Sybil Morrison Lecture: The Honourable Mary Gaudron QC's Contribution to Law and Jurisprudence

By Winnie Liu*

Justice Mary Gaudron is a person who requires no introduction. It is no exaggeration to say that she is a living legend. Not only is she the first woman to be appointed to the High Court, she is also a trailblazer at every point of her career. It is no small task to summarise her immense contribution to the law and jurisprudence of this country.

In preparing for this lecture, I searched for a unifying theme that would allow me to delve into the different areas of law in which Justice Gaudron has had influence. As always, the answer came from Justice Gaudron herself. Upon being appointed to the High Court, Justice Gaudron in her swearing-in speech identified three obligations of a judge: 'the need for rigorous and dispassionate intellectual analysis; the obligation to ensure equality before and under the law; and the obligation to ensure that justice is done in accordance with the law'.[1]

It is the theme of equality on which I wish to speak. Undoubtedly, equality is an elusive concept, but it is also, as Justice Gaudron identified, an essential component to ensuring that justice is done in accordance with the law. It is through the recognition of the need to achieve equal justice that the interests of the most disadvantaged and vulnerable members of our community may be protected.

Justice Gaudron grew up in Moree, the child of a working-class family. Her first encounter with the law was with a former High Court Justice, 'Doc Evatt', formerly Justice Evatt.[2] He was in Moree to encourage the 'no' vote on the 1951 referendum to ban the Communist Party.[3] An eight-year-old Justice Gaudron, intrigued by the reference to the Constitution, asked Doc Evatt what it was and where she could get a copy.[4] Doc Evatt described the Constitution as the laws by which Parliament was governed, sort of like the 'ten commandments of government', and later posted her a copy. Although the Constitution appeared to be more like a 'pamphlet' than the stone tablets that she had imagined, Justice Gaudron declared to schoolyard bullies that the Constitution was important to lawyers and that she would become one.[5]

Moree in the mid-1900s was 'notorious for its racism' which Justice Gaudron witnessed firsthand.[6] It caused her later to reflect that in the words of George Orwell, 'some people were more equal than others – indeed, significantly so'.[7] While discrimination against Indigenous Australians was readily apparent to Justice Gaudron from her childhood experiences in Moree, the extent of discrimination against women would not become evident until she commenced studying law.

Student at the University of Sydney

Justice Gaudron enrolled as a student at the University of Sydney in 1959 at just sixteen years of age.[8] She was too young to be admitted directly into the Law School and did not commence studying law for another two years.[9] During her time at University, she became acutely aware of the entrenched discrimination against women in all aspects of society.[10] Unlike Sydney Law School today where female law students easily outnumber their male counterparts, Justice Gaudron matriculated with only a small number of female students.[11] To some, the under-representation of women justified their exclusion from the outset; for example, every lecture Justice Gaudron attended commenced with the simple salutation: 'Gentlemen'.[12]

Employers took pains to explain to her that it was not their policy to employ women as articled clerks.[13] When she eventually obtained a position with the Commonwealth Crown Solicitor's Office, she was not only paid less than her male colleagues but was compelled to resign once she married.[14] Justice Gaudron took action and in 1964, she and fellow student Daphne Kok joined the Women Lawyers Association of New South Wales as representatives of Sydney University's female law students.[15]

Justice Gaudron remained implacable in the face of adversity. She studied law part-time while working and raising a young family. She was heavily pregnant when she sat her final exams. She won numerous prizes, including the Geddes Prize for coming first in Equity.[16] This is no small feat when the subject was taught by Sir Anthony Mason and Justice Gummow was a classmate.

In 1966, Justice Gaudron graduated with first class Honours and the University Medal in Law. She was the first part-time law student to win the University Medal and the second woman, after the Honourable Elizabeth Evatt AC, to do so.[17]

'Mary the Merciless' at the Bar

Upon graduation, Justice Gaudron set her sights on going to the Bar. A male graduate of Sydney Law School with a fierce intellect and unimpeachable qualifications would have had his pick of chambers. It is well known that Justice Gaudron had difficulty obtaining a room for no other reason than that she was a woman.[18] The male-dominated Bar made it clear that women were generally not welcome. Justice Gaudron recounts that in the 1960s the Chief Justice's admission day speech was varied whenever a woman was admitted to the Bar to include the observation that 'a woman barrister was mother nature's only mistake'.[19] Such a remark is unfathomable today. Standing in sharp relief are Chief Justice Bathurst's remarks at the 2021 Opening of Law Term Address on 'Trust in the Judiciary' in which the Chief Justice observed:[20]

