Selden Society Lecture – Mary Gaudron

Introduction

Judicial colleagues, members of the profession, friends, thank you to the Chief Justice for your kind introduction. And thank you for inviting me to give a Selden Society lecture.

I would like to acknowledge the traditional custodians of the land on which we meet this evening and pay my respects to their elders past, present and future. I expect we are part of a long tradition of people who have met together to discuss and revere respected elders as we do tonight.

As the title indicates, I will speak tonight about Mary Gaudron, the girl from the small country town of Moree who grew up to become the first woman to serve on the High Court of Australia.[1] In drawing together the narrative of Mary Gaudron's life to date, certain connections between her early experiences and later motivations and actions appear irresistible. I have been aided considerably in making these connections by the comprehensively researched, albeit unauthorised, biography of Mary Gaudron by Pamela Burton, published in 2010.

Justice Gaudron herself had, she said, "a horror of biographies", consequently, apart from a small amount of material including my own personal knowledge of her, there is a paucity of personal material available other than what Pamela Burton has assembled in what is a major work of record and scholarship. I encourage those of you who would like to know more details of Mary Gaudron's life and career to read Burton's book and acknowledge the significant extent to which I have relied on it.

I should mention at the beginning the personal debt I owe to Mary Gaudron. I was just at the commencement of my legal career when she reached the apotheosis of hers. My last day as Associate to Justice Brennan of the High Court was her first day as a judge of that court. She was a breath of fresh air: open, generous and informal. She made her Associates a cup of tea! Her family consisted of her two daughters, her husband (there had never been one of those

[1] I would particularly like to acknowledge and thank Gabriel Perry, my Associate during 2016, for his contribution to this lecture.

before) and her five-year-old son who spent the hour of his mother's swearing in by colouring in, a standby for mothers everywhere but not usually seen in the High Court. In those days children under seven, even those accompanied by a parent, were not usually allowed to be in the public gallery of the court as I found out when Justice Brennan invited my husband to bring our young children to observe their mother in court.

Growing up in Moree

Mary Gaudron's story commences on 5 January 1943, when baby Mary was born into East Moree's railway community. Her father worked as a fettler with New South Wales railways, placing him, like the other railway workers and their families, in a socio-economic class falling somewhere between the town's wealthy pastoralists and its poor Aboriginal communities.[2] The disparity between these groups was formative in highlighting issues of social and racial inequality that became marked in Gaudron's thinking and advocacy throughout her life.

A large Aboriginal settlement, called Top Camp, was located close to her childhood home and the conditions there were bleak. Noeline Briggs-Smith, known as Auntie Noeline, an Aboriginal researcher who grew up in that settlement, recalls that:

> 'Living in the tin huts made out of metal from kerosene cans meant living with the smell of kerosene, with the smell of cow dung and trying to sleep with the noise of the trains shunting at night.'[3]

More significant than these adverse living conditions, however, was the overt racism directed towards the Aboriginal community in the Moree township. In a speech given subsequent to her retirement from the High Court, Gaudron gave the following examples:

> 'Aborigines were not allowed on the bus that travelled from East to West Moree, nor in the Municipal swimming pool. They were allowed into the picture theatre but only in the front rows which were roped off from the rest of the audience. Aboriginal children did not go to school like the rest

[2] Burton, above n 1, at 10-11.
[3] Quoted in Burton, above n 1, at 12.

> of us, although some few received a rudimentary schooling on the Mission. And if they were ill, Aboriginal people were treated, if at all, in the isolation ward of the local hospital.'[4]

The starkness of this discrimination had a significant impact on Mary Gaudron. She continued:

> 'It was impossible – absolutely impossible – not to be aware that, in the phrase made famous by George Orwell, some people were more equal than others – indeed, significantly so.'[5]

Indeed, the notoriety of Moree's racial inequality led to it being chosen as a destination for the Freedom Bus Ride led by Charles Perkins in 1965,[6] the same year that Mary Gaudron graduated from university. So, her upbringing in Moree gave her an early awareness of the impact of politics on social issues, like racial discrimination, in addition to the industrial issues that affected its workers. These were frequent topics of discussion in the Gaudron household and her father, in particular, would forcefully express his views on why the then Coalition government was ruining the country and why there was a need for Labor Party rule.[7] It is perhaps unsurprising, then, that an interest in labour law and in anti-discrimination would form an important part of Gaudron's work throughout her career in the law.

