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*MARY GAUDRON: FROM
MOREE TO MABO*

Biography by Pamela Burton

Foreword
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The Hon. Michael Kirby AC CMG

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FOREWORD

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Mary Gaudron is a bright star of the Australian legal firmament. Because of her role as the first woman Justice of the High Court of Australia she is assured of her place in the nation's history. So with her work in the law, before and after she took her seat on the Court. So with her remarkable personality and character, demonstrated in the decades of her public life.

We have it on the authority of this book that Mary Gaudron has a horror of biographies, believing that some events in life belong in the past and should be left there, undisturbed by prying eyes. Yet hers is a story that demands the telling. Judicial biography in Australia is a neglected *genre*. In Mary Gaudron's case, Pamela Burton has done well to repair this neglect.

Reading these pages, I learned much about the life and motive forces of Mary Gaudron that I did not previously know. And this is so although I would claim to have been an acquaintance, colleague and ultimately a friend, over virtually our entire lives in the law. The early years demonstrate how life hangs by a thread, depending upon strange events that appear to happen by chance.

In the young Mary's case, inspiration for the public life that was to unfold may have been given an energetic start in her imagination by the fortuitous events of her "dawdling round town" in Moree, NSW, when she came upon the then Labor Party leader, Dr. H.V. Evatt (a past Justice of the High Court). He was addressing her father's friends in the street, urging them to vote 'no' in the 1951 referendum on communism. An interchange with Evatt led to his posting the young girl a copy of the Australian Constitution, whose interpretation was later to become one of her main judicial responsibilities. Decades later she remembered the arrival of the envelope from Evatt, boldly marked "OHMS", bringing the booklet to her humble parental home.

The inspiration of wonderful and strong women teachers in the convent school in Moree inspired her to make the most of her manifest abilities. Sister Vianney, then one of the influential nuns, got it right when she explained why Mary was a "delight to teach". She was "enthusiastic, attentive, observant, studious, caring and alert". Yet would these gifts have come to the fore if she had not applied for, and received, a bursary to pay the school fees that her father, a railway fettle, could never have afforded? Would she have stayed in education to win a Commonwealth scholarship to university, but for the inspiration, and urging, of wonderful teachers?

As the author points out, there is a kind of irony in the fact that the nuns of Mary Gaudron's childhood encouraged the quick-witted pupil in their care to make the best of her abilities; to question everything; and even to challenge (and mostly to reject) the religious doctrines that underpinned their Faith. As a young girl, she boldly wrote an essay to prove that God did not exist. And when, on the other side of town, she had a chance to

take on the boys at the De La Salle College, she knew at once that she had a talent in public speaking and advocacy. The path ahead of her began to become clear.

Mary Gaudron and I were fortunate to enter Sydney University in the same decade, when there were many creative students and a number of highly influential law teachers. Mary Gaudron resented the way her teachers addressed the classroom as “Gentlemen”. It was something I did not even notice. In truth, in those days, there were very few women. Her skills in analysis and her inclination to audacity quickly marked her out. The competing influences for her conceptions of law, provided successively by Julius Stone, Frank Hutley and Bill Morison were to lay the ground for her judicial philosophy, which it is a main purpose of this book to explore and explain.

Mary Gaudron demonstrated to fellow students and teachers alike the special quality of fearlessness that was necessary, especially in those hostile days, for a woman to stand out in the law. Repeatedly, she confronted the chauvinism of the judiciary and legal profession of that time, earning for herself the label of “Mary the Merciless”. The same spirit often made her relationships turbulent. In a professional group dynamic, which was then even more conformist than it is today, she was remarkable for being unrestrained and unself-conscious when so many others (including myself) were well and truly buttoned-up. She was fun (most of the time), histrionic, often ego-centric, given to tantrums (many strategic) and quite a personality. None of this fitted into the then general expectation of how a young woman should behave in the world of Australian law.

Nevertheless, it was these very qualities that quickly got Mary Gaudron noticed in the circles that mattered. What her intellectual brilliance and University Medal in Law had not immediately done, her feistiness, mixed with a warm and humorous personality, began to break the ice of frigid social expectations. By chance events (including terrifying last-minute abandonments by QC leaders), she secured opportunities in appellate advocacy where her intellect could shine and be noticed. And shine it did. A union leader who would later become one of Gough Whitlam's ministers (Clyde Cameron), saw her capacity in protracted litigation involving a union colleague. Later, following her brilliant success as counsel for the Commonwealth in the *Equal Pay Case* of 1975, he sought to persuade the Whitlam Cabinet to appoint Mary Gaudron at 31 to the Arbitration Commission. His praise of her talents ultimately led Whitlam to exclaim: "Next, you will tell me that she was born in a bloody manger". But appointed she was.

The troubled and difficult years that the young Mary Gaudron experienced first as a Deputy President of the Australian Conciliation and Arbitration Commission and then as Solicitor-General of New South Wales, are not glossed over in this book. In the former, she emerges from her resignation as a judge to be a person of very strong principles. In the latter, she demonstrated, as her departmental head declared, impeccable professionalism and perfect knowledge about the applicable law.

