The Legacy of Sir Gerard Brennan to Australian Public Law

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"Law", as Sir Maurice Byers once said, is "an expression of the whole personality".[1] For those who have immersed themselves for a professional lifetime in the administration of the law, that is true. To them, law is not readily compartmentalised. Who they are cannot readily be separated from what they do. Of judges "trained within a system of judicial functioning" Sir Gerard Brennan himself said that "their minds are cast in the mould of the system, they develop personal qualities which are compatible with the system" and that "[t]hey both determine and are formed by the functions which they discharge".[2] Their personalities have been shaped by their professional experiences and by the legacies of those who have gone before them. Their own legacies will inevitably be expressions of their personalities as so shaped.

An examination of the legacy of Sir Gerard Brennan to Australian law, or to so much of Australian law as might be classified as "public" law, can therefore start with a reflection on the personality of Sir Gerard Brennan. Nowhere is that personality better depicted than in the official portrait of him as Chief Justice of the High Court. The portrait hangs in Court Room No 3 of the High Court building in Canberra. There it hangs in a line of succession with portraits of past Chief Justices who worked in that building before him and after him, beginning with Sir Garfield Barwick and currently ending with Robert French. The portrait was painted by Robert Hannaford in 1996 during the first of Sir Gerard's three years as Chief Justice.

Portrayed is a man 67 years of age in evident good health and good humour. He is seated casually. Yet tellingly, in his casualness, he is still dressed in judicial robes. He is evidently comfortable occupying the ultimate judicial office to which he has been appointed. For that office he is impeccably qualified. He has been a judge for two decades: most recently a Justice of the High Court and before that an inaugural member of the Federal Court. Overlapping with his time on the Federal Court, he has been the first President of the Administrative Appeals Tribunal. Before becoming a judge, he has been a barrister for a quarter of a century. A decade of that, he has spent as a Senior Counsel.

He looks directly and calmly at the viewer. The light falling from behind and to his right highlights his face in repose. There is a glint in his glasses. Or is it a twinkle in his eye? His demeanour is one of composure. Some might describe it as tranquillity. He exudes a wisdom which surpasses mere accumulation of knowledge. He exudes intellectual humility borne of life experience. He exudes compassion.

Held in his two hands and resting lightly on one knee is a copy of what is evidently volume 175 of the Commonwealth Law Reports. The volume covers the period 1991–1992. It includes the report of the judgment in *Mabo v Queensland (No 2)* (*Mabo*),[3] which commences at the very beginning of the volume. Inserted into the volume is a bookmark. What is marked by the bookmark is unclear. It might be a passage in his own celebrated reasons as the pivotal member of the majority in *Mabo*. It might equally be the commencement of the report of the judgment in *Secretary, Department of Health & Community Services v JWB* (*Marion's Case*),[4] decided a month before *Mabo* and reported immediately after *Mabo*,

* Justice of the High Court of Australia. This speech was presented at the CCCS Global Public Law Seminar on Monday 15 August 2022.

[1] Sir Maurice Byers, "From the Other Side of the Bar Table: An Advocate's View of the Judiciary" (1987) 10 *University of New South Wales Law Journal* 179, 182; James Allsop, "The Law as an Expression of the Whole Personality" [2017] *Bar News* 25.

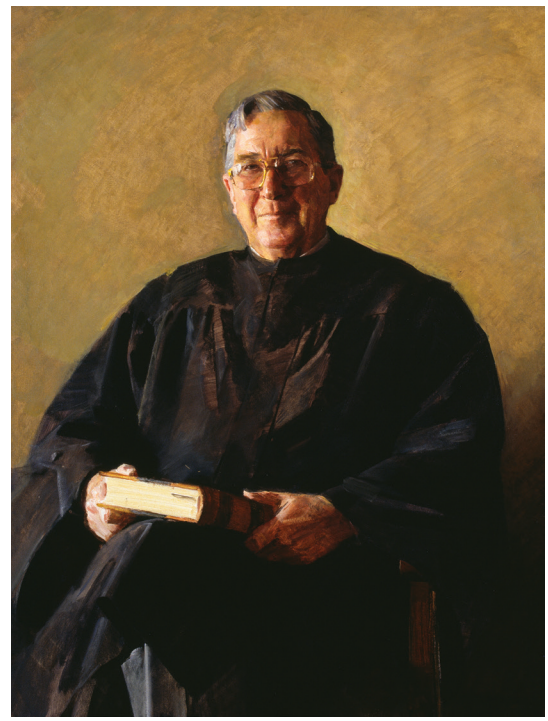
[2] Gerard Brennan, "Limits on the Use of Judges" (1978) 9 *Federal Law Review* 1, 2.

