

From England

MAGNA CARTA AND MODERN-DAY JUSTICE

by Baroness Elizabeth Butler-Sloss

It is an honour to be invited to give the Magna Carta lecture in Lincoln and in this beautiful and ancient Cathedral. I am also delighted to do so since I had the pleasure of knowing the Dean when he was the Canon Treasurer at St Paul's Cathedral.

My first time out on circuit as a judge in 1980 was to Lincoln. I was new and inexperienced and was given a warm welcome and much support by everyone here. It was January and I remember it was very cold and there was snow on the ground. The other judge and I began the sitting by a service in the Cathedral and then to court. In those days the High Court Judge went to court robed and we were driven the exceedingly short distance from the Judges' Lodgings to the Court in the 1928 Phantom Rolls which was several years older than I was. It moved at a majestic 5 miles an hour. On my last visit it was the moment for the Phantom Rolls to retire. I was asked if I would be photographed beside it. I stood in front and was asked to move to the side. I realised that the car was the picture and I was, quite rightly, incidental to it.

I want to cover in this lecture a brief historical mention, look at the relevance of Magna Carta to certain aspects of the present somewhat uneasy relationship between the Executive, that is to say, the Government, and the judiciary and a brief comment on the present position in the United States.

I have not read previous lectures given on the Magna Carta here in Lincoln but I assume much has already been said about the origins of the disputes between King John and the Barons which culminated in Magna Carta being sealed at Runnymede on the 15th June 1215. We know that the King did so reluctantly and with no intention of keeping to its terms and that he broke his part of them quite quickly and it was, perhaps, providential that he died the following year. The Great Charter was revised and reissued by Henry III in 1225 and in 1297 was formally recognised as part of English law.

Magna Carta was designed to protect the feudal rights, interests and properties of the powerful landowners who challenged the King. It is, however, an extraordinary document and gave far more extensive rights than those needed by the Barons in 1215. It is not only the rights which were extraordinary for the period but even more the way in which it has been regarded for nearly 800 years in England and throughout the United Kingdom. It is equally so regarded in Australia, New Zealand, glimpses of it may be found in India and Africa and other former colonies and it has played an important role in the United States. It was, of course, to the United States Library of Congress that your copy of the Magna Carta was sent in 1939 for safe keeping where it received a great welcome. I was glad to learn that a 1297 copy of Magna Carta was sold in the USA last year and now sits beside the Declaration of Independence in the Washington National Archives.

The Magna Carta has gained an iconic status far beyond its original importance and has become a symbol of the rights of the citizen against the use and misuse of power by the State. In England, a country largely without a written constitution, it stands beside the Act of Settlement 1700, the Human Rights Act 1998 and the Constitutional Reform Act 2005, but it remains more significant in public perception than any subsequent legislation.

For much of English history the assertion of those rights has been between Parliament and the King but at certain periods the judges became directly involved, notably during the reigns of King James I and King Charles I and the Stuart assertion of the Divine Right of Kings. The Chief Justice, Sir Edward Coke, supported by the judges relied upon Magna Carta as recording the liberties and freedoms enjoyed since time immemorial by the people of England. Although not accurate it was an effective use of Magna Carta in a bitter dispute with Charles I, at its peak in 1641, over the King's claim to be all powerful.

This dispute between the King and his judges in the 17th century has a relevance to the main theme of my talk this evening, the present relationship between the Executive and the judiciary.

The Executive has from the 18th Century gradually and now entirely taken over the exercise of power from the Monarch. Since the Second World War the Government of each major party has taken increasing powers to deal with the affairs of citizens and has gradually emasculated the powers of local government. This process has, I suggest, enormously increased during the past 10 years.

In 1215 the Barons stood up to the King to protect their rights. In the 21st century and for many years previously, I suggest that the senior judiciary are in effect playing the part of the Barons but on behalf of the public, in particular individual members of the public. I should make it plain that, as a retired judge, my comments are entirely my own other than where I specially rely on other lectures or talks which are in the public domain and I have not discussed my views with any of the judiciary.

The two best known paragraphs of the Magna Carta are

- (39) "No free man shall be seized or imprisoned, or disposed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgement of his peers, or by the laws of the land."

