ADDRESS GIVEN TO THE LEGAL RESEARCH FOUNDATION ANNUAL GENERAL MEETING

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Anniversaries are everywhere this year. Most importantly for this audience, this year marks 50 years since the setting up of the Legal Research Foundation.

It just goes to show that the memory plays tricks. I have always thought I was in at the birth of the Foundation. But indeed fifty years ago I was still at school – just. I cannot have had any contact with the Foundation till I enrolled at the Law School, then at Pembridge, the following year. I have, however, certainly grown up in law with the Foundation. I am not going to talk about the 50 years of the Foundation and its work, because it is to be the subject of an anniversary conference of its own later in the year, which most unfortunately I am not able to attend. But I am honoured to have the opportunity to speak on this occasion.

Another anniversary in 2015 is the landing at the Gallipoli Peninsula, at what is now known as ANZAC Cove. My Welsh grandfather was with the invading British troops. Some of my family on the other side had lived in Turkey since Byzantine times. This year also marks the 100th anniversary of the Armenian genocide, the first to be so named in what was to prove a blood-soaked century.

There are however two other anniversaries this year of especial interest to New Zealand law. It is the 175th anniversary of the signing of the Treaty of Waitangi, sometimes referred to as the Maori Magna Carta.[1] Next week, on 15 June, the original Magna Carta is 800 years old. Both documents are foundations of constitutional government in New Zealand.

The constitution is a proper subject of study for a Foundation which has promoted the study of law for fifty years. It prompts reflection about the national values of which New Zealand became conscious in the experiences of war away from home at Gallipoli. The constitution should provide a haven for peace and human dignity which is the only response to the darkness of war and inhumanity. So in this year of anniversaries, talking about the constitution lights the candles on many of the birthday cakes.

This is the third annual meeting of the Association I have addressed. On the first occasion I spoke about the Treaty of Waitangi and the work of the Waitangi Tribunal. On the second I spoke about the rule of law and judicial independence, referring to the days of the Depression when parliamentarians were more assiduous about judicial independence than even the judges.

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[1] See Paul McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Oxford, 1991).

I have tried without success to locate a copy of my remarks on the first occasion, when I talked about the Treaty. It was a long time ago. My memory, which may be entirely unreliable on the point, is that in was in the mid-1980s. The Waitangi Tribunal had just started its great early work under the chairmanship of Sir Eddie Durie with the publication of the reports on Motonui, Manukau, and Kaituna reports. I remember asking those attending the meeting for a show of hands of those who had ever read the text of the Treaty of Waitangi. Not a single hand went up.

I was not surprised by that. When asked by Professor David Williams to help Nganeko Minhinnick with the claim relating to the Manukau Harbour I had read the text of the Treaty for the first time and I had done a dissertation on New Zealand constitutional law! I think for most New Zealanders it was a revelation when on Waitangi Day 1988, following the decision of the Court of Appeal in the Lands case, the New Zealand Maori Council took out a full page advertisement in the major dailies and printed the text of the Treaty in Maori and in English. My then young son was very excited. It says here, he said, that Maori have "full, exclusive and undisturbed possession" of their fisheries. Then he told me "Well you've got to win that fisheries case – anybody can see that".

The matter of the Treaty and its place in our constitution remains a work in progress. But perceptions of the Treaty – for so long consigned to the dustbin of legal history – have changed very fast indeed. It would be a mistake to think however that constitutional thought shifts violently. The principles we call constitutional are the work of hundreds of years. The change in the view taken of the Treaty of Waitangi came from the insight that it could be repositioned within an older tradition of law. That insight was provided by the bridge to understanding built by the Waitangi Tribunal. It described claims of right, to which our legal order could respond.

To some it may seem odd to speak of a tradition of law formed over many centuries, when our nation was founded only 175 years ago. But that was a notion convincingly exploded by John Beaglehole in 1954 in his wonderful essay "The New Zealand Scholar".[2] He rejected what he called the "parrot cry" that we are only a young nation. We are, he said, as old as civilisation. I do not talk about our indigenous side, which is part of the New Zealand common law tonight. But on our imported side, we are as old as the common law and its rich history. None of them richer than the Great Charter of 1215.

Only one clause of Magna Carta remains in force today: the celebrated provision prohibiting imprisonment without "lawful judgment of his Peers, or by the Law of the Land" and providing the pledge for "administration of justice": "We will sell to no man, we will not deny or defer to any man, either Justice or Right". This is clause 29 as entered on the parliamentary roll in its

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[2] See JC Beaglehole "The New Zealand Scholar" in Peter Munz (ed) *The Feel of Truth: Essays in New Zealand and Pacific History* (A H and A W Reed, Wellington, 1969) at 244.

reissue by Edward I in 1297 but as originally contained in articles 39 and 40 of the original in 1215. The Edward I version is almost identical to the reissue by Henry III, when he gained his majority. It remains law in New Zealand by virtue of the Imperial Laws Application Act 1988, in which it is positioned in the schedule with other enactments described as "constitutional".

