

Rediscovering rhetoric¹

The Hon JJ Spigelman AC delivered the following address at the launch of *Rediscovering Rhetoric*, in the Banco Court on 14 November 2008.

For several centuries the Inns of Court were called 'The Third University' on the basis that they were as significant a centre of learning as Oxford and Cambridge. Although the centrality and quality of that function declined after the civil war, it never disappeared. This was not, however, one of the functions of the Inns which their epigoni in the Australian bar associations chose to imitate.

This has changed over recent years, most notably in the intensity and quality of the Readers' Courses organised by the New South Wales Bar Association. However, the series of lectures on rhetoric, which are now published, is, so far as I am aware, the most innovative and intellectually challenging education project that the New South Wales Bar Association has ever attempted.

I congratulate Michael Slattery SC for instigating the project and Justin Gleeson SC and Ruth Higgins for both organising a series of the highest intellectual quality and producing this book as a permanent record.

One of the most distinctive characteristics of contemporary legal practice is the degree of specialisation in legal practice. It is at the heart of the continued virility, indeed the continued existence, of a separate and independent bar that advocacy should be understood to be a form of specialisation.

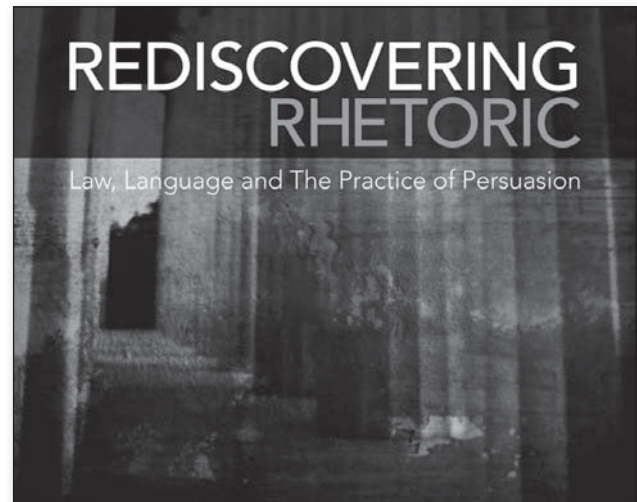
The great classical tradition of learning on the subject of rhetoric, as a distinct body of knowledge and technique, is a powerful affirmation of the existence of such a specialisation. For that reason, the whole bar is indebted to the organisers of this project.

The first part of the book contains papers of great learning about the classical tradition. This part expanded my knowledge to a significant degree. Rhetoric was a subject upon which I collected one or two books over the years but, save for dipping into Cicero both in his collected works and biography, this was a field into which I never had the time to delve in depth.

I am very grateful to the authors of these chapters for making their learning available. I am particularly grateful to the editors for inviting me to launch this book so that I actually had to set aside the time to do the reading. My speaking engagements are not always as fruitful as this.

Part two of the book focuses on the practice of advocacy at the bar. Michael McHugh mourns the passing of a golden age, whereas Michael Kirby, as is his wont, finds the promised land still ahead of us. Between them, these two great products of the New South Wales Bar, tell us much about where we came from and illuminate the issues ahead of us. Dyson Heydon, who never takes any shortcuts, is thorough and insightful in the manner to which we have all become accustomed. There is much practical wisdom in his chapter, which any barrister can read to advantage.

The declining role of orality in legal advocacy has been identified, notably by the late Bryan Beaumont and by Arthur Emmett.² Contemporary case management practices have considerably expanded the extent to which evidence and submissions are in written form. This was originally designed to save time and therefore costs. As the preparation of statements has become more refined, and written submissions have become more elaborate, I doubt that there is any cost saving today.



There is no doubt that the ability to test propositions in face to face debate improves the quality of the decision-making process. There are very real costs in the decline of orality.

The change of practice in this respect, particularly the greater involvement of judges in procedural matters and in testing submissions on substantive law, are manifestations of a process of convergence between common law and civil law systems. Just as common law systems have adopted what might be regarded as investigatory elements, so civil law systems have adopted adversarial elements. Nevertheless, a significant difference of emphasis exists between the two.

At the heart of this difference, reflecting many centuries of political and legal development, lies a fundamental difference of approach to the relationship between a citizen and the state. Our institutional tradition in this respect is deeply rooted in our social history and which, for over two centuries, has been reflected in the distinctive role of advocacy in an adversarial trial.

In our tradition, each autonomous individual is permitted a considerable degree of control over the judicial decision-making process that affects their lives, in a manner which is in no sense subordinate to the representatives of the state. Not only does this inform every aspect of our procedure, it is reflected in the very physical structure of our courtrooms.