> *'Judges not only must be technically competent, but they must first and foremost be men and women of integrity with a deep appreciation of the needs and diversity of the community they serve.'*

Justice Gaudron eventually secured a room on the 13th Floor of Wentworth Chambers with the assistance of Janet Coombs.[21] She quickly established herself as a leading junior on Phillip Street. In 1970, she made her mark by appearing unled in the High Court in the matter of *O'Shaughnessy v Mirror Newspapers Ltd*.[22] Unfazed by a loss at trial and in the Court of Appeal, Justice Gaudron single-handedly took the matter to the High Court and won 5-0.[23]

In 1972, Justice Gaudron further solidified her reputation as a 'brilliant young barrister' by appearing in the Pat Mackie case, one of the most publicised and long-running defamation cases of its day.[24] It was also during her time at the Bar that she earned the nickname, 'Mary the Merciless'.[25] Notwithstanding (or perhaps because of) this fearsome title, Justice Gaudron was elected to Bar Council and she became its first female member.[26]

The Whitlam Government was elected to power in December 1972 and shortly thereafter the Equal Pay case was reopened.[27] Justice Gaudron became the first woman to represent the Commonwealth in a national wage case.[28] She successfully advocated for the principle of equal pay for work of equal value such that award rates for all work would be considered without regard to the sex of the employee.[29] In 1973 and 1974, Justice Gaudron appeared for the Commonwealth in two further national wage cases. The Commission's 1974 determination saw the extension of the full minimum wage to women.[30]

Appointment to the Conciliation and Arbitration Commission

Justice Gaudron's triumph in the national wage cases saw her appointed to the Conciliation and Arbitration Commission as Deputy President in 1974.[31] She was the youngest person ever to be appointed a federal judge.[32] She was known for her skilfulness as an arbitrator and conciliator, often adopting a no-nonsense, interrogative style of questioning, especially of counsel who had strayed from the point.[33] She is reported to have said, on behalf of herself and Justice Kirby, that their time on the Commission was 'infinitely more fun' than their time on the High Court.[34]

Two decisions of the Commission held particular importance for women in the workforce. The first concerned a 1975 Award that permitted the Queensland Local Government to terminate a woman's employment on account of her being married.[35] Proponents of the policy justified the dismissal of married women on the basis that it would alleviate youth unemployment.[36] The Commission did not accept that justification and found the policy to be clearly discriminatory and contrary to the aims of both the International Labour Organisation and the Federal Government.[37]

The second decision of significance was the 1979 Maternity Leave case in which the Commission recognised that it was a matter of 'equity and good conscience' for women to be entitled to maternity leave and to have job security upon their return to work.[38] For the first time, women in Australia were entitled to 52 weeks of unpaid maternity leave.[39]

The appointment of Justice Gaudron to the judiciary was not a panacea against misogyny or discrimination against women. For example, the mayor of Rockhampton, Rex Pilbeam, proclaimed that he would overcome the Commission's decision by simply refusing to employ married women.[40] That way, he reasoned, he would not only keep families together but also keep wages down 'because kids will work for half the wage'.[41] To justify his apparent support for child labour, Pilbeam also expressed the view that 'working mothers are behind Australia's mounting problems of drug taking, venereal disease and juvenile delinquency'.[42] Justice Gaudron reportedly kept a clipping of this article with her notes when she heard the maternity leave case.[43]

First female Solicitor General

On 16 February 1981, Justice Gaudron was appointed Solicitor General of New South Wales. She was the first woman to hold the position anywhere in Australia.[44] It was also in 1981 that Justice Gaudron took silk becoming the first female Queen's Counsel in New South Wales.[45]

During her time as Solicitor General, Justice Gaudron contributed to a number of law reform initiatives including significant legislative reform in the area of sexual assault. The *Crimes (Sexual Assault) Amendment Act 1981* (NSW) abolished the common law offence of rape and made non-consensual sex in marriage an offence.[46] The reform also changed the definition of consent recognising, among other things, that a person is not taken to have consented simply because he or she has not offered actual physical resistance.[47] The issue of sexual assault is complex and remains the subject of ongoing reform.[48] It is clear that Justice Gaudron was at the forefront of this process.

