Nicholas Hasluck

INSIDE MAGNA CARTA

A Memorial erected by the American Bar Association stands like a beacon in the field of Runnymede near Windsor Castle. It commemorates Magna Carta, the sealing of which took place here on 15 June 1215 – eight hundred years ago. The encircling inscription reminds visitors that Magna Carta's principles became engrained in the common law as an assertion of individual freedom, an acknowledgment of sovereignty and a guarantee of the continuance of the law of England.

A beacon can be used to warn or guide. The Memorial is a reminder also that when the early colonists crossed the seas from England and settled in Virginia, they took with them the principles set out in the Great Charter. These were eventually reflected in the Declaration of Independence and the Constitution of the United States – documents inspiring a quest for change, but lighting the way to the rule of law.

That Magna Carta stands for both change and continuity is borne out by a letter dated 4 February 1947 written by a senior British public servant in Whitehall: Mr K.W. Blaxter. In response to a proposal that Magna Carta Day be celebrated in schools throughout the British Empire and the United States, Blaxter asserted, somewhat indignantly, that Magna Carta could not properly be regarded as a vindication of the doctrine that political power must be subject to the rule of law. It was essentially an attempt by the barons to restrain the power of the King and wasn't brought about 'by any altruistic promptings.'

Then, like a character in a Flashman novel curbing the demands of an unruly horde in some distant corner of the empire, Blaxter moved to his reason for rejecting the proposal before him: 'There is a possibility that the celebration of Magna Carta Day in the Colonial Empire might be used for purposes very different from those we desire. In some colonies where ill-disposed politicians are ever on the lookout for opportunities to misrepresent our good intentions, its celebration might well cause embarrassment and in general there is a danger that the colonial peoples might be led into an uncritical enthusiasm for a document which they had not read but which they presumed to contain guarantees of every so-called right they might be interested at that moment in claiming.'

Mr Blaxter's letter (not quite as he intended perhaps) draws attention to a number of questions concerning Magna Carta's influence upon the rule of law. I will look principally at the extent to which the rule of law in recent times has been affected by judicial activism.

At Runnymede in 1215 the barons' demands were reduced to the form of a charter, but the peace didn't last. The Pope purported to release King John from his undertakings on the grounds that they had been extracted under duress. With John's death from dysentery in the following year Magna Carta was reissued as the new King's coronation charter. Throughout the rest of the 13th century demands for reissue were a constantly recurring motif in the struggle between the monarch and the barons. In 1297, the Great Charter in its amended form was placed on the statute books of the realm. However, as appears from the American Bar Association's Memorial

and from Mr Blaxter's indignant letter, its power lay in its symbolism and moral force.

Four copies only of King John's Magna Carta are thought to have survived – two are now in the British Library, one in Lincoln Cathedral and one at Salisbury. Many of the chapters concern the intricacies of feudal relationships, and many provisions were weeded out or supplemented as reissues of the Great Charter occurred. An inquiry into the Charter is made easier by grouping the chapters into several categories.

The essence of the Great Charter's achievement with respect to the administration of justice can be glimpsed in a paraphrasing of its most famous clauses. ***No free man shall be imprisoned or ruined except by the lawful judgment of his peers, or by the law of the land. To no one will we sell, to no one will we deny or delay right or justice. Moreover, all these aforesaid customs and liberties shall be observed by all of our kingdom.***

A rule of law, binding even the King, is suggested by these clauses. The concept is reinforced by other principles derived from the Great Charter which are thought to be characteristic of western democracies, including parliamentary supremacy.

There is room for debate about the exact meaning of the phrase 'rule of law'. In contemporary times it is generally understood to mean that individuals and agencies within the state are bound by laws made publicly and administered by an independent judiciary. In addition, laws made by parliament and rulings of the courts must be

intelligible, within the capacity of most people to obey, and for the most part they must not be retrospective.

It is generally understood also that procedures governing the resolution of disputes by the courts should be fair, with questions of right and wrong being determined by the application of known law and not by the exercise of discretion. Put shortly, courts are expected to look at the law as it is, find the facts as they are, and apply the law to the relevant facts. An independent judiciary is thought to be one of the best guarantees against the exercise of arbitrary or unlawful power by the government of the day, and for that reason judges have tenure and are expected to renounce political causes or allegiances.

