

HAL WOOTTEN LECTURE 2012

Response to Lecture delivered by Sir Gerard Brennan

by

Hal Wootten

For the seventh year I have the honour of thanking the Faculty for giving me the opportunity to attend an eponymous Lecture that is not a Memorial Lecture, a situation in which, as you can imagine, I yearly rejoice. I stress again that the title is not only eponymous but metonymous, my name representing not just myself but the large and growing body of staff, students and supporters who have contributed to shaping, developing and sustaining the vision that nourishes this Law School.

It has been my hope that the Hal Wootten Lectures could provide a forum in which men and women who have lived lives in the law might tell of those lives, of the opportunities and satisfactions the lives have brought, thereby showing to students and young lawyers that it is indeed possible, as Holmes said, for a man or woman to live greatly in the law as elsewhere.¹ Our speaker has generously responded with some lessons from a life in the law, but I believe the most telling lesson is from our very encounter with the man - the evidence that it is possible for a person to live a life in the law, achieve its highest office, yet retain their humility, integrity and humanity, uncorrupted by pride and power.

Sir Gerard has had a long and distinguished career in Australian law, rising to be Chief Justice. Yet he is a modest and private man who has told us nothing of the role he himself has played. This is his longstanding practice. As a judge his standard response to journalists was reputedly: "No comment...and that's off the record". When we discussed the possibility of his giving this Lecture, I hopefully pointed out that this year was the 20th Anniversary of the *Mabo* decision². Sir Gerard's immediate response was "Of course I couldn't talk about that". Fortunately I am under no such inhibition.

Sir Gerard did refer to *Mabo* in his Lecture, as an example of the High Court giving the law a little nudge in the direction the judges thought it ought to go. He was picking up a phrase I used in my 2008 Lecture, which I in turn picked up at the 1971 Australian Law Convention. In those days we couldn't have a conference without a visiting Law Lord. In opening the Convention, Lord Diplock observed³ that it is not often that there is an opportunity of saying as Lord Mansfield could, "the air of England is too pure for any slave to breathe, let the black go free", but there are many more opportunities of giving a little nudge that sends the law in the direction it ought to go. The mention of Lord Mansfield was a reference to his somewhat hesitant decision in *Somerset's Case*⁴ in 1772 concerning the status of slavery under the common law.

I have often quoted those words in preaching a 'little nudger' philosophy, open not just to judges but to everyone. Each of us has countless opportunities every day to give the world little nudges in the right direction, and the cumulative effect of our little nudges, and those of all the other little nudgers, is a major effect on the direction the world takes. All of us, however humble, can lead worthwhile lives.

I remember using the theme in responding to the extraordinary attacks that followed the *Mabo* decision. In the turbulent 18 months between the judgment and the passing of the *Native Title Act*, I was one of those who engaged in the public defence of the decision that judges could not undertake themselves⁵. Among dozens of occasions on which I spoke or wrote was a graduation ceremony where I told the story of Granville Sharp, a civil servant who, as one historian wrote, "fired by the cruel usage of a negro slave in the streets of London, never rested until he had obtained the verdict [of Lord Mansfield] which forever afterwards rid the British islands of the taint of slavery."⁶ In my anxiety to give just recognition to this little nudger, I obscured Lord Diplock's distinction between the Lord Mansfields and the little nudgers: I did the same when I came to praise the 'little nudgers' on the High Court who had given the *Mabo* decision. I lumped them in with many little nudgers whose work laid the ground for the decision, people like Eddie Mabo himself, Greg McIntyre, Henry Reynolds, Ron Castan and the lawyers he led, our own Garth Nettheim (with us tonight), to invidiously name a few⁷.

But Lord Diplock's distinction is worth making. In the end we little nudgers need the Lord Mansfields. We depend on there being people in high places who have the wisdom, the vision and the courage to seize the opportunity and bring the work of the little nudgers to fruition in a form that will command authority and survive. As Ecclesiastes tells us, there comes a time to praise famous men and women, especially when they are so little given to self-praise as our speaker tonight.