School days

The prospect of a *legal* career was, itself, of early origin. Famously, at the age of eight, Mary received a copy of the Australian Constitution from then leader of the Labor Party, and former Justice of the High Court of Australia, Herbert 'Doc' Evatt. Evatt had been giving a speech from the back of a Holden ute, campaigning against the Menzies Government's plan to amend the Constitution so as to outlaw the Communist Party of Australia. Mary's intellectual curiosity,

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[4] Mary Gaudron, speech presented at the UNIFEM International Women's Day Breakfast on 8 March 2005 at the Adelaide Convention Centre, accessed on 16 November 2015 via the Women Lawyers Association of South Australia website: https://web.archive.org/web/20070929022937/http://www.womenlawyerssa.org.au/publicationsandspeeches/hon-mary-gaudron-qc-at-the-unifem-international-womens-day-breakfast.

[5] Ibid.

[6] Australian Institute of Aboriginal and Torres Strait Islander Studies, 'Commemorating the Freedom Ride', <http://aiatsis.gov.au/exhibitions/1965-freedom-ride> (accessed 20 November 2016).

[7] Burton, above n 1, at 22.

even at this age, led her to ask 'Please sir, what's a Constitution?' After determining that it was a bit like the 'Ten Commandments of government', Mary asked where she could get a copy. The opposition leader told her that she could write to him at Canberra and he would send her one. And he did.[8]

Young Mary was excited by the prospect of receiving her own Constitution, telling her schoolmates about having sent for it. All were expecting some grand or elaborate document – perhaps even some tablets of stone – but were ultimately disappointed to find that the copy Mary received looked to be little more than a small pamphlet. A school bully was derisive: it was 'just a book' and of 'no use to anyone'; 'You're not a lawyer', he said. The perhaps inevitable retaliation from Gaudron was 'Well, I'm going to be one.'[9]

Mary Gaudron was remembered by her teachers as brilliant, quick-witted and high-spirited. She was not a conformist - producing an essay at her Catholic school setting out why she had concluded that God did not exist. [10]

In Mary's last year of high school, she tested the waters of a future legal career by seeking out the advice of a local solicitor. His blunt assessment was that she had set her sights too high and that "girls don't do law".[11] This was perhaps Gaudron's first personal exposure to the issue of gender inequality, something that would become increasingly obvious as she proceeded to ignore the solicitor's advice and set her sights on the path to study Arts and Law at the University of Sydney, aided by the award of a Commonwealth scholarship.

University days

Mary Gaudron's first impressions of university are evocatively captured in the Address she gave on the occasion of her being conferred an honorary Doctorate of Laws by her alma mater. Those impressions were:

> '…not of the magnificent sandstone buildings that then predominated, nor of the remote and intimidating academics in their austere black robes, but of the sophistication of my fellow students. They had all the answers.

[8] Gaudron, above n 6.
[9] Ibid.
[10] Burton, above n 1, at 27-39.
[11] Burton, above n 1, at 38.

> They knew, for example, what was and was not examinable, what had to be read and what could safely be ignored, whose ideas were in and whose were out. All this imparted to me and a clutch of other awestruck freshettes from the bush with solemn superiority.'[12]

Respect for that superiority was quickly overcome as Mary Gaudron settled into university life. She came to appreciate that it was often the question, rather than the answer, that was all important.[13] She worked and studied part time, took up social and recreational activities, and made new friends (often with those whose unrestrained behaviour encouraged her own). The obstacles put up by entrenched sexism, however, were not so easily overcome. Lectures commenced with the salutation 'Gentlemen' (and only that) and '[m]any distinguished lawyers took a lot of trouble and effort to explain to [her] that it was not their policy to take on women as articled clerks.'[14] Upon taking work at the Commonwealth Crown Solicitor's office, Gaudron discovered that there was entrenched wage discrimination in favour of men and that if she were to marry her employment would automatically terminate (as, in fact, occurred when she married fellow caving enthusiast Ben Nurse in February 1963).

Nonetheless, Mary Gaudron stood out at law school as an unconventional but academically brilliant student. She was well liked for her wit, humour, tenacity and audacity. The latter qualities were demonstrated when the Vice-Chancellor proposed, against the recommendation of the Dean of the Law School, to award the University Medal in law to a male student who came second behind her in results. The Vice-Chancellor's view was that the male student was more likely to benefit from the award than Gaudron, as she, having recently married and had a baby, would be occupied in looking after her family. Rejecting this suggestion, Mary Gaudron reputedly replied 'The only difference between us is that I sit to pee.' Mary was given the award, making her only the second woman, after Elizabeth Evatt, to have received that honour.[15]

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[12] Justice Mary Gaudron, 'Occasional Address' (2000) 22 *Sydney Law Review* 151 at 151.

[13] Ibid. Burton notes that the use of a 'question technique' for analysing legal problems, or as a means of highlighting the significance of certain issues, was to become a relatively common feature of Gaudron's work on the High Court: see, e.g., *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 53; *Plaintiff 157/2002 v Commonwealth*, transcript 4 September 2002, [2002] HCA Trans 423.

