

Remarks at the Launch of Jeff FitzGerald's *Sir Gerard Brennan: The Law's Good Servant*  
(The Federation Press, 2024)

Fr Frank Brennan SJ AO  
together with Chief Justice Debra Mortimer

Federal Court of Australia  
Court 1  
Queens Square  
Sydney

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Listen at <https://soundcloud.com/frank-brennan-6/fitzgerald-book-launch>

Being the eldest child of Francis Gerard Brennan, I am delighted and honoured to say a few words at the launch of Jeff FitzGerald's detailed biography of a person who was one of the Australian law's finest servants. As Jeff notes at the outset, 'In 2008, when I asked him if he would cooperate with me if I were to write his biography his response was negative, and largely based upon his own humility.'<sup>1</sup> Here we are 16 years later wondering what Dad would have made of it all. With that characteristic humility, he'd have thought that it was best that he was not in attendance.

I know Dad would be very chuffed that one of his very own associates, Debbie Mortimer, now Chief Justice of the court of which Dad was a proud founding member, is present to launch the book. He would be delighted that we are gathered in this splendid courtroom where he spoke from this very lectern on the 40<sup>th</sup> anniversary of the Federal Court.

What can I usefully add, especially when speaking to such an esteemed audience of judges and barristers? I note that the many silks in the room include one who is his daughter, and another who is his granddaughter. Being the only priest amongst his descendants, I thought it useful to toast Jeff's book through the prism of Jeff's self imposed task of doing justice to his subject 'as a man, a committed Catholic, a husband and father, and as a barrister and judge. Equally, very high priority has been given to exploring how the contributions he has made to the development of Australian law have been informed and enlightened by his humanity and his experiences in each of those capacities.'<sup>2</sup>

These are bold undertakings and beyond the bounds of a routine judicial biography. Jeff displays some fascination with how Dad held together the highest legal method, absolute

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<sup>1</sup> Jeff FitzGerald, *Sir Gerard Brennan: The Law's Good Servant* (The Federation Press, 2024), p. x.

<sup>2</sup> *Ibid.*, p. xv.

judicial integrity and commitment to his Catholic faith. I always thought the answer was neatly summarised by Dad in the four points he made in 1992 when speaking at the ecumenical service for the opening of the legal year at the Lutheran church in Canberra. While judgment was reserved in *Mabo*, he told his fellow believers and fellow lawyers: (1) ‘Declarations of solidarity with or sympathy for a neighbour who suffers an injustice are no substitute for, or solvent of, the duty to do whatever lies within our power to see that justice is done according to law.’ (2) ‘We have no divine mandate to administer justice in disregard of human law. To the contrary, the professional duty of the Christian lawyer is to administer the law created by the competent organs of society’s government.’ (3) ‘If the law itself is an obstacle to justice, the duty of a Christian lawyer extends to seeking its reform.’ (4) ‘To aspire to perform our duties, we need wisdom and knowledge, humility and compassion, courage and strength. These are gifts for which we pray and which we commit ourselves to employ.’<sup>3</sup>

This is not the place for me to say much about Dad’s role as husband and father. But might I wholeheartedly endorse the observations offered by Chief Justice Mortimer and one other ‘close colleague’. Jeff writes: ‘Throughout the period of the “Mason Court”, the relationship between Gerard and Patricia continued to be one which was remarkable for what Debra Mortimer, Brennan’s associate in 1988, has identified as the mutuality of understanding between them and the absence of “any sense of subordination of one to the other”. Mortimer also reported that, while she has observed other legal colleagues “strive to adopt a similar relationship”, very few have entailed “the same levels of respect, affection, and priority that [she] saw in theirs”. Another close colleague during the period marvelled at how Brennan had been “greatly helped by a very remarkable wife who won’t allow a word against [him] to be said by anyone outside the family or a few very close friends, but who isn’t a member of his Number One Fan Club, and who brings him down to earth very, very well”.’<sup>4</sup>

Though it’s very irreverent not only to deceased judges but also to the living, I think it worth recalling Mum’s great line: ‘The thing I like least about the Australian legal profession is that the more your husband is promoted, the more stupid they think you must be.’ I once got into trouble with a woman silk for disclosing in an interview that my mother was ‘probably smarter than my father.’<sup>5</sup> Any child with difficult maths homework knew that to be the case. My parents’ medico-legal alliance bore great fruit, including a ferment of ideas born of independent thought and respectful engagement.

I was very fortunate as a son to be living at home studying law and politics in Bjelke-Petersen’s Queensland between 1971 and 1974. I then lived in Sydney in 1975 and 1976 while Dad was doing a lot of work here, prior to his appointment to the bench, wondering what was to become of him, because a return to Queensland seemed impossible. So I had a front row seat to many of the activities detailed in Jeff’s Chapter 5: ‘Broader Legal Horizons’.

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<sup>3</sup> Sir Gerard Brennan, ‘The Christian Lawyer’, Address at Ecumenical Church Service, Reid, ACT, 28 January 1992, (1992) 66 *ALJR* 259, 260-261.

<sup>4</sup> Jeff FitzGerald, p. 298.

<sup>5</sup> Margaret Simons, ‘Father Figure’, *The Australian Magazine*, 11-12 September 1993, 34 at p. 39.

There had been the 1969 Sugar Inquiry before Lord Denning in Fiji. This arbitration opened Dad up to the reality of Indigenous land rights.