And

- (40) "To no one will we sell, to none will we deny, to none will we delay right or justice."

I would also underline the importance of

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

Clause 40 is for my purpose the most relevant and in particular the denial of or delay to access to justice. There are many areas in which there are tensions between Government Departments and the judges but I propose to refer to two in particular: - sentencing in the criminal courts and terrorism. I also want to say something about denial of justice in the civil courts.

THE HUMAN RIGHTS ACT 1998

I should start by saying that we cannot be complacent and take our rights and freedoms for granted. The Human Rights Act 1998 gives each individual protected rights which are recognised by the courts. The Act came into force in 2000 and incorporated into English law the European Convention of Human Rights dated 1950 which is part of the laws of most, if not all, Western European countries. Prior to 2000 British citizens could go direct to the European Court of Human Rights in Strasbourg. The Convention written 5 years or so after the Second World War was, and is, intended to protect the individual from repressive regimes. Although it was largely drafted by British lawyers it took us 50 years to accept it as part of our legislation. It is greatly to the credit of the present Government that it took the plunge but I do not think that, as with much other legislation, it actually thought through the

implications of incorporation into English law and the open application of human rights principles to the actions of Government departments and local government. It was the view of many judges that the common law already applied the principles of human rights but they were not so called. Some legislation, such as the Children Act 1989, was specifically drafted with an eye to the European Convention. But there is no doubt that human rights issues are much more openly considered and breaches of human rights form a much greater part of the business of the courts. Judges are specifically under duty under the Human Rights Act to ensure that legislation is interpreted, wherever possible in compliance with the Convention and that public bodies do not contravene human rights. In doing so the judges have to be entirely independent of Government and free from any outside influences.

In enacting this legislation the Government has in a sense opened a benign sort of Pandora's Box. As is so often said judges do not make the law but it is their function to interpret it, not always as Government would wish it to be interpreted. The devil is in the detail and the application of human rights has in some areas been patchy and has resulted in a series of court cases. This function of the court to interpret new and existing laws in the light of human rights considerations has been the subject of particular and often uninformed criticism by Government Ministers and by the Press.

SENTENCING IN THE CRIMINAL COURTS

I turn now to the sentencing process in the criminal courts which has from time to time provoked intense criticism by Ministers and by the Press. In one notorious case, Jamie Bulger, the little boy murdered by two 10 year old boys, which I am sure you will remember, Michael Howard, then Home Secretary, increased the tariff on the two child killers, the period they would have to serve in custody before their release, from 10 years decided by the Lord Chief Justice to 15 years. The European Court of Human Rights in Strasbourg held that a Government Minister cannot set minimum jail terms for child murderers. The European Court held that it was a judicial decision. There was however huge Press publicity supporting the Home Secretary's approach to these two children. In 2008 the Court of Appeal Criminal Division held that the Home Secretary cannot block Parole Board recommendations to release prisoners serving less than life sentences.

Successive Home Secretaries have criticised the judiciary for undue leniency in sentencing criminals and have commented critically about individual cases.

An extreme example of shooting from the hip by a Home Secretary, that is to say unfair criticism without knowledge of the facts, related to a sentence of a paedophile which had the effect of releasing him into the community within a few months. The Home Secretary was outraged and the Press went to town using strong language to criticise the judge. Later his comments on sentencing were read which showed that he had no choice but to pass the sentence he did. The cumulative effect of several sections in the Criminal Justice legislation required him to pass a sentence which he, himself, described as unsuitable but which he had no discretion to increase.

There remains a strong inclination in the Government, fuelled I fear by comments on unduly lenient sentences by the Press, to continue to constrain the sentencing powers of the judges. Side by side with this concern to be seen as cracking down on crime is the immediate need to reduce the prison population, increased not so much by an increase in crime but by the sentencing requirements imposed by successive Criminal Justice Acts. The latest Criminal Justice Act includes sections designed to reduce the prison population by further restrictions on sentencing by judges and magistrates. I should be very surprised if there is not in the near future further criticism of the judges based on this new legislation. The judges have a difficult balancing role in applying the frequent Criminal Justice Acts passed by Parliament and using their judicial discretion to pass sentences which are fair to the individual offender and are fair to the public. The Lord Chief Justice, Lord Phillips, spoke recently in his annual review about ministerial erosion of sentencing by judges.