By contrast, in civil law nations, the tradition of the architecture of a courtroom has been distinctly different. The prosecutor in a criminal trial, who is part of the same career structure as the judge, often entered the courtroom from the same door as the judge and wore the same kind of robes. In the courtroom itself the prosecutor was not located on a basis of equality with the advocate for the accused, but sat on an elevated platform in a distinct part of the court rather than, as in our tradition, at the same bar table as the accused's counsel. This is changing as part of the convergence to which I have referred.

There is a long standing debate about the virtues of the two systems in terms of which is best designed to reveal the truth. This is not a matter about which I can elaborate on this occasion. There is very real issue

as to whether truth best emerges by a process of Socratic dialogue, on the one hand, or by inquiry expressly directed to ascertaining the truth, on the other hand. Absolute truth is not the only value to be served by the administration of justice. Procedural truth has its own value. That is where advocacy performs a critical social function.

A contemporary philosopher, the late Stuart Hampshire, to whom Gleeson and Higgins refer, has placed the value of fairness in procedure at the heart of his political philosophy. Hampshire was no stranger to the frustrations of advocacy, particularly that sense of dejection one has upon thinking of one's best point after the case is over. Hampshire worked in intelligence during the war and, many years later, came to regret that he had never shared with anyone the view he frequently expressed to himself in the privacy of his own room at Bletchley Park: 'There is something the matter with that chap Philby'.

Hampshire adopted a dictum of Heracleitus that 'justice is conflict'. He said:

'Fairness and justice in procedures are the only virtues that can reasonably be considered as setting norms to be universally respected.'

And:

'... no procedure is considered fair and just, anywhere and at any time, unless the particular procedure employed is chosen to be, or to become, the regular one ... Human beings are habituated to recognise the rules and conventions of the institutions within which they have been brought up, including the conventions of their family life. Institutions are needed as settings for just procedures of conflict resolution, and institutions are formed by recognised customs and habits, which harden into specific rules of procedure within the various institutions – law courts, parliaments, councils, political parties and others.'³

Advocacy lies at the heart of this institutional contribution. This was what the classic rhetoric scholars understood. It is no less significant today.

The third part of the book focuses on political rhetoric. It contains an insightful contribution by Graham Freudenberg, my old comrade, as E G Whitlam used to call us – and still does.

This is in many respects the most topical part of the book because of the election last week of Barack Obama as President of the United States of America. The chapter entitled 'The Political Rhetoric of American Aspiration' by Susan Thomas correctly assesses the rhetorical skills of President-elect Obama in terms of the transformative possibility of his oratory. That prospect has now come to pass.

The author highlights the contrast between Abraham Lincoln's address at Gettysburg, and the florid official orator on that occasion, whose words are lost to memory. The 272 words of the Gettysburg Address have appropriately been described by Garry Wills as 'the words that remade America'⁴. The chapter assesses the eloquence of Obama's announcement of his candidacy in Abraham Lincoln's home town of Springfield, Illinois.

The speeches in this volume were delivered in the period up to October 2007. Later, in March 2008, Barack Obama had to deliver a speech on the subject of race, in the immediate wake of the revelations of some potentially devastating comments by Reverend Jeremiah Wright, Obama's preacher at his Church. No doubt, in confronting the race issue directly, Obama drew on John F Kennedy's address to a conference of Protestant ministers during the 1960 campaign, in which there was a widespread belief that the American people would never vote for a Catholic. There is an even more telling comparison.

Garry Wills has published a detailed analysis comparing Obama's speech on race to Lincoln's address at the Cooper Union⁵, when Lincoln also had to face the explosive issue of race and to confront a charge of extremism.

Obama and Lincoln both had limited political experience: briefly in the Illinois legislature and then, two years in the House of Representatives for Lincoln, and four years in the Senate for Obama. In each case the leading candidate for their party's nomination was a Senator from New York of greater reputation and experience. Each had taken a stand against what had been initially a very popular war: in Lincoln's case, the invasion of Mexico on the false pretext that American territory had been attacked; in Obama's case, the invasion of Iraq on the false pretext that that nation was accumulating weapons of mass destruction. It was the way in which they faced their greatest challenge – the charge of being soft on extremism – that created the foundation for their success. In each case, oratory was how that was done.

Lincoln spoke in the wake of the execution of the radical abolitionist, John Brown, who had attempted to incite a slave rebellion. Lincoln successfully distanced himself from the radical abolitionist, without expressly rejecting all his opinions.

