

Weaving suitable Cloth for emerging Emperors

A speech by Professor Dr Andrew Cannon for the FFA Graduation ceremony at Trier University, 7 July 2011

Verehrte Gäste, liebe Studentinnen und Studenten!

Es ist mir eine besondere Ehre Sie hier in diesem schönen Trier begrüßen zu dürfen. Sie wissen, ich komme aus dem fernen Australien und es ist mir ein Vergnügen unsere Studenten zu ehren. Bitte verzeihen Sie mir, wenn ich jetzt auf Englisch umschalte, denn die englische Sprache passt zu diesem Kurs!

Congratulations! Tonight is recognition of your dedicated effort applied by considerable natural ability and intellect. Also I congratulate all of your parents and supporters for whom this moment is a well earned reward for all their hard work. All of you have climbed a mountain to excellence. The Scottish prodigy Thomas Macaulay said "The highest intellects, like the tops of mountains, are the first to catch and reflect the dawn."

This is a most apt thought to commence this brief address because I want to look forwards into your new day. This is contrary to the tradition of the Law, which is to look backwards to distil wisdom from those who have gone before. We carefully follow the codes written by professors under lamplight and precedents from long past judges, weaving the threads of previous arguments into a suitable cloth for our current and future society. And we lawyers will always do that, and sensibly so, because those who went before us had a broad experience and we can learn much from their solutions to problems that recur.

Benjamin Cardozo the noted US Supreme Court Judge put it this way¹:

'History like mathematics is obliged to assume that eccentricities more or less balance each other, so that something remains constant at last.' ...

'The like is true of the work of courts. The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, ... one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has constancy and uniformity and average value greater than its component elements.'

'The pebble on the beach talking loudly to its neighbour does not define the shoreline.'

¹ B.M. Cardozo, *The Nature of the Judicial Process* (Yale University Press, New Haven, 1921) (30th edition, 1971), pp 176-177.

Many years ago, when your parents and I were young, we were living in society that we thought was so modern and state-of-the-art. We drove the original Volkswagen beetle cars, played vinyl 45 records and a new group, and the English Beatles were scandalising our parents with their long hair. Mop tops they were called but we showed our parents what long hair really looked like, but it is hard to believe that now. Personal computers had not yet been invented. We also had a war that was necessary to protect the free world, in our time it was in Vietnam to protect us from Communism rather than now in Afghanistan to protect us from the Taliban and Al Qaeda. Much has changed but most has not. As the passage of history moves us into successive societies we lawyers must weave an ever more refined cloth from past experience to regulate the current problems.

But in your lives it will not be sufficient only to look backwards. You will need to deal with much real change for reasons I shall briefly touch on. Law depends upon those with power lending their power to the court system so that their decisions made in accordance with legal principle can be enforced. They do this to resolve conflict without risk to their power. Great difficulties occur where there is a disconnection between real power and legal authority. This was graphically demonstrated in the Iraq war when the United Nations Security Council became irrelevant because it would not comply with the USA's wishes and 'the coalition of the willing', including my country, went to war any way without the authority of the Security Council. More recently we have seen that the banks are too powerful to impose on them the consequences of their own imprudence. I do not intend this as criticism of any country, but I raise it just as a demonstration of the problems confronting law and legal institutions when legal authority and power lie in different places.

Law is interpreted, expressed and applied in the court system. Nearly all traditional courts rely for their power upon the nation state. But the power of the nation state is declining. In many societies, including Australia, governments are vesting a substantial part of the ownership and management of society's basic infrastructure in private enterprise. Many large global corporations now exceed the wealth and turnover of most nation states. With ownership, management, wealth and turnover goes substantial power which can be used to manipulate our politicians who govern the nation states. They are using new court systems through international arbitration arrangements such as UNCITRAL and their own internal dispute resolution systems such as industry ombudsmen. Private mediation is widely used to resolve disputes. Nation state court systems no longer hold a monopoly on dispute resolution. We can of course find earlier precedents for this. Before the time of the nation state the powerful bishops had their courts, the king had courts, the feudal lords had courts and the city guilds had courts. Much of this alternative dispute resolution is a benefit but if corporate dispute resolution is done in private it carries risks that wrongdoing will remain hidden, the development of law may be stunted and may be different wherever it is applied, and judges for hire may lose their independence.²