Justice Gaudron appeared for the State in a number of High Court matters including *Actors and Announcers Equity Association v Fontana Films Pty Ltd*[49] which concerned the validity of the secondary boycotts provision of the *Trade Practices Act 1974* (Cth); although Justice Gaudron was annoyed to find that the media was more interested in the late stage of her pregnancy than her arguments in the case.[50] Her appearances in the High Court in significant constitutional cases included *Hematite Petroleum v Victoria*[51] and *Miller v TCN Channel Nine*[52] concerning the freedom of interstate trade and commerce, *Stack v Coast Securities (No 9)*[53] concerning the Federal Court's jurisdiction to adjudicate federal and non-federal claims, and the landmark decision of the *Tasmanian Dam Case*[54] concerning the Commonwealth's external affairs power. Justice Gaudron's 'outstanding and ingenious' advocacy did not go unremarked.[55]

First female justice of the High Court

Friday 6 February 1987 was a momentous day for women in Australia as Justice Gaudron was sworn in as the first female justice of the High Court of Australia. It now seemed possible for women to attain the highest judicial office.

I was surprised to learn that Justice Gaudron felt concern that she might be the first and last woman to be appointed to the High Court. It seems so obvious, with the benefit of hindsight, that she would become one of Australia's leading jurists, paving the way for the appointment of more women to the High Court.[56] Justice Gaudron's concern is perhaps not unique to women who are appointed to positions previously held exclusively by men. Sandra Day O'Connor, upon being appointed the first female justice of the Supreme Court of the United States, expressed the same sentiment. She said, 'I've always said it's fine to be the first, but you don't want to be the last. I was acutely aware of the negative consequences if I arrived here and did a poor job.'[57] It has been observed that women are often acutely aware of the 'inevitable, albeit unfair, scrutiny' placed on individual women as representative of her gender.[58]

In her swearing in speech, Justice Gaudron expressed the wish that one day the appointment of any woman to the High Court would be 'unremarkable'.[59] While we may not be there yet, we are getting closer. Since 2015, three of the seven justices of the High Court have been women and in 2017, Chief Justice Kiefel was appointed the first female Chief Justice of the Court.

Any trepidation Justice Gaudron might have had in assuming this new role must have been temporary as she knew the job she had to do and got to it quickly. From the outset, Justice Gaudron had a clear idea of the way in which she would carry out her judicial function: the obligation to ensure equality before the law and that justice is done in accordance with the law is to be achieved through the application of rigorous and dispassionate intellectual analysis of the law.[60]

As foreshadowed at the opening of this lecture, it is impossible, in the time allocated, to do justice to all of Justice Gaudron's decisions during her time on the High Court. Each decision is significant and advances the law and jurisprudence of this country. In light of this, I have chosen to focus on five areas of interest that I think best illustrate Justice Gaudron's advancement of the principles of equal justice and equality before the law. These areas include: (1) recognition of Indigenous rights, (2) development of the meaning of discrimination, (3) ensuring the right to a fair trial, (4) contribution to the development of the law of equity and (5) protecting the vulnerable through s 75(v) of the Constitution.

Recognition of Indigenous rights

In her first year on the bench, a question arose as to whether Indigenous customary practices could give rise to a defence of a claim of right to property otherwise unlawfully taken. In *Walden v Hensler*, Mr Herbert Walden, an elder of the Gungalida people, was convicted for killing an Australian plain turkey and keeping its chick as a pet.[61] In accordance with customary practice, Mr Walden intended to eat the adult bird and raise the chick until it was old enough to be released into the wild. A majority of the High Court accepted that Walden honestly believed that he did nothing wrong but found that such a belief was not a legitimate defence of a claim of right.[62] Justice Gaudron dissented observing that 'Mr Walden's claim of right was based on his membership of an Aboriginal community and the customs of that community'.[63] In circumstances where an asserted claim of right is based in Indigenous customs recognised by law, such a claim should be recognised as a valid defence.[64] The same defence succeeded when it was raised again a decade later in *Yanner v Eaton (No 2)*.[65]