The speech at Cooper Union was widely reprinted and led the powerful editor of the *New York Tribune* to say:

'Mr Lincoln is one of nature's orators, using his rare power solely and effectively to elucidate and to convince, though the inevitable effect is to delight and to electrify as well.'⁶

These words could equally have been written about Obama's speech on race in March of this year. He effectively, and eloquently, distanced himself from Reverend Wright's ravings and, like Lincoln in the wake of the Cooper Union speech comments about John Brown, Obama was accused of not sufficiently distancing himself from his preacher. Later he had to, but on this occasion his refusal to completely disown the man, who had been so influential in his life, displayed a strength of character and of conviction.

It was a supporter of John Brown, Ralph Waldo Emerson, who, a century and a half ago, had divided the political landscape into the Party of Memory and the Party of Hope. From the title of his autobiography – 'The Audacity of Hope' – and throughout his campaign, hope was a central theme of Obama's rhetoric, down to the victory speech that moved so many of us last week.

Many commentators have emphasised the extraordinary rhetorical capacity of President-elect Obama and his power to persuade: his cadences, his rhythm, his conversational tone, the subliminal

implications of his repetitions – hope, change, something happening – and the invocation of the words of the founders and of Lincoln. The rhetorical techniques of logos, pathos and ethos – invoking logic, appealing to emotion and relying on personal credibility – are all on full display. The contrast with eight years of malapropisms from George W Bush is clear.

America's cottage industry of advice on how to become a leader has already produced a volume entitled *Say it Like Obama*. Obama's inauguration speech promises to be a classic. For those of us who regard politics as a spectator sport, we have had a wonderful two years, with more to come. Political oratory is back.

I conclude on a less contemporary note. The Australian contribution to international rhetoric is not as well regarded as our contribution to world sport. However, in terms of the power of conveying information and, on many occasions, of persuasion, perhaps the most significant contribution Australians have made over recent decades is in the form of the tabloid headline. Primarily because of the expansion of the News Corporation internationally, but not only because of that, Australian sub-editors have made a disproportionate contribution to the punch of tabloid newspapers, particularly in London and New York.

In international politics, we have seen this skill on full display in phrases like 'war on terrorism' or 'axis of evil' or 'mission accomplished'.

Let me share with you my favourite set of newspaper headlines which appeared in *Le Moniteur Universel*, the principal French newspaper during the French Revolution and for many years thereafter. It was virtually the official journal of the French government, including during Napoleon's rule.

During the 100 days – the Cent-jours – between Napoleon's escape from Elba and the restoration of the Bourbons, *Le Moniteur* remained loyal to the government. On the day of his escape *Le Moniteur* led with the following headline, as compiled by John Julius Norwich:⁷

'The Cannibal has left his Lair.'

Thereafter there appeared the following sequence:

'The Corsican Ogre has just landed at the Juan Gulf.'

'The Tiger has arrived at Gap.'

'The Monster slept at Grenoble.'

'The Tyrant has crossed Lyons.'

'The Usurper was seen 60 leagues from the Capital.'

'Bonaparte has advanced with great strides – But he will never enter Paris.'

'Tomorrow, Napoleon will be under our ramparts.'

And then:

'The Emperor has arrived at Fontainebleau.'

And finally:

'His Imperial Royal Majesty entered his palace at the Tuileries last night in the midst of his faithful subjects.'

Perhaps the most important aspect of all advocacy is the ability to adapt to changing circumstances. *Le Moniteur* is an example to us all.

I conclude with the last sentence of Aristotle's *Rhetoric*:

'I have spoken, you have listened, you have (the facts), you judge.'⁸

I have much pleasure in launching this excellent book.

Endnotes

1. Justin T Gleeson and Ruth C A Higgins (eds) *Rediscovering Rhetoric: Law, Language, and the Practice of Persuasion* Federation Press, Sydney, 2008.
2. See Bryan Beaumont 'Written and Oral Procedures: The Common Law Experience' (2001) 21 *Australian Bar Review* 275; Arthur R Emmett 'Towards the Civil Law?: The Loss of 'Orality' in Civil Litigation in Australia' (2003) 26 *University of New South Wales Law Journal* 447.
3. Stuart Hampshire *Justice is Conflict* Princeton University Press, Princeton NJ, 2000 at 53-54.
4. See Garry Wills *Lincoln at Gettysburg: The Words that Remade America* Simon & Shuster, New York, 1992.
5. Garry Wills 'Two Speeches on Race' *The New York Review of Books* Vol LV May 1 2008 at 4.
6. David Donald *Lincoln* Jonathan Cape, London, 1995 at 239-240.
7. See John Julius Norwich *Still More Christmas Crackers* Viking, London, 2000 at 329.
8. George Kennedy (ed) *Aristotle on Rhetoric: A Theory of Civic Discourse* Oxford University Press, Oxford, 1991 at 282.

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