It is the reissue of Magna Carta by Edward I as entered on the parliamentary roll that is treated as statute. Magna Carta for that reason does not have first place in the schedule to the Imperial Laws Application Act because the Statute of Westminster the First of 1275 was enrolled earlier, even though its promise of equality before the law "as well poor as rich, without respect to persons" builds on the liberties under the Great Charter of 1215 and is an idea later in development. Magna Carta may appear second in the schedule to the New Zealand Act, but there is no doubt of its pre-eminence in the line-up. Indeed its pre-eminence in legal thought has nothing to do with the fact that one article remains in force in New Zealand through a New Zealand statute. Lord Bingham said of Magna Carta that "it can plausibly claim to be the most influential secular document in the history of the world".[3]

There have been detractors. Cromwell jeered coarsely at it. Legal philosophers from the eighteenth century thought its exaltation by its partisans, such as Lord Coke, was romantic antiquarianism or special pleading, which ignored the self-interest at work in its creation and invested it with modern values undreamed of by the magnates who obtained it. It is said to have been misunderstood in its own terms.

It is true that the Charter extracted from King John in dramatic circumstances in the meadow beside the Thames between Windsor and Staines was repudiated almost immediately by the King. The Pope quickly annulled it as having been extracted by duress. That precipitated civil war which ended only with John's providential early death. The essential promises of the Charter, shorn of the enforcement clauses and those that compelled John to disgorge lands wrongly taken, were however reissued by successive kings and confirmed some 30 times throughout the Middle Ages. Scholars have so far identified some 58 instances in which it was invoked in legal proceedings in the next century.[4] The extent of the dissemination throughout the land of copies of the Charter was huge – even today scholars are still turning up copies, misfiled for centuries. The articles became the root from which further protections of freedom grew, making retention in their original form unnecessary but not diminishing or detracting from what had been accomplished or the affection in which the original continued to be held.

It is true that the terms of Magna Carta are often misunderstood. Inevitably, myths have grown up around it, leading to its disparagement as "bad history" or "romantic" thinking. Detractors have pointed out that there is little in

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3 Tom Bingham *Lives of the Law–Selected Essays and Speeches 2000-2010* (Oxford University Press, Oxford, 2011) at 3.

4 Anthony Arlidge and Igor Judge *Magna Carta Uncovered* (Hart Publishing, Oxford, 2014) at 103.

Magna Carta that was truly new. It is true that similar promises of good government had long been made by Anglo-Saxon and Norman kings. Contrary to folk-lore Magna Carta did not establish habeas corpus or trial by jury. Nor did it establish parliamentary control of taxation. Although it treats taxation by the king without the council of the land as contrary to law and custom, the council had not yet developed into anything like even the rudimentary parliament of the time of Edward I. But in article 14 (which provides for the summoning of the barons and the bishops to advise the king) there are indications of a felt need for wider and more systematic representation in the council advising the King, as Sir William Holdsworth suggests.[5] Magna Carta does not point to the repositioning of the sovereign power to make law in the king-in-parliament. Still less does it say anything about democratic government. Nor does it protect the independence of the judges, which was not secured until the Act of Settlement in 1701. All these things lay in the future in 1215 and their achievement was by no means made inevitable by the Charter.

None of this diminishes Magna Carta. More importantly, these folk memories of the importance of "The Great Charter of the Liberties of England" (as it was called in the Petition of Right of 1628) and their persistence in popular estimation tap into enduring values despite the politics and self-interest of the moment in 1215.

The clauses of the Charter repay reading, especially in the more accessible translations produced for this anniversary. I confess that until prompted by anniversary celebrations, I do not think I had ever read through the whole. They indicate a seed bed for the development of law and protections of liberty, realised in succeeding centuries.

The clauses of the Charter protest against arbitrary deprivation of liberty and property and look to proper legal process. If the term "due process of law" is not used in Magna Carta, due process of law is the effect of the promises, as was soon made explicit in subsequent legislation.

The provisions of Magna Carta are concerned to ensure that justice is not corrupt and is not delayed. They look to the provision of justice increasingly by the king's judges. A complaint of the barons was that the king's judges were not accessible enough. The Charter fixes the place of justice in Westminster and provides for regular assizes by judges sent on circuit to the counties. It promises that those appointed will know the law and be committed to fulfilling the obligations of the Charter.

