SPEECH | SYDNEY UNIVERSITY LAW SOCIETY

120th Anniversary Dinner

18 OCTOBER 2023

I acknowledge the Gadigal people of the Eora Nation, the traditional custodians of the land and waters on or near which we gather, and pay my respects to their elders past, present and emerging.

Recently, some have questioned the utility of such acknowledgments of country. That it can be viewed by some through a utilitarian lens is somewhat dismaying of itself. Stated genuinely, such acknowledgments are important living recognition of the past, the present and the future. Such acknowledgments have become, recently, all the more important.

It is a great privilege to speak to you tonight. Until recently I was not sure what to say or how to approach this gathering. I thought it should have at least some legal flavour and most importantly something that might appeal to the young lawyer or law student.

So, after some hesitation I thought I would say a few things about some of my legal heroes. Law and heroes? … I hear you ask quizzically. When I was your age, I would have shared that quizzicalness.

I only have time to speak of four. The others whom I mention later include a guest tonight, the Hon William Gummow AC.

The people about whom I will speak have had a personal effect on how I have thought about the law and come in my own way to be very attached to it.

I did however abandon the law after two years of arts/law: Legal History was okay if prosaically taught; but Constitutional Law I (Administrative Law) killed my interest, taught as it was as a structured list of deconstructed, taxonomized rules all to be learnt at by heart. Not for me – I went back to history and became a school teacher, but I returned to the law with a slightly older brain three and five years later and began to sense something more. It began to dawn on me that one needed this mass of stuff in different subjects before one could think of law as a whole, as life, as philosophy and as human.

The irony of my recoiling from Administrative Law is that the subject is deeply human and interesting: It is about the power of

the state and its limits and its affects on people and society. This is an analytical process, but not just analytical: it also a human one. Law is always about people – though necessarily abstracted: human and abstract – an antithesis or antinomy. Antithesis, antinomy and reconciliation of opposites is central to law and its development.

In a democratic society all power (to be efficacious) is built on assent. Not assent to the particular, but to the general – to the system or structure and application of the power. That assent is sometimes absent when power or system is viewed as foreign or not owned by the person or group. The criminal justice system is viewed thus by some First Nations people, especially the young.

Assent comes in significant part however from the antithesis or antinomy to which I referred above. The Judge is abstracted not personal – the representative of just state power; but the Judge is also human and fallible: abstract and human at the one time. This phenomenon of human acceptance by the intuitive understanding of the antinomy of abstract and human is a factor missing in the AI debate.

Mercy is the embodiment of justice in an ineffable mixture of right, duty and humanity.

The law, like life, is full of antinomies, antithesies and opposites which somehow are mediated and resolved.

These notions lead me to the first of my heroes: Benjamin Nathan Cardozo, because they were central to his thinking. I have only time to paint a glimpse of this man as a legal thinker.

Born in 1870 of two proud Sephardic Jewish families who had arrived in America before the Revolution, Cardozo was elected in a Tammany Hall election at 43 as a Judge of the New York Supreme Court. This was 42 years after his father had resigned from the same Court under a cloud of corruption. Soon after the election he was elevated to the Court of Appeals – the highest Appellate Court in New York. His jurisprudence on the Court of Appeals, including as its Chief Judge, was prolific, beautifully written, always betraying a personal kindness, courtesy and gentleness that were his hallmarks.

His judicial work is of modern relevance, not just because it came from an age, now past, of international acclaim of American judicial lawmaking, but because of his intense appreciation of judicial lawmaking in which kindness and an understanding of the human condition were essential partners with logic, reason and precedent in the deciding of cases and in the development

of legal doctrine. His great trilogy of extra-judicial writing: The Nature of the Judicial Process, The Growth of the Law and The Paradoxes of Legal Science, illuminates with the beauty of prose that is almost poetry ideas of great subtlety in the law as a living human engagement. When you are ready you should read these books.

Cardozo could encapsulate the whole sense of a complex idea and relationship with its opposites and contradictions in a few words which called up intelligently formed emotions and a penumbra of meaning as well as abstract ideas. His most famous short expression of legal principle was I think in describing (importantly not defining) the essential characteristic of the fiduciary obligation of the trustee or partner or coventurer. In a practical context of a real estate option and the position of a joint venturer he said the following in *Meinhard v Salmon*:

> "*Joint venturers, like copartners owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a work a day world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of*

> *an honor the most sensitive, is then the standard of behaviour.*"

I will leave you to explore yourselves (I hope) the gifts of a deeply gentle and kind Judge's jurisprudence.