There remains a considerable tension between the Executive and the judiciary in this area of criminal law.

TERRORISM

There have been a series of decisions by the House of Lords, Court of Appeal and the Administrative Court which have made considerable inroads into the Government initiatives to try to curb terrorism and have brought into sharp relief the tension between protection of the public from terrorist acts and the rule of law. I give you just a few examples from many.

In 2005 the House of Lords held that indefinite detention in Belmarsh prison of foreign terrorist suspects without charge or conviction was unlawful. Recently the Administrative Court held that financial orders which were intended to freeze bank accounts of terror suspects could not stand.

These financial orders had been introduced as Orders in Council and were adopted in order to give effect to two United Nations Security Council resolutions imposing sanctions on those alleged to be funding terrorism. They had not been scrutinised either by MPs or by the House of Lords. The effect of the Orders was to freeze every penny of the assets of the family with a requirement for people on the terrorist list and their wives and children to have to apply for a licence to the Treasury in order to buy groceries and other necessities. There appears to be no right of appeal or review of the order. Anyone who provided the suspect with "an economic resource" was liable to be prosecuted and sent to prison. The judge was scathing about these orders and called them "absurd" unfair and a "breach of fundamental rights". He also said that "It was frankly another example of an immediate reaction without it being thought through properly - which is rather the pattern with the anti-terrorism measures."

In 2005 the House of Lords held that evidence obtained by torture could not be used against those tried on terror charges. The Government has made agreements with a number of Middle East countries to enable deportation of obviously undesirable aliens to their home countries. The return of several aliens to Egypt and Libya has recently been blocked by the Court of Appeal on the ground that they might be tortured or killed if returned. We are signatories to a Convention on Torture and I hope it would be more than we could accept to send people, whoever they might be, back to death or torture or both.

Only this week Abu Qatada, the radical cleric has been released on bail with very strict conditions. He was one of those the Court of Appeal refused to allow to be deported. The Home Secretary was very disappointed and will appeal. Conservatives have branded the decision "offensive".

I hope the cases to which I have referred demonstrate some of the problems which surround the anti-terrorism legislation the Government is bringing into force and the tensions between the Government and the courts. We all want the Government to take steps to protect us from terrorist acts. I have no doubt that in principle we support steps taken to stop money going to help terrorists carry out their appalling acts. Equally we do not want undesirable aliens continuing to live in this country. These decisions of the courts present the Government with considerable difficulties in carrying out their policies and it would, for instance, be popular to send undesirable aliens back home and to make life difficult for terrorist suspects. It was

interesting however to read in the Times on April 25th an account of the asset freezing case and a comment by Frances Gibbs with the heading "Judges will carry on holding ministers to account - because that's their job." The decision is subject to appeal but the judge has identified issues of injustice and potential breaches of the rule of law which require serious consideration. It is important also to remember that the ultimate court for these issues is the European Court of Human Rights at Strasbourg which would be likely to uphold the English Courts.

The Government has a duty to protect the public and in its proposals to do so is often over-conscious of the Press and is not all that careful in thinking through the consequences of the legislation which is pouring through Parliament as well as Orders in Council. The judges have the duty to apply the rule of law to all who live within the jurisdiction of our courts and to ensure that the individual has been fairly treated and has the opportunity to apply to have his situation reviewed by a court or tribunal. The US Government deliberately set up the detention centre at Guantanamo Bay to place it outside the jurisdiction of the US courts and I sincerely hope that it would be impossible for such a situation to occur anywhere in the UK. Lord Falconer, former Lord Chancellor, said (in a lecture to which I refer below)

"The rule of law must prevail just as much in times of terror as in times of peace".

That is a sentiment which derives from the philosophy of Magna Carta, but it means that judges from time to time make decisions which are unpopular both with the Government and with the public. We pride ourselves that we live in a civilised country and we have exported our concept of the rule of law right round the world. It would be a sad day if we were to fall seriously below the standards we have set ourselves and which we expect of other countries, especially emerging countries with newly constituted legal systems. We have however only to read about the problems in some other countries where judges are not allowed to be independent to recognise the importance of upholding the rule of law.

