

BOOK REVIEW

Jeff FitzGerald, *Sir Gerard Brennan: The Law's Good Servant*. Sydney, The Federation Press, 2024, pp. xviii + 505, ISBN: 978 1 76002 478 9, \$79.95 (hardback)

Social science scholars sometimes find their research involves issues that include hearings before the High Court of Australia (if not other courts and tribunals). Being the good scholars that they are, they examine such cases and associated legal material, which they then incorporate into their 'broader' analysis. It might not be unreasonable to suggest that many such scholars, while being prepared to engage with legal matters, lack an understanding of the operation of the High Court and how its members 'go about' their work.

This book by Jeff FitzGerald, which examines the judicial career of Sir Francis Gerard Brennan (1928 – 2022), provides a thoroughgoing and insightful examination of, as lawyers might like to say, such matters. Brennan was appointed to the High Court in February 1981, became its Chief Justice in April 1995, and retired in May 1998 — the day before he turned 70 as required by the Australian Constitution. It appears that FitzGerald spent fifteen years conducting research on this book, something which he did in his retirement following a broadly based legal career. Brennan himself agreed to cooperate with FitzGerald on the basis that the book 'must be a judicial biography' (p. x). FitzGerald interviewed 62 people who interacted with Brennan, who, we are told, are listed in an Appendix that only contains 59 names (pp. xiii + 485) — three presumably wanted anonymity.

Brennan was the son of Frank Tenison Brennan (1884 – 1949) who was active in Labor Party machinations in Queensland, during the 1910s and early 1920s, and was a member of the Supreme Court of Queensland from 1925 to 1949. Brennan attended school in Queensland, studied law at the University of Queensland, had a short spell as an assistant registrar at the Australian National University in 1950, and was an associate to Justice (Kenneth) Townley (1902 – 1981) at Manus Island war crimes trials, also in 1950. He completed his legal studies and was admitted to the Queensland Bar in 1951. He quickly developed a reputation as a talented lawyer and was appointed to a number of commissions and inquiries associated with more broadly based legal reforms that occurred in the 1970s. This involved him in such things as an appearance before the Land Rights Royal Commission, being appointed to the Australian Law Reform Commission in 1975, the inaugural President of the Administrative Appeals Tribunal and the inaugural Chair of the Administrative Appeal Tribunal, both in 1976, and the Federal Court in 1977. As already mentioned, he was appointed to the High Court in 1981.

By incorporating material on Brennan's father as background material to enhance an understanding of Brennan's role as a jurist, *Sir Gerard Brennan* contains valuable information on legal and political matters in Queensland from the early twentieth century through to the 1970s. It also provides an insightful examination of the Queensland Bar during Brennan's period of membership and of the mixture of respect, rivalry, and animosity that existed between its members. The book also provides a broad overview of the broadly based legal transformation that occurred at the federal level in the last three decades of the twentieth century. FitzGerald, of course, highlighted the role that Brennan played in these events, providing a clear and concise analysis of his judgements and numerous lectures and addresses he delivered to a variety of (mainly) legal forums.

The most interesting part of *Sir Gerard Brennan*, however, is FitzGerald's attempts to explain Brennan's approach to the law. Judges are often accused of making decisions that

accord with their values, biases, and prejudices. Throughout his career, Brennan sought to ensure that decisions were based on the law, not the prejudices of a judge — judges were impartial. Brennan always maintained that the law had to be applied evenhandedly: you cannot depart from the law to achieve some desired object. There were two major strands to the way in which Brennan interpreted this quest. The first involved a notion of a separation of powers. Parliament makes laws; courts interpret the law; judges can only make decisions according to the law. The law will evolve in ‘response’ to changes in societal values and norms (such as legislation); courts need to be alive to such changes. The second strand is that courts need to ‘tidy up’ the law where decisions concerning the common law, constitutional, and legislative issues have become ‘messy’; where they do not provide clear guidance to either judges and lawyers who seek to interpret and administer the law. FitzGerald referred to Brennan’s use of the term ‘weasel words’, such as ‘the best interests of the child’, in decisions that are purportedly made on their behalf as not being useful as a guide to decision-making by a court (p. 369). Such ‘weasel words’ cannot be used by a judge to disguise their value systems as being ‘law’.

Frank Brennan, Gerard’s father, was involved in internal disputes within the Queensland Labor Party in the latter part of the 1910s and early 1920s. He was an anti-conscriptionist and was caught up in a bribery case in 1922 to cross the floor to bring down the government. Following his appointment to the Queensland Supreme Court, he did not feel the need to stop expressing himself on political and other issues of the day. FitzGerald said he ‘regularly expressed his views about sexual morality and virtue, sometimes in colourful terms that attracted considerable media attention’ (p. 19). Such comments often attracted criticism from the press and members of the Queensland Bar. His behaviour was not seen as being in accordance with what should be expected from a judge.