² Cannon, "A Pluralism of Private Courts", (October 2004) 23 *Civil Justice Quarterly* 309-23

New types of communities are emerging, such as the Facebook community, which only started in 2004. Now it has a population of 500m active users with 250m logged on each day. This is ten times the population of Australia logged on each day. These community members in many ways have as much in common as the Australian nation state community where nearly half the population have migrated since WWII. Facebook is a real community. How is this community to be governed? Will it be sufficient to leave it to the founder of Facebook Mark Zuckerberg to be the Emperor who, with his parliament of only four more board members and two observers³, rules this new community? I have seen the movie *The Social Network* and I think not. This new community has arisen in just seven years. Imagine what else will happen in the forty years or so of your working lives.

One of the great challenges facing you in your legal careers will be the task of reconnecting our legal systems with the real holders of power in the world. This is vital for two reasons. The first is that legal systems such as courts are credible not only because of their adherence to procedural fairness but also because they can back their authority with real power. Without real power they are like an emperor with no clothes and will wither away. The second is that the existence of legal systems exercising the rule of law between those that have power and the rest of us is essential to moderate the manner of the exercise of power to prevent tyranny and totalitarianism. Unbridled power, like a drug, addicts all who try it. Independent courts exercising the rule of law are necessary to control this drug of power.

The British, who have long history of the use and abuse of power, developed a careful constitutional arrangement for the nation state, which in Australia has served us very well for more than a century. At its core it depends upon power being separated into different institutions, the legislature, the executive and the courts, so that no one has absolute power and the politicians being answerable to the people by election on a regular basis. However this will be of marginal importance if power, as I predict, moves to others outside the nation states.

In Lord Macaulay's terms, the new dawn for you as lawyers is to ensure that our legal systems keep up with the changing power relationships in our world. To do this you will need to follow the legal tradition of learning wisdom from the past, but from the top of your mountain you will also need to look around carefully to avoid stepping into the abyss of tyranny and war. This will be the responsibility for each of you: the protection of the rule of law is too important to trust to luck or someone else.

I am talking here of wisdom not just legal skills and knowledge. I expect that skills and knowledge are preconditions to the acquisition of wisdom, but they certainly do not inevitably lead to it. And wisdom is pre-eminently important. The 17th-century English born American puritan poet Anne Bradstreet put it this way⁴:

³ <http://www.facebook.com/press/info.php?factsheet> (accessed 5 July 2011)

⁴ Anne Bradstreet *Meditations Divine and Moral* (1664)

*“Authority without wisdom is like a heavy axe without an edge,
fitter to bruise than to polish”*

You are lucky to have come to Trier University School of Law. It equips you well with skills and knowledge. More importantly it gives you the tools to acquire wisdom. These include, an inquiring, creative and free ranging intellect, which remains discerning and sceptical. One of the strengths of the school is that it is young and so it has vigour, enthusiasm and willingness to challenge long held views. And this will be important for you, as it has been important for this School of Law.

For those who rely solely on a backwards view of legal traditionalism are likely to find themselves consigned to “the dust and silence of the upper shelf”⁵.

You on the other hand, have been equipped to take the threads of legal tradition and with them to weave a suitable cloth to cover and constrain the naked power of the new emperors who shall exercise power in the dawn of a changing legal age.

At the personal level I add a cautionary note. My experience was that the early practice of Law frankly can be a disappointment. Employers can be hard to find and set in their ways. The pursuit of billable cost units furthering the sometimes dubious interests of clients can be remote from lofty idealism. The stuff of Law is the whole breadth of human experience, the good, the bad and the ugly. I reassure you that amongst the mundane you shall find the moral dilemma that will test your personal metal, and you always will remember whether you passed or failed. When you pass you will have served justice and that should be a sufficient aspiration for all of us lawyers.

Thank you for your attention.

⁵ MacAulay, *On Milton* 1825.