HAL WOOTTEN LECTURE

University of New South Wales

23 August 2012

Lessons from a life in the Law

The Hon Sir Gerard Brennan AC KBE

When Hal Wootten delivered his eponymous Lecture in 2008, he gave it the title "Living in the Law". He thought that subsequent Lecturers might be judges or others who have had an opportunity "to give a little nudge that sends the law along the direction it ought to go."[1] It is an inevitable function of a Justice of the High Court that she or he can give a little nudge to the law, and I am happy to think, that life in the law can and should have a connection with the problems of the time. But I shall not trouble you with an analysis of High Court judgments to demonstrate their relationship with contemporary issues. It is manifest that cases such as the Communist Party case[2], the Tasmanian Dam case[3], the Mabo cases[4], Lange's case[5], the Work Choices case[6] and the recent migration cases[7] have engaged major issues of the day and have nudged the law in a direction in which the Court thought that the law ought to go. Rather at this terminal stage of my life in the law, I should like to reflect on the way in which that legal life has taught me some lessons about law itself, its significance for the community and about the profession which practises the law.

It is nearly 70 years since I first entered a court room presided over by my father in Rockhampton. That was in the war years when his Associate was temporarily absent and I stepped into the role and demonstrated my lack of experience – a story that I have previously told[8]. I had in one hand a pro forma sheet for charging a prisoner on trial and in the other the indictment signed and presented by the Crown Prosecutor. Mistaking the name of the Prosecutor for the name of the accused, I charged a kindly, meek and highly reputable man with the crime of rape. Counsel for the accused, in accordance with the

---

1 Australian Communist Party v The Commonwealth (1951) 83 CLR 1
2 Commonwealth v Tasmania (1983) 158 CLR 1
3 Mabo v Queensland (1988) 166 CLR 186; Mabo v Queensland (No 2) (1992) 175 CLR 1
4 Lange v Australian Broadcasting Corporation (1997) 189 CLR 520
5 New South Wales v Commonwealth (2006) 229 CLR 1
6 Plaintiff M61/2010E v Commonwealth

camaraderie of the Bar, immediately announced his appearance for his learned friend and pleaded not guilty. And so I was given the first instalment of a lesson about life in the law. It was not about the need to follow the formal – that was only too obvious – it was a lesson about the relationship that exists among members of the legal profession who share a deep respect for their vocation – respect which fosters warm personal relationships even when they are engaged as adversaries. I shall return later in this talk to discuss the significance of that relationship for the way in which the law is practised.

Every practising lawyer will have learnt a variety of lessons in the course of her or his practice. The education of the fledgling barrister might focus on how to run a case in court, how to avoid embarrassing mistakes and how to survive the first lea(r)-5(m)f aaJ 0.0045t, hs. t was tocghf tha I bed(s)8(l)4(t w)8-5(m

the humour of events and the battles fought and won and lost. But I think I should identify a few issues of more general importance and try to develop a few themes in the time available. I have chosen four issues: law and cultural values; the importance of the community's interest in the law and its administration; the necessity for fair procedure; and the motivation of the lawyer and the rewards of legal practice.

First, the law and cultural values.

In the course of an undistinguished academic career in the past seven years, I had the good fortune to be appointed as an Associate first to my father and later to other Supreme Court judges. I learnt that the law regulates a vast area of our lives, as individuals, as parties to relationships and as members of the community. And it seemed to operate consistently with the values of the community.

When the foundations of the common law were laid in the 12th and 13th centuries, the English judges drew on the customs of the English people, albeit the content was affected by the practices of the judges and lawyers of the time assisted by scholars familiar with Roman Law.[8] In the formative years of the common law, the judges drew on the values of contemporary society, giving institutional force to the values of that society. This is the way in which the

> "Law is indeed an historical growth for it is an expression of customary morality which develops silently and unconsciously from one age to another."

standards have bypassed an old law, the old law will gradually slide into irrelevance and cease to be enforced. Conversely, when there is a movement towards a change in community standards, a timely change in the law may hasten the change in standards. But the law cannot go so far in advance of the community's standards or alienate the approval of the general community without forfeiting the practical sanction on which every law depends, namely, a community consensus that law should be obeyed or otherwise operate according to its terms. That consensus is Lord Devlin's "bond of common thought" that keeps society together. The common law cannot be developed inconsistently with the enduring values of contemporary society. If it were otherwise, the law would lose its authority. Nevertheless, as the majority said in the Native Title Case[12] that "the content of the common law will, in the ordinary course of events, change from time to time according to the changing perception of the courts".