In many ways, Brennan’s career was one of seeking to ‘rectify’ or ‘overcome’ the problems of his father as a jurist. He sought to ensure that he maintained the highest standards of legal and judicial performance. He was courteous to other members of the Bar, sought to maintain cordial relations with colleagues, and was active in various extra-legal organisations, such as the Bar, participating in conferences and other extracurricular events associated with the operation of the law. Following his appointment to the High Court, he took two of his children to dinner (presumably to celebrate). One said ‘congratulations’ to which he replied with ‘I did it for my father’ (p. 169).

Brennan established himself as an accomplished member of the Queensland Bar. He was not, however, looking for an appointment to the Queensland Supreme Court. FitzGerald reported that he became

... concerned about the difficulties of working with integrity within a system of government in Queensland in which the executive branch at the time had little obvious respect for the rule of law . . . In addition, the antagonism towards him of one Supreme Court judge and another very likely appointee to that Court caused him to be very concerned that his membership of the Court would lead to a fractured and dysfunctional bench. (p. 79)

This, plus his growing reputation, explains his appointment to a number of federal judicial bodies in the 1970s, which subsequently led to his High Court appointment in 1981.

Sixty percent of *Sir Gerard Brennan* examines Brennan’s time as a member of the High Court. The material is organised around the ‘reigns’ of the three Chief Justices when Brennan was a member: Sir Harry Talbot Gibbs (1917 – 2005), from February 1981 to February 1987; Sir Anthony Frank Mason (1925 –), from February 1987 to April 1995; and Brennan from April 1995 to May 1998. Within these respective sections, FitzGerald provided information on the broader political and legal context in which the High Court operated. Only one or two pages sketch the background and legal approach of the different

members of the court, how they interacted, and an extensive analysis of the major decisions and relevant precedents in the respective periods. FitzGerald had a close eye on Brennan's relationship with associates and his extracurricular writings on the role of the Court and law more generally. He also provided material on Brennan's role of Chief Justice in his overall management of the High Court and his dealings with the government of the day. His period of stewardship was characterised by attacks on the court over decisions that were not to the liking of leading members of the government, businessmen, and the media.

FitzGerald provided material on the 'Murphy Affair' which put a strain on the working of the court in the mid-1980s. Lionel Murphy (1922 – 1986) was a former Labor Party politician who had been Attorney General during the Prime Ministership of Gough Whitlam (1916 – 2014) from 1972 to 1975. The affair involved allegations concerning Murphy's 'improper contacts' with members of the New South Wales judiciary over the prosecution of a 'little mate'. Investigations were initiated, and questions were raised concerning Murphy's suitability to remain on the court — an issue that had the potential to ultimately find its way to the High Court. This created a high degree of discomfort for members of the court. The judges 'needed to avoid saying or doing anything that might indicate they had formed an opinion (one way or another) about the merits of potential litigation' which may arise (p. 227).

The High Court during these years was seen as being 'activist' in comparison to earlier periods. FitzGerald explained this in terms of there being more legislation to interpret associated with the economic and social reforms which occurred in the last quarter of the twentieth century. Additionally, in 1986, decisions of the High Court could no longer be appealed to the Privy Council in England. This cemented the High Court as the final 'port of call' on legal matters in Australia, which 'encouraged' it to reconsider past decisions of the Privy Council and their applicability to Australia.

Brennan saw adherence to legal principles as being essential to the good governance of a society such as Australia. FitzGerald quoted from a paper Brennan delivered in 1997 where he stated:

Australians like every civilized society, wish to be ruled by law, not by popular clamour or by raw power. Australia has no place for the police state, the show trial, the oppression of minorities, unfettered and arbitrary governmental power, or the tyranny of officialdom or great economic or industrial might. The law, impartially and competently administered, is the infrastructure of our society and the protector from conduct that would disrupt it. It is our assent to the rule of law that makes us a free and confident nation. (p. 444)

In an 'Author's Note', FitzGerald said he hoped

... that th[is] work is legally credible while also being comprehensible and of interest to non-lawyers. My hope is that it will also prove to be of use to legal studies and law students in developing a realistic understanding of the law in action at the various levels at which Brennan operated. (p. xv)

He has been successful in this goal. The depth and breadth of his scholarship are of the highest order. He has provided a clear exposition of a wide range of legal issues and carefully analysed numerous cases in an accessible and readable prose. He has integrated this material with a close reading and understanding of broader political, economic, social, and legal changes that have occurred at both the state and federal level in Australia, as well as developments overseas. This broader macro material has been thoroughly integrated with the micro life of Gerard Brennan, of his unrelenting quest to be the best lawyer and

judge that he could possibly be, to be impartial and hand down decisions according to law, a lodestar that guided him throughout his career. This is a book that should be applauded for its outstanding scholarship. This 'judicial biography' of Sir Francis Gerard Brennan will help all who read it better understand the work of lawyers and the role of the High Court in Australia.

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