The other issue to which I refer briefly since the Bill has not yet reached the House of Lords is the Government Counter Terrorism Bill and the proposal to hold terror suspects in custody for up to 42 days before charging or releasing them. It was passed in the House of Commons last week by 9 votes. Its fate in the House of Lords is uncertain. The organisation Liberty which is implacably opposed to 42 days detention in custody without charge

has produced T shirts with a quotation on the back from Benjamin Franklin used on the title page of "An Historical Review of the Constitution and Government of Pennsylvania" 1759

"Those who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety."

If, as it seems probable that the House of Lords will not pass the 42 day clause and then there will be a ping pong between the two Houses, the Government will have the choice of giving way or overriding the Lords by the use of the Parliament Act. It will be interesting to see then if it is challenged in the courts as incompatible with the Human Rights Act with an eventual decision in the European Court at Strasbourg.

ACCESS TO JUSTICE

It is interesting to consider the extent to which paragraph 40 remains relevant, at least in part, to the present situation in England. It has a resonance in the way in which some laws are passed or sought to be passed which affect the fundamental rights of individuals and make inroads into the rule of law. I have expressed my concerns about the impact of criminal justice legislation and some anti-terrorism laws and the danger of abandoning core principles which have been under attack over the centuries and remain under attack today.

I wish however to turn to a completely different area and look at access to justice not only in the criminal courts but also in the civil and family courts and the extent to which the rights enshrined in paragraph 40 - "to none will we deny, to none will we delay right or justice" are effective today. You might be surprised that I look at these rights in the context of the civil courts but there are circumstances which militate against easy access to the civil and family courts by large numbers of potential litigants. Of course in 1215 and for several centuries thereafter few ordinary people had access to the courts. But we now pride ourselves on universal suffrage and anti discrimination and have a newly constituted Equality and Human Rights Commission.

A commendable attempt has been made by successive Governments to provide adequate means tested legal aid to enable people to litigate in the civil and family courts. Legal Aid has spiralled into a huge bill to be met from the budget of the Ministry of Justice which also has to manage the cost of judges and magistrates, court buildings, the prisons and the probation service. Something has to give and the court service has suffered year by year cuts in the money allocated for instance to keep up the court buildings.

Civil cases are expected to pay for themselves and the fees for applications in civil and family cases have risen steeply. Legal aid is only obtainable by those on a very low income.

There are several unfortunate results. Perhaps the most important is the reality that only the rich or the very poor can now afford to litigate in the courts. There has been a sensible move towards alternative dispute resolution of issues which would otherwise have gone through the courts and mediation and conciliation in family disputes has a high rate of success if the former spouses or partners can be seen early enough before they become entrenched in their approach to their family problems. Solicitors and barristers accept some cases on a contingency fee basis. Small claims can be dealt with in a relatively informal and inexpensive way without lawyers by district judges in the small claims court. These procedures do not, however, cover all the problems which may arise and may require a judicial decision. There remains a large group of potential litigants who are neither rich nor sufficiently poor for whom the costs of litigation are too great and who are, in effect, denied access to justice.

Lord Woolf, at the end of the 1990s wrote a seminal report on access to justice and masterminded a revolution in our civil court procedures which have been very much simplified. But there remains in all but the simplest cases a cost which is unacceptable to many who cannot afford to litigate and to whom justice is denied. I am not criticising the Government about this situation because I am aware of the huge size of the legal aid bill but I believe we need to be aware of the position. How the balance should be struck is an extremely difficult question but there is a group of people who for lack of money do not have access to justice.