Why had there been no appeal from Justice Blackburn's 1971 decision⁸ affirming that in the eyes of the common law Australia had been *terra nullius*⁹ prior to British annexation? Because the plaintiffs' lawyers judged, with good reason, that there would be no Mansfield moment in the Barwick High Court.¹⁰ Had an unsuccessful appeal been made, the possibility of overturning *terra nullius* may well have been buried, perhaps beyond resurrection. So the issue had to wait another 20 years, until the work of many little nudgers found six receptive judges on the Mason Court.

While all six joined in the Mansfield role, one had to write what would become the leading judgment, find the words and the arguments that could command a majority - the reasons that would survive the scrutiny of future generations of judges and ultimately win the support of the community. Although one would never guess it from tonight's Lecture, that role fell to Justice Brennan.

Like all judges in common law systems, he lived in the constant tension between the claims of continuity and consistency, which give certainty and predictability to the law, and the claims of justice according to contemporary values, which give respect and acceptance. Not surprisingly this tension was acute when values embodied in acts done two centuries earlier were pitted against values shaped by subsequent events that had included the French Revolution, two World Wars, the advent of universal suffrage and the welfare state, the rise and fall of Fascism and communism, the expansion and rejection of imperialism, the Holocaust, the Nakba and other horrific episodes, and the distilling of all this experience into the modern doctrine of human rights.

Who could find the courage and wisdom to bridge the vast gap that had opened up? It called for statesmanship. In 1967 the people of Australia gave their national government responsibility over the issue in a referendum as near unanimous as any is likely to be. Whitlam started a land rights process which, carried forward by Fraser, got as far as the Northern Territory, then stalled. Later national governments lost their nerve, and the Indigenous people turned to the courts to intervene where politicians had feared to tread.

Unlike legislatures, our courts do not have a free hand to craft solutions to the injustices that history has left in its trail. They cannot make fresh starts. Normally they apply the law or develop it in response to new problems or changing circumstances. One can sympathize with Justice Dawson, the only dissenter in *Mabo*, who concluded: "If traditional land rights...are to be afforded ..., the responsibility *both legal and moral*, lies with the legislature and not with the courts".¹¹ However, as Justice Brennan drily observed five months later in *Dietrich*¹², "Legislatures have disappointed the theorists" who maintain that it is the exclusive function of the Legislature to keep the law in a serviceable state, and have left the Courts with a substantial part of the responsibility.

For him a legal doctrine denying indigenous people rights because it deemed them "barbarous" or "so low in the scale of social organization that that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society" seriously offended "the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system". Was the Court to affirm this doctrine and allow the law to remain "frozen in an age of racial discrimination"?

As you saw tonight, Sir Gerard is an unpretentious, indeed, many have said, conservative man, who lacks the confident vanity that supports some radical reformers. Yet such an affront to human dignity was more than he could bear. Having satisfied himself that in the result the law would remain consonant with "the skeleton of principle which gives the body of our law its shape and internal consistency", he discarded *terra nullius* as the foundational doctrine of Australian law.

Given the way the newly recognized institution of native title was formulated, the actual effect on non-Indigenous property rights was minimal.¹³ Not one existing title was prejudiced. Yet there followed a period of the most extraordinary virulent, vicious and racist attacks not only on the decision, but on the judges who gave it and the Aboriginal people whose legitimacy in Australia the Court had had the temerity to recognize. These attacks were not by some fringe elements but by eminent businessmen, leading politicians, distinguished historians, knights of the realm, retired judges and senior lawyers – the great and the good who mobilized as guardians of the nation to denounce the 'gang of six' on the High Court who had betrayed it, and to ensure that the pernicious doctrine of native title was abolished by Parliament.¹⁴

I wonder what these critics would say of their extravagant language today, when everyone can see *Mabo's* modest effect on land titles and its beneficent effect on our race relations and, whether we are black or white, on our self-respect and feelings of legitimacy in our land. When the highest legal authority in Australia said 'there never was a *terra nullius*, a land belonging to no-one', it liberated both black and white. No longer need Indigenous people feel their legitimacy, their equality, their very humanity under question. No longer need the rest of us feel the legitimacy of our presence tainted by a lie, or feel diminished by the humiliation of fellow citizens whose legitimacy and equality were denied in our foundational doctrine.

So Sir Gerard, we not only thank you for sharing with us tonight some lessons of your life in the law. We thank you too for what you and your fellow judges did to liberate us from the past in your Mansfield moment twenty years ago.