The Charter looks to common laws and common measures and weights. It is concerned to protect trade and the free movement of merchants. In this it indicates a society in change. The magnates cannot do without the towns and the merchants, both specifically mentioned. The "quarrel" which gave rise to the events of Runnymede arose from John's abuse of his feudal

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[5] Sir William Holdsworth *A History of English Law* (7th ed, Sweet and Maxwell, London, 1956) vol 1 at 55.

privileges, and there is much in the Charter about redress and correction for them. But it is clear from the text of the Charter that, as Ferdinand Mount puts it, "the middle classes were on their way" and fifty years later knights and burgesses as well as barons were summoned to the parliament of Simon de Montfort.[6]

If the direct obligations are for the benefit of free-men and the tenants in chief of the king, they also look to a trickle-down effect because lords are required to observe like obligations in their dealings with their own tenants. Some clauses in the Charter refer to all men, pointing to an extension that was made in succeeding legislation in part because of the difficulties in determination of who was free and who was villein.

Wales, Scotland and the law of the Marches are all recognised in the Charter, indicating a plurality in the realm that simmers on today in the United Kingdom. Widows are protected in their dowers and their husband's houses (for forty days) and in the freedom not to marry if they do not wish to. And there is anxiety to ensure that fines are proportionate to the gravity of the offence and do not destroy the livelihood of the merchant or freeman. Clause 20 of the Charter of 1215 provides:

> 20. A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise; in the same way a villein shall be amerced saving his wainage; if they fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighbourhood.

I have not forgotten that Mr Justice Lugg at least was not greatly impressed by the invocation of this clause by Mr Albert Haddock.[7] Haddock had appealed a fine of £2 together with costs for obstructing the highway and a further £1 for conducting his defence in rhymed couplets. His argument that the fine was "excessive and not 'after the manner of the fault'"[8] and was contrary to clause 20 of Magna Carta (which he was obviously reading in a different translation to the one I have given you).

Mr Justice Lugg took a dim view of Magna Carta more generally, which he said he had read for the first time that morning in bed. He expressed some distaste about the custom of speaking "loosely of Magna Carta as the enduring foundation of what are known as the liberties of the subject".[9] He pointed out that even article 29's strictures about not selling, denying, or delaying justice or right were overblown: "We in this Court", he said, are well

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6 Ferdinand Mount "Back to Runnymede" (2005) 37 London Review of Books 15.

7 AP Herbert *Uncommon Law: Being sixty-six Misleading Cases revised and collected in one volume,including ten cases not published before* (6th ed, Methuen, London 1948).

8 At 54.

9 At 54.

aware that these undertakings have very little relation to the harsh facts of experience":[10]

> All that can be said is that much justice is sold at quite reasonable prices, and that there are still many citizens who can afford to buy the more expensive brands. If a man has no money at all he can get justice for nothing [I interpolate that Mr Justice Lugg may not have anticipated more recent reforms of legal aid]; but if he has any money he will have to buy justice, and even then may have to go without right (for the two expressions are not always synonymous). Indeed, there is something to be said for selling, denying and delaying some sorts of justice.

Mr Justice Lugg concluded that he was compelled to reveal the truth, although with "some reluctance", that Magna Carta was "no longer law".[11] And Mr Haddock lost his appeal. But I believe Mr Justice Lugg is an outlier on the Charter. And, in any event, in New Zealand, the Imperial Laws Application Act means that his conclusion that Magna Carta is "not law" is wrong in relation to article 29.

Most importantly for the development of constitutional government, the Charter proceeds on the basis that law is observed by the king not as a matter of grace, but as a matter of obligation. And the articles look to arbitrary power being curbed by the consent of the country and by law. William Holdsworth considers that, viewed from the position in 1215, "the Great Charter has made it clear that the future of English law is with royal justice, and that therefore there will be a law common to the whole of England".[12]

By the reign of Edward I the role of the Charter in the common law of England is explicitly recognised in the confirmation of the King (reprinted in the Imperial Laws Application Act) that "the Charter of liberties shall be kept in every point without breach". The Charter was directed to be sent to all sheriffs and other officers, and to all cities throughout the ream to be published (read). All "Justices, sheriffs, mayors, and other ministers" were directed to allow the Charter (and the Charter of the Forest) to be "pleaded before them in judgment in all their points". The Great Charter was described as "the common law". Any judgment given contrary to the Charter "shall be undone and holden for nought".

If the Charter represented in its day in large part claims for restitution of freedoms and liberties long-known or was preoccupied with aspects of feudal tenure, it also represents a departure. Demands for the laws of Edward the Confessor were no longer made after Magna Carta. Instead, the focus changed to confirmation of the Charter and the better securing of its promises. Subsequent reforms invoked the Charter. Encroachments on freedom were resisted in its name, particularly in the times of growing

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10 At 55.

