

# **Lord Neuberger receives the Trinity Praeses Elit Award 2015**

## **Dublin University Law Society, Trinity College Dublin**

**6 March 2015**

1. Auditor, fellow lawyers, whether academics, students, or practitioners, ladies and gentlemen, it is a very great pleasure to be here in the beautiful city of Dublin. And it is an extraordinary honour to have been selected as the recipient of the 2015 Trinity Praeses Elit Award. To be identified as a person who has “inspired a love of knowledge and desire to contribute to the legal and political spheres” is not only awesome, to use the language of those a little younger than me, but actually rather awe-inspiring. This award reminds the recipient, indeed it reminds us all, of the importance of law and politics and the great responsibility of those who have significant roles in either of those two essential areas of modern life.
2. I wanted to start this speech in the Irish language, as my predecessor did last year. However, I feared that, even if I had got it right in written form, my pronunciation would have been so lamentable that you would not have understood a word. Nonetheless, I would like to begin by expressing respect for the historic, but happily still living, language of this island. Particularly so in the light of the way in which the people of the neighbouring and rather larger island, where I am based, have from time to time treated the people and traditions of this island. In one way and another, the relationship between what are now the United Kingdom and the Irish Republic has notoriously not been a happy one for long periods over the years since 1169 when the Earl of Pembroke landed in Wexford. More than six hundred years later, our two countries were formally unified as one country for over a century, and since 1923 we have been two countries which have been independent of each other. However, the past two centuries, initially united and subsequently separated, have had their difficulties, which is scarcely

surprising to anyone who has even a cursory knowledge of our histories.

3. It was at least partly for that reason that one of the highlights of last year for me was to attend the state banquet given at Windsor Castle by the Queen of the United Kingdom in honour of the President of the Irish Republic on his state visit. I was particularly touched by your President's speech: here was a President of the Irish Republic speaking in the castle which has been a home of the English monarchy for more than 900 years. Like the state visit itself, it was a highly significant and very positive event in the history of the relationship between our two countries. A fitting counterpart to the equally significant and positive visit of the Queen to the Republic three years earlier.
  
4. No nation should ever forget or ignore its history. That is not so much because our past is interesting in terms of what was done and who did it, although that is undoubtedly true. It is more for two other reasons, which are not unconnected. First, because we should be able to learn from the mistakes, and indeed from the right decisions, which our predecessors and ancestors made. And, secondly, because our history explains our present situation: it is the context in which our national institutions, our national outlook, our national principles have been formed. Lawyers and linguistic philosophers know that a statement can only be interpreted and understood if one knows the context in which it was made. In the same way, the institutions and traditions of any state can only be understood and appreciated if one knows the history, experience and traditions of that state. So we should never forget our history if we are to learn lessons from the past and to understand why, where, what and who we are. And while we should never forget our history, I think that one of the lessons we can learn from it is that we should never be prisoners of our history. We should benefit from it, not be obsessed with it.

5. Thus, it is important that any change in the way in which we are governed, whether in the legislature, the executive or the judiciary, is conceived and developed in a way which harmonises with our present established arrangements. For instance, one can't simply graft on an aspect of a foreign system which seems to work abroad: like a perfectly sound stranger's organ transplanted into another's body, the foreign aspect may simply be rejected by our home grown system. Equally, I think that one must be wary about the attractions of a change which seems logical if one was starting with a blank sheet of paper. In each case, an innovator has to recognise that he should treat the political system in the same way as a new writer treats an established soap opera: he cannot ignore the story so far, and the new story that he writes must fit in with what has gone before.
  
6. In the same way, our laws are not, and should not be treated as if they were, made in a vacuum. Every statute that is enacted by our national legislatures must reflect our national practices and traditions, and must be consistent with the existing law. Otherwise, it will not be effective and ineffective laws lead to loss of respect for the law. At any rate in the United Kingdom, Parliament, particularly before 2010, has been manifesting an unfortunate tendency to produce too much and poorly drafted legislation in many fields. Thus, the late Lord Barnett revealed in a speech in the House of Lords that "As Chief Secretary to the Treasury, I had the misfortune for five years ... to take two Finance Bills a year through, mainly because the first Bill had to be amended because it had not been properly scrutinised."
  