[3] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

[4] *Secretary, Department of Health & Community Services v JWB* (1992) 175 CLR 218.

in which he delivered a powerful dissent. In an interview he much later gave as part of the National Library's Oral History Project, he described it as the hardest judgment he had ever written.[5]

Marion's Case and *Mabo* might or might not qualify as "public" law. That depends on the taxonomy adopted. Howsoever the category of "public" law might be defined within any given taxonomy, Sir Gerard Brennan's enduring contribution to the category of "public" law can only be fully appreciated taking account of his reasons for judgment in those two cases. Together they manifest the deep humanity which was at the heart of who he was, and which in turn was central to the entirety of his legal philosophy and his judicial technique.



Famously on display in Sir Gerard's reasons for judgment in *Mabo* was his embracing of moral responsibility for what he described as the "organic development" of legal doctrine in order to "accord with contemporary notions of justice and human rights" while respecting and maintaining what he described as "the skeleton of principle which gives the body of our law its shape and internal consistency".[6] In *Mabo*, he exercised that moral responsibility with unsurpassed technical skill to reappraise feudal notions of land tenure and to restate the common law of Australia with reference to land title in order to redress an historic injustice by which the rights and interests of Australia's indigenous inhabitants had been treated as non-existent.

Spelt out in *Marion's Case* was a fundamental animating consideration, which can be seen to have informed the moral choice starkly made in *Mabo* and to have pervaded Sir Gerard's jurisprudence more generally. The central question in *Marion's Case* was as to the power of another, be that other a parent or a guardian or a court, to authorise the sterilisation of an intellectually impaired child. The majority view was that a court had power to authorise sterilisation by reference to the "best interests" of the child.

[5] Sir Gerard Brennan interviewed by Fiona Wheeler and Michael Coper in the History of the High Court of Australia Oral History Project (25 October 2007).

[6] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 29.

Sir Gerard disagreed. Absent community consensus on the ethical principles to be applied, the "best interests" approach appeared to him to depend so much on the "value system of the decision-maker" as to give rise to an "unexaminable discretion in the repository of the power".[7] The "best interests" approach for that reason provided an insubstantial protection of "human dignity".[8] "Human dignity" he explained to be a value "common to our municipal law and to international instruments relating to human rights" which required "that the whole personality be respected"[9] and which was required to be afforded equally to all.[10]

Sir Gerard's namesake and onetime associate, Gerard Carney, has pointed out that a concern for human dignity, equally afforded to all, was at the core of Sir Gerard's approach to the judicial administration of the whole of the law.[11] In a lecture at Bond University shortly after his retirement, Sir Gerard took on the herculean task of mapping out the respective roles and immunities of the Parliament, the Executive and the Courts under the *Australian Constitution*. True to that core concern, he commenced not with reference to the constitutional structure or constitutional text, nor to constitutional history. He commenced instead with the observation that "[c]onstitutions are made for a people and a time". Inevitably times will change, he went on to say, but "humankind will remain the same – with the same mystical spark that gives each a unique dignity and, as those who believe would hold, an eternal destiny; with the same basic concerns for life, liberty, property and human relationships that can be satisfied only in a society governed by law".[12]

Essential to the preservation of human dignity in a society governed by law, as Sir Gerard saw it, was the imposition of legal limits on the capacity of any one person or body of persons to exercise power to affect the interests of any other person. The unique and essential function of courts in such a society was to declare and enforce those legal limits on power. Indispensable to the capacity of courts to perform that unique and essential function was maintenance of public confidence in those courts as faithful guardians and neutral arbiters of disputes about those legal limits on power. And indispensable to the maintenance of that public confidence was the appearance, and much more so the actuality, of competence, fairness, and impartiality on the part of the judiciary.