The principles concerning judicial independence are so long-established, and so deeply engrained in the common law, that it doesn't seem surprising to see them reflected in a list of resolutions composed by Sir Mathew Hale, Chief Justice of the King's Bench from 1671 to 1676, to guide his own conduct. They can be presented in a truncated form as follows. ***That in the execution of justice, I must lay aside my own passions, and not give way to them however provoked. That I will reserve myself unprejudiced until the whole case be heard. That in business capital, though my nature prompts me to pity, yet to consider that there is also pity due to the country. That I be not biased with passion to the poor, or favour to the rich. That popular or court applause or distaste have no influence into anything I do in the distribution of justice. If in criminals it be a measuring cast, to incline to mercy and acquittal. To abhor all private solicitations of whatever kind.***

Resolutions of this kind could be regarded as equally applicable to present-day judges. Indeed, it is with such a thought in mind that I cannot forbear from calling attention to the final resolution on Sir Mathew Hale's list: *to be short and sparing at meals that I may be fitter for business.*

Hale's list indicates that judges should be impartial, objective, incorruptible, and not only decisive but accustomed to applying known law to established facts. The conventional view is that rulings made in this way will give a welcome degree of certainty to the law, for citizens and corporate bodies must know what the law is before they can be expected to obey it. Rulings should not be affected by the personal beliefs of the presiding judge or by the vagaries of public opinion.

Curiously, the conventional or legalistic view of a judge's function was called into question recently by some other extra-judicial writings of Sir Mathew Hale. It happened in this way. A man was found guilty of rape on two occasions in South Australia, notwithstanding that at the time of the alleged offences in 1963 he was married to and cohabiting with the alleged victim. Upon appeal to the High Court, the man relied upon a proposition set out in Sir Mathew Hales' *The History of the Pleas of the Crown* to the effect that a husband cannot be guilty of rape in such a case because consent is presumed. Hale's proposition was apparently viewed as good law in the 1960s by the prosecuting authorities because no charges were laid at that time. It was accepted that the elements of the offence of rape identified in S48 of the Criminal Law Consolidation Act 1935 (SA) were supplied by the common law.

The man's appeal was dismissed by a majority of the court: *PGA* (2012) HCA 21. Five of the seven judges held that if the marital immunity described by Hale was ever part of the common law of Australia it had ceased to be so by 1935. The majority referred to a 'creative element' in judicial work and to certain permissible steps in that regard identified by a former Chief Justice of the High Court, Sir Owen Dixon, in a famous essay: *Concerning Judicial Method.* The majority went on to add another step which was thought to be 'determinative of the present appeal', namely, where by reason of statutory intervention or a shift in the case law, the initial rule has become no more than 'a legal fiction'. Hence, having regard to the profound enhancement of women's rights over the years as to property, suffrage, citizenship and matrimonial causes, any basis for a continued acceptance of Hale's proposition had been removed.

The majority judges said that it was unnecessary to rely in general terms upon judicial perceptions today of changes in social circumstances and attitudes which had occurred in this country by 1935, even if it were an appropriate exercise of legal technique to do so. Their conclusion followed from the changes made by statute law, as then interpreted by the courts, before the enactment of the Criminal Law Consolidation Act.

It emerges, then, that the majority felt obliged to assert that they were proceeding in a conventional or strictly legalistic manner. No, they were not influenced by personal 'perceptions' concerning the status of women in the modern world, and nor should it be assumed that they simply weren't prepared to leave a wife without a remedy (even in respect of events that had taken place 47 years

earlier when a marital immunity was thought to exist). Nonetheless, the majority ruling could be viewed as a disguised form of judicial activism. This may have contributed to the writing of powerful dissenting judgments by the minority – Justice Heydon and Justice Bell.

According to Justice Heydon, the effect of the majority view was this: conduct that no one saw as attracting criminal liability in 1963 did in fact attract that liability because, on a historical review of the law 47 years later, it was thought that changes in legal and social conditions had caused the conduct to become criminal. The step taken by the court conducting the review was said to be doing nothing more than removing an anachronistic fiction, but this was specious. The rule of law is based on the idea that the citizen should be ruled by laws and not by the whims of men. This means that only breaches of existing criminal law should be punishable – the citizen should be able to know beforehand what conduct is permitted and what forbidden, for only in that way can he order his affairs with certainty. When parliament creates a new crime, it almost invariably legislates for the future only. If a court manufactures a new crime it thereby determines *after* the event that the defendant's conduct is a criminal offence. To countenance this type of retrospective criminal legislation means that certainty and consequently freedom are at an end.

Justice Bell's dissenting judgment was equally forthright. The fact that reformative legislation had been enacted throughout Australia on the understanding that the marital immunity propounded by Hale was indeed a rule of law provided some

evidence that it was. This was a good reason for the High Court not to treat the immunity as no defence to what happened before the reformative era. She said: 'It is abhorrent to impose criminal liability on a person for an act or omission which, at the time it was done or omitted to be done, did not subject the person to a criminal punishment ….. the law should be known and accessible.'

