Diversity in Judicial Appointments

May I first say what a pleasure it is to be invited to speak at this session hosted by the Judges' Forum and the Discrimination and Gender Equality Committee of the International Bar Association. My association with the IBA has been strengthened and deepened by my experience earlier this year of being one of the international trainers on behalf of the IBA who worked with Iraqi judges and prosecutors for a week on international human rights law and how the norms and standards of that law could be adopted in Iraq.

It was a stimulating and challenging experience; not the least of which was the topic of the final and fifth day of the seminar, which concerned women's rights in the administration of justice. The organisers thought the final day's seminars on women's rights had been very successful. I think that, if this perception was correct, there were a number of contributing factors:

- There were a significant number of both sexes present from both the presenter and Iraqi groups of participants;
- The issue of women's rights was only addressed centrally on the final day, by which a level of mutual trust and goodwill had been established and our expertise on substantive topics demonstrated;
- One of the other presenters was Johan Kriegler, a recently retired member of the Constitutional Court of South Africa. As a former and a practicing judge respectively, he and I were granted considerable authority and respect by the Iraqi participants. In addition, Judge Kriegler was able to speak with great authority about living through a period in which his own society had moved

painfully towards a system of law which granted greater respect to all peoples, including women. As a woman with judicial authority, who was accorded respect, I was more or less an embodiment of the point we were trying to address;

- Another of the presenters was a practising lawyer in the area of human rights who is based in Paris and was born in Tunisia. He was able to bring a sophisticated understanding of the issue from a Muslim point of view, amply demonstrating that these are not western values but universal human values.

Having addressed the subject of women's rights in that context, it is easy to be complacent in today's context. After all, one assumes that all right thinking people support the notion of gender and ethnic diversity in judges to ensure that the widest pool is available so that appointments can be made of the best people; but unfortunately my experience tells me that this is not necessarily the case.

I well recall the first session on a similar topic that I attended at the IBA Conference in San Francisco two years ago. A couple of extraordinary statements were made. The first related to the UK government's proposals to encourage the appointment of more women to the judiciary. It was said that:

> "The government's proposals, including improving the position of working women, are … surprising and are perhaps evidence of the government's commitment to a more compliant judiciary."

Another speaker referred to "working women" as a "narrow sectorial interest".

In my position of course I know a large number of female judges, all of whom are of necessity "working women". You won't be surprised to know that I cannot think of one who could possibly be described as "compliant"; quite the contrary.

One imagines that any intelligent person would find those comments not only insulting but also quite surprising. But it does seem that it raises the prospect that one still has to argue for equality for women in judicial appointments.

There are such a wide number of reasons why it is important to have women as well as men as judicial officers that it is difficult to know where to start.

There are powerful arguments based in psychology and sociology: the different experiences in men and women inevitably mean slightly different approaches to judicial decision making which enhance its legitimacy.

A further approach is to argue from human rights or equity point of view: that it is discriminatory not to include women equally as decision makers; and that all participants in the judicial system, offenders and victims, witnesses and lawyers, benefit by having intervention in the process and interpretation of the law by female judicial officers as well as male judicial officers.

But it seems to me that in the end the most compelling argument is one of justice. A model of the third arm of government, the judicial arm, which closes the door on decision making by women by raising such barriers to

their appointment as to effectively exclude them, or most of them, is incapable of being