Kindness and gentleness are not mere personal qualities; they are deeply legal emotions and notions: they are the well-spring of mercy and decency, not as a religious expression, but as an expression of value, and hence values, which are human, and, importantly, which perhaps exist outside humans and to which we come in our appreciation of, and as we approach, consciousness.

If you wish to be a lawyer's lawyer or understand what one might be, read as much as Cardozo as you can. Cardozo died on 9 July 1938: an age away for you, but less than 15 years before I was born.

The next two in my pantheon are very different, but similar people (a Cardozo antinomy): Sir William Deane and Mary Gaudron. Both huge intellects with unremitting views and personal approaches to law, rule, principle, decency and fairness. One, Sir William, with a devout Catholic sense of humanity and human justice and the other, Mary Gaudron, with

a combative, raw determination to see social equality and justice manifested in reasoned and fearlessly logical expression. Their respective places on the High Court have not yet been fully appreciated as two of the finest judges in the English-speaking world, for different, but similar reasons. They wrote differently. Deane J wrote softly with great linguistic nuance, sometimes disguising the power of his ideas. Gaudron J wrote with clarity and logical force, but her logical clarity was always encased with a distinct humanity. Like her personality: an uncompromising conversationalist, but with a gentleness of soul that despite sometimes her best efforts she can never hide.

Both wrote powerful judgments some yet to be fully acknowledged for their influence. Sir William Deane's expression of the human dimension of bankruptcy in *Kleinwort Benson v Crowl* in discussing a provision for dispensation of errors in a bankruptcy petition illuminated the human context of bankruptcy:

> "*It is true that the strictness of the above rules leaves open the possibility of abuse by unscrupulous debtors. That is, however, an unavoidable concomitant of the protection of ordinary people faced with the threat of being bankrupt. Many, and possibly most, of the*

> *petitions in the bankruptcy lists of this country seek the bankruptcy of honest, albeit unbusinesslike or naïve, people whose indebtedness springs from causes which evoke sympathy rather than indignation. For such people, bankruptcy does not represent a game to be played to the frustration of their creditors. It represents a pronouncement of failure and humiliation attended by the fear of unknown consequences and the susceptibility to criminal punishment for what would otherwise be innocent conduct.*"

But for tonight, and especially tonight, their commanding joint judgment in *Mabo No.2* should be noted. Sir Gerard Brennan's judgment is often identified as the core of Mabo. It was a great and influential judgment, as was that of Toohey J. But the joint judgment of Deane and Gaudron JJ exhibited the searing power of language in a 20th Century European recognition of what was done to the First Nations Peoples in the colonisation and occupation of this country. I have used the expression privately in recent discussions about a history of the casting of the inheritors of 60,000 years of community and culture to the riverbanks. Justices Deane and Gaudron said this far more powerfully. After pithily expressing Aboriginal connection to the land in 1788 as what was beyond any real doubt or intelligent dispute, they wrote one of the most powerful pieces of judicial

writing one can read. It rears up from the page as imaginable reality– illustrating that how a Judge writes is a source of law by its mark of indelibility and the emoting of meaning and truth. At paragraphs 48 and following they describe the early dispossession which was to mark the colony's future. They described an early flashpoint on the Hawkesbury River as the "*first stages of the conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame*." The whole judgment should be read and re-read. It is not written in abstracted prose, nor with the niceties of property law at hand, but with a compelling narrative style recognising and expressing the human dispossession, contemporaneous legal injustice and human catastrophe committed within a legal framework built on Crown radical sovereignty that the Court could not question.

I was naïve enough at the time to think that such language, reflecting the reality of history as the foundation for the righting of such an appalling wrong, would be met with the deep respect that it deserved. I was shocked at the reaction: at the expression, sometimes in visceral, highly personal terms, inside and outside the legal community, of disagreement with not only the decision, but also with the recognition of the historical reality upon which it was based. For some people it seemed that the

Court had betrayed “their” history, “their” common law. Such views simply could not recognise the deep intellectual power, rooted in the judicial technique of a living and just common law, found in the reasons of Deane J and Gaudron J together with those of Brennan J and Toohey J (Mason CJ and McHugh J agreeing with Brennan J). At that point, I understood the challenge for Australia as a nation to come to terms with its past and to become whole as an historical colonial, that is colonising, society. The challenge continues.