In 1992, Indigenous customary rights would be the subject of one of the most significant decisions of the High Court. A majority of the Court in the landmark decision of *Mabo (No 2)* recognised the existence of native title at common law and rejected the notion that Australia was *terra nullius* in 1788.[66] Perhaps the most remarkable aspect of Justices Deane and Gaudron's judgment is the recognition that:[67]

> *'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 acknowledgment of, and retreat from, those past injustices.'*

This powerful statement not only recognises the historic and systemic dispossession of the Indigenous people of this country, but that the only means by which such injustices may be addressed is directly to confront the past. Their Honours took care to observe that any use of 'emotive' or 'unrestrained language' was not for the purpose of attributing moral guilt but that 'the full facts of that dispossession are of critical importance to the assessment of the legitimacy of the proposition that the continent was unoccupied for legal purposes and that the unqualified legal and beneficial ownership of all lands of the continent vested in the Crown'.[68]

It is an understatement to say that the *Mabo* decision was controversial. While many welcomed the decision as a victory for Indigenous Australians in their struggle for equality and justice, others saw the decision as giving Indigenous Australians more than their fair share.[69] The debate within the law centred on whether the decision was a form of judicial activism that departed markedly from the 'proper approach' of strict legalism.[70] This is clearly not the place nor time to debate the proper approach to judicial decision-making, whether judges make law[71] or simply declare it.[72] However, two observations may be made.

First, it would be simplistic in the extreme to label Justice Gaudron as a 'judicial activist'. Her Honour's reasoning has been noted 'for its legalism and the rigorous application of principle and logic'.[73] As Justice Gaudron observed in her swearing-in speech, equality and justice before the law was to be achieved through the rigorous and dispassionate intellectual analysis of the law. Secondly, in recent times, there has been growing recognition of the importance for judges to consider issues of cultural diversity and inclusion in order to ensure equal justice and equality before the law.[74]

The decision in *Mabo (No 2)* led to the passing of the *Native Title Act 1993* (Cth) which allows Indigenous Australians to seek recognition of native title rights, negotiate native land titles and seek compensation for any loss or impairment of native title found to have existed. In the 1996 decision of *The Wik Peoples v State of Queensland*,[75] Justice Gaudron, in the majority but writing separately, carefully explicated the history of land grants in Queensland and the derivation of the pastoral leases to demonstrate that the rights of the pastoralists were limited.[76]

Defining discrimination

In 1998, at the launch of Australian Women Lawyers, Justice Gaudron observed that 'equality, equal justice and equality of opportunity are complex ideas, difficult to implement and achievable only by the sustained efforts of those committed to those ideals'.[77] Importantly, equality is not blind to differences but requires 'recognition of genuine differences and, where it exists, different treatment adapted to that difference'.[78] Conversely, 'inequality' involved 'the different treatment of persons who are equal and the equal treatment of persons who are different'.[79]

Justice Gaudron's theory of discrimination has been described as her 'most significant contribution' to the law.[80] Her statement of principle in *Street v Queensland Bar Association* has 'since become a leading statement of the meaning of discrimination within Australian law'.[81] Justice Gaudron observed that discrimination arises in circumstances where the treatment of a person is not appropriate to a real or 'relevant difference'.[82] The question of appropriateness is to be determined by reference to whether the treatment is 'reasonably capable of being seen as appropriate and adapted to that purpose'.[83] Further, ignoring differences and treating them equally can also amount to discrimination.[84] These concepts were consolidated in *Castlemaine Tooheys Ltd v South Australia* in which Justices Gaudron and McHugh observed, 'discrimination lies in the unequal treatment of equals, and … the equal treatment of unequals'.[85]

The joint decision of Justices Deane and Gaudron in *Australian Iron & Steele Pty Ltd v Banovic*, became the leading authority on indirect discrimination.[86] In that case, the employer applied a 'last on first off' retrenchment policy. At first blush, the policy did not appear to be discriminatory as more men than women were retrenched. However, the considerable delay in employing women meant that they lacked seniority and became the first to be retrenched. Justices Deane and Gaudron found that an act or decision could be discriminatory in its operation even if there was no motive to discriminate.[87]

