

The Motto of the Flinders Law Students' Association — *Neminem Oportet Esse Sapientiorem Legibus*

*Peter Kelly**

When David Lewis, the first president of the Law Students' Association, asked me one day in 1992 if I had any ideas for a motto, I said I would try to think of something. He said they wanted one in Latin. I did some thinking, but evidently too slowly; because when I found something in Latin, antique and impressive, I learnt from David that they had already discovered something else in Latin, antique and impressive. That discovery of theirs is the official motto now, and I thought that it might be an idea to have a look at it today. It bears thought.

More and more these days English mottoes are coming in. I would guess that the new ones are beginning to swamp Latin. Most of the older ones are in Latin. A few are in other languages. If you are a member of the Order of the Garter, your motto is in French. If you are the Prince of Wales, it is in German. But the bulk of the old is in Latin, and it is good to find Flinders adhering to that strong root. Latin is a language made for mottoes. You can put things in it more crisply and punchily than in any other European language.

So then, where did this motto come from? And what sort of a meaning does it have?

Legal history has seen thousands of legal sayings thrown up in its flowing tide. These sayings, usually known as maxims, are short and pithy, meant to be easy to remember, often generalisations that are not true for all particular cases, designed to catch some noteworthy point. Many have been local only, and have not lasted. Some, at the other extreme, have lasted, have become universal, have indeed become proverbs in our language and in other languages. Some go back to Roman law, many were formed in the Middle Ages.

Around the year 530 AD when Emperor Justinian made his great collection of Roman law, he listed in the fiftieth book of his fifty books of the Digest over a hundred legal maxims. Our present Flinders motto is not one of them. Nearly eight hundred years later, in 1298, the lawyer Pope Boniface VIII published a collection of decretals that was to become famous in legal history. It is known as the Sext, from liber sextus — the sixth book of decretals following five that had been published earlier that century. It contained a large number of highly polished, sharp maxims. A good number of them have come into English law. But our maxim is not in that collection either. Nor, if we skip some more centuries, is it found in Herbert Broom's *Selection of Legal Maxims*, an English collection (I

* Senior Lecturer (Retired), School of Law, Flinders University of South Australia. An address given at the prize giving ceremony held 11 March 1994.

refer to the 1939 edition). It is not, so far as I have been able to see, mentioned in Peter Stein's *Regulae Juris*, published in 1966.

But we do strike a little gold in a modern German collection. In 1984 Professor Detlef Liebs of Freiburg published the fourth edition of his *Lateinische Rechtsregeln und Rechtssprichwoerter* — translatable, I think, as “Latin Legal Rules and Legal Maxims”. It contains 1639 maxims, all of them, according to the author, in current force. The maxims are given in alphabetical order in Latin, with a very brief German translation and commentary.

Our maxim, our motto, is there. No origin is given for it, nor any opinion of its meaning — though English studies on legal rules in general are referred to. No mention is made of Sir Edward Coke. A cross-reference is made to two other similar maxims: *Non sunt judicandae leges* (“The laws are not to be judged”) and *Stulta sapientia, quae vult lege sapientior esse* (“Foolish wisdom, which wants to be wiser than the law”). It is possible that all three maxims were directed to the judiciary: that is, judges should decide according to the law, and not substitute what seemed better to them privately.

But we still have something important to come in our historical search. Jowitt's *Dictionary of English Law* gives our maxim, attaching the words:

No man ought to set himself up as being wiser than the law which is the perfection of reason, because by many successions of ages it has been fined and refined by an infinite number of grave and learned men.

This is almost straight out of Coke.

Sir Edward Coke (1552–1634) is, if not the founder, at least the great promoter of the doctrine in our maxim. It expresses his passionate belief in the supreme wisdom of the common law. It is tied to his defence of this common law against royal absolutism — a defence which cost him his job as Chief Justice under James I. He claimed that the records showed that the common law had in many cases controlled Acts of Parliament and had declared them null and void. He meant that the experience, the authority, the reasoning of the past should outweigh our personal judgement; and indeed that in the common law of England the perfection of legal reasoning had been reached. No one could expect to find anything wiser. In his *Commentary Upon Littleton*¹ he writes:

Reason is the life of the law; nay the common law itself is nothing else but reason, which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason; for *nemo nascitur artifex* [no one is born a skilled worker]. This legal reason is *summa ratio* [supreme reason]. And therefore, if all the reason that is dispersed into so many several heads, were united into one, yet could he not make such a law as the law of England is, because by many successions of ages it has been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection for the government of this realm, as the old rule may be justly verified of it, *neminem oportet esse sapientiorum legibus*: no man (out of his own private reason) ought to be wiser than the law, which is the perfection of reason.

1 I, 97b, s 138.

In *Calvin's Case*² in 1608 he, sitting either as one of the judges or at least reporting the case, came back again to the theme:

[F]or we are but of yesterday, (and therefore had need of the wisdom of those that were before us) and had been ignorant (if we had not received light and knowledge from our forefathers) and our days upon the earth are but as a shadow, in respect of the ancient days and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, (the trial of right and truth) fined and refined, which no one man (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto. And therefore it is *optima regula, qua nulla est verior aut firmior in jure* [the best rule, than which none is truer or firmer in law], *neminem oportet esse sapientiores legibus*: no man ought to take upon him to be wiser than the laws.

Does one catch here a whiff of Cicero, comparing Roman law with the laws of other peoples, especially the Greeks?

