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Who's Who in the Legal Zoo: Sir Gerard Brennan AC, KBE – Former Chief Justice of the High Court

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Sir Gerard Brennan was the fifth Queenslander to be appointed as a Justice of the High Court of Australia when he was appointed in 1981. He later joined the ranks of his fellow Queenslanders, Sir Samuel Griffith and Sir Harry Gibbs, when appointed Chief Justice of Australia in 1995. I had the great privilege of working for him as his Executive Associate in 1995-1996.

Ged (as he was known to his family) was born on 22 May 1928 in Rockhampton. His father, Frank, was the Supreme Court judge there, having earlier been a Queensland politician. Ged obtained his education from the Christian Brothers in Rockhampton and later boarded at Downlands College, Toowoomba. He then attended the University of Queensland, from which he graduated with a Bachelor of Arts and a Bachelor of Laws. Thereafter his career in the law began as associate to his father, until his father's death in 1949, then later as an associate to Mr Justice Townley, before being called to the Queensland Bar in 1951. Gerry (as he became known to the profession) developed a wide-ranging legal practice as a barrister in both criminal and civil law, renowned for his sharp intellect and pronounced social conscience. He was appointed a Queen's Counsel in 1965.

His first judicial appointment occurred in 1976 when he was appointed both as a judge of the Australian Industrial Court, and as first President of the Commonwealth Administrative Appeals Tribunal (AAT). The following year he was appointed as one of the foundation judges of the new Federal Court of Australia, which absorbed the jurisdiction of the Australian Industrial Court. In 1981, he was appointed by the Fraser Government to the High Court at the same time as Sir Garfield Barwick retired as Chief Justice and Sir Harry Gibbs was appointed his successor. The appointment of Gerry Brennan by a conservative federal government was regarded at the time as surprising, given his renowned social conscience.

As was the practice at the time for appointees to the High Court, Gerry Brennan accepted a KBE (Knight Commander of the British Empire) in 1981, and thereafter became known as Sir Gerard Brennan. He served on the High Court until his

retirement on 21 May 1998, the day before his 70th birthday as prescribed by s 72 of the *Commonwealth Constitution*. For the last three years of his term there, he served as Chief Justice, succeeding Sir Anthony Mason.

Before elaborating a little on his contribution to the development of Australian law through the hundreds of judgments he wrote while on the High Court, it is important to note an additional legacy of Sir Gerard, namely, the model he provides of the ideal judicial demeanour: his acute sense of fairness both within and outside the courtroom, his passion for justice under the rule of law, his integrity, his commitment to duty and public service, and his modesty. These personal qualities were evident throughout his legal career both as a barrister and a judge. More importantly, they were recognised by his peers and all who appeared with or before him.

To understand his judicial legacy, I have previously suggested there are at least three principles which guided Sir Gerard in writing his judgments:

First, our democratic system of government depends for its legitimacy and continuity on preserving and protecting the dignity of every human being. Secondly, critical to our democratic system of government is the rule of law which recognises and protects the dignity of every human being. Thirdly, the rule of law ultimately depends on the maintenance of public confidence in the judicial branch which administers the law.¹

The last of these principles is an abiding theme in the many speeches he delivered during his long judicial career: the critical importance of an impartial and independent judiciary, both in reality and in appearance. One of his eloquent statements on this theme occurred when delivering the Blackburn Lecture in 1990:

[A] judiciary of unquestioned independence is essential. The judge stands in the lonely no-man's-land between the government and the governed, between the wealthy and the poor, the strong and the weak.²

For this reason, he declined to chair the Council of the Order of Australia, which recommended the award of honours, and felt uncomfortable swearing-in the members of the House of Representatives in 1996, these being roles which breached the appropriate divide between the judiciary and the government.

More significantly, this concern to maintain judicial independence led to a series of decisions of the High Court in the 1990s which limited the capacity of the government to vest in judges non-judicial powers. Most dramatic was the decision in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*³ which held invalid 6-1 the appointment of a judge of the Federal Court to undertake an inquiry into what was known as the Hindmarsh Bridge affair in South Australia. The majority of the High Court considered it incompatible with the role of the judiciary under the Constitution for a federal judge to undertake such an inquiry for the executive government since this might undermine public confidence in the impartiality of the judge and her court. In other words, the executive government cannot borrow judges to do the work of the executive branch. Since this decision, serving judges are no longer used to undertake inquiries for the government, instead retired judges are appointed.

The first and second of Sir Gerard's guiding principles above focus on protecting the dignity of every human being. These principles provided the foundation for the judgment for which Sir Gerard will most be remembered, both within and outside the legal profession - his judgment in *Mabo v Queensland (No 2)*.⁴ Indeed it is one of only a handful of documents from Australia which is listed on the *UNESCO World Heritage Documents List*.⁵

One of the most quoted passages from his judgment notes:

[N]o case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system.⁶

He rejected the legal view espoused over a century ago that Australia in 1788 was *terra nullius*, that is, an uninhabited land. There could be no worse human indignity to the first inhabitants of this continent to refuse to acknowledge their existence. Consequently, the High Court recognised the legal concept of native title.

Before his appointment to the High Court, Sir Gerard also played a pivotal role in the development of administrative review under the *Administrative Appeals Tribunal Act 1976* (Cth). That Act established the Administrative Appeals Tribunal (AAT) with jurisdiction to review hundreds of specified administrative decisions made by federal officials including ministers of state. As the first President of the AAT, Sir Gerard in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*⁷ articulated how the AAT should exercise merits review of government decisions made in accordance with government policies. The AAT should not merely follow such government policies, but must first ask if it is lawful and then see that it does not produce injustice.

Sir Gerard later advocated, in his extra-curial writings, the importance of independent merits review of government decisions by a body such as the AAT. He often emphasised its role as an essential complement to judicial review by the courts. In his Inaugural *Gerard Brennan Lecture* at Bond University in 1997, Sir Gerard remarked with his characteristic literary flourish:

[B]ureaucracies sometimes regard the AAT as an irksome trespasser on their territory - a cuckoo in the administrative nest. And so it is. And, in my respectful opinion, so it should be. It should also be a constructive participant in the improvement of administration and the refinement of policy.

As a former Chief Justice of Australia, Sir Gerard is entitled, at government expense, to an office and secretarial assistance for the remainder of his life. Since his retirement as Chief Justice in 1998, Sir Gerard has used these facilities to continue to contribute to the law, writing innumerable speeches and articles, as well as contributing to public debate on topics such as judicial independence and administrative review. He has also served as Chancellor of the University of Technology Sydney, and continues to serve for a month a

year as a visiting judge of the Court of Appeal of Hong Kong.

No doubt Sir Gerard will continue, as long as his health permits, to pursue his life-long passion with the law, not because of the intellectual challenge, but because of his deep abiding commitment to the enhancement of the human experience through the rule of law and its protection of personal liberty.

References

- ¹ 'Sir Gerard Brennan - the Principled Judge' in M White & A Rahemtula (eds), *Queensland Judges on the High Court* (2003), 88.
- ² Sir Gerard Brennan, 'Courts, Democracy and the Law' (1991) 65 *Australian Law Journal* 32, 40.
- ³ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.
- ⁴ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
- ⁵ See www.whc.unesco.org.
- ⁶ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 30.
- ⁷ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 645.

For discussion

Research Sir Gerard Brennan's appointments. What were some of the influences on Sir Gerard that led him to write the leading judgment in the Mabo Case?

Identify other Judges that served with or after Sir Gerard Brennan on the High Court, and discuss whether their decisions have been influenced by Sir Gerard.