7. None of this is meant to challenge the idea of change in our institutions or our laws. With the fast-moving developments in communications, globalisation, travel, and social and cultural mores, it would be absurd to challenge the need for change. But the very fact that our world is altering so much and so quickly should make us careful to ensure that we have a degree of stability and continuity in the morass of change. And as change can be discombobulating, so I suggest that keeping in touch with our basic principles is all the more necessary in the present

world. And, since basic principles change to some extent with time and with geography, that means appreciating our history and traditions.

8. Our systems of government, both in the Republic and in the UK, have been built up over a long time, and have served us remarkably well. Apart from a slightly messy divorce between the Republic and the UK in 1923, the UK has had no constitutional upheavals, no tyranny, no revolution, and no successful invasion for over 325 years. The strength of the Republic's political system is apparent from its stability in the face of the recent economic pressures. Stability does not of course justify resisting change, as is demonstrated by the fact that there have been very significant changes over the past 200 years, most notably the rise of universal suffrage.
  
9. This year in the UK we are very conscious of our history. 2015 is the 100<sup>th</sup> anniversary of Gallipoli, the 200<sup>th</sup> anniversary of the battle of Waterloo, and the 600<sup>th</sup> anniversary of the Battle of Agincourt, but I am glad to say that the centenary which is receiving by far the most attention is the 800<sup>th</sup> anniversary of Magna Carta. And, of course, Magna Carta has a strong Irish dimension. The year after it was sealed, a version of this world-famous document, the Magna Carta Hibernae, was sent in 1216 by the great William Marshall to Dublin. Sadly, it was destroyed in an explosion at Dublin's Four Courts in 1922 – but even that sad event reflects an important aspect of your history. In a sense, the Republic can claim a closer connection with Magna Carta than can the UK. The Great Charter of Ireland is still specifically retained as a part of your law – see Part 1 of Schedule 1 to the Statute Law Revision Act 2007. By contrast, in the United Kingdom we have progressively repealed all but three clauses of Magna Carta (albeit sometimes re-enacting a clause in more modern terms).
  
10. The past century has been remarkable for its scientific developments, which have, I think, influenced our thinking generally, in the same way as scientific developments in the 17<sup>th</sup>

century (Galileo, Newton etc) helped bring about the so-called Age of Reason – although this is was, no doubt, a two-way process. Over the past 100 years, quantum physics has helped us realise that, at least in some respects, we cannot always see matters as they are, but only as they appear to be, and that by looking at something we affect its character. And the theory of relativity has made us appreciate that the notion that there are absolutes can be dangerous or unsafe. Indeed, visiting the remarkable Chester Beatty collection of religious books and manuscripts this morning makes one realise how the absolute and the relative can co-exist.

11. The relevance of this apparent diversion is that, perhaps far more than our ancestors, we now appreciate that the fact that we may now see past events in a different light from that in which they appeared at the time at which they occurred does not invalidate our present perception. Accordingly, we do not have to be too exercised about the views of some historians suggesting that the immediate contemporary significance of Magna Carta in 1215 was pretty slight. What is remarkable and important is not what Magna Carta meant in 1215, interesting though that might be, but the extraordinary and consistent symbolic quality which Magna Carta has enjoyed over the past eight centuries, and the way it is perceived today by so many people across the world. It was frequently re-issued by or on behalf of the King in the ensuing two centuries after 1215 with a view to showing the public the royal commitment to what we now think of as the rule of law. And it was invoked on many occasions thereafter, perhaps most notably by Chief Justice Coke in his works on English law in the 17<sup>th</sup> century, by the founding fathers of the United States in the 18<sup>th</sup> century, by the great Victorian constitutional historians in the 19<sup>th</sup> century and by the civilised democratic world in the aftermath of the Second World War. And, of course, its significance still resonates today, when it is seen as the foundation both of the common law and of human rights, two fundamental concepts which the Irish Republic and the United Kingdom share.

12. Specifically for today's purposes, the sealing of Magna Carta was a key event because it has come to be seen as such a game-changer in the two areas to which the Trinity Praeses Elite award is dedicated, namely politics and law. On the political front, Magna Carta represented a classic deal between two main power groups with different, indeed conflicting, interests, the monarchy and the aristocracy, a deal brokered by the third force in the kingdom, the church. King John and the barons may have been at war, or nearly at war, before they met at Runnymede, but then, to misquote, albeit only very slightly, the great 19<sup>th</sup> century historian, Carl von Clausewitz, war is merely the continuation of politics by other means. And Magna Carta was of course concerned with the law. In the sense of actual laws, with rules covering topics including fishing weirs, scutage, money-lending and deforestation. And in the sense of the rule of law, with the famous clause 29 with its promise of no imprisonment without lawful judgment, and justice being neither sold nor delayed.