¹ Oliver Wendell Holmes (1886) "The Profession of the Law", a Lecture to undergraduates of Harvard University, reprinted in Sheldon M. Novick, S M (ed.) (1995)*The Collected Works of Justice Holmes*, Vol 3, 471

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

³ Sixteenth Australian Legal Convention (1972) 45 ALJ

⁴ Mansfield's judgment does not carry the brevity, elegance or conviction implicit in Diplock's summary, which gives no hint of its complex historical significance. There is no official report but several versions: *R v Knowles, ex parte Somersett* (1772) 20 Howell's State Tr. 1; *Somersett v Stewart* 1 Lofft 499; 98 ER 499. There is a convenient discussion of the case and its interpretation in Wikipedia under the title 'Somersett's Case', which reprints a version from a letter to the London *General Evening Post* of 21–23 June 1772. For more scholarly discussions see Wiecek, WM (1974) "Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World" 42 *University of Chicago LR*. 86-146; Watson, A (2006) "Lord Mansfield: Judicial Integrity or Its Lack; Somerset's Case" www.alanwatson.org/somersets_case.pdf; George Van Cleve, "Forum: Somerset's Case Revisited: Somerset's Case and Its Antecedents in Imperial Perspective," *Law and History Review* Fall 2006 <<http://www.historycooperative.org/journals/lhr/24.3/cleve.html> (25 Aug. 2012).

⁵ Wootten, H (2012) "Mabo at Twenty: A Personal Retrospect" in Bauman, T and Glick, L (2012) *The Limits of Change: Mabo and Native Title 20 Years On*. AIATSIS, Canberra 431-444 at 437-439.

⁶ Wootten, H (1993) "Cheer for the Mabo nudgers", *Sydney Morning Herald*, 11 May 1993 and (1993)3 *Aboriginal Law Bulletin* 2. The historian was H A L Fisher in *A History of Europe* (1944).

⁷ Sharp, N (1996) *No Ordinary Judgment: Mabo, the Murray Islanders' Land Case*, Federation Press

⁸ *Milirrpum & Ors v Nabalco Pty Ltd* (1971) 17 FLR 141 ("The Gove Case").

⁹ There has been some debate about the propriety of using the term *terra nullius* as in the Gove Case and *Mabo* eg Ritter, D (1996) "The 'Rejection of Terra Nullius' in Mabo: A Critical Analysis" [1996] 18 *Sydney Law Review* 5. The term (signifying land without an owner) was used in international law to describe territory that was open to acquisition by occupation because no competing sovereignty was recognised. It was not used in domestic common law which however had a corresponding doctrine of acquisition by settlement. In each case the scope of the doctrine permitted acquisition not only of uninhabited land but also of land occupied by people whose title was not recognised for discriminatory reasons. In that general sense it was used in *Mabo* and is used here.

¹⁰ At the 1996 Land Rights Anniversary Conference Justice Woodward, who as Ted Woodward QC had been counsel for the plaintiffs, said: "It had been decided not to appeal the Blackburn decision, because of the near certainty that the High Court, as then constituted under Chief Justice Barwick would have entrenched the negative aspects of the Blackburn decision, and perhaps even poured cold water on the positive aspects." (*My personal notes HW.*) See also Levy, Ron "Twenty Years of Land Rights - Lessons for the Native Title Act" [1996] *Aboriginal Law Bulletin* 722.

¹¹ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 175.

¹² *Dietrich v The Queen* (1992) 177 CLR 292.

¹³ It is not my purpose here to make any overall comment on the *Mabo* decision or to discuss its doctrine of native title. My purpose is simply to pay tribute to the High Court's seizing of the opportunity to remove from Australian common law the foundational doctrine now commonly referred to as *terra nullius*, and the racist categories and values associated with it.

¹⁴ Wootten, H (2012) "Mabo at Twenty: A Personal Retrospect" in Bauman, T and Glick, L (2012) *The Limits of Change: Mabo and Native Title 20 Years On*. AIATSIS, Canberra 431-444 at 434-436. See also Wootten, H (1995) "Mabo and the Lawyers", 6 *The Australian Journal of Anthropology* 125.