When I entered practice, Australian community standards were changing. We found that, however gradually, the law changed too in order to establish its relationship with contemporary culture. Divorce law was a clear example. At first the laws of the several States governing divorce required proof of a matrimonial offence or breach of an order for the restitution of conjugal rights. And the three C's – collusion, connivance and condonation – were absolute bars to a decree. To give effect to these laws, the Supreme Courts of the States and Territories exercised a busy jurisdiction and briefs in undefended divorces were some of the basic fodder of the junior Bar. But community standards were changing and ultimately the Commonwealth exercised its constitutional power to legislate with respect to marriage and divorce. In 1959 Garfield Barwick as Attorney-General procured the passage of the Matrimonial Causes Bill which introduced the concept of no-fault divorce. The concept was advanced when

---

[12] (1995) 183 CLR 373, 486; see per McHugh J in Re Colina, Ex parte Torney (1999) 200 CLR 386 at 400-401

Senator Lionel Murphy introduced the Family Law Act 1975[13]. The concept of no-fault divorce was strongly opposed and was perhaps in advance of general community sentiment at the time but once it became law it confirmed a change in the community's standards. Today no reversion to fault-based divorce would be possible.

A law which is at odds with the fundamental standards of the community will not be enforced. For that reason, Australia came to reject capital punishment. It had been abolished in my home State of Queensland in 1922. In 1967, the last judicial execution in Australia – the hanging of Ronald Ryan in Victoria – met with such community abhorrence that capital punishment was ultimately removed from every statute book in this country. It took a long time but the law was ultimately brought into conformity with community standards.

Parliament is the branch of government which is primarily capable of, and responsible for, changing the law. Of course, some legislative changes are made simply because of a political decision which does not affect the fundamental moral standards of the community. Similarly, the courts may change some common law rules simply because the existing rules are too complex or are not the most efficient in contemporary conditions. But the courts are slow to change the common law (including in that term the rules of equity) in response to a change in community standards. Yet by making a change, the law is kept in a serviceable state. If a fundamental moral standard which supported a common law rule has been supplanted by a new fundamental moral standard and the old common law rule denies the contemporary community's fundamental moral standard, application of the old rule would work an injustice. Moral standards monitor the law's operation, as they always

---

[13] Section 48

If there is no correlation of the law and the community’s culture or there

the communities in the Top End of the Territory. It was clear that Aboriginal culture was languishing. Aborigines had lost much of their land and land is central to Aboriginal culture – indeed, to an Aborigine's identity[17]. Following Justice Woodward's report, large tracts of land were restored to Aboriginal ownership by the Aboriginal Land Rights (Northern Territory) Act 1976 and the cultural life of many communities, especially in Arnhem Land, was greatly strengthened. Australian law accommodated and was reconciled to essential elements of Aboriginal culture.

There have been some suggestions that, following the growth of Islam in Australia, there is room for a pluralistic legal system, a system in which at least some parts of Islamic Shariaa law might operate as part of Australian law and in parallel with the common law system. Dr Rowan Williams, Archbishop of Canterbury made that suggestion for the United Kingdom. That suggestion seems to me to be misconceived. It recalls the problem of recognition of traditional Aboriginal law which the Australian Law Reform Commission reported on in 1986[18]. The Commission acknowledged that there are substantial objections to legal pluralism in the sense of two distinct legal systems operating in the one country[19]. Its recommendations for recognition of Aboriginal law did not go so far. The Commission noted that[20]

> "The general arguments . . . lead to the conclusion that any recognition of Aboriginal customary laws must occur against the background and within the framework of the general law. Indeed, the contrary has not really been argued before the Commission."