There is however one aspect of the legal aid bill about which I am critical. In family cases and also in the criminal defence cases, there have been attempts to cut costs by reducing the fees of the lawyers. For the majority of lawyers criminal and family work is not well-paid but a few lawyers have made large incomes out of very expensive long criminal trials and long family hearings. The Government is introducing a new legal aid fee structure for lawyers representing those who qualify for legal aid. There is a danger, which is not fanciful, that by reducing the fees of lawyers, both barristers and solicitors below a certain point in criminal defences and in family cases that lawyers will cease to do this work. It is already happening and in some areas of England it is difficult to find family solicitors prepared

to take legal aid cases. Less experienced lawyers take longer and find it more difficult to settle or realise the short cut which will help the client and save time. The judges take longer over the cases and delays build up. This situation breaches also a right recognised in Magna Carta - delay can be a denial of justice and in family cases the person disadvantaged is principally the child.

MAGNA CARTA IN UNITED STATES

I have recently come back from the United States and was staying with a trial lawyer who practised in the Federal Courts. I remember, some years ago, seeing his Appellate Brief in a public utilities case in which he referred to the rights of the American citizen deriving from Magna Carta. President Kennedy attended a great ceremony at Runnymede recognising the importance of Magna Carta to the United States. I understand that two clauses from Magna Carta became the 5th and 6th Amendments to the American Constitution and I have already referred to the recent purchase of a copy of the Magna Carta in the USA for about \$21 million.

It is however a sad reflection upon a great State that the response to the appalling terrorist attacks on New York on 9/11 was to create a camp for terror suspects at Guantanamo Bay deliberately outside the jurisdiction of the American Federal Court system. Over 6 years after the Camp was set up I believe about 270 detainees remain in the Camp and a Special Military Court is now hearing some of the more serious cases. I understood from the American newspapers that the defence lawyers only received much of the prosecution documents a few days before the trials began. It is difficult to understand the basis upon which these suspected terrorists are being tried. It is also interesting to note that the British suspects returned from Guantanamo Bay to the UK have neither been tried nor even been made subject to our anti-terrorism requirements such as control orders.

There have been 3 decisions by the US Supreme Court to the effect that foreign citizens held at the camp were nonetheless entitled to process in a US court. The first two decisions appear to have been ineffective but in a 5 to 4 decision this month the Supreme Court held that the limited rights provided by Congress were not adequate to protect the inmates and they had the right to petition for habeas corpus, a device to enable a person to claim that he is being wrongfully held. Justice Kennedy said in the judgment of the Court

"The laws and Constitution are designed to survive, and remain in force, in extraordinary times."

It is not of course clear whether this ruling of the Supreme Court will be any more effective than the earlier ones but it is heartening to see that the Supreme Court of the USA and the Judicial Committee of the House of Lords are at one in their assertion of the rule of law even with the threat of terrorism.

Another matter of great concern is the American Government approach to evidence obtained by torture. Although evidence obtained by torture is not accepted in the US courts I understand that the President has decided that water-boarding, the holding of prisoners under water, is not a form of torture and presumably evidence obtained by that method will be accepted in the Military Court.

Prominent politicians and former and present members of the British Government have joined in the criticism of the detentions in Guantanamo Bay and there is widespread disapproval among American lawyers. The current American Government approach to terrorism is a warning to this country which we should heed. It is also interesting to conjecture what Benjamin Franklin and the Founding Fathers might have said.

THE CONSTITUTIONAL REFORM ACT

I turn now to the changing relationship between the Executive and the judiciary and the position of the judges in the framework of our still largely unwritten Constitution. The independence of the judiciary at all levels was taken for granted throughout my life as a barrister and a judge. The Lord Chancellor was head of the judiciary, always one of the most senior figures in the Cabinet and the judiciary expected him to speak up for them and protect them when necessary. I do not propose to explore the attempt by the Government in 2003, expressed in a press release and without consultation, to abolish the post of Lord Chancellor and replace him by a Secretary of State for Constitutional Affairs, now the Ministry of Justice. As a result of these steps by the Government the then Lord Chief Justice, Lord Woolf, supported by the Heads of Division negotiated with the then Lord Chancellor, Lord Falconer, the Concordat, the agreement between the Government and the judiciary which was incorporated in the Constitutional Reform Act 2005. For the first time the judges felt it necessary for their independence to be enshrined in statute and for the relationship between the judiciary and the Executive to be redefined. Section 3 of the Constitutional Reform Act states

- (1) The Lord Chancellor, other ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.
- (2)(5) The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.
- (3)(6) The Lord Chancellor must have regard to:
 - a. the need to defend that independence
 - b. the need for the judiciary to have the support necessary to enable them to exercise their functions
 - c. the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.

