisaged.

A fundamental point to my mind is that the judiciary are appointed to administer justice and develop the law. One of the major driving forces in administering and developing the law is to give dignity to all individuals affected by the law. The public may not perceive that the best decisions are being made so long as the judiciary appear to be drawn almost exclusively from one group in society and so long as it appears that diversity is welcomed in principle but is not often found in practice.

I am pleased to see that there are a number of scholars examining the characteristics of the feminist approach to judgment writing. Those characteristics have been found to include the fact that such an approach is more contextualised.<sup>29</sup> It is early days, yet, but this ground-breaking work opens up new vistas. It challenges our traditional view of what judgment writing involves and provides some practical support for the view that a diverse bench would produce more diverse reasoning and insights, and that the judgments of a diverse bench in a particular case may produce a better balance of views. Certainly at the

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<sup>29</sup> *Feminist Judgments-From Theory to Practice*, R Hunter, C McGlynn and E Rackley, eds (Hart) 2010.

appellate levels, a legal problem can often be solved in different ways, and by looking at those different ways we can get to a better answer. I know from my own experience that courts here and in other jurisdictions often face the same problems but adopt different, often equally legitimate, routes to resolving them. To find the best solutions to legal problems we need to look at as many different perspectives on problems as possible and thus to have judges who can bring their different backgrounds, and their different understandings and experiences, to bear on the resolution of legal issues.

### **Additional Quality Two: Understanding of Non-UK Jurisprudence**

I propose to move now to the second additional quality which I suggest is relevant at the present time, that is, knowledge of the case law of other courts, particularly courts elsewhere in Europe. We need today to be familiar with the jurisprudence of the two supranational courts in Europe. The reception of case law of these two supranational courts is an area of study in which I am particularly interested as, in my work as Head of International Judicial Relations for England and Wales, I have particular responsibility for relations between our courts and those of the supranational courts. The two European supranational courts are: the Court of Justice of the European Union ("the Court of Justice"), which sits in Luxembourg, and the European Court of Human Rights ("the Strasbourg Court"), which sits in Strasbourg. These courts are frequently confused in the press and by politicians.

An important point to note is of course that the Convention is not an instrument of the European Union, but of the Council of Europe. That is not to say that the European Union does not now have its own human rights instrument. Under the

Lisbon Treaty the 27 member states of the European Union have adopted the Charter of Fundamental Rights and Freedoms,<sup>30</sup> which is far more extensive than the Convention but only applies to acts governed by European Union law. The Convention is, however, of far broader application in terms of the number of countries and people to which it applies. The Council of Europe has 47 contracting states whose populations total approximately 800 million people. The Lisbon Treaty now provides for the accession of the European Union itself (as differentiated from its individual member states) to the Convention, but this has not yet taken place and leads to a new complexity in the legal position between the Court of Justice and the Strasbourg Court.

Now, it is important to make it clear that the legal status of decisions of the Strasbourg court is very different from that of decisions of the Court of Justice of the European Union. Whilst the latter are binding on the UK courts, the former are not, but must be taken into account, when interpreting the Convention.<sup>31</sup>

In short, there now needs to be real familiarity, not just with the law of the land, but with the legal systems of other countries in Europe and with the case law of the two supranational European Courts. To varying degrees, the case law of those two courts can now properly be described as part of the law of the land.

The provisions of the Convention include the right to life, the right of access to court, the right to property and so on. Like any rights document, the Convention is, in many respects, open-textured and the Strasbourg court has to give its

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<sup>30</sup> Article 6 of the Treaty on European Union.

<sup>31</sup> Compare section 2 of the European Communities Act 1972 and section 2 of the Human Rights Act 1998.

provisions meaning in concrete cases. Thus, it is principally in the case law of the Strasbourg Court that we find out what the rights mean in practice. These rights raise moral and social issues of wide dimensions. The English courts are not obliged to apply the case law as if it were the case law of some higher national court. It is obliged to take that case law into account in interpreting the Convention rights for itself. So the courts have a choice. No doubt in most cases they would exercise that choice in favour of applying Strasbourg jurisprudence, but there are cases where the Strasbourg case law seems to take no account of some particular provision of English law or its far-reaching consequences in English law.

How does the Strasbourg court develop its jurisprudence without inviting unnecessary conflict with the legal systems of the contracting states to the Convention? Sometimes the Strasbourg court applies a "consensus" test. It considers whether the area is one on which there is consensus among the contracting states. If there is a sufficient consensus, that may embolden it to develop its jurisprudence into a new area. If there is no sufficient consensus, the Strasbourg court often finds that the matter falls within the margin of appreciation of the contracting states, leaving it to them to decide what view to take. In other cases, the problem may be resolved by dialogue between the courts – either informally through discussion of general issues in the sphere of human rights, or formally through judgments of the respective courts which discuss the difficulties and seek a rapprochement. There are many techniques for resolving this conflict and each system has to have respect for the other and a desire to reach a compromise.

Thus, there are occasions where there have been successive judgments by the Strasbourg court and national courts leading to a modification by the Strasbourg court of its position. I was involved in a case as an ad hoc judge of the Strasbourg court where this occurred. The short point was that, under the common law, to sue a public authority or indeed anyone in negligence, it is necessary to show a duty of care. The English courts held that there was no duty of care on a public authority in certain circumstances. The Strasbourg court held that this violated the Convention right of access to a court on the grounds that it conferred immunity from liability. However, the English courts made it clear that this was a misunderstanding of domestic law. The Strasbourg court, in consequence, accepted that the duty of care requirement was simply a mechanism for defining the circumstances in which the tort of negligence applied. This sequence is an example of the dialogue that can occur between a national court and the Strasbourg court through the judgments they give. National judges need to understand the viewpoint of the Strasbourg court when they frame their reasoning in domestic cases.