In my respectful opinion, this was a wise conclusion.

---

[17] Powerfully described by Professor W.E.H. Stanner in his Boyer Lectures "After the Dreaming" deliv

No Court could apply and no Government could administer two parallel systems of law, especially if they reflect – as they inevitably would reflect – different fundamental standards. To give effect to dual legal systems would be to confirm dual cultures and, as Lord Devlin pointed out, a stable society is held together by "the invisible bonds of common thought", that is, common thought about fundamental moral standards. The emphasis here is on "fundamental". In a multi-cultural society, cohesiveness depends on agreement about fundamentals, leaving ample freedom for individuals to adhere to moral standards different from those of the mainstream majority.

The beliefs, customs and practices which give an individual his or her

our law. This is the law that binds all Australians and which has effect in every part of our nation[22].

Therefore a Muslim is free to adhere to the beliefs, customs and practices prescribed by Shariaa law insofar as they are consistent with the general law in force in this country. That freedom must be respected and protected but that does not mean that Islamic Shariaa should have the force of law. One version of Islamic Shariaa was expounded by the President of the Federal Supreme Court of the United Arab Emirates at a Conference I attended in Abu Dhabi in 2008. The scholarly and hospitable President explained the scope of that law. He said that –

> "the Islamic Shariaa is …comprehensive in the sense that it finds the legal rules that regulate all the aspects of daily life for individuals and societies. For instance, there are overall rules regulating civil and commercial transactions, rules regulating family relationships, rules regulating the affairs of the judiciary, litigation and criminal justice, rules related to international relations, and so on[23]."

His Excellency further explained that the basic principles of Islamic Shariaa are provided by –

> "[b]oth the Koran and the Sunna [which] could be considered the constitution in other legislation systems, and therefore all other sources should agree with them. Thus, if juristic reasoning contradicts with them, it should be rendered invalid, and if customs contradict with them, they are also unacceptable; and this applies to all other secondary or ancillary sources."[24]

The common law does not go so far. It leaves a gap between the mandates of the law and the conduct that we choose to engage in according to our individual moral standards. We call that gap "freedom" and it allows Australian law to protect the cultural moral values of our minorities. We value that freedom not

---

22 The unity of Australian common law was reaffirmed by the High Court in Lipohar v R (2000) 199 CLR 485

23 Paper on Scopes of Juxtaposition of Islamic Shariaa Legal System with Other Great Legal Systems of the World, 2nd Day, Slide 20

24 Ibid. Slide 29

only for the benefit of the individual but in order to maintain a free society – a society which can celebrate the rule of law but which rejects the notion of rule by law.

We are proud of our multi-cultural, multi-ethnic, multi-religious society especially because our citizens, including the Islamic community, share the basic Australian values of tolerance, egalitarianism, and individual freedom in thought and action. That consensus provides the essential cohesiveness of our society and the moral support for our integrated system of law which secures the peace and order that we cherish.

We are so accustomed to the open administration of the law that its role in maintaining the rule of law in an ordered and peaceful society does not dawn on our consciousness. But peace and order are characteristics of our society only by reason of the community's confidence – indeed, its ownership of – the process of administering the law.

This was the law in local action, involving the community and open to observation by the people. It was easy to sense the response of the gallery and, indeed, the pride of the district. The rule of law was strengthened by the public involvement, as critical spectators, in the proceedings of the trial.

In 1970, the legendary Lord Denning, accompanied by a distinguished accountant, Mr McNeil, went to Fiji to conduct what was in substance an arbitration between the 15,000 sugar growers – mainly Indian Fijians – and the sugar miller, South Pacific Sugar Mills, a subsidiary of the CSR Company, a major element in the economy of Fiji. There had been festering dissatisfaction about the terms on which growers supplied cane to the mills. A Committee sponsored by the Government Party, the Alliance, briefed for some of the sugar growers and other growers were represented by local counsel briefed by

There was no protest against the proceedings in the trial and the numbers in the public gallery diminished as day after long day went on. When so contentious an issue was involved, it was only community satisfaction with the fairness of the proceedings that could account for the peaceful outcome of the trial and public order in the Gazelle Peninsula.