In *Van Gervan v Fenton*, Justice Gaudron agreed with the majority that the value of gratuitous care provided by Mrs Van Gervan to her injured husband ought to be calculated by reference to the market rate.[88] However, her Honour wrote separately to point out the inherent unfairness of counsel's argument that women's work was domestic work and, therefore, of no value.[89] Her Honour found the argument that Mr Van Gervan could not take care of himself before his injury without the assistance of his wife was to assume 'incompetence and selfishness of a very high


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order'.[90] Justice Gaudron also categorically rejected the argument that because Mr Van Gervan enjoyed free domestic labour pre-injury, he would continue to enjoy that labour for free post-injury. Her Honour found this argument 'equates a wife to an indentured domestic servant – which she is certainly not'.[91]

Right to a fair trial

Justice Hamill, a former associate to Justice Gaudron, recalls her Honour emphasising the importance of getting the criminal law right. It is trite to say that the individual accused has a right to a fair trial when faced with the full prosecutorial powers of the State. Justice Gaudron's commitment to ensuring procedural fairness for the accused has been described as her 'most notable contribution to the criminal law'.[92]

In *Dietrich v The Queen*, a question arose as to whether a fair trial could be achieved if the accused did not have legal representation.[93] A majority of the High Court found that the trial had miscarried observing that in circumstances where an indigent accused, through no fault of their own, could not obtain legal assistance, a stay ought to be granted to allow the accused time to obtain legal representation. Justice Gaudron, writing separately, observed that, 'a trial may be unfair even though conducted strictly in accordance with law. Thus, the overriding qualification and universal criterion of fairness!'.[94]

Her Honour further observed that:[95]

> 'The fundamental requirement that a trial be fair is entrenched in the Commonwealth Constitution by Ch. III's implicit requirement that judicial power be exercised in accordance with the judicial process.'

Justice Gaudron's decisions in respect of the criminal law have been described as combining 'technical mastery' with an insistence on procedural fairness for the accused and due respect for the function of the jury.[96] This is illustrated in decisions concerning the admissibility of evidence, for example, *Palmer v The Queen* and *HG v The Queen* – cases with which readers are intimately familiar following the recent Bar exams. The complexities surrounding certain principles of criminal law meant that Justice Gaudron was not always in agreement with the majority. In *Wilde v The Queen*, Justice Gaudron dissented, finding that the Court of Appeal had erred in applying the proviso under s 6 of the *Criminal Appeals Act 1912* (NSW).[97] Her Honour criticised the approach taken observing that the 'process is tantamount to the accused being tried with the Court of Criminal Appeal as the tribunal of fact: clearly a contravention of the fundamental precept'.[98] In *Osland v The Queen*, Justice Gaudron with Justice Gummow in dissent found that it was inconsistent, in the case of a joint criminal enterprise, for the jury to find the first co-accused innocent, but the second co-accused guilty.[99] The law with respect to joint criminal enterprise remains a fraught area of the criminal law.[100]

Sybil Morrison was the first woman to practise at the New South Wales Bar. She was admitted to practice on 2 June 1924, six years after the enactment of the *Women's Legal Status Act 1918* (NSW) which provided that a person shall not 'by reason of sex' be prevented from being admitted to practise as a barrister or solicitor. Sybil practised in a range of areas at the Bar from 1924 to 1930 and was admired for being able to 'hold her own in legal argument'.[130]

Contribution to the law of equity

Justice Gaudron's contribution to the law of equity is sometimes overlooked. Greater emphasis has been placed on her Honour's contribution to constitutional, administrative and criminal law. However, it should not go unmentioned that Justice Gaudron has decided some of the most significant equity cases over the last forty years including the landmark decision of *Walton Stores (Interstate) Ltd v Maher* which most law students remember as the case in which equitable estoppel became a sword, not just a shield.[101] The decision of *Commonwealth v Verwayen* soon followed in which her Honour analysed the doctrines of estoppel and waiver, ultimately finding that the Commonwealth had waived its right to rely on certain defences.[102] In *Breen v Williams*, Justice Gaudron writing with Justice McHugh considered the scope of fiduciary relationships observing that the categories are not closed and that some aspects of the doctor-patient relationship exhibit characteristics of a fiduciary relationship.[103] In *Johns v Australian Securities Commission*, a case concerning breach of confidence, Justice Gaudron observed that confidential information did not necessarily lose its quality of confidence simply because it had entered the public domain.[104]