[14] Gaudron, above n 6.

[15] Story recounted by Burton, above n 1, at 62-3.

The recognition Ms Gaudron received for her achievements was hard won but important. One academic success, in particular, had the direct consequence of aiding her transition to the bar upon graduation. When, in her fourth year at university, Gaudron sat her end of year succession law exam she was nine months pregnant with her first child. The course was conducted by Professor Frank Hutley QC, a brilliant man notorious for his rudeness and his joy in failing students (some unfortunates had been required to re-sit the course three or four times). Mary Gaudron, stretching to write over her baby-*in-utero*, finished the exam early and with aplomb, receiving a grade close to 100 per cent and the Succession prize for topping the year.[16] Remembering her succession paper as the 'finest he had ever marked', Hutley invited her to read with him at Wentworth Chambers when she was admitted to practice as a barrister in 1968.[17]

Life at the Bar

This invitation proved useful. Although Ms Gaudron at first refused to 'squat' in chambers, thinking (wrongly) that her academic record would invite offers of a room of her own, Hutley's endorsement helped Mary overcome resistance to the idea that a second woman would be allowed into those chambers (the clerk had threatened to resign if this were to occur). After repeated rejections at other chambers – being 'reassured' that it 'was neither discriminatory nor personal; it was just that [she] was a woman' – Gaudron accepted a standing offer to share a room with Janet Coombs, the only other female barrister at Wentworth Chambers.[18] This was something of a vindication for Coombs, who had previously proposed this arrangement to Gaudron only to be told, rather brashly, "I'm sure I can do better than that"![19]

After two years sharing rooms on the 13th floor, having become a permanent member after 6 months, Mary Gaudron had a room to herself. Two more years passed and she purchased Hutley's chambers, generously offered to her at cost price when he was appointed to the New South Wales Court of Appeal.[20]

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[16] Burton, above n 1, at 59-60, citing Justice Mary Gaudron, 'Part Time and Partisan' in *A Century Down Town: Sydney University Law School's first hundred years*, eds. John and Judy Mackinolty, Sydney University Law School, 1991 at 141.
[17] Burton, above n 1, at 77.
[18] Gaudron, above n 6.
[19] Burton, above n 1, at 77.
[20] Burton, above n 1, at 80.

Ms Gaudron carved out a niche in defamation and negligence work, frequently receiving briefs to act on behalf of unions and the Labor Party. No doubt her working class background and stated political views assisted in this regard. However, she did not restrict her practice, taking briefs in diverse areas, including crime, taxation, probate and succession.[21]

Significant cases during Gaudron's relatively short career at the bar included *O'Shaughnessy v Mirror Newspapers Ltd*[22] (a successful appeal to the High Court in a complex defamation matter about Peter O'Shaughnessy's production of *Othello* which had been described by a respected theatre critic as a "disaster" and that the "waste and dishonesty" of the production had made the critic "very angry indeed". Ms Gaudron appeared without a leader as a junior barrister of only two years' standing and managed to have the decisions of the trial judge and the New South Wales Court of Appeal consisting of the Chief Justice and Justices Jacobs and Mason overturned); the *Pat Mackie* case[23] (a successful and high-profile month-long defamation trial brought by the prominent unionist Mackie against Frank Packer's Australian Consolidated Press); and the 1972 *Equal Pay Case*[24] (which represented both a career highlight and turning point for the young barrister).

That *Equal Pay Case* in fact represented the first of a series of such cases in which Gaudron and others appeared before the Conciliation and Arbitration Commission to represent the Commonwealth, presenting submissions aligned with the policies of the newly installed Whitlam government. Perhaps fittingly, Gaudron got this gig by impressing the soon-to-be Minister for Labour Clyde Cameron with her advocacy in the *O'Shaughnessy* and *Mackie* cases.

Before the Commission, Gaudron argued forcefully that working conditions for Australian men and women should be on the basis of 'equal pay for work of equal value', including in industries consisting largely or exclusively of female

[21] Burton, above n 1, at 80, 84.
[22] (1970) 125 CLR 166.
[23] Detailed exposition of the trial provided by Burton, above n 1, at 95-111. The facts and legal issues on appeal can be found in the reasons of the New South Wales Court of Appeal: *Mackie v Australian Consolidated Press Ltd* [1974] 1 NSWLR 561.
[24] *National Wage Case and Equal Pay Cases* (1972) 147 CAR 172. The history of this case, the submissions made by Gaudron and the commentary surrounding her advocacy are described by Burton, above n 1, at 112–124.

employees. In doing so, she drew on the International Labour Organisation's Convention on Equal Remuneration. Gaudron's success in arguing the position ultimately led to her appointment to the Commission at the age of only 31.