In 1913, the High Court said[25] that the admission of the public to attend proceedings is "one of the normal attributes of a court"[26]. Public scrutiny of curial proceedings gives the assurance of integrity in the application of the law. The administration of the law is a public function and, as Sir Frank Kitto observed[27]:

> "The process of reasoning which has decided the case must itself be exposed to the light of day, so that all concerned may understand what principles and practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to judicial high performance. Jeremy Bentham put the matter in a nutshell ... when he wrote ...:
>
> 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying on trial'."

The community's interest in the administration of the law is partially satisfied by the media, but that is not always beneficial. The courts are not strangers to the risk of injustice flowing from prejudice sometimes created by media statements, particularly in criminal cases when statements on the part of the police or other law enforcement agencies may represent only a partisan version of the facts. The ultimate bulwark of liberty is the jury. The jury is the

---

25 Dickason v Dickason (1913) 17 CLR 50, 51; [1913] HCA 77 per Barton ACJ for the Court

26 Stephen J (as Sir Ninian then was) in Russell v Russell (1976) 134 CLR 495, 532 said that "a tribunal which as of course conducts its hearings in closed court is not of the same character as one which habitually conducts its proceedings in open court"

27 "Why Write Judgments?" (1992) 66 Australian Law Journal 787 at 790

institution which not only assures the community of its right to participate in the administration of justice but also assures the litigants of an impartial assessment of their rights and duties. The collective wisdom of twelve jurors and the innate sense of fairness in our people is a solid bastion against injustice. After some experience in criminal cases, I recall only one instance of a jury whose verdict I suspected because of the intense feeling in a country town, but even then the verdict may well have been correct. Perhaps some of you remember the film "Twelve Angry Men" in which Henry Fonda was the questioning juror who steadily engaged the prejudices of his fellow jurors until a unanimous and just acquittal was returned. Then the jurors dispersed. It is a common experience, in civil and in criminal jury trials, for the jurors to perform their critical functions and then, anonymously and with no more than a judicial expression of appreciation, to leave the court to resume their disparate activities. Their anonymity is proof of the jurors' disinterest in the verdict they were sworn to give. They take with them, however, the consciousness that they have represented their community in administering justice and they are able to tell others about the fairness – or otherwise – of the curial process. Community participation in the trial process is one of the important bonds between the courts and the people they serve. No doubt there are some issues, particularly of a technical nature, that may be difficult for a jury to evaluate, but errors in findings of that kind can often be traced to the inaccuracy or obscurity of the technical evidence. To be sure, there can be miscarriages of justice but, when it comes to the determination of the ultimate issues in a trial, the wisdom born of the various life experiences of twelve jurors is likely to be greater than the wisdom of a single judge, however experienced and learned the judge may be. The worldly wisdom of the jury cannot be supplied by a judge. Moreover, as Latham CJ observed[28]:

---

[28] Newell v The King [1936] 55 CLR 707, 711, cited in Cheatle v The Queen [1992] 177 CLR 541, 559

> "The right to a jury is one of the fundamental rights of citizenship and not a mere matter of procedure, and so the courts have said."

I remember a trial in which my client was charged with assault. He produced ostensibly independent witnesses who gave unshaken evidence of an alibi. A judge would surely have acquitted in the light of that evidence, but the jury convicted. Juries have an uncanny ability to spot the truth, as I discovered later. One of my colleagues reported that the client, despite conviction, a hefty fine and the payment of my fee, had been pleased by my advocacy and found the tribute difficult to understand. "Oh", the colleague explained, "your client thought it was all worthwhile to have had the satisfaction of hitting the rotter!" In my view, it would be a mistake to favour trial by judge alone in preference to trial by jury.

There is another great advantage which, in my view, juries confer on the administration of justice. They strengthen the independence of the Bar. In the absence of juries, advocates are obliged to respond to judicial idiosyncrasies and sometimes it is possible to detect an obsequiousness in the framing of submissions. The advocate may think that a show of independence will not be in the interests of a client and, in time, may allow servility to sap the passion for independence. In a jury trial, the advocate is primarily concerned not by the response of the presiding judge, but by the response of the jury. Mortimer's Rumpole not only illustrated the strength of an independent Bar but demonstrated the community's admiration of a system that accommodates, and indeed welcomes, robust independence.