With customary elegance, Sir Gerard explained that "[t]he rule of law depends on and is perhaps synonymous with confidence in the courts", that "it must rest on the common acceptance by all who are subject to the jurisdiction of the courts of the authority of the courts to determine cases and controversies" and that "to destroy public confidence in the courts is to destroy the foundation of the rule of law".[13] He said that:[14]

> Public confidence depends both on the reality and the perception of a judiciary that is competent, of unshakeable integrity and isolated from influences that might improperly affect the administration of justice according to law. Its awesome powers must be exercised always in the service of others. It must always respond to any application duly made to it. And it must account publicly and to the parties for the reasons for its decisions. It is a judiciary for a society living under the rule of law. Its standards must be, and be seen to be, unimpeachable.

Practising what he preached, Sir Gerard personified those essential judicial attributes.

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[7] *Secretary, Department of Health & Community Services v JWB* (1992) 175 CLR 218, 271.

[8] *Secretary, Department of Health & Community Services v JWB* (1992) 175 CLR 218, 272.

[9] *Secretary, Department of Health & Community Services v JWB* (1992) 175 CLR 218, 267.

[10] *Secretary, Department of Health & Community Services v JWB* (1992) 175 CLR 218, 266.

[11] Gerard Carney, "Sir Gerard Brennan – The Principled Judge" in M White and A Rahemtula (eds), *Queensland Judges on the High Court* (Supreme Court of Queensland Library, 2003) 85, 88.

[12] Gerard Brennan, "The Parliament, the Executive and the Courts: Roles and Immunities" (1997) 9 *Bond Law Review* 136, 136–137.

[13] Sir Gerard Brennan, "Courts for the People – not People's Courts" (1995) 2 *Deakin Law Review* 1, 3. See also Sir Gerard Brennan, "Courts, Democracy and the Law" (1991) 65 ALJ 32, 39–42; Sir Gerard Brennan, "Why Be a Judge?" (1996) 14 *Australian Bar Review* 89, 94–96; Sir Gerard Brennan, "The State of the Judicature" (1998) 72 ALJ 33, 33–34.

[14] Brennan, "Courts for the People - Not People's Courts", n 13, 12.

Judicial review is a topic that must lie within the heartland of "public" law on any taxonomy. Sir Gerard's enduring contribution to our collective understanding of judicial review followed directly from that broader conception of the essentiality of the judicial function to the preservation of human dignity in a society living under the rule of law.

Judicial review of administrative action, he told us, "is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly".[15] Moreover, he told us, there is an essential unity in the role of a court engaged in judicial review of administrative action and the role of a court engaged in judicial review of legislative action. In each case, as he famously put it in *Attorney-General (NSW) v Quin*,[16] in language destined to become canonical, "[t]he essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power" and "the duty and jurisdiction of the court … do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of [the relevant] power".

With those words, he articulated a pure conception of judicial review: untied to the jurisdiction or powers of any particular court, uncomplicated by obscure nomenclature, and uncluttered by notions of grounds of review or concerns about the availability of particular judicial remedies. In its simplicity lay its strength. By strictly confining a court engaged in judicial review to the declaration and enforcement of law, it ensured that the judiciary remained within its peculiar field of institutional competence. In so doing, it enhanced the public confidence in the judiciary on which the continuing ability of courts to engage in judicial review ultimately depended.[17]

In due course, that pure conception would come to inform our understanding of the express constitutionally entrenched jurisdiction of the High Court to engage in judicial review of the exercise of power by Commonwealth executive and judicial officers as well our understanding of the implied constitutionally entrenched jurisdiction of the State Supreme Courts to engage in judicial review of the exercise of power by State executive and judicial officers.[18]