The Lord Chief Justice is now head of the judiciary and the Lord Chancellor does not have to be a member of the House of Lords or even a lawyer. The present Lord Chancellor, Jack Straw MP, is in the Commons but he is a QC, an experienced lawyer and has a distinguished Parliamentary background. He has made it clear that he is well aware of his responsibilities towards the judiciary and that he must be a bridge between them and Government. Accountability of the judges to the public cannot be direct. It is, as Jack Straw said in a recent lecture in Washington:

"via the person of the Lord Chancellor to Parliament".

As the Lord Chief Justice, Lord Phillips said in his recent annual review, the judiciary is one of the three branches of the State. This country continues to accept the principle of Parliamentary sovereignty and, unlike the USA Supreme Court, the courts cannot declare a law to be unconstitutional. There are the twin principles of the supremacy of Parliament and the rule of law interpreted by the judges. Those principles are now subject both to the overriding jurisdiction of the European Court in Luxembourg and the power of the higher courts in the UK to declare that a law is incompatible with the Human Rights Act, but leave it to the Government to decide whether to make changes to render it compatible.

The new Supreme Court comes into effect in October next year. One important aspect of our final Court of Appeal is that in any sensitive case before it the political views of the judges will be unknown nor will it be known much in

advance which 5 of the 12 judges will be sitting on a case. Judges do not engage in politics and unlike the American Federal judges are not subjected to interview by a Judicial Committee of politicians. The present members of the Supreme Court of the United States were interviewed for their political leanings as well as their excellence as lawyers in the majority of issues which they have tried. Although there has been a suggestion that senior judges should be questioned by Parliament as to their views, I do not believe it has, much to my relief, Government support.

Lord Irvine when he was Lord Chancellor gave a lecture soon after the implementation of the Human Rights Act in which he warned judges of the dangers of judicial activism. Lord Woolf has recently had published a collection of his lectures under the title "In Pursuit of Justice". In the introduction he explained the reason for the title

"that judges should strive to achieve justice. They should not be content to be merely neutral arbitrators who, having listened to the arguments of both sides, give reasoned judgements. They should be pro-active, even fiercely pro-active in the pursuit of justice."

The balance for the judiciary between these two viewpoints is extremely delicate. It is however important for a judge to understand the implications of the decisions he or she makes where it is a judicial decision in the political arena.

In a lecture given in Sydney in 2006, Lord Falconer delivered a Magna Carta lecture and devoted it to the current position of the judiciary at a period when fundamental rights and freedoms were coming under threat. He spoke of the role of the judges in a modern democracy and how it was changing and how judges were being asked to take decisions which had formerly been left either to the Executive without restraint or to Parliament. Judges now found themselves dealing with issues which were also the business of politics. He said that this overlap, this congruence, needed recognition so that the overlaps could more easily be dealt with. He suggested that a new form of relationship was needed and was being established between the Executive, Legislature and Judiciary. He said:

"We do need better understanding between the three areas of our democratic state."

He went on to say

"Democracies can only survive where judges have the power to protect the rights of the individual. Democracy is not just a process of electing those who govern us. It is also a political philosophy which believes in the critical importance of the rule of law, that says we are all equal, with an equal say in how we are governed and with the right to be treated without discrimination. That democratic principle of equality and the right to be free from discrimination must be enforceable and recognised in ways other than simply the intermittent right to vote for a government. Otherwise it is empty words. Each individual's personal rights and freedoms can only be given effect to by protection under the law. The extent of that protection will involve judgments on whether executive action has exceeded the limits of freedom and freedom from discrimination to which the individual is entitled in a modern democracy."

He referred to the need for clarity about the separation between the courts and the other parts of the State. It must be clear which are the decisions of the courts and which are those of the Executive or Legislature. He took the example of terrorism and said that the Executive or Legislature must decide how the fight was to be conducted and the courts to decide whether measures others have decided are lawful. There has to be mutual understanding about the different roles and a recognition of shared values.