A seat on the Commission

Commissioner Gaudron's time on the Conciliation and Arbitration Commission was richly rewarding. She was able to draw on her expertise in industrial law to distil the essence of complex workplace disputes and she proved to be a skilled negotiator. In describing the work of the Commission, Justice Gaudron said:

> 'There was endless variety; the industrial situations were invariably hilarious so long as you maintained sufficient distance therefrom, and one had the opportunity for inspections to quite interesting places, although in retrospect I think I could have gone without my interminable inspections of sewage works. Thanks to those, there is no doubt that I can claim to be the only Judge of the High Court with an intimate knowledge of activated sludge.'[25]

She later commented that her time on the Commission was 'infinitely more fun' than being on the High Court.[26] Perhaps ironically, then, it was her performance on the Commission that left a powerful positive impression on Bob Hawke, whose government it was that ultimately appointed her to the highest court in the country.

The case Gaudron handled in a manner that so impressed Hawke, who was then President of the ACTU, was the 1978 Telecom dispute. She chaired a conference between Telecom and the Australian Telecommunications Employees Association, who were taking retaliatory action against each other following staff cuts and strikes instituted because of Telecom's plan to computerise its exchange system. In a day that has been remembered as 'Bloody Sunday', Gaudron assembled the parties in a hearing room at 10:30am and almost immediately adjourned the matter to a conference which she chaired. With no break during which food was allowed in or the disputants out, a

[25] Justice Mary Gaudron, 'NSW Bar Honours Justice Gaudron' [1987] Winter ed. *Bar News* 11 at 14.

[26] Justice Mary Gaudron, speech delivered at a dinner of the Industrial Relations Commission to mark the Centenary of Federation (2001), quoted in Michael Kirby and Breen Creighton, 'The Law of Conciliation and Arbitration' in Joe Isaac and Stuart Macintyre (eds), *The New Province of Law and Order* (Cambridge University Press, 2004) 98 at 100.

settlement was reached at 10:35pm, and the proceedings were finally resolved at 11:00pm, ending a month-long dispute during which citizens attempting to engage in telephone communications had been experiencing considerable difficulties.[27] Hawke later told his biographer:

> 'We all knew she was an extraordinarily intelligent woman [and]… her sense of humour was a big help in keeping things together. In conferences of that length fatigue and frustration cause short tempers, and often the whole thing breaks down. It's a tremendous plus if the mediator can keep the atmosphere light.'[28]

Despite Mary Gaudron's enjoyment of the Commission's work, her work there ended in less than ideal circumstances. She resigned as a matter of principle in protest over the manner in which the President of the Commission and other Commission Members had treated fellow commissioner, and friend, Justice Staples. Staples had been resistant to the Fraser government's approach to industrial relations and that government's changes to the law governing how the Commission was to handle disputes and he spoke out against those changes. Although Gaudron did not approve of all of Staples' conduct in protesting against the changes, she was most aggrieved that the letter expressing disapproval of Staples' actions, that she and other Members of the Commission had signed, had been used subsequently as justification for depriving Staples of his panel responsibilities.[29] Gaudron thus became only the second Arbitration justice to 'resign on principle' and the first to relinquish judicial rank in doing so.[30]

Gaudron as first female Solicitor-General

At the end of 1979, Mary Gaudron took a part-time position as head of the newly established Legal Services Commission in New South Wales. She also became a visiting fellow at the University of New South Wales' Law School. Her next highly significant role came with her appointment to the position of New South Wales Solicitor-General in February 1981. Once again she had Clyde Cameron's support for this appointment. Importantly, she also had the

[27] Burton, above n 1, at 154-157.
[28] Blanche d'Alpuget, 'Robert J. Hawke' (Schwartz/Penguin Books, 1984) at 352, quoted in Burton, above n 1, at 157.
[29] Burton, above n 1, at 168-172.
[30] Burton, above n 1, at 137.

support of Frank Walker, who was then Attorney-General in Neville Wran's Labor Government.[31]

Mary Gaudron was very pleased to be offered the role – she saw it as the best job to have in law. Her respect for the position was enormous and her ambitions high. She told the media what she hoped to achieve in the following terms:

> 'I should like to see a greater awareness in the community at large of legal rights, responsibilities and remedies available. Perhaps in the long term I should like to see that the law is not something apart from ordinary life… People should see that the law is there not to stand against them, but for their benefit.'[32]

The position of Solicitor-General involves providing frank, fearless and independent advice to the government on often complex legal and political questions. It also involves representing the State in court, putting the government's case. Conventionally, this is a position for Senior Counsel but Mary was not a QC, having only practised at the Bar six years before being elevated to the bench of the Commission. Thus, in a rare example of tradition working in her favour, the Attorney-General arranged for Ms Gaudron to take silk just prior to her appointment[33] (making her just the third woman in Australia to attain that status).[34] Around the same time, and just days before commencing her new job, Ms Gaudron married her new partner John Fogarty, and later gave birth to their son Patrick.