You will get such joy and pleasure from knowledge of the law, because you will easily understand how much our ancestors surpassed other nations in skill if you compare our laws with Lycurgus and Dracon and Solon amongst those others. For it is incredible how all civil law except ours is uncouth and almost ridiculous.³

Coke never ventured to such extremes in openly praising English common law; but it is not unsound, I think, to speculate that he thought it.

Let us return to our maxim. Coke refers to it as “the old rule”. So far I have not been able to find any history for it older than Coke. There are one or two mean spirits who suspect that Coke invented it. Certainly it seems from the extracts just given that he was applying the great quality of the rule to the English common law alone, and implicitly excluding other legal systems from it. On the other hand, the two similar rules cited by Professor Liebs, especially the second, resemble our motto so much as to indicate that its origin lies not in Coke. But perhaps they copied from him?

Whatever may be the right or wrong of that, we still have to try to find some kind of meaning for it today — a meaning compatible with a modern view of the common law, a view which may admire the common law without apotheosising it as Coke did; and compatible too with the huge quantity of statute law and regulation, which Coke and his contemporaries could never have dreamed of.

If yesterday's meaning has gone, as I think it has, then the maxim either has no meaning now or has a meaning fitted to today. I believe the latter. I shall try to say briefly what I think that meaning is — aware that others may find some application of it different from mine.

I think there is the kernel of a greater truth in the rule than merely saying that long professional experience should not lightly be questioned by untrained persons. That truth concerns our attitude to law.

We often hear from non-lawyers as well as lawyers, but especially the former, that we have too many laws. And certainly modern statutes and regulations

2 (1608) 7 Co Rep 1 at 3b; 77 ER 377 at 381.

3 *The Orator*, I, 197.

multiply like mosquitoes: they buzz around us in clouds. Look at the statute books, and the law reports, of one or two centuries ago, and the difference is obvious. Then the volumes were slim and few. Today there are far too many for the individual lawyer to keep up with, even with all modern helps of digests and information retrieval.

We haven't yet gone quite so far as the famous Prussian Code of 1794, a misbegotten monster in any age, which contained 19,000 provisions, regulating amongst other things private family affairs, such as how many books one should have in one's own private library, whether one might have decorative objects in one's own library, how long a mother should suckle her child, what form the family prayers should take, what clothing belonged to the house wardrobe. This Code was soon withdrawn as it was unworkable. We haven't gone that far, and let us hope that vigilance will ensure that we don't. We should be wiser than laws like that.

On the other hand, we hear the cry for more laws. Laws for the environment, human rights, equal opportunity, new economic and social matters, a never ending list.

Both more laws and fewer laws may be right according to time and place. What is certain is that you can never have exactly the right amount of law. We can never say, "It is perfect. There's not the faintest shade too much or too little, like Shylock's contract." There must be a constant striving. And that means a constant watchfulness. And these thoughts lead us on a little further.

We must have some law. All agree on that. We are not here discussing the jurisprudential question of what law is. Nor are we speaking of the whims of a dictator. We are considering the solid chunk — the law — that is there in all our lives, single and social, which can be altered in detail but never goes away. It is part of parliamentary democracy. It may be our exasperation at times, but it is our protection.

It was of law in this sense that Robert Bolt spoke in his play, *A Man For All Seasons*, published in 1960. Sir Thomas More is beginning his fatal duel with the king on the question of the royal supremacy in religious matters. At one stage there is a gathering of family members at More's home. A man, present with them, pretending friendship, has slipped out. Most of those there think he was a spy for the king, and will report, and falsely report, what had been said. They want him stopped.

"Arrest him!" cries one. "For what?" replies More. "That man's bad" asserts another. "There's no law against that" rejoins More. His family and friends want More to do an illegal act for his own safety. His answer is that that action against the law is destroying the law and the protection it gives:

This country's planted thick with laws from coast to coast . . . and if you cut them down, do you really think you could stand upright in the winds that would blow then?

I would put my own thoughts on this, and my thoughts on the motto, as follows. It is not a question here whether we should have more government

control, or less; nor a question of differing views on social issues, or on politics; nor a question of seeking to improve laws (as we should — of course we should want good law!). It is not a question whether we should have law. It is a question of our attitude to it.

The law in our society is a vast sea, surging, ebbing and flowing, never still, running on the broad ocean and into creeks and twisted inlets: and of all of it we are part. Not just associated with it, but part of it.

Therefore it is not just a matter of seeking to improve laws, but it is a consciousness as an individual citizen, and still more as a lawyer, that we should recognise, both in a group and singly, that this sea, this bond of security, this amorphous living principle, this hedge of freedom — which only humans have — is in our charge; and is affected by us.

So that, whatever may be said of an individual law, plus or minus; or the number of laws, plus or minus; we know that law as such, through which we live, and in which we are inextricably woven, is not just a thing there, a sort of lump, a necessity but a bother, but a part of our being, not to be scoffed at or neglected; to be cultivated and kept healthy, as our own body and mind are.

We should have an esteem for seeking out the best law, and prizing that, finding worth in that, being conscious and deliberate about that: given all the different opinions about what the best law is.

This elevates us, adds to our sense of individual worth; it tells us that even the most humdrum work we do as lawyers has a meaning and a value. It consoles us, it informs us that we have in our charge (I repeat: it is in our charge) that which enables our society to live; and enables it to aim to live happily.

And that should be our wisdom in the law. I think our motto means: it is not wise to think little of the law.