He spoke of the need to make explicit the different roles of each part of our Constitution. He also urged restraint upon the judges and an indefinable wisdom as to where to pitch their decision because judges must carry public confidence.

This was an admirable lecture and I not only very much support the sentiments expressed but am delighted it was said by so distinguished a lawyer and politician. I fear, however, the message is less well-understood by the Government and by the Press than it is by the judges. Judges are, nonetheless, increasingly expressing their views, particularly to Parliamentary Select Committees but Lord Phillips warned of the danger that the perception of impartiality may be prejudiced and the proper boundary between the judiciary infringed by judges giving evidence. He also indicated that the judiciary was willing to advise on the practical implications for the administration of

justice of proposed legislation. This was particularly so in relation to the undue complexity of the sentencing process.

It is a delicate balance for the judiciary to give advice and retain the perception as well as the actuality of impartiality. But when the legislation is passed judges have the duty to implement it in the courts and in some instances particularly sentencing the judicial perspective given in advance of legislation might reduce some of the problems thrown up by a stream of Criminal Justice Acts.

Lord Woolf in several of his lectures has spoken of the importance of a partnership between the Executive and the judiciary. That partnership cannot avoid the inevitable tensions between the policies of the Government and the decisions of the courts. Judges should exercise restraint and should not engage in making political decisions, as such, nor become over-enthusiastic in interpreting the law. If a judge however oversteps the mark then he can and usually will be appealed, if necessary to the Supreme Court. Politicians should also show restraint and recognise the role that the courts are there to perform. It seems to me that it is becoming increasingly important that there should be excellent communication between the senior judiciary and Government and good relations but at arm's length. Ministers need to discuss with their civil servants the implications of their disagreement with and sometimes anger with judicial decisions and seek to obtain the facts before they speak publicly. Judges need to reflect upon the possible political effect of their decisions and the need for restraint in phraseology and clear language in explaining the reasons in their judgments where a decision may hit the headlines. The public must be able to understand why controversial decisions are made by the courts and must be able to retain confidence in the judiciary. It would be helpful if the Press from time to time was more restrained and more responsible in their comments. The Times in a leader also on the 25th April made the helpful suggestion that Ministers and judges needed more respect for each other's territory. It said that it was in the interests of all sides to seek to secure an acceptable boundary between them.

I am undecided whether we should have a Bill of Rights. There is a good New Zealand model which we might consider adopting and a Bill of Rights might simplify the task of judges in their duty to protect the public from an excess of power exercised by Government, particularly if the Government has a very large majority. There is always the danger of Government passing through Parliament legislation interfering with fundamental rights of the

citizens and those living within the country. Ultimately it is the rule of law which stops a democracy descending into an elected dictatorship.

Parliament has, however, already given the judges the tools, particularly the Human Rights Convention with which to protect the individual from the unfair or arbitrary use of power by a Government Department. Parliament has now enshrined in legislation the independence of the judiciary. The judicial process is there to apply the rule of law for the protection of all of us. The unpopular decisions of today might be the salvation of ordinary citizens in the future. The Barons did not have any conception of the magnitude of the Charter they forced King John to sign in 1215.

It has however resonated through the ages and part at least remains as potent in 2008 as in 1215.

Anne Elizabeth Oldfield Butler-Sloss, Baroness Butler-Sloss, GBE PC is a retired English judge.

She was called to the Bar from the Inner Temple in 1955 and was appointed a Registrar at the Principal Registry of the Family Division in 1970. In 1979, she was appointed as a High Court judge, assigned to the Family Division, and was made a Dame Commander of the Order of the British Empire (DBE).

In 1988, she was appointed as a Lord Justice of Appeal (judge of the Court of Appeal), and in 1999, she became President of the Family Division of the High Court of Justice.

She was advanced to the rank of Dame Grand Cross of the Order of the British Empire (GBE) in 2005 .

She is Chairman of the Security Commission.

She was gazetted as Baroness Butler-Sloss, of Marsh Green in the County of Devon, in June 2006 and in August 2006 she was appointed to the Court of Ecclesiastical Causes Reserved for a period of five years.

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