There is a story I heard while I was employed at the High Court which I hope is not apocryphal. One Friday a case was very nearly completed. All that was left was Ms Gaudron's reply. The presiding judge decided to adjourn the matter to finish on the next sitting day the following week. An urgent whispered conversation took place amongst the judges and the presiding judge announced that on second thoughts they would finish hearing the case that day. Patrick, I was told, was born that weekend.

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[31] Burton, above n 1, at 177, 179-180.
[32] Quoted in Burton, above n 1, at 186.
[33] Burton, above n 1, at 184
[34] Justice Jane Mathews, 'The Changing Profile of Women in the Law' (1982) 56 *Australian Law Journal* 634 at 640.

The period during which Gaudron held the role of Solicitor-General was politically tumultuous and the range of matters on which she was called to give advice extensive. The reform agenda of the Wran government included formulating a Bill of Rights; prohibiting non-consensual sex in marriage (at the time not an offence); bringing NSW anti-discrimination policies into line with the UN *Convention on the Elimination of all forms of Discrimination against Women*; and the recognition of Indigenous land rights, including the proposal to pay compensation to Aboriginal communities previously dispossessed by government resumption of their reserves.[35]

Gaudron QC displayed a high degree of aptitude in analysing the interaction of State and Commonwealth powers in Australia's federal system of government. She appeared in numerous significant High Court cases on constitutional issues, such as *Miller v TCN Channel Nine*[36] (concerning s 92's guarantee of free trade and commerce between States) and the *Tasmanian Dam Case*[37] (concerning the reach of the Commonwealth's external affairs power). The skills she displayed in such cases were later relied on in support of her suitability for a High Court appointment. Gaudron also happened to contribute to the significance of that later appointment by her involvement, as Solicitor-General, in the move to abolish appeals from the High Court to the Privy Council, that shift occurring just in time for her arrival to the bench of what then became the final arbiter of disputes in the country.[38]

Before all this was to occur, however, one particular problem (or perhaps, rather, category of problems) came to occupy a significant amount of Gaudron's time as Solicitor-General.[39] They arose from the mounting allegations of crime and corruption amongst police, politicians and the judiciary that were surfacing in the 1980s. This environment led to numerous politically-charged decisions having to be made about whether adequate evidence had been obtained to support high-profile prosecutions (including of ALP MPs) and decisions concerning which potential witnesses should be given immunity from prosecution. In the absence of the office of Director of Public Prosecutions, a position created later, it was the Solicitor-General whose job it was to make

[35] Burton, above n 1, at 189-191.
[36] (1985) 161 CLR 556.
[37] *Commonwealth v Tasmania* (1983) 158 CLR 1.
[38] *Australia Act* 1986 (Cth); *Australia Act* 1986 (UK).
[39] See Burton, above n 1, at 206–249.

these calls. The pressure around such decisions came to a head with the advent of the '*Age* tapes' controversy and the allegations that followed involving her close friend and supporter, High Court Justice Lionel Murphy.

The *Age* newspaper had published extracts from copies of cassette tapes and written material purporting to be transcripts or summaries of intercepted telephone conversations, all suggestive of improper connections between public officials and the New South Wales criminal underworld. Solicitor Morgan Ryan was said to be central to the so-called 'Network of Influence' the *Age* tapes showed. Given Ryan's frequent contact with Justice Murphy, the publication of the *Age* tapes had a snowball effect that had the ultimate consequence of the judge being prosecuted for interfering with the administration of justice. The details of that saga have been detailed extensively elsewhere,[40] including by me in other speeches.[41] Relevant for our purposes, however, is that Gaudron's handling of the legal issues raised by this and other similar controversies, in the face of considerable press pressure and cynicism, was always considered by those who worked with her to be of the highest standard: succinct, timely and carried out with the utmost professional integrity.

Attaining Higher Ground

Mary Gaudron's appointment to the High Court, the most significant of the many 'firsts' in her career, was inevitably a source of controversy; not unexpectedly, charges of tokenism, emotionality and cronyism were directed at her elevation. She was cognisant of the increased scrutiny attendant upon her position as first woman Justice. She noted, in her inaugural speech from the High Court bench, that "too often, we emphasise differences at the expense of common cause, I would wish that the day had arrived when the appointment of a woman to this Court was unremarkable."[42]

Nonetheless, the appointment of the first woman was indeed remarkable and it, along with Gaudron's force of personality, presaged a number of changes to High Court practice. One early change was that the title "Mr Justice" was

