

**BOOK REVIEW\****Rediscovering Rhetoric: Law, Language and the Practice of Persuasion*

Justin T Gleeson SC and Ruth C A Higgins (eds)

(Sydney Australia, The Federation Press, 2009) xxi + 295 pages

Recommended retail price \$85.00 (ISBN 9781862877054)

This collection of essays arose out of a series of talks organised at the New South Wales Bar Association by the editors, Justin Gleeson SC and Ruth Higgins, both barristers practising in Sydney. Each of the essays is engagingly written and illustrates the depth of feeling and learning of the author.

But the title, *Rediscovering Rhetoric*, invites a number of questions. What do the authors mean by 'rhetoric'? When and how was it lost or forgotten?

Although the focus of the book is clearly forensic advocacy, it ends with two essays on 'The Politics of Persuasion', by which is meant the art of advocacy in politics. One piece, by Dr Susan Thomas, a lecturer in education at the University of Sydney, discusses the oratory of Abraham Lincoln and Barack Obama. Thomas concludes:

Contemporary rhetorical scholars argue that rhetoric is not merely a 'device' or 'method', but a process – of inquiry, of understanding – indeed of human intellectual evolution. Invention, the first canon of classical rhetoric, is never static, but perpetually changing with the times, asking us to adapt to a shifting context of 'reality', 'truth', and 'knowledge'. ...As Quintilian proposed, and as Lincoln and Obama demonstrate, rhetoric is more than a theory of persuasion or style. It is epistemic, a way of knowing, and a philosophy for our time.<sup>1</sup>

If Thomas is correct, the title of the essays might have been 'Reinventing Rhetoric'. The Hon Michael Kirby, whose essay is a commentary on one by the Hon Michael McHugh, might have agreed. However, the other essays assume or articulate a common premise, namely that something has been lost. In a brief concluding chapter on the political rhetoric of Churchill, Menzies and Whitlam, Graham Freudenberg identifies<sup>2</sup> a decline in public discourse in Australia, which he tentatively ascribes to the death of the public meeting. As Freudenberg clearly includes as 'orators' those political leaders he discusses, the decline must have come in the last 35 years.

The first four essays remind or inform readers of the serious intellectual discipline applied to argumentative communications, commencing in classical Greece. The editors, Gleeson and Higgins, have provided well written introductions to rhetoric in classical Greece and the writings of Cicero in

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\* John Basten, Justice of the Supreme Court of New South Wales, Court of Appeal.

1 Susan Thomas, 'The Political Rhetoric of American Aspiration', 268–9.

2 Graham Freudenberg, '20<sup>th</sup> Century Political Rhetoric: Churchill, Menzies and Whitlam', 280.

republican Rome respectively. The third paper, also by a barrister, Douglas Hassall, addresses the later contribution of Quintilian in the second half of the first century AD, in imperial Rome. Hassall notes that modern discussions of advocacy as the art of persuasion commonly eschew 'a systematic, integrated attempt to identify the essential parts of the theory and practice of the art of forensic oratory or advocacy and to communicate them in a unified, comprehensive and useful fashion'.<sup>3</sup>

Justice Arthur Emmett's essay, nominally on Hermogenes of Tarsus, helpfully provides some background to the Roman legal system within which advocates operated. It is undoubtedly important to place what one reads about advocacy in its historical setting.

The theory provided by the classical philosophers and masters of rhetoric identified the kinds of argument or communication (broadly political, forensic and occasional), the appropriate structure for a speech or written text, the kinds of arguments that can be deployed and, within that framework, the way in which the content of the communication should be presented. The framework included appropriate attention to what we today would describe as psychological factors, including the likely mindset and attitudes of the listeners.

There is no doubt that effective advocacy, whether written or oral, must be presented within a carefully developed structure. In a sense, all forms of analytical thinking require such an approach. However, too great a focus on structure can give rise to arid formalism. Why that was not so in the case of the great orators of classical times depends on some degree of knowledge of their work, to the extent that we still have records.

No doubt there is a sense in which the conceptual structures developed by those, such as Plato and Cicero, who wrote about rhetoric, involve universal truths. That, presumably, is the thesis underlying the selection of topics for the book. Nevertheless, for the reader who does not have a working familiarity with the cultural attitudes and political institutions of classical times, the descriptive nature of the first part of the book may not easily engage attention.

That difficulty is not lessened by the fact that each of the authors has relied upon translations from the Greek or Roman texts which do not adopt the common forms of current legal discourse. For example, a disputed question of law is described as a matter of 'definition'.

These linguistic problems are not unimportant: even the term 'rhetoric' carries its own semantic baggage for the modern reader. At its highest, it is probably understood to refer to the use of eloquent and persuasive language, perhaps primarily in speaking, but also in writing. However, it readily carries pejorative connotations, such as 'mere rhetoric'. 'Rhetorical flourishes', especially in the courts, are thought of as irrelevant distractions. 'Rhetorical questions' are often avoided by advocates because, although not calling for an answer, they may well lead the listener to provide an answer which may seem counter-intuitive and may open up an area of debate which was intended by the

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<sup>3</sup> Douglas Hassall, 'Quintilian and the Public Attainment of Justice', 111.

speaker to be dismissed as beyond question. Such pejorative connotations may not apply universally, but they are commonplace in legal usage.