Mabo reveals the intertwining of law, morality and history. It demonstrates, in living form, the relationship between constancy and change, in the law and in life. It illustrates, in judicial technique, the movement of rules based on accepted and acceptable values capable of shaping a just society. It demonstrates that language, through the evocation it brings, is a source of law: because law is not just organised abstraction, it is organised morality. Mabo sought to free the common law from racial discrimination. It brought the reality of history to the law, to govern the present and the future. In doing so, it helped cure a hobbled common law.

The power of text comes from the soul, and the heart, and the brain. It is not all brain; it is not all heart; it is not all soul. The law is the indefinable mixture of all three. That is why kindness

and gentleness as part of decency is a legal realisation. The humanity of the law gives the context and capacity for the reconciliation of opposites and antinomies; logic alone cannot reconcile opposites, only with the human whole and human values is this achieved. Sir William Deane and Mary Gaudron understood this.

My next hero was a hard tough 19th and 20th Century man who fought and was wounded, narrowly escaping death in the Civil War in the United States.

I think his kindness was reduced by his near-death experience in the Civil War. But he was a mighty thinker. He lived and judged at a time and in a country of confronting opposites: the United States still reeling from the appalling fratricidal bloodshed of the Civil War, the home to an emerging raw brutal capitalism and a nation witnessing the daily failure of the project of liberation of African Americans from slavery. I am speaking, of course, of Oliver Wendell Holmes.

He could speak harshly, even brutally, and sometimes did. He wrote in a style that was condensed and concentrated and sometimes difficult for the discursive 21st Century mind to grasp. But he was a thinker and philosopher as well as a Judge and he could sometimes leave his prosaic directness to one side to write

with a beauty that betrayed a gentleness of the poetic mind. In speaking to a group just like you in Boston in 1897 before he went to the Supreme Court (and while a Judge of the Supreme Judicial Court of Massachusetts) in a lecture entitled “The Path of the Law” , he said some words of poetry in speaking of theory and practicality. `

> “*Theory is my subject, not practical details … theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house … theory is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject. … The object of ambition, power, generally presents itself nowadays in the form of money alone. Money is the most immediate form, and is a proper object of desire. “The fortune,” said Rachel “is the measure of the intelligence.” … But, as Hegel says “it is in the end not the appetite, but the opinion, which has to be satisfied*.” *To an imagination of any scope the most far-reaching form of power is not money it is the command of ideas. … The abstract speculations of Descartes [have] become a practical force controlling the conduct of men. Read the works of the great German jurists and see how much more the world is*

> *governed today by Kant than by Bonaparte. We cannot all be Decartes or Kant, but we all want happiness. And happiness, ….. cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.*"

I did not appreciate the insight and gift of Holmes until I became a Judge. I hope you do not wait that long. My wait was the product of my inadequacy.

The law is not rules alone. The law is the expression of human justice and as Sir Maurice Byers, a great Commonwealth Solicitor-General said, the law is the expression of the whole personality.

All I have done is to pass on the scattered words of four great lawyers to which could be added if I had time to discuss them

the personal and legal qualities of others, most particularly coming to mind presently the late Paul Finn who died recently and far too young, and my Judge (as all associates call their judges) Sir Nigel Bowen, the first Chief Justice of the Federal Court, Sir Anthony Mason, the leader of that astonishing High Court of the 1980s and 1990s and the Hon William Gummow. (The last three also Alumni.) All four as judges exhibited the qualities of kindness and generosity of spirit, together with their towering intellects, that made and make them wonderful people as well as wonderful lawyers.

I have sought to give you a glimpse of what I have seen in these eight people. Each in his or her own way connected the practical and human with the general in the law. What gives law its universal interest and its echo of the infinite is the intertwined binding of the abstract and the human and the place of human kindness and gentleness (as part of mercy and decency) in the development and application of legal doctrine. Do not make the mistake that I made in thinking that law is inert or without life. It is a deeply human calling which demands rigour in thinking, precision in expression, but the recognition of the importance of the indefinable and the uncertain in context, circumstance and human character, and the recognition of the central antinomy of abstraction, experience and humanity.

It has been a great pleasure to be here tonight, and I thank you for your patience.

Sydney
18 October 2023