[40] See, e.g., A R Blackshield, 'The Appointment and Removal of Federal Judges', in B Opeskin and F Wheeler (eds.), *The Australian Judicial System* (Melbourne University Press, 2000) at 410-422.
[41] See, e.g., R G Atkinson, 'The Chief Justice and Mr Justice Murphy: Leadership in a Time of Crisis' (2008) 27(2) *University of Queensland Law Journal* 221-238.
[42] Swearing-in Ceremony of Gaudron J reported in (1986) 68 ALR xxxvii.

immediately abandoned by all the judges in favour of, simply, "Justice". I remember my own feeling of optimism about the future when I saw the name plates on their chambers being changed on the announcement of her appointment. Another was that she discontinued the practice of having a tipstaff and a single associate, instead appointing two young lawyers to the position. Now it is the norm for each High Court justice to have two associates to assist them in their onerous work.

The most significant changes to the court's embodiment of notions of equality concerned not its members' verbal formulae, but rather their jurisprudence. In this regard, Justice Gaudron was instrumental and I propose to briefly sketch a few examples.[43]

Gaudron's Jurisprudence on Equality

There was, of course, the famous joint decision of Deane and Gaudron JJ in *Mabo v Queensland (No 2)*.[44] As this audience is aware, the question for the court to decide in *Mabo* was whether, notwithstanding Crown sovereignty, Australian law could recognise the existence of native title rights to lands that had been occupied for generations by the country's First Peoples. If the answer to that question was yes, the question would then be whether, in this particular case, the Meriam people of the Murray Islands in the Torres Strait had established their native title right.

A 6:1 majority of the High Court found that 'the Meriam People [were] entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands.'[45] And, as is well known even beyond legal circles, in reaching this conclusion the Court rejected the notion that Australia was unoccupied (*terra nullius*) prior to colonisation. For Deane and Gaudron JJ, this was more than a case of overturning a factual mistake that had been proceeded upon, in ignorance, in the past. For them, the true facts concerning Indigenous

[43] In doing so, I am not, of course, seeking to suggest that Justice Gaudron's jurisprudence was not also influential and respected in respect of the many other areas of law and legal issues she dealt with on the High Court. For example, Sir Anthony Mason has remarked on Gaudron's 'very fine' command of and insight into constitutional law and her 'outstanding' criminal law judgments: see Burton, above n 1, at 368.

[44] (1992) 175 CLR 1.

[45] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 217. Note: this declaration was inapplicable to certain parts of the Murray Islands that had been validly appropriated by the Crown.

occupation had been long known but ignored.[46] It was therefore critical, in their view, to tell the unvarnished true history of Indigenous dispossession in the judgment to ensure that the law, from now on, would proceed on a legitimate basis. One famous passage from the judgment illustrates this approach:

> 'The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices.'[47]

By stating the history of Indigenous dispossession and discrimination in stark but accurate language, the judgment sought to ensure that, in that case and in those to follow, the legitimacy of legal propositions concerning that history could be assessed in a clear light.

Justice Gaudron's notion of what "equality" means was developed over a series of cases, including *Street v Queensland Bar Association*;[48] *Castlemaine Tooheys v South Australia*[49] and *Leeth v Commonwealth*.[50] A helpful device Justice Gaudron used in explaining the concept was to define its opposite: inequality or discrimination. Extra-curially, Justice Gaudron succinctly paraphrased her reasoning in this way: [inequality is] 'the different treatment of persons who are equal and the equal treatment of persons who are different.'[51] In the case law, this apparently straightforward notion was teased out and applied in a variety of contexts; its subtleties, as revealed by the interpretation and application of anti-discrimination legislation and s 117 of the Commonwealth Constitution, were articulated. In *Leeth*, for example, Justice Gaudron emphasised that differential treatment of those who are, relevantly, different will still amount to unlawful discrimination unless the differential treatment is 'reasonably capable of being

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[46] See, e.g,. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 106–109.
[47] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 109.
[48] (1989) 168 CLR 461 ('*Street*').
[49] (1990) 169 CLR 436.
[50] (1992) 174 CLR 455 ('*Leeth*').
[51] Justice Mary Gaudron, 'In the Eye of the Law: The Jurisprudence of Equality' (speech delivered as the Mitchell Oration, Adelaide, 24 August 1990) at 5. She went on to say "It is a by far from perfect exposition of what is involved in "inequality". However, it does provide a framework so that, at least, we can ask the critical questions, namely:

(i) Is there a relevant difference?
(ii) If so, what is the appropriate manner of dealing with that difference?"

seen as appropriate and adapted to that difference.'[52] In *Australian Iron & Steel Pty Ltd v Banovic*,[53] one of the leading cases on indirect discrimination, Deane and Gaudron JJ found that a 'last on, first off' policy of retrenchment, whilst *prima facie* fair and non-discriminatory, was unlawful because it operated to systematically benefit male over female employees due to historical discriminatory *recruiting* practices that favoured men.