The necessity of fair procedure

The primary purpose of fair procedure is the protection of the interests of the parties who are affected by the exercise of governmental power, whether administrative or judicial power. But there is another purpose – the maintenance of public confidence in the authority of the repository of the

power. If a fair procedure is followed in exercising a power, even unfavourable decisions may find acceptance. An unsuccessful applicant or litigant may feel disappointed in the result, but if the decision has been reached without observing a fair procedure, disappointment will be exacerbated by a sense of fundamental injustice. Community confidence in the integrity of a system depends more upon the fairness of the procedure in the exercise of power than on the results of the power exercised.

The importance of procedural fairness in the exercise of governmental power was at the heart of the enormous reforms that introduced the new Commonwealth administrative law, leading in turn to new administrative law arrangements in the States. Traditional procedure for exercising administrative power had fallen short in achieving fairness compared with judicial procedure. That is why there was more confidence in the exercise of judicial power than in the exercise of administrative power. Sir Anthony Mason pointed out[29]

> "Experience indicates that administrative decision-making falls short of the judicial model . . . in five significant respects. First, it lacks the independence of the judicial process. The administrative decision-maker is, and is thought to be, more susceptible to political, ministerial and bureaucratic influence than is a judge. Secondly, some administrative decisions are made out in the open; most are not. Thirdly, apart from statute, the administrator does not always observe the standards of natural justice or procedural fairness. This is not surprising; he is not trained to do so. Finally, he is inclined to subordinate the claims of justice of the individual to the more general demands of public policy and sometimes to adventitious political and bureaucratic pressures.
>
> The five features of administrative decision-making which I ha[(m)8(ak)12(i)8(ng

The Administrative Appeals Tribunal Act 1975 created a framework for merits review of administrative decisions which vested in the AAT the powers and duties appropriate to judicial procedure. The Tribunal was constituted by a Judge and independent members but when the Tribunal opened its doors in 1976; I was its only member. Its hearings were generally to be in public, it had to apply the law and to give reasons for the Tribunal's decision and its decisions were subject to appeal on questions of law to the Federal Court. This was a novel development under a Westminster form of government, but public and bureaucratic confidence in the Tribunal's processes was quickly shown by the rapid increase in applications on the one hand and the rapid expansion of areas subjected to review on the other. Not least among the benefits of this innovation was the following of statutory and other legal rules in place of traditional

procedures adopted in the war crimes trials that took place in the aftermath of World War II.

As an undergraduate Judge's Associate, I had had some early experience of the shortcomings of war crimes procedure when my Judge, Mr Justice Townley, a judge of outstanding ability, was appointed to preside at the last of the Japanese War Crimes Trials which took place in 1950 on Los Negros Island, then an Australian Territory. The trials, in the form of a field general court martial, were governed by the War Crimes Act 1945 which provided[30], inter alia, for the reception of hearsay evidence if it appeared to be "of assistance in proving or disproving the charge." It was unnecessary for any eye witness to give oral testimony or to be cross-examined. The prosecution tendered affidavits that had been obtained either from witnesses to the events charged or from investigators deposing to confessional statements made by an accused. In obtaining evidence that pierced the veil of anonymity by which

[30] Section 9(1)

There was another disturbing aspect of the Los Negros trials. I was familiar with the Queensland practice that a judge who was presiding at a criminal trial would not meet with counsel for either the prosecution or the defence in the absence of counsel for the other side. But in Los Negros, all members of the 1st Australian War Crimes Section – both members of the Court and the prosecutors – were members of the same Army mess. I was the secretary who kept the accounts! The Japanese counsel, their interpreters and their support staff were accommodated in a compound nearby and there was no social communication between them and the members of the Army mess, except for the Australian liaison officer – the estimable George Dickenson who exemplified the best traditions of the Australian Bar.