This brings me to the nature of judicial creativity and to the question of whether there is need to revisit certain features of the rule of law including the notion of judicial independence - a cornerstone of our democratic system.

Sir Owen Dixon, Chief Justice of the High Court from 1952 to 1964, was of the view that great forensic conflicts could only be properly resolved by 'strict and complete legalism.' Close adherence to legal reasoning was principally for the sake of attaining uniformity, consistency and certainty. The mere fact that a case was new did not justify judges deciding it on their own view of what was just or expedient. The superior courts are bound by a strict doctrine of precedent for that very reason.

It emerges from the reasoning in the *PGA* case that Dixon's view allowed for a 'creative element' in judicial work, but limited to extending the application of accepted principles to new cases. It is clear that Dixon was opposed to what is now loosely described as 'judicial activism'; that is, to use a definition provided by *The Oxford Companion to the High Court,* 'a process of reasoning that openly takes account of contemporary but enduring community values when formulating legal rules or doctrines.'

A leading Australian jurist whose name is often associated with judicial activism is the former High Court judge, Michael Kirby. In his book *The Judges* he described strict legalism as 'a fairy tale'. He said that there are few observers in the judiciary who would deny that judges make law. If they have a function in making law, they have a function in its reform. In his view, the debate today is rather about 'the principles by which these unelected lawmakers will perform their creative duties.'

There is obviously a certain force in the suggestion that judges make law. A judgment is the outcome of an evaluation, a weighing up of factors relevant to the dispute in question. The elements to be put into the scales are thought to be objectively defined, but the weight to be given to each factor, and the overall balance to be achieved, may often vary from one judge to another. Moreover, by simply accepting that they are bound by the doctrine of precedent, many judges may unconsciously be reproducing in a new judgment certain hidden values underlying an existing rule, even though community practices have changed significantly. Legalism could become a cloak for the continued application of undisclosed policy values or complacent social assumptions.

The *PGA* case could be used to underpin a critique of this latter kind. The male appellant set up a defence of marital immunity, but the precedents he relied upon dated back to a time when the nature of marriage was entirely different. It might seem to an activist that to follow the precedents would conceal the fact that the conduct complained of was no longer acceptable.

In various cases Justice Kirby's reasoning reflected the activist credo. In the *Hindmarsh Island* case, for example, in construing the race power vested in the federal parliament, he said: 'My reasons are in part textual and contextual, in part affected by the "manifest abuse test"; in part influenced by the history of the power which I have outlined and in part affected by the common assumptions against the background of which the Australian constitution must be read today.'

In a recent biography – *Michael Kirby: Paradoxes / Principles* by Professor A.J.Brown – the author mentions Justice Kirby's *Hamlyn Lectures* delivered to an audience in Cardiff in 2003. Having repeated his characterisation of strict legalism as 'a fairy tale', Justice Kirby indicated that when faced with a novel problem judges had regard to three great sources of guidance: legal authority, legal principle and legal policy. Professor Brown observed that 'at the heart of Kirby's trinity of legal sources lay the notion that ideally, legal principle and public policy were clearly distinguishable', but it seems that the exact nature of the difference can only be fully established by a close reading of his judgements.

These lectures rounded off a significant phase in the legalism versus activism debate. Almost exactly twelve months earlier, in a manner which would probably have startled the applause-averse Sir Mathew Hale, Justice Kirby addressed the 34,000 people from across the world who had filled the Aussie Stadium for the opening of the 2002 Sydney Gay Games. In doing so, the 'active judge' spoke of a future world where everyone can find their place and where their human rights and dignity will be upheld. Bringing the crowd to its

feet - and prompting many to tears - Justice Kirby's closing words featured on national television and were published worldwide: 'by our lives let us be an example of respect for human rights.'

In the meantime, a number of equally eminent jurists continued to see merit in the more conventional judicial method contended for by Sir Owen Dixon – 'legalism' – and were still troubled by what were seen to be significant defects in the activist cause.

