

In light of the recent celebrations commemorating 800 years since the first official sealing of Magna Carta, we must recognize that these celebrations furthermore commemorate the individual freedoms enjoyed by many today. The Magna Carta enshrined the rule of law into English law and sought to limit the power of authoritarian rule. It has influenced the constitutional frameworks of many countries, and denial of it by some has led to a profound loss of liberties and living standards elsewhere. We are, however, currently forgetting fundamental rule of law principles that deliver us the many freedoms we take for granted.

In his recent speech at the Constitutional Centre of Western Australia, the Hon Nicholas Hasluck AM, former Justice of the Supreme Court of Western Australia, addressed this issue regarding the recent increase in judicial activism. Judicial activism is a process of reasoning that openly takes into account contemporary community values when formulating legal rules. This is concerning, as it has usually been the role of the courts to look at the law as it is and apply it to the facts as they are. This process instead places the judiciary in a position which has traditionally been vested exclusively to the legislature.

In a liberal democratic society, elected representatives are more inclined to gain sufficient experience understanding dominant community values. They also have access to the necessary resources which enable them to do so effectively. If they fail to represent their electorate, they can then be replaced. It therefore seems inappropriate for unelected judges to make decisions based upon their own subjective views on current prevailing community standards. Members of parliament are held accountable to their electorate. However, judges are not due to the rule of law requirement that they remain independent.

A basic understanding of what defines the rule of law is therefore crucial in this discussion. Most simply, it can be understood as a restriction on arbitrary power. Nicholas paid his respect to it by paraphrasing one of Magna Carta's 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.

He also noted that the rule of law is additionally reinforced by other principles found in the Great Charter, including parliamentary sovereignty in which laws are to be made publically and administered by an independent judiciary. Laws are also required to be comprehensible, comprehensive and prospective in nature.

In addition to these formal procedural and institutional requirements, libertarian philosophical thinkers like Friedrich Hayek recognised the relevance of public opinion in order for there to be a realisation of the rule of law. He argues that if the rule of law forms part of the moral tradition of the community, legislatures and courts tend to approach it with a higher degree of caution. When the public ceases to hold it in high regard, it will rapidly disappear and the society will be in danger of relapsing into a state of arbitrary tyranny. It is therefore of paramount importance that in light of our recognition of Magna Carta's significance, we pay our respects by maintaining the rule of law as a firm element of public opinion.

With reference to recent cases, Nicholas highlighted how recent decisions have countered rule of law principles. He referred to the *PGA* case of 2012¹, in which the majority found the appellant guilty of a crime which was not considered to be an offence during the time it occurred. This directly convenes the rule of law requirement that laws are to be prospective in nature, readily known and accessible. What's of greater concern is that the majority referred to their use of a 'creative element' in their judicial work where they were to have regard to a change in rights (in this case women's rights) over the years. Prima facie this may seem ideal, however, if judges take on board the responsibility for being a champion of human rights, they not only give themselves the power to further the rights of citizens, but also to restrict them.

Nicholas argued in favour of the common law approach of gradual development, a preference also embraced by Hayek. This is enabled through the doctrine of precedent in which judges draw upon existing legal sources and previous decisions when reaching a conclusion. As the former Justice Heydon pointed out, precedent provides certainty and stability in the law; elements required so that people are able to plan out their lives and maintain fruitful interactions with each other. The rule of law is openly undermined if judges abandon this doctrine by taking it upon themselves to keep the law up to date with current social values.

Professor James Allen contends that judicial activism poses the risk of creating a 'lawyerly caste' whose views on contentious issues are at odds with the voting public. This would be in direct contravention to our democratic system and poses a considerable risk to the rule of law. As eloquently stated by Nicholas:

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?

I agree with Nicholas Hasluck when he contends that today's law students are immediately drawn to the field of human rights and the removal of discrimination. I say this while currently undertaking a human rights law program through my university in Geneva. With a lack of focus on legal history and the coherence of the legal system as a whole, we are instead being encouraged toward a new concept of what is 'just': that merely being a judge's ability to reach a decision which subjectively 'rights wrongs', instead of one which upholds rule of law principles by following a set of known legal norms and principles.

The best way to prevent discrimination is by upholding the rule of law as it promotes an objective approach to interpreting the law and implies a certain generality in its application. To properly appreciate Magna Carta's importance, we must recognize the rule of law's historical value and maintain its integrity in our legal system today; otherwise we risk endangering our democratic system and leave it open to serious abuses of power.

¹ *PGA* (2012) HCA 21