These procedural shortcomings cast an increased burden on the members of the Court, and especially on the President. I think their judicial approach earned the respect of the Japanese Counsel and Dickenson, the latter commenting in an article published in the Australian Quarterly in 1952[31]:

> "It was a good thing for Australia that the War Crimes Court at Manus had as its president an able and experienced lawyer and Supreme Court Judge, and it was indeed fortunate that he was assisted by a bench of fair-minded officers, all with battle experience in the Second World War."

The quality of the members of the Court diminished the risk of injustice. Nevertheless, I have not seen any indication that the decisions of that War Crimes Court have had any precedential authority.

Two years earlier the judgment in the major Tokyo War Crimes Trial was delivered. Unfairness in the procedure of that Trial has deprived the judgment of any precedential value in the view of the international community. In November 2008, the Asia Pacific Centre for Military Law at Melbourne University hosted a conference to mark the 60th anniversary of the delivery of

---

[31] Vol 24 No 2 p 69-75

the judgment. The scholarly papers delivered by international authors, including Japanese academics, were subsequently published in a volume entitled “Beyond Victors’ Justice? The Tokyo War Crimes Trial Revisited”[32]. Professor Tim McCormack and Ms Sarah Finnin, writing of the continuing relevance of the Trial, observed that

> “There has been sustained criticism of the rules of evidence and procedure applied by the Allies in Tokyo....[S]ome will argue that the lack of procedural fairness was so fundamental as to call into question the convictions of the accused....[I]t is unquestionably the case that contemporary international criminal procedure distances itself from the Nuremberg/Tokyo model.”

The modern international criminal Tribunals are not constituted as “Victor’s Justice”. The fairness of their procedures are respected. And the result is that the cogency of international criminal law has become more firmly established even though there are notable omissions in the extent of the international tribunals’ jrpkla(he)4(in)8al prRuing

rele 0 Td [(a)(t)9pp tS>BDC g/1t8(g/1t(t)9(uP7i -8(m)21o)8(ntei)9(nS>BDCP

assisted by their legal experience. Others find new challenges in the daily practice of the law. That is not surprising. The law is an intellectual construct and there is an attraction in discovering unexplored areas of the law and in following its development. Indeed, that kind of curiosity can be satisfied even after retirement! Moreover, because of the rich diversity of humankind and the innumerable activities about which they seek legal advice, the lawyer's interest is likely to be stimulated in a wide variety of problems. Some of the most interesting days I have spent were in the Administrative Appeals Tribunal, sitting sometimes with aviators, sometimes with actuaries, sometimes with doctors. In practice, lawyers learn a great deal about human nature, society, its institutions and customs and the utilisation of material goods. They are privileged to be given access to confidences and intimacies that are hidden from others. The risk of boredom is diminished by a flow of new problems which sometimes have to be solved by research in previously unfamiliar areas of the law.

It is one thing to find some interest in the intellectual task of solving legal problems, it is another to identify why the solution of legal problems is a worthwhile lifetime pursuit. The basic motivation for practising law in any of the professional categories is, I suggest, the desire to see justice done and to see it done according to law.

Ideally, of course, the law operates justly. When

man his due". That is why lawyers find the pursuit of individual justice a worthwhile motivation for continuing the practice of law in one or other of its categories. Whether in the representation of a client, or in the adjudication of a case, or in analysing and expounding a legal proposition or in proposing an amendment to the law, committed lawyers see themselves as administering justice. And they see one another as truly "learned friends". It has been my good fortune to be in the company of such lawyers from the day I entered practice.

At the Bar, it was a group of friends, opposed to one another in court, competitive but acknowledging the ability of others from whom we could learn. When the issues are significant, the contest is vigorous and the egos are unbending, the integrity of opponents who maintain the ethical standards of the Bar earns not only the respect but the friendship of colleagues. Those are friendships which last a lifetime.

On the Bench,

four of the Justices utterly anonymous, I am pleased to say you would walk around the Parliamentary triangle discussing shoes and ships and sealing wax and cabbages and kings. The judicial aspiration that justice should be done according to law gave no guarantee, I regret to say, of unanimity about the content of the law. Yet the aspiration of justice according to law is central to