Common assumptions. **Is a judge qualified to determine what are the common assumptions of the Australian people?** ***Unelected lawmakers.*** **Are unelected judges entitled to impose their preferences or their perceptions about what is best for society in regard to human values and attitudes when the essence of democracy is generally understood to be that elected lawmakers should decide matters of concern?**

Human rights. **An unequivocal commitment to human rights sounds virtuous (utopian perhaps), but as one right is usually limited by the presence of another, will such a commitment led to uncertainty in the law? According to the appellant in the *PGA* case, for example, the wife's 'right' to autonomy within a marriage was reduced to some extent in circumstances where it would subvert a countervailing right vested in her husband; that is, a right not to be prosecuted for a crime which didn't exist when the act complained of was allegedly perpetrated. Will an emphasis upon human rights lead to a favouring of whichever rights are preferred by the unelected lawmakers?**

Only a few days before the tumultuous proceedings at the Aussie stadium described by Justice Kirby's biographer, another widely-respected judge, Justice Dyson Heydon, delivered an address - in a quieter vein - called *Judicial Activism and the Death of the Rule of Law.* He endorsed Dixon's approach to judicial method and noted that the rule of law operates as a bar to untrammelled discretionary power. In deciding cases a judge drew upon existing or readily discoverable legal sources. He was bound to identify what the crucial issue was and reach a decision on that and no other. The legalistic approach was underpinned by the doctrine of precedent, an approach which subordinated individual judicial whim to the collective experience of generations of earlier judges out of which could be extracted principles hammered out in numerous struggles. This served to explain the common law approach of gradual development.

It still seemed true, Justice Heydon went on to say, that modern Australian judges were financially incorruptible, but there were two types of wholly illegitimate pressure pushing a judge away from probity, and evidencing judicial activism. The first was the desire to utter judicial opinions on every subject which may have arisen however marginal. The second was the desire by ambitious judges to state the applicable law in a manner entirely unconstrained by the way in which it has been stated before because of a perception that it ought to be different.

The duty of a court, Heydon contended, as evidenced by the judicial oath, was not to make law but to do justice according to law. When judges detect the presence of particular community values as

supporting their reasoning they may become confused between the values they think the community actually holds and the values which they think the community should hold. Radical legal change was best effected by parliamentarians who have a long experience of assessing the popular will and have all the resources of the executive and the legislature to assist them.

It seems that Justice Heydon's fears about the increasing influence of judicial activism were not allayed by his years of service on the High Court. Shortly after his retirement, in a piece published in the *Australian Financial Review* on 5 April 2013, Heydon reaffirmed his previous approval of legalism. He pointed out that each elector has the right to be treated as an autonomous moral being whose opinion on moral issues is taken into account. Each member of parliament is directly accountable to each individual elector in his or her constituency. Judges are not, because of their independence. There is more legitimacy in accountable legislators deciding social or moral issues than non-accountable judges.

The nature of the contest between the legalistic approach of Justice Heydon and the activist view to the contrary put by Justice Kirby is reflected in another decision of the High Court: *Cattanach v Melchior* (2003) HCA 38. In that case the appellant doctor was found to be guilty of negligence when the respondent mother became pregnant and gave birth to a heathy child after a sterilisation operation.

Justice Heydon observed (in a dissenting judgement) that there was no superior court authority favouring the damages sought by the respondent parents, namely, the reasonable costs of raising and

maintaining the child until the age of 18 years. It was therefore up to the claimant parents to establish that the principles concerning recovery of damages could be extended. This could not be done persuasively because limiting attention to outgoings incurred during childhood would ignore some significant consequences of parenthood, such as the emotional and spiritual rewards it may bring. He said: 'It is wrong to attempt to place a value on human life or on the expense of human life because human life is invaluable – incapable of effective or useful valuation.'

On the other hand, a majority of the High Court was prepared to approve the award of damages. Justice Kirby held that the claim was justified by the application of ordinary legal principles. He criticised Justice Heydon for denying relief on the grounds of emotive considerations and public policy, contrary to his usual opposition to criteria of that kind.

The *Cattanach* case could be taken to suggest that, in practice, when a need for judicial creativity arises due to the novelty of the circumstances, it may often be difficult to distinguish the judicial methods known respectively as legalism and activism. Nonetheless, the reality is that within legal circles the debate runs on.

Justice Heydon is not alone in voicing misgivings about a perceived tendency on the part of activist judges in a modern (or perhaps a post-modern) world to give effect to their personal views, albeit presented as simply disposing of anachronistic fictions, or giving effect to current community values, or as a means of vindicating human rights.

The decision of the High Court in the well-known *Mabo* case was described by some commentators as the high point of judicial activism. The judgments of the majority effected a profound reversal in common law doctrine relating to the proprietary claims of indigenous persons to their traditional lands. The majority expressly sought to bring Australian law into line with jurisdictions overseas, and with some of the judicial opinions acknowledging the relevance of human rights standards and community values. Justices Deane and Gaudron went so far as to declare that redress of the indigenous claimants' position was required because until this was done 'the nation as a whole must remain diminished.'