When Lionel Murphy was dying of a cancer probably aggravated by his long ordeal under criminal accusations ultimately rejected by a jury, he exclaimed that what was needed in the Justice of the High Court who would replace him, was "a keen mind and a good heart". Following his

death, Mary Gaudron and I spoke at Justice Murphy's memorial service in the Sydney Town Hall. Her speech, typically, approached the subject laterally and with great insight into Lionel and the moment. It therefore came as no real surprise that the call to take Murphy's seat went to Gaudron.

Present at her welcome to the High Court was Dame Roma Mitchell, her predecessor in the struggle for women's equality in the Australian legal profession and judiciary. The *Moree Champion* reproduced a circled photograph from the convent school days declaring that the decision that brought the young Mary to the High Court bench was one that had been effectively made "years ago".

The largest part of this book is devoted to an analysis of the leading cases in which Mary Gaudron participated whilst a Justice of the High Court. The record demonstrates the confidence which she displayed in her own intellectual abilities and the large reserves of emotional energy upon which she could always call. It is not for me to comment on the many decisions that are analysed here. A large number of them after 1996 were written in cases in which I also participated. Some of them we wrote jointly together.

As has become customary in recent times, the author puzzles over the labels that media and some other commentators are pleased to assign to judges, according to whether they are to be considered "black letter lawyers" or "judicial activists". Not every judge accepts that dichotomy or the particular label attributed to a judge's work. Sometimes the labels represent little more than code language, designed to reflect approval or disapproval of particular judicial conclusions; modes of reasoning;

references to past authority; or invocation of policy and principle as well as precedent in fulfilling the judicial task.

The discussion of the constitutional validity of the cross-vesting legislation in the High Court in *Re Wakim* (where Justice Gaudron and I differed) may not, as suggested, show her “legalism” in contrast to my suggested “activism”. Rather it may show, in that case as in others, our respective conceptions of where our notions of “legalism” differentially led us. In our judicial system, judges are obliged to provide reasons for their decisions. Those reasons display for all to see the grounds and arguments that the judge invokes to support the orders to which he or she ultimately comes. Chief Justice Brennan is quoted, correctly in my view, as disclaiming the label of “activism” when assigned to the High Court during the years when Mary Gaudron, Chief Justice Mason and he sat together. What was different about those years, he explains, was the greater openness of the Mason Court in acknowledging the range of considerations that had led it to its reasons.

These were days in which many important decisions were written that had the effect of re-expressing the law of Australia on many topics. In virtually all of those decisions, Mary Gaudron was a powerful, and usually a concurring, voice. None of the decisions of that time was more important than that written in the second *Mabo Case* in 1992. At that moment, the High Court of Australia re-expressed the common law of Australia to reverse more than a century of earlier judicial holdings that had denied Aboriginal Australians title to their traditional lands. *Mabo* was pronounced with the strong participation of Justice Gaudron, before my arrival on the High Court. I can take therefore neither praise, nor blame, for its conclusions. Critics of its holding still exist in the Australian

legal profession. However, I believe that future generations will say that, along with the *Communist Party* decision of 1951, and a few other notable cases, this was an historic blow for equal justice under law in Australia.

Justice Gaudron's life-long commitment to equality and non-discrimination shine forth in *Mabo* as in other opinions. What democratic parliaments had failed over 150 years to provide, the High Court secured in *Mabo*. If there was particular passion in the language of the joint reasons that Justice Gaudron wrote with Justice Deane, it may, in her case, have derived from her early years in Moree. Witnessing discrimination and inequality close up. Sharing the feelings of injustice and outrage. Writing a new chapter in the nation's legal chronicle. Correcting an unrepaired legal wrong.

Mary Gaudron continues to make contributions to the law and society. In recent times, her activities have been mainly in the field of international law. Yet, through it all, she has remained herself. A fine technical lawyer who never lost faith in the law. A complex personality who achieved professional triumphs whilst enjoying the sometimes more elusive successes as wife, mother and convivial companion to her select circle of friends.

When Mary Gaudron left the High Court of Australia in 2003, things were never quite the same again. It had been a long journey from the railway worker's home in Moree to the grand building on the lake in Canberra. Suddenly, for us who were left, the covert cigarettes were gone. The ready bottle of champagne was no more. The convivial laughter was not heard amid the silence. The turbulence and occasional tantrums

disappeared. In the icy stillness of a Canberra night, one yearned for Mary's deep voice, her sense of compassion and convivial humour. There were no more Irish songs to astonish dignified guests at lunchtime. The Justices drifted back to holding their functions at gentlemen's clubs which did not admit women members, something they would never have dared to do in Mary Gaudron's time. The respectful isolation of the individual chambers was restored. A walk across the book-lined corridor had never been too difficult for "Mary the Merciless".

Great courts need formal, predictable and unerringly polite judges with quiet voices and serene personalities. But to fulfil their true greatness, they also need lateral thinkers, people with unusual backgrounds who can be noisy, with fiery tempers and occasional minds and tongues to match. It will be a while before there is another judge in Australia's apex court quite like Mary Gaudron.

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