As to the judicial discernment of the content of the law which determines the limits and governs the exercise of power, Sir Gerard saw plenty of scope for the *Constitution* to be interpreted to keep pace with long-term changes in Australian society,[19] just as he saw plenty of scope for common law principles of statutory interpretation to be developed to ensure that the exercise of powers conferred by statute kept pace with contemporary conceptions of justice.[20] What he insisted upon was that any constitutional implication be firmly anchored in the text and structure of the *Constitution*[21] and that any principle of law to be judicially developed be capable of being stated with precision and preferably in the form of a syllogism.[22]

A conference was held at the Australian National University to honour Sir Gerard's contribution to administrative law not long after his retirement. There, Sir Anthony Mason delivered a paper on Sir

[15] *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70.

[16] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–36.

[17] See Sir Gerard Brennan, "The Purpose and Scope of Judicial Review" (1986) 2 *Australian Bar Review* 93; Gerard Brennan, "Principle and Independence: The Guardians of Freedom" (2000) 74 ALJ 749.

[18] See Stephen Gageler, "The Constitutional Dimension" in M Groves (ed), *Modern Administrative Law in Australia* (CUP, 2014) 165–179, discussing *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2 and *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; [2010] HCA 1.

[19] *McGinty v Western Australia* (1996) 186 CLR 140, 168.

[20] For example *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36.

[21] For example Sir Gerard Brennan, "Foreword" in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent* (Federation Press, 2009) vi; Sir Gerard Brennan, "Foreword" in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Disciplinary Perspectives* (CUP, 2012) xvi.

[22] For example *Dietrich v The Queen* (1992) 177 CLR 292, 320–323. See Sir Gerard Brennan, "A Critique of Criticism" (1993) 19 *Monash University Law Review* 213.

Gerard's contribution to judicial review. Sir Anthony perceptively said of Sir Gerard that "[r]ule-based rather than discretionary justice was central to his jurisprudence".[23]

Commenting on that paper at that conference, I suggested that an analysis by Sir Anthony of the contribution of Sir Gerard to administrative law was like an analysis by Picasso of the contribution of Matisse to modern art.[24] Sir Gerard was not especially pleased with the analogy. He saw himself as a Rembrandt or a Vermeer. Over 20 years later, I am still convinced that on this point, he was wrong. They were masters of an earlier age. He, like Matisse, was a master of the modern age. And he, like Matisse, had a distinctive style characterised by distinct forms and harmonious composition.

More than once in his extra-curial writings,[25] Sir Gerard referred to Learned Hand's posthumous tribute to Benjamin Cardozo published in the *Harvard Law Review* in 1939.[26] Hand referred to the "customary law of English-speaking peoples" as "a structure indubitably made by the hands of generations of judges, each professing to be a pupil, yet each in fact a builder who has contributed his few bricks and his little water, often indeed under the illusion that he has added nothing". Sir Gerard Brennan was a judge who should not have been under any such illusion. To the question of what he added to Australian public law, the answer can be given with a precision which would have pleased him. I give that answer now. He added its essential unity. He added its guiding principle. He added its moral compass.

[23] Sir Anthony Mason, "Judicial Review: The Contribution of Sir Gerard Brennan" in P Creyke and R Keyzer (eds), *The Brennan Legacy* (Federation Press, 2002) 38, 38.

[24] Stephen Gageler, "Sir Gerard Brennan and Some Themes in Judicial Review" in P Creyke and R Keyzer (eds), *The Brennan Legacy* (Federation Press, 2002) 62, 62.

[25] Gerard Brennan, "Judging the Judges" (1979) 53 ALJ 767, 770; Gerard Brennan, "New Growth in the Law – The Judicial Contribution" (1979) 6 *Monash University Law Review* 1, 10.

[26] Learned Hand, "Mr Justice Cardozo" (1939) 52 *Harvard Law Review* 361, 361.