As to her judicial manner, she could be robust when she thought that the submissions before her were poorly framed. I remember going to watch her when she heard the first of the interlocutory matters in the Patrick Stevedores case[54] in Brisbane.

In those matters, she pressed Gavan Griffith QC who had just finished his term as Solicitor-General and was appearing for the Commonwealth Attorney General on what was the constitutional question involved which required the case to be removed to the High Court. She refused to put up with obfuscation.

> ***HER HONOUR:*** *Well, I want to know what the constitutional question is for those causes of action.*
>
> His long-winded answer did not satisfy her.
>
> ***HER HONOUR:*** *No, but you will not tell me what the question is.*
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> ***MR GRIFFITH:*** *Your Honour, the question is whether one has a matter for the purposes of section 75 or section 77 or in combination of operation, your Honour, merely by reason of the fact that the Commonwealth is joined as one of the parties with some 23 other respondents.*
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> ***HER HONOUR:*** *That is a proposition that is seriously advanced?*
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> ***MR GRIFFITH:*** *Well, your Honour, that is a question to be determined.*
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> ***HER HONOUR:*** *It is a proposition that is seriously advanced?*

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[52] (1992) 174 CLR 455 at 498.
[53] (1989) 168 CLR 165.
[54] *Maritime Union of Australia v Patrick Stevedores No 1 Pty Ltd (under Administration) ex parte: the Honourable Daryl Williams, Attorney General for the Commonwealth of Australia M25/1998* [1998] HCA Transcripts 106 (17 April 1998) pp26-27.

MR GRIFFITH: *As a question to be determined.*

HER HONOUR: *Dr Griffith, do you seriously contend that a proceeding alleging a cause of action against the Commonwealth and other co-defendants is not a matter for the purposes of sections 75 or 76 of the Constitution?*

Another attempt at a long-winded and what she regarded as a non-responsive answer followed.

…

HER HONOUR: *Yes. But I am trying to understand - I mean, if you said to me - if you were to seriously advance - and I might, of course, find difficulties in containing my mirth - but if you were to seriously advance that a proceeding alleging a cause of action in conspiracy against the Commonwealth and other co-defendants is not capable of being treated as a matter in respect of which jurisdiction could be conferred on the Federal Court, then I can see a constitutional question. I cannot see that it is a genuine one, but I could see one.*

Any judge trying to deal with a difficult matter with apparently unhelpful counsel would appreciate her exasperation.

Justice Gaudron's notion of "equal justice" found its way into her judgments in a wide range of cases, both criminal and civil.[55] Her thinking on equality, discrimination and fairness also informed her approach to dealing with cases concerned with the meaning of citizenship.

Her advocacy in opposition to practices which unfairly diminished the rights of vulnerable groups of people remained, and even strengthened, upon her early retirement from the High Court at the relatively young age of 60.

Retirement and Work beyond the Court

When Mary Gaudron left the High Court, she had the joys of rest and relaxation with family and friends firmly in mind. This she achieved, with frequent trips to her second home in the Loire Valley. Her French cottage also became a

[55] In addition to those cases cited above, see the cases in which Gaudron articulated her ideas about 'due process' and 'the universal criterion of fairness', such as *Dietrich v The Queen* (1992) 177 CLR 292 and *Nicholas v The Queen* (1998) 193 CLR 173 at 208–211. See also the cases referred to in the following paragraphs.

welcome point of detour for many judicial colleagues on their way to and from international judicial conferences.[56]

However, Ms Gaudron did not remain idle.[57] She first took a three-year appointment as Visiting Professor in the University of New South Wales' Faculty of Law. Then, just four months after retiring from the High Court, she commenced a part-time appointment to the International Labour Organisation's Administrative Tribunal in Geneva, a United Nations initiative established to define and protect the rights of workers. The Tribunal hears complaints from serving and former staff members of various United Nationals organisations, including the ILO itself. In 2006, she became Vice-President of the Tribunal and, in late 2009, became its President. Her term on the Tribunal ended in 2012, when she resigned due to ill health.[58]

Ms Gaudron's Tribunal work also led to other interesting assignments. Memorably, in 2003 she was appointed by the ILO to a commission of three to examine trade union rights in Belarus. The experience of visiting Belarus in 2004 and interviewing trade union and government officials reinforced for her the value of s 75(v) in Australia's Constitution as a means of protecting human rights. Ms Gaudron had been in the majority in several High Court cases that held that this provision guaranteed the availability of review of 'decisions' infected by jurisdictional error (for example, because of a denial of procedural fairness). Ms Gaudron saw that the Belarus Constitution contained many guarantees of basic human rights – far more, in fact, than are found in the Australian Constitution[59] – but the absence of an equivalent to s 75(v) meant that, in practice, these rights could be trampled on with no recourse to the courts