Equity cases also presented an opportunity for Justice Gaudron to highlight the need for courts to recognise women's unpaid work.[105] In *Baumgartner v Baumgartner*, the Court found that a man held property on constructive trust for his de facto partner with the beneficial interests of the parties being in proportion to their contributions.[106] Justice Gaudron said that the share actually contributed should be adjusted to reflect the amount that the woman would have contributed had she not been pregnant with and caring for their child.[107]

The case of *Singer v Berghouse* concerned the application of the *Family Provision Act 1982* (NSW) and whether the widow had been provided with adequate maintenance.[108] Justice Gaudron strongly disagreed with the majority that the maintenance provided was adequate. Her Honour drew attention to the widow's significant contribution if not sacrifice in giving up her employment in New York to look after her husband. Her Honour said in the strongest terms:[109]

> *'The tendency of the courts to overlook or undervalue women's work, whether in the home or in the paid work force, has often been remarked upon. To my mind, that is what is involved in the failure to acknowledge the significant contribution involved when a wife gives up paid employment to be with and look after her husband'.*

In *Garcia v National Australia Bank Pty Ltd*, an issue arose as to whether guarantees executed by a wife as security for her husband's debts ought to be set aside on the basis that she had been unduly influenced to provide those guarantees.[110] David Jackson QC submitted that 'often educated, articulate women' fall victim to 'cads' thereby contracting 'sexually transmitted debts'. Justice Gaudron presiding 'naturally' agreed with Mr Jackson. Justice Kirby, uncomfortable with the sexist stereotype, declared that articulate and educated men could also fall victim to cads. The Court ultimately held that enforcement of the guarantees would be unconscionable and an observation was made that 'there is still a significant number of women in Australia in relationships which are, for many and varied reasons, marked by disparities of economic and other powers'.[111] But perhaps the most remarkable aspect of the case was the tradition established at the end of the hearing day that all the justices retire to Justice Gaudron's chambers to discuss the appeal.[112] Justice Gummow welcomed the development and observed that 'when Gleeson CJ took up his appointment in May 1998 he readily acceded to what he was told had become established practice'.[113]

Protecting the vulnerable through s 75(v) of the Constitution

On 21 February 2007, Justice Gaudron's portrait was unveiled in the Bar Association Common Room.[114] The portrait, by Sally Robinson, incorporates the text of section 75(v) of the Constitution:

> *'In all matters … (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth; the High Court shall have original jurisdiction.'*

It is a short but difficult provision known to 'reduce grown men to tears'.[115] To Justice Gaudron, the provision speaks to the 'genius' of our Constitution in preserving the rule of law by empowering the High Court to check the powers of the Executive.[116] Both sides of politics have attempted to curtail its scope of operation but, so far, 'the little subsection' has withstood the assault.[117]

In the early 2000s, both sides of politics perceived the arrival of asylum seekers to be a crisis but presumably for very different reasons. The *Migration Act 1958* (Cth) was amended on a number of occasions, each time attempting to restrict judicial review of migration decisions. In *Yusuf*, a majority of the High Court found jurisdictional error to be 'the central gatekeeper for constitutional writs'.[118] The Howard Government's response was to introduce a privative clause such that with the exception of limited grounds for review, a migration decision could not in effect be challenged in court. In *Bhardwaj*, Justice Gaudron writing with Justice Gummow as part of the majority found that a decision involving

jurisdictional error would entitle a party to relief under s 75(v) of the Constitution by way of mandamus or prohibition.[119] That formulation was crystallised in *S157* in which the Court held that decisions infected with jurisdictional error were not 'privative clause decisions' as they were not decisions made under the Act. Further, the Court held that s 75(v) introduces into the Constitution 'an entrenched minimum provision of judicial review'.[120]

Justice Gaudron has spoken critically of Australia's treatment of asylum seekers.[121] In hearing the matter of *275-02*, Justice Gaudron was scathing of the Government's amendment to the *Migration Act* that prevented her from referring to a self-represented asylum seeker by name.[122] She said to counsel for the Minister:

> *'You see, you are very lucky. You have a name. … I was brought up understanding that there were certain courtesies and considerations to be extended to all fellow creatures. I was brought up at the Bar to believe that you treated people at the Bar table with respect. … The Act is arguing against it.'*

Justice Gaudron then said to the asylum seeker:

> *'I will have to refer to you as sir. I would prefer to call you by your given name. The Act forbids me. I realise it is a gross discourtesy.'*

It is fitting that 'a small pamphlet' known as the Constitution would be given by a former High Court Justice to a child who would grow up to be a High Court Justice herself and fashion a small subsection of that 'pamphlet' into one of the greatest tools for the protection of human rights.

Justice Gaudron behind the scenes

No tribute to a person's life and works is complete without a few anecdotes. I am grateful to Justice Gaudron's former associates, Justice Hamill, Kevin Connor SC and Naomi Sharp SC for the following stories that I am about to share. Rest assured I have vetted the stories so that they are safe to share with the public.

It may not be well known that Justice Gaudron was a trendsetter upon arriving at the High Court. She quickly abolished the traditional division of labour in chambers between the secretary, associate and tipstaff figuring that she could have two intelligent, legally trained associates if she abolished the traditional tipstaff role typically held by retired naval officers.[123] The model worked well and was soon adopted by other justices of the High Court. Justice Gaudron was also the catalyst for abandoning the wearing of wigs in the High Court having ensured that it remained a standing agenda item until it was agreed that they would be dispensed with in 1988.[124]

Her associates describe her as having 'the biggest brain' and as being 'the most intelligent person' they know.[125] My favourite is 'Queen of Chapter III' which I think ought to be a permanent title. Despite her fierce intellect, Justice Gaudron never made her associates feel that their ideas were not valued; every idea was considered and taken seriously.

She is known for having an incredible work ethic. In times when she was working interstate, drafts of judgments would be faxed back to her associates in Canberra. Her associates recall receiving drafts where a dot had been placed above every word indicating that she had considered each of them.

Despite periods of intense work, Justice Gaudron was never one to take things too seriously. She has a wicked sense of humour with impeccable timing for delivering punch lines. She is generally irreverent and not one to follow rules. For example, in 1987 she declared that the ban on smoking in the High Court building did not apply to her chambers as they were not part of the building and anyone who would like to smoke could use her chambers.[126]

Justice Gaudron is not known for letting small things get her down. For example, on their way to Perth for the hearing of *Mickleberg v The Queen*, one associate was responsible for packing the tea set.[127] It did not occur to this associate to wrap the china and, upon arriving in Perth, the entire set had smashed to smithereens. It did not bother Justice Gaudron at all; she simply laughed. Another time, on their way to Melbourne, Justice Gaudron's luggage did not arrive to meet them at the terminal. It might not have been such a big issue if her speech to the University of Melbourne that evening had not been packed with the luggage. Again, Justice Gaudron simply laughed and drove off to deliver, what I'm sure was, an inspiring and insightful speech.

Justice Gaudron is also known for her humility and general dislike of events that sing her praises. She famously declined the Order of Australia as part of the Bicentennial Australia Day honours without providing a reason.[128] She has been described as a 'judge of the people' which seems apt given her ability to start a conversation with anyone. On one occasion during a protest on Macquarie Street, she was observed conversing with a person dressed in a full chicken suit; the identity of the person remains unknown.[129] Before the recent lockdown, Justice Gaudron travelled with friends to far western New South Wales, beyond her hometown of Moree. She was observed striking up a conversation with a local Indigenous woman during which she introduced herself not as a former Justice of the High Court, but simply as a pensioner.

