

The Honourable Sir Gerard Brennan AC, KBE, QC

(b. 22.5.1928) (Chief Justice from 1995-1998)



AUSTRALIAN
CONSTITUTION
CENTRE



For Brennan, judicial method began with a thorough understanding of the existing case law. His judgments uniformly displayed great industry and attention to history. From the existing case law, Brennan sought to discern underlying values and principles. Those values and principles were weighed against the enduring values and principles of the Australian legal system as a whole. They were then applied to refine and where necessary reformulate the specific legal rules. Brennan saw that the courts could in this way legitimately develop the law to keep pace with contemporary social and economic conditions. However, for Brennan, the courts had no role in rejecting and replacing legal rules in the pursuit of social or economic ends. Nor could they bring about a change in the law simply to achieve tidiness or conceptual purity. Overruling was properly confined to those rare cases where specific legal rules had proved to be unworkable, or where to continue to apply them would perpetuate injustice.

By Belinda Baker and Stephen Gageler

Gerard Brennan was born in Rockhampton Queensland in 1928. His father was a politician, lawyer and judge of the Supreme Court of Queensland. He excelled at school in Rockhampton and Toowoomba and finished his final year of high school at the age of 16. As he was too young to attend university, he waited one year before starting a combined BA/LLB at the University of Queensland. In 1949, while at University he was elected as the President of the National Union of Students.

Once he had completed university, Brennan worked as an associate with his father and then from 1950 as an associate to Justice Kenneth Townley at the Supreme Court of Queensland. He was admitted to the Queensland Bar in 1951 and began practice early the following year. His early practice was diverse and included criminal cases, defamation, committal hearings and commercial disputes. He was well regarded in the legal community by justices, barristers and solicitors.

Brennan was appointed QC in 1965 and was later also admitted to the Bar in NSW, NT, PNG and Fiji. He was an early advocate of Aboriginal land rights and represented the Northern Land Council on these matters at the Woodward Royal Commission in the Northern Territory in 1974. In 1975 he became a part time member of the Australian Law Reform Commission and was the President of the Australian Bar Association from 1975-76.

In 1976 Brennan was appointed as the first President of the Australian Administrative Appeals Tribunal, a new body created as part of the reform of administrative law, and which, uniquely allowed a tribunal to examine both the legality and merits of decisions made under Commonwealth laws. In 1977 he was appointed as a judge of the Federal Court and four year later in 1981 he joined the bench of the High Court. Brennan had a somewhat different view of the role of the judiciary to his predecessor as Chief Justice, Sir Anthony Mason, leading to some notable dissents. Brennan resisted the extension of discretionary judicial powers because they could create a government of men, rather than a government of laws. This the underlying philosophy of the Rule of Law.

Brennan was appointed Chief Justice in 1995. He took a different approach from Mason by not making public statements other than on formal legal occasions. His belief was that it was the role of the Commonwealth Attorney-General to defend the Court from criticism. Brennan's sense of fairness and integrity, plus his passion for the Rule of Law saw him engage in careful legal, factual and theoretical analysis of arguments put before the Court.

Brennan retired from the Court in 1998. Afterwards he was appointed as Chancellor of the University of Technology Sydney and took up a position as a visiting judge of the Court of Appeal of Hong Kong. These days Brennan continues to contribute to the legal profession by writing articles on topics that include judicial independence and administrative review.

Chief Justice Brennan's quotes in constitutional decisions that encapsulate the vision of him as Chief Justice

1. Chief Justice Brennan's constitutional vision is clearest in his Honour's approach to constitutional implications. Prior to becoming Chief Justice, Brennan J stated in *Theophanous v Herald & Weekly Times Ltd* [1994] HCA 46; 182 CLR 104 (at 143):

In the interpretation of the Constitution, judicial policy has no role to play. The Court, owing its existence and its jurisdiction ultimately to the Constitution, can do no more than interpret and apply its text, uncovering implications where they exist. The Court has no jurisdiction to fill in what might be thought to be lacunae left by the Constitution. If there be a lacuna in the text, it can be filled, if at all, only by the common law or by another law which binds the courts and people of the Commonwealth and applies in all parts of Australia. Under the Constitution, this Court does not have nor can it be given nor, a fortiori, can it assume a power to attribute to the Constitution an operation which is not required by its text construed in the light of its history, the common law and the circumstances or subject matter to which the text applies. The notion of "developing" the law of the Constitution is inconsistent with the judicial power it confers. Clearly the Court cannot change the Constitution, nor can it convert constitutional silence into a legal rule with constitutional force. I do not mean that, in changing conditions, the Constitution does not have a changing effect, that the denotation of its terms does not change, that the course

of judicial interpretation does not reveal that a past constitutional doctrine is untenable or that new situations do not reveal new doctrines inherent in the constitutional text. The Constitution speaks continually to the present and it operates in and upon contemporary conditions. But, in the interpretation of the Constitution, judicial policy provides no leeway for judgment as it does when the Court is developing the common law. ...

(Principle: what is the Australian Constitution?)
(Key words: Interpretation, common law)

2. Later in *McGinty v Western Australia* [1996] HCA 48; 186 CLR 140, Brennan CJ similarly stated (at 168) that:

Implications are not devised by the judiciary; they exist in the text and structure of the Constitution and are revealed or uncovered by judicial exegesis. No implication can be drawn from the Constitution which is not based on the actual terms of the Constitution, or on its structure.

3. In *Levy v Victoria* [1997] HCA 31; 189 CLR 579, Brennan CJ described the role of the Court (at 598) as follows:

Under our Constitution, the courts do not assume the power to determine that some more limited restriction than that imposed by an impugned law could suffice to achieve a legitimate purpose. The courts acknowledge the law-maker's power to determine the sufficiency of the means of achieving the legitimate purpose, reserving only a jurisdiction to determine whether the means adopted could reasonably be considered to be appropriate and adapted to the fulfilment of the purpose.

4. On the nature of the Constitution more generally, in *Krugar v Commonwealth* [1997] HCA 27; 190 CLR 1 Brennan CJ stated (at 41-2):

The Constitution, though in form and substance a statute of the Parliament of the United Kingdom, was a compact among the peoples of the federating Colonies, as the preamble to the Constitution declares. ... The leading object of the Constitution was the creation of the Federation. ... The federal compact was expressed in the distribution of legislative, executive and judicial power to be exercised throughout the federating States by the Commonwealth on the one hand and the respective States on the other.