Gaudron was to speak often about her experience in Belarus, citing it as an example of how human rights abuses can occur even where, at least on paper, there are protections in place to prevent this.[60] The experience also shaped her

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[56] Burton, above n 1, at 381–2.
[57] See Burton, above n 1, at 382–6.
[58] Governing Body, 'Matters relating to the Administrative Tribunal of the ILO: Composition of the Tribunal' (313th Session, Geneva, 15–30 March 2012) <http://www.ilo.org/gb/GBSessions/WCMS_176169/lang--en/index.htm> (accessed 18 November 2016).
[59] She noted that the terms of the Belarus Constitution 'would make ours look like a very meagre document indeed.': Mary Gaudron, above n 6.
[60] Mary Gaudron, above n 6; Mary Gaudron, 'Remembering the Universal Declaration' (address to the annual lunch of the Jessie Street Trust, Parliament House, Sydney, 3 March 2006)

view that international law and international human rights bodies are necessary and important mechanisms for safeguarding citizens against abuses by their own governments.[61]

The Mary Gaudron Legacy

There is no doubt that Mary Gaudron has had a powerful and lasting influence on the development of Australian law and those who practise it. At the time of her retirement from the High Court, David Curtain QC, then President of the Australian Bar Association, spoke of her work in the development of "every important area of Australian law – the common law, criminal law, equity, conflicts of laws, constitutional and administrative law, native title, free speech and natural justice."[62] Of course, in the time I had available in this speech, and out of a desire to present a snapshot of the entire span of her career, it has not been possible to touch on all of these contributions.

What is apparent from even this brief survey of Mary Gaudron's career is that she was a trailblazer in Australian legal history. But she should not be remembered simply as a collection of firsts or as someone who shattered at least a few glass ceilings. There are at least two reasons for this. First, Mary Gaudron's intellect and humanity produced legal work and advocacy of a standard that can proudly stand alone, without a token 'first woman' leg to prop it up. Second, as Ms Gaudron herself was conscious of observing, there is a problem with the 'glass ceiling' metaphor. It implies that rather than women being held back by discriminatory practices or unequal treatment, their continued lack of representation amongst the upper echelons of the legal profession (and in the wider workforce) is down to some 'mysterious indefinable *je ne sais quoi*, some phenomenon not quite capable of explanation.'[63] As some of the starker examples of prejudice in Mary Gaudron's life and career show, commonly the problem is much more concrete than that.

<http://evatt.org.au/papers/remembering-universal-declaration.html> (accessed 18 November 2016); Kydia Kinda, 'Celebratory Dinner: The Honourable Mary Gaudron QC' (2005) 135 *Victorian Bar News* Summer 38 < https://www.vicbar.com.au/webdata/GeneralFiles/BarNewsArchive/2000-2009/VBN_135_2005_Summer.pdf> (accessed 18 November 2016).

[61] Mary Gaudron, 'The Rule of Law – its role in international governance' (speech presented at the Australian Centre for Peace and Conflict Studies, University of Queensland, Brisbane, 17 September 2004).

[62] David Curtain, speech at a dinner at the High Court of Australia to welcome new silks, and to honour Justice Mary Gaudron (10 February 2003) quoted in Burton, above n 1, at 398.

[63] Justice Mary Gaudron, 'Equal Rights and Anti-Discrimination Law' (the Sir Richard Blackburn Lecture, Academy of Science, Canberra, 29 July 1992) at 15.

Although it is still not quite the case that the appointment of a woman to a position of high office can pass without comment about her gender, it is a testament to Mary Gaudron's abilities and personality – to "her steely determination [to] seldom [take] a backward step"[64] – that we are creeping ever-closer to that ideal.

Let me close on a personal, and local, note. Mary Gaudron freely gave me sage advice and met with me when she came to Brisbane to check how my early career at the Bar was going. She had, I should cautiously mention, a less than entirely complimentary view of the Queensland Bar as it then was and initially encouraged me to commence practice in the allegedly more accepting atmosphere of Sydney.

However, we can now celebrate that the first female Chief Justice of the High Court of Australia is a former Queensland barrister, that eight of my 26 colleagues on the Supreme Court of Queensland are women, including the Chief Justice, and that the members of the Queensland Bar when they stand in this place for their President's speeches at welcome and retirement ceremonies look slightly less like the front row of a Brisbane GPS rugby team than they used to. I'm glad I stayed, but it is in no small part because of Justice Gaudron's pioneering role, outspokenness, indefatigable spirit and legal brilliance that these changes have occurred.

[64] Ross Fitzgerald, 'One of our finest judges of character' (article in *The Australian*, published 15 January 2011).