There was the publication of his 1971 letter to the editor objecting to the tactics being adopted in Queensland with the declaration of a state of emergency to permit the trouble free playing of a rugby game by the all white Springboks team.<sup>6</sup> That night he came home and told Mum and me that he had been confronted at lunch by Peter Connolly, one of the doyens of the Queensland Bar, who told him: ‘That’s it, Brennan. Now you’ll never be a judge.’ He matter of factly said to us: ‘Well so be it.’ But that wasn’t it at all. Within a decade he was a Justice of the High Court of Australia.

There was the 1972 politically explosive trial in Rabaul of 13 Tolai charged with the murder of an Australian district patrol officer. The Commonwealth asked Dad to prosecute because there was a need for a first rate lawyer to handle the sensitivities of the land dispute which occasioned the killing.

There was the 1973 Woodward Royal Commission into land rights. Woodward specifically requested Dad to be senior counsel for the Northern Land Council. I’m pleased that Jeff has reported that Woodward was persuaded to make such far-reaching recommendations in response to Brennan’s submission that “this is a report which will for all time mark the high-water mark of possible Aboriginal aspirations. Whatever Your Honour does not recommend in favour of Aborigines at this stage, will never be granted.”<sup>7</sup> Also Jeff felicitously quotes Woodward’s chief anthropologist Nicolas Peterson who explained that the Northern Territory Land Rights Act’s ‘genius lay in the fact that it benefited “the most tradition-oriented and poorest Aboriginal people, the great majority of whom were actually living on or near the land with which they had traditional connections. It was legislation concerned with the future rather than the past, and it was based substantially on the drafting instructions written by Brennan.”<sup>8</sup>

Unbeknown to any of us at the time there was Barwick’s letter to Prime Minister Whitlam in September 1973 enclosing a short list of nine possible appointments to the High Court. Dad and Ron Wilson were on that list.<sup>9</sup>

There was Dad’s appointment to the Law Reform Commission in 1975 under the dynamic youthful leadership of Michael Kirby where Dad often locked horns robustly and happily with Gareth Evans.

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<sup>6</sup> Letter to the Editor, *The Australian*, 2 August 1971.

<sup>7</sup> Jeff FitzGerald, p. 93, quoting E Woodward, *One Brief Interval: A Memoir* (Miegunyah Press, 2005) p 141.

<sup>8</sup> Jeff FitzGerald, pp. 93-4, quoting N Peterson, “Common law, Statutory Law, and the Political Economy of the Recognition of Indigenous Australian Rights in Land” in L Knafla and H Westra (eds), *Aboriginal Title and Indigenous Peoples: Canada, Australia and New Zealand* (UBC Press, 2010) p 177.

<sup>9</sup> Letter of Sir Garfield Barwick to Prime Minister Whitlam, 14 September 1973. Barwick wrote: ‘As a starter, I attach on a separate slip a few names that might be kept in mind. The performances of the persons named might be watched over the next year or so. The list will need to be revised from time to time both by addition and deletion.’ He specified that the 9 names were ‘not in any order of preference and all, indeed the majority, not ready yet.’ It’s still worth noting that Brennan was second on the list, after J. McI. Young.

These horizons kept opening, taking him beyond the Queensland Bar and beyond the strict parameters of the law.

From 1969 onwards, my father was always conscious of the law's shortcomings when it came to the rights and aspirations of the First Australians. In January 1976 – after Woodward, after the dismissal of the Whitlam government and prior to his appointment to the bench - he joined Patrick Dodson at Yeppoon in Queensland and delivered two stirring speeches to the Aboriginal and Islander Catholic Council.<sup>10</sup>

Dad proposed a motion to the conference which was carried overwhelmingly. These were the opening preambular words of his draft:

‘As the Aboriginal peoples in Queensland have no title to their land; as land is essential to the life and dignity of Aboriginal people; as Aboriginal people have frequently been removed from their land and homes, without their consent; and all Aboriginal people who wish to do so should be entitled to live in a traditional style.’

These were stirring words almost 50 years ago.

In the book Jeff deals at length with the Mabo proceedings and Kenneth Hayne contributes a fine foreword noting: ‘This book seeks to describe and explain the impact Gerard Brennan had on Australian law and Australian society. His judgment in *Mabo (No 2)* is the most prominent example of that impact. The Court’s decision in that case, and what Brennan wrote in his reasons, was a fundamental re-evaluation of the common law of Australia.’<sup>11</sup>

I have long thought that the culmination of Dad’s passion for justice, quest for legal principle, unfailing courtesy, honest intellectual inquiry and judicious contribution to what he often described as ‘a free and confident nation’ was the exchange between him and Geoff Davies, Solicitor General of Queensland, on the third day of argument in the Mabo proceedings:

‘Brennan J: If your argument be right, Mr Solicitor, it seems that the common law as applied in England, and perhaps the law as applied in Canada and the United States, was no more than a device to ensure that the indigenous people had nothing.

‘Mr Davies: Your Honour, historically unpalatable as that may appear to be today to us looking back at that in retrospect, historically it seems to have been correct, but it was no rights against the government.

‘Brennan J: No rights against those who exercise the power of control?

‘Mr Davies: Yes, that seems to be the case.

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<sup>10</sup> See Jeff FitzGerald, pp. 107-8.

<sup>11</sup> Kenneth Hayne, Foreword, in Jeff FitzGerald, *Sir Gerard Brennan: The Law's Good Servant*, p.v.

‘Brennan J: It is scarcely an enabling doctrine for a common law.’<sup>12</sup>

Congratulations Jeff, on placing in broad context the splendid achievements of Gerard Brennan who was the law’s good servant. We salute Ged’s ‘wisdom and knowledge, humility and compassion, courage and strength’. Thank you.

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<sup>12</sup> Transcript of Proceedings, *Mabo v The State of Queensland*, 30 May 1991, pp. 305-6.