In the years that followed, notwithstanding Sir Mathew Hale's cautionary maxims, members of the public have seen Federal Court judges being photographed in the presence of successful native title claimants. These photographs have been taken after the making of consent orders admittedly, but they are bound to leave an impression that the judges in question are doing more than simply applying the law: they are speaking for the community. Photographs of this kind may seem benign, but they continue to raise the question of whether, in the long run, legalism or activism represents the best judicial method.

In his recently-published book *Democracy in Decline,* Professor James Allan contends that the exercise of judicial power by activist judges lacks legitimacy and can be regarded as an interference with democratic decision-making by parliamentarians. He refers to a possible lack of diversity among those appointed as judges, especially if it comes to pass, as in the United Kingdom, that appointments to

the Bench are made pursuant to the recommendations of judicial commissions. The fear is, Allan contends, that we will end up with an insulated, self-selecting 'lawyerly caste' whose views on same-sex marriage, abortion, euthanasia, how to balance criminal procedures and public safety and other contentious issues are noticeably at odds with those of the voting public.

This reference to a 'lawyerly caste' points to a potential erosion of the rule of law of a slightly different kind to the case against judicial activism put by Justice Heydon. In his extra-judicial writings Heydon argued that the doctrine of precedent provided continuity, certainty and stability in the law. Thus, if judges, as a matter of conscious decision, and as a means of demonstrating that they are keeping the law up-to-date, purported to draw upon current social values in resolving disputes, then the rule of law would be undermined. That is because judicial decisions should not be made pursuant to latent judicial whims and assumptions, but upon the application of rules that are known or readily discoverable.

But are we now entering an entirely new phase of judicial activism? In years to come will up-to-date judges, as members of a 'lawyerly caste', set about their self-appointed task of reforming the law not as a matter of conscious decision, supported by accessible reasons, but rather, in an age of increasing conformity, pursuant to a number of assumptions that are never questioned; that is, all those assumptions about community values which are thought to be patently benign and generally shared by well-educated people? If decisions are made in such a manner, arrived at pursuant to current orthodoxies or supposedly self-evident assumptions that are so deeply

entrenched as not to require reasons, the rule of law will be put at risk.

There was a time when law students were encouraged to study legal history and jurisprudence as a means of revealing the vagaries of legal systems, exploring the process of reform. That time seems to have passed. The young lawyer of goodwill who wishes to move beyond 'bread and butter' issues, and look at the workings of the legal system with an inquiring gaze, now seems to be drawn immediately into the field of human rights and the removal of discrimination. This is where the action is thought to be. Unfortunately, however, the rhetoric of human rights can lead not only to an undue emphasis upon the predicament of complainants, a push for justice in particular cases, but also to a lack of interest in the coherence of the legal system as a whole.

These days, lawyers who like to think they are moving with the times are inclined to revere the judge who eschews the old ways in order to achieve a 'just result'. This brings with it a risk that the various ingredients of the rule of law, most of which are deeply rooted in legal history, will become blurred and possibly subsumed within a general but somewhat hazy notion that the rule of law stands for the righting of wrongs.

Hazy notions of this kind will lead to injustice, for just results depend ultimately upon the application of known rules by an independent judiciary pursuant to the workings of a stable and generally efficacious legal system. It will be difficult to eliminate discriminatory practices where rules are uncertain or not applied

consistently. It will be impossible to remedy such practices where the legal system is chaotic or has broken down.

A clear understanding of what the rule of law stands for will foster objectivity, and enhance the prospect of doing justice by treating like cases alike. It will serve also as a useful reminder to the legal fraternity that the law cannot be expected to solve all problems. It is generally not the function of law to intrude upon the intimate moments or private lives of citizens, or to seek to impose particular patterns of behaviour, save for where it is necessary to preserve public order or to protect people from what is oppressive or injurious.

It was a thought of this kind presumably that lay behind a passage from a textbook mentioned by Justice Bell in the course of her dissenting judgment in the *PGA* case – a thought which has been overtaken by later changes to the law but may still serve to explain the former, long-established rule concerning marital immunity: 'A husband should not walk in the shadow of the law of rape in trying to regulate his sexual relations with his wife. If a marriage runs into difficulty the criminal law should not give to either party to the marriage the power to visit more misery upon the other than is unavoidable in the nature of things.'

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Nicholas Hasluck's book on law and literature Legal Limits (The Federation Press) was reviewed in the March 2014 issue of Quadrant.