There are many problems with the Convention system. For example, the Strasbourg court is overburdened by many cases which it ought not to receive because they raise issues on which it has already ruled and the contracting states ought to have, but have not, changed their laws so as to make them Convention-compliant. There is also an issue as to how far the Strasbourg court should advance human rights standards where there is a social, technical, bio-ethical or other major change in today's world.

From the Strasbourg court's point of view, it has the difficult task of deciding how fast to force change in human rights standards in Europe. Judge Angelika

Nußberger, the German national judge at the Strasbourg court, recently compared the position in European human rights protection to that of a house with many rooms where each of the rooms represents the legal system of a contracting state. The rooms are connected: they are all within the curtilage of a single house because we share common legal and ethical values; and the Strasbourg court is like a person wandering outside, deciding whether to enter and, if so, into which rooms.

By contrast, EU law is part of the law of the land in any event. That is the effect of the European Communities Act 1972. We do not have a choice whether to follow EU jurisprudence, but we do have to work at what the decisions of the Court of Justice actually mean. It is becoming increasingly important to know how to apply EU law. It does not simply affect abstruse areas of competition law and VAT but subjects such as immigration and asylum, employment law and criminal law. It is very pervasive.

There are very real problems in the reception of EU law. The decisions of the Court of Justice express propositions in a very concise form more familiar to civil law jurisdictions and the national court will have to be able to decipher how these are intended to be applied in other situations. In addition, the decisions often use concepts and conventions drawn from other European Union legal systems, the majority of which have codes rather than the common law, and make assumptions which do not apply in our system. Accordingly, when English judges read a decision of the Court of Justice they often have to have a different mindset. They have to have some knowledge of other European systems and have an understanding of why the case seems to have been decided in the way it has. There is, therefore, an increasingly obvious need for education in EU law and,

further than that, for skills and interest in comparative law. To interpret EU law, a judge needs an ability to move easily within different legal cultures

These skills are, in any event, needed for English law to develop, taking advantage of the best legal concepts and practices developed abroad. When it comes to law, we have one of the best legal systems in the world but that does not mean that we have a monopoly of wisdom. Take for example the principles of proportionality. Under the core principle of proportionality, a state measure can be justified if it is suitable and necessary to achieve the state's legitimate aim notwithstanding that it interferes with an individual's fundamental right. To be suitable and necessary, the measure must be a proportionate way of achieving that aim. In our purely domestic law, it is said that a measure is only proportionate if it achieves its legitimate aim by the least intrusive means of interfering with the individual's right. Under the jurisprudence of the Court of Justice, the test of proportionality may be applied with differing levels of intensity of review, so that when, for instance, there is an issue of national security the court may apply a less strict test than one which requires it to be shown that the measure involves the least intrusive means of interference with the individual's right. The principle of proportionality is applied in differing ways by the Court of Justice, the German Federal Constitutional Court and the Strasbourg court, and their ideas are being absorbed in this area by common law courts, such as the Constitutional Court of South Africa. Judges need to have open and inquiring minds about the benefits to be obtained from studying concepts developed by other systems and, where appropriate, putting them to use, with all necessary modifications, in the English context. Judges in the 21<sup>st</sup> century need to be aware that this is an increasingly globalised world and we need to make ourselves familiar with other legal systems and not just "the law of the realm" in the sense of English domestic law.

## **CONCLUSIONS**

The objects of this study of Magna Carta have been to demonstrate the following. Viewed from the perspective of the role of the judges and the legal system, Magna Carta was truly visionary. It is the source of many fundamental concepts. I have divided its achievements into two themes: the constitutional theme and the theme related to liberty of the subject. Magna Carta envisions a society governed by the rule of law, where everyone is equal before the law and his or her dispute is decided by a competent judge in accordance with the law. It laid the foundations of the judicial role and our system of law, for example, by insisting on the separation of powers and the independence of judiciary and authorising the application of the common law. These are all still relevant concepts, needed as much today as in the past.

But, to realise the vision of Magna Carta, we have to keep the qualities required of the judges under review and up to date, so that they include any additional qualities that are appropriate in today's world. We need to update our view of what is required of judges because of changes in society, constitutional reform and the increased relevance of European law. We also need to take account of the need for social awareness and the need for knowledge of the case law of courts outside the UK as attributes of a judge.

Because of the complexity of society, and the range of situations that can arise in cases before the courts, there need to be different points of view expressed on legal issues. A source of some of those different points of views will inevitably be a person's background, gender and ethnicity. The broader the experiences of the judges, the deeper the understanding of the issues they are likely to bring to the court and, by extension, the greater the legitimacy of the courts.

Moreover, diversity cannot, by its nature, be achieved simply through the selection of a single individual. The selection process for judges needs to look at the portfolio of judges at a particular tier and consider the diversity of the skill sets and experiences of the persons who make up that portfolio of judges, and the complementarity of their skills and experiences.

This study is not a stopping point in the debate. The task of realising today the vision of the judiciary contained in Magna Carta is not at the end of the road. We are simply at a fork in the road. But it is an important staging post because of the recent changes in society and in our constitutional structure. It is now time to augment our understanding of the judicial role and to make advances in its development. If we do so, it will surely have been in part because of the inspiration provided by that extraordinary foundational document – the document we rightly call Magna Carta.