There is no doubt about the continuing importance of rhetoric in modern persuasive discourse in the political arena. Yet there, the carefully structured speech must often be adapted to the demands of mass media for a pithy or colourful point (with all the dangers of oversimplification). In the forensic context, rediscovering rhetoric needs to overcome the sceptic's view (or prejudice) that rhetoric is misplaced in legal debate and that highly structured formalism is counter-productive. It is just because times have changed that the lessons of an earlier generation must be applied with sophistication and consciousness of structural change, in order to be of value.

The second part of the book contains three papers by present or former members of the High Court. The first, by the Hon Michael McHugh, addresses the question: 'Has a noble and once glorious tradition begun its decline into a twilight of insignificance?'.<sup>4</sup> What follows is a history of the bar, both in England and Australia (or at least New South Wales) which places the 'golden age' of forensic advocacy as the period from 1875 to 1939.<sup>5</sup> McHugh is satisfied that 'the golden age of the bar has gone, and almost certainly gone forever'.<sup>6</sup> This might be thought a somewhat self-defeating argument coming from one of the foremost living forensic advocates and a great raconteur. But it leaves one wondering what were the real skills and achievements of the 'golden age' and how one is to judge them against current advocacy. This is a point well made by the Hon Michael Kirby in the second paper in this part.

In truth, McHugh's thesis is untested. His examples are mostly taken from cross-examination and jury addresses. But a cross-examination does not reveal the art of the advocate in the telling question and answer: usually the art is to be found in earlier lines of questions in which the skilled cross-examiner closes all the gates to the paddock, except that through which he or she wishes to persuade the witness to pass (or fall). Thus, we accept that Carson was 'the greatest advocate' of his era at the English bar only because McHugh says he was, not because we can deduce it from an anecdote about the cross-examination of Oscar Wilde.<sup>7</sup> It is, of course, part of the advocate's repertoire that he or she will use examples selectively. Further, McHugh suggests that the introduction of written submissions was in part responsible for 'the virtual death knell of eloquent and colourful advocacy'.<sup>8</sup> That is a curious proposition, because it appears to deny to the written word the powers of persuasion which are surely part of the art of the effective advocate and which are epitomised by McHugh's own public writing, both in judgments and in his extra-judicial papers.

The inference, not always stated, is that McHugh's 'great advocates' used their skills to achieve justice, not to subvert it. In truth, the advocate often does not know for sure whether he or she is pursuing a worthy cause or the opposite.

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4 The Hon Michael H McHugh, 'The Rise (and Fall?) of the Barrister Class', 165.

5 Ibid 184.

6 Ibid 193.

7 Ibid 179–80.

8 Ibid 190.

The great advocate, like any other barrister, operates in a world of moral ambiguity, a point appreciated in classical times, but not (apparently) the focus of any concerted analysis by modern advocates. As Kirby notes of the characterisation of F E Smith,<sup>9</sup> to describe him as a man who ‘despised almost everybody’ is unlikely to indicate a man given to such qualities as self-doubt or self-examination. Indeed, what may be remarkable about the modern bar is its absence of analytical self-examination. The present contributors aside, the authors have failed to identify a Cicero or Demosthenes who is able to conceptualise the art of advocacy in modern times.

Like Susan Thomas, the Hon Michael Kirby looks for elegant and effective advocacy in new places, consonant with the changing times. Justice Dyson Heydon provides flesh for that argument, with an informed and comprehensive analysis of the forms of advocacy which do and do not have a place in the modern courtroom. His denunciation of ‘artificial, ostentatious or over-elaborate speech’ is emphatic: ‘it conveys the impression that the advocate who employs it is a mountebank. Its windiness and glibness – its failure to mesh precisely with the issues – cause it to bear on its face a badge of irrationality’.<sup>10</sup> He also deprecates the ‘rhetoric of invective’.<sup>11</sup> By contrast, he sees the success of most modern advocates in ‘a spare, sinewy, economical and above all lucid style’.<sup>12</sup>

There are, as there have always been, different styles for different occasions and different styles which suit the character of different individuals. What this book provides is a disincentive to the unthinking use of glib phrases like ‘mere rhetoric’ and ‘rhetorical flourishes’. It reminds us that our forebears in classical Greece and Rome saw the art of persuasion as one which merited close attention and analysis. Their achievements, recounted in the first four essays, remind us not only of the extraordinary insights that their leading proponents achieved, but also that the tradition is not a static pronouncement of truth for all time. What is missing and needs to be rediscovered is the self-analytical approach to an art practiced on a daily basis in our courts, parliaments, places of education and other fora. The medium of public debate in modern times may have changed more outside the major public institutions than within. Nevertheless, it has clearly changed within the court system. In the appellate courts, working with written submissions provided in advance, there is less room for the uninterrupted eloquent speech now than in the past, a point identified by Heydon.<sup>13</sup> The role of the jury advocate may have changed less, although what is effective advocacy now may be quite different in style from that which was effective even 50 years ago.

This book provides a welcome reminder that the art of advocacy is a matter for self-analysis and cannot be left to academic reflection alone. The bar does not have a monopoly on forensic advocacy, but it does provide a community having a depth of experience and skill in that field which is unequalled elsewhere in our

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9 The Hon Justice Michael D Kirby, ‘Rhetoric in Law – A Case for Optimism?’, 206.

10 The Hon Justice J D Heydon, ‘Aspects of Rhetoric in Forensic Advocacy Over the Past 50 Years’, 222.

11 Ibid 223.

12 Ibid 226.

13 Ibid 230.

society. The efficient administration of justice, which is the ultimate public good served by a specialist bar, can only benefit from a serious focus on the skills required for expert advocacy. If this book stimulates such activity it will have served an important public purpose. It deserves to be widely read.