11 At 58.

12 Sir William Holdsworth *A History of English Law* (7th ed, Sweet and Maxwell, London, 1956) vol 1 at 63.

absolutism under the Tudors and Stuarts and the dictatorship of Cromwell. It was cited in opposition to arbitrary power to imprison or take property, taxation without parliamentary consent, and development of Crown prerogative powers. The Charter was critical in the battle of ideas which led eventually to parliamentary government.

It is not fanciful to see in the terms of the Charter ideas central to the rule of law and which have influenced modern statements of rights. Professor John Baker certainly says so in his essays on legal history. Magna Carta has been cited in court cases from the 13th century down and in all jurisdictions which have inherited it. It was an important plank in the reasoning of the United States Supreme Court in *Rasul v Bush* 542 US 466 (2004) which held against executive imprisonment.

The best evidence of the importance of Magna Carta is, as Sir William Holdsworth claimed, "the history of our public law from the time of the granting of the charter".[13]

> The charter was constantly appealed to all through the mediaeval period, and during the constitutional conflicts of the seventeenth century; and, after those conflicts had been settled, its observance came to be regarded both by lawyers and politicians as a synonym for constitutional government.

While some of the claims made for the Charter were not wholly correct as a matter of history, Sir John Baker says "that made no difference": "Magna Carta, though not in any sense a written constitution, was morally entrenched". Chapter 29, in particular, "was the chief legal weapon deployed against growing absolutism".[14]

"Moral" claims are not, of course, the same as legal right. In our legal system moral or political claims are a twilight world in which, for the moment, the Treaty of Watiangi is confined. Magna Carta and the legislation and law to which it has given rise is at least acknowledged to support claims of right, recognisable as law in the courts. But entrenched rights they cannot be in a system of parliamentary supremacy, which is why Baker accurately identifies them as "morally entrenched" only.

How secure is moral entrenchment? It would be nice to think that it is as secure as formal entrenchment. But that can only be if there is widespread understanding and willingness to work harder at maintaining what is essential in our mostly unwritten constitution in which the rule of law shadows but is unequally matched to the legislative supremacy of parliament.

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13 Sir William Holdsworth *A History of English Law* (4th ed, Sweet and Maxwell, London, 1936) vol 2 at 215–216.

14 Sir John Baker *Collected Papers on English Legal History* (Cambridge University Press, Cambridge, 2013) vol 2 at 936.

Magna Carta lays the foundations for the rule of law and parliamentary sovereignty, the twin elements of the New Zealand constitution today. The 800th anniversary of Magna Carta may be a good time to take stock of how well they are serving our society. It is puzzling that the constitutional conversation to date seems largely hung up on the identity of the head of state, an element of the constitution that seems to work well. It seems reluctant to engage with bigger ideas, such as the fulfilment of the ideas set loose at Runnymede in the circumstances of today and the standing of the Treaty of Waitangi after 175 years.

Magna Carta confronted the arbitrary power of the Crown. Over the following centuries the ideas it launched brought the Crown under the law, as Bracton and Coke insisted it was. Is parliament itself made by the law in much the same way as the king was said by Lord Coke to be made by the law at the beginning of the 17th century? And if parliament is made by law and subject to law (as James I had wit enough to see was the implication of being made by the law), are there legal limits to what it may or may not do? Is arbitrary power acceptable today if exercised by a parliament democratically elected? Can we make progress in addressing the matter of the Treaty without confronting these questions? Most of the common law world has, starting with the United States where the States took Magna Carta as their constitutional lodestar. Lord Hailsham was raising such questions in connection with the constitution of the United Kingdom in his Dimbleby lecture, provocatively entitled “Elective Dictatorship”, forty years ago. His paper is worth revisiting. It accurately identifies some of the strains now evident in the constitution of the United Kingdom today.

In recent years there has been much change in New Zealand that is properly characterised as “constitutional” –New Zealand Bill of Rights Act, the change to the system of electoral representation, and the Official Information Act in particular have been transformative. They may be sufficient change for now. Our adaptable and pragmatic constitution may suit New Zealand society and indeed has some considerable virtues. It would however be foolish to think constitutional evolution is at an end in New Zealand., especially while the challenge of the Treaty remains. And even if change in our institutional arrangements is not in prospect, a largely unwritten constitution needs to be talked about if it is to work.

I do not have a crystal ball. But two things I think are clear. First, it can confidently be expected that the ideas of Magna Carta will continue to be drawn on in the necessary discussions on constitutional directions, as they have been for the past 800 years. I won’t ask for a show of hands, but I do recommend to those of you who haven’t done so that you read both the text (or texts) of the Great Charter and some of the excellent works which have been published concerning it in this anniversary year. The second thing of which I am confident is that, in talking about the constitution, the Legal Research Foundation can be expected to take a lead, as it has done in matters of law of importance for the past fifty years.

I wish the Foundation very many happy returns.

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