Justice Gaudron has been an inspiration to generations of lawyers and is an inspiration to me. As a working-class Chinese migrant woman and mother at the Bar, I am grateful for all that she has done to make it possible for people like me to come to the Bar. Much has been achieved over the last sixty years. I note, in particular, the work of the Bar Association's Diversity and Equality Committee, the Women Barristers Forum and the First Nations Committee as leaders and advocates for change. However, there is still much work to do, not only in terms of improving gender equality at the Bar, but also cultural, ethnic and socio-economic diversity at the Bar. I and likeminded people look forward to the challenge and the opportunity to drive the change that is needed to make the Bar a more inclusive place. **BN**

Since 2019, the annual Sybil Morrison Lecture has been delivered by the recipient of the Katrina Dawson Award. Katrina was a much-loved member of the Bar. She is remembered for her legal talent, commitment to pro bono work and dedication to diversity at the Bar. In her honour, the Katrina Dawson Award seeks to encourage women to practise at the New South Wales Bar.[131]

ENDNOTES

1 * Reader at New Chambers. I would like to thank the Diversity and Equality Committee for inviting me to present this lecture and for their support in the lead up to the lecture, Catherine Gleeson for her invaluable editing, and Michael Wilcox and Samantha De Costa of New Chambers for their administrative support. All mistakes are my own. H Roberts, ''Swearing Mary': The Significance of the Speeches Made at Mary Gaudron's Swearing-in as a Justice of the High Court of Australia' (2012) 34(3) *Sydney Law Review* 493.

2 The Honourable Justice Gaudron, 'Speech to the Adelaide UNIFEM International Women's Day Breakfast', Adelaide Convention Centre, Adelaide, SA, 8 March 2005 (**UNIFEM 2005**). <https://web.archive.org/web/20080719000131/http://www.womenlawyerssa.org.au/publicationsandspeeches/hon-mary-gaudron-qc-at-the-unifem-international-womens-day-breakfast.

3 See The Hon Justice Michael Kirby CMG, 'H V Evatt, The Anti-Communist Referendum and liberty in Australia', speech delivered at the Conference on the Life and Works of Dr H V Evatt, Bond University (14-15 July 1990) <https://www.michaelkirby.com.au/images/stories/speeches/1990s/vol22/835-Bond_Uni_-_H_V_Evatt%2C_The_Anti-Communist_Referendum_and_Liberty_in_Aus.pdf>.

4 UNIFEM 2005.

5 Ibid.

6 Ibid.

7 P Burton, *From Moree to Mabo: The Mary Gaudron Story* (UWA publishing 2010) p 17.

8 P Burton, *From Moree to Mabo* p 40.

9 Ibid. The first woman to study law at the University of Sydney was Ada Evans. She graduated in 1902 but was not permitted to practise until 1921 with the passing of the *Women's Legal Status Act*. See 'Pioneering Women 1921-1975: Ada Evans', *New South Wales Bar Association*, < https://nswbar.asn.au/the-bar-association/bar-history/pioneering-women#/view/1_ada_evans>.

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19 The Honourable Justice Gaudron, 'Speech for Women Lawyers Association of New South Wales, 50th Anniversary Gala Dinner', NSW Parliament House, Sydney, 13 June 2002 <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gaudronj/gaudronj_wlansw.html>.

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22 (1970) 125 CLR 166. Justice Gaudron represented the actor Peter O'Shaughnessy in his defamation claim against the Murdoch paper.

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25 The Honourable Justice Margaret McMurdo, 'Speech proposing a toast to retiring Justice Mary Gaudron (Speech delivered at the Australian Women Judges Dinner, Sydney, 22 February 2003)' (QSC) [2003] *QldJSchol* 13, p 2.

26 Ibid.

27 P Burton, *From Moree to Mabo* p 112.

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123 Burton, *From Moree to Mabo* p 261.

124 Ibid p 263.

125 'Swearing in Ceremony of the Honourable Justice Peter Hamill' (29 April 2014) at [46] <http://classic.austlii.edu.au/au/journals/NSWJSchol/2014/24.pdf>.

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127 (1988) 167 CLR 259.

128 Ibid pp 263-264.

129 In the original speech, I had referred to the 'man dressed in a full chicken suit'. Justice Gaudron was quick to correct this, pointing out that the person in the chicken suit was in fact a woman. She cautioned against making assumptions as to a person's gender.

130 See 'Pioneering Women 1921-1975: Sybil Morrison', *New South Wales Bar Association* <https://nswbar.asn.au/the-bar-association/bar-history/pioneering-women#/view/2_sybil_morrison>; B Smith, 'A Lady of Law', *Bar News* (1995) pp 39-40 <https://nswbar.asn.au/assets/angular/pioneering-women/assets/content/pdfs/2_sybil_morrison/Sybil%20Morrison%20Bar%20News%20article.pdf>.

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