13. In terms of politics, we have travelled a very great distance in terms of hard power over the past eight centuries. As I have indicated, at the time of Magna Carta the three most powerful forces in the land were the monarch, the barons and the church. Today, power is seen to rest in the hands of the legislature, particularly it may be thought with the House of Commons and those who vote for it, the executive, particularly the civil services, and the judiciary. And, over the past 800 years our law has become almost literally infinitely more complex, with primary and secondary legislation extending over literally tens of thousands of printed pages rather than being contained a single piece of hand-written parchment. So, too, many accepted norms relating to fundamental rights and the rule of law have altered since Magna Carta was sealed: our attitudes to capital punishment, sexuality, torture, and welfare are but a few obvious examples.

14. However, some things never change. And I think that the tension between politics and law, or more precisely between political power and the rule of law, is always present. When drafting

Magna Carta, the barons no doubt wanted the rule of law, but it was ultimately the rule of law on their terms and for their benefit. Thus the famous clause 29 is expressly stated to be for the benefit of every “freeman”. Inevitably, there is disagreement among historians as to what proportion of men were “free” in 1215, but expert assessments vary between a mere 10% and 50%, and then there were the women. Accordingly, it was arguably between 5% and 25% of the adult population who were even promised early 13<sup>th</sup> century access to justice.

15. So, we see at once that even one of the most famous endorsements of access to justice in Western European history left much to be desired – at least by modern standards. Although we have, of course, moved a long, long way from the world of serfs and freemen, and the world of barons tussling with kings, one of the ironies of modern life is that, as we are all starting to become aware, there is a real tension, and hopefully a beneficial and creative tension, between the rule of law and democracy.
  
16. Democracy to some people means parliamentary supremacy, ie that a government voted in by the people should be able to rule as it pleases. But a moment’s thought shows that that cannot be right. It would lead to the tyranny of the majority, which is plainly unacceptable in that it undermines respect for a government, and can lead to serious tyranny, war or revolution – as we saw in Germany and Italy in the period between the First and Second World Wars, and in Egypt and Thailand today. It is in such circumstances that the rule of law comes into its own. There are certain principles which even a democratically elected and democratically accountable government has to abide by. In countries such as the Republic, that is traditionally achieved by means of a constitution, which can be invoked by a court to overrule a statute which infringes it. But in a country without a constitution, such as the United Kingdom, with its theory of Parliamentary supremacy, that is more difficult to achieve. With the bringing into UK law of the Human Rights Convention in 1998, we have gone some way down the road

towards having a sort of crypto-constitution.

17. Democracy and the rule of law are the two pillars on which a modern, free, democratic society rests. In countries such as ours, it is interesting to contrast the roles of the politicians who represent democracy and the judges who represent the rule of law. Politicians, at least when in government, represent the majority because that is how elections are decided, although a sensible government will take into account minority interests. By contrast, it can be said that, at least when carrying out their public law function, the courts exist to a significant extent to protect minorities. But the contrasts between politicians and judges in the common law world go further.

18. Politicians are high profile and it is of the essence of a democratic system of government that they can be removed from office. By contrast, judges are relatively unknown figures, and it is of the essence of the rule of law that they are constitutionally irremovable - provided they behave themselves. Politicians make decisions by reference to all sorts of factors – their party, their career, their ministry, the media, as well as the national interest, whereas judges decide their cases simply by reference to one question – what does the law require? Politicians are expected to defend their unpopular or controversial decisions by appearing in public media, whereas judges are positively precluded from subsequently discussing in public their judicial decisions. We expect, or at least tolerate, a degree of passion and indeed trading of insults by politicians, but we expect detachment and coolness from the judiciary.

19. And yet judges and politicians have much in common too. Perhaps above all a sense of public service, the desire to help achieve a society which is safe, happy, diverse, prosperous and just. The fast-moving and sometimes worrying world we now inhabit makes it all the more important and valuable to have a reliable, responsible and respected democratic government and an independent, dedicated and respected judiciary. Those are, as I see it, the twin aims of



the Trinity Prases Elit Award with its emphasis on inspiring enthusiasm for, and making contributions to, the legal and political spheres.

20. Thank you very much indeed.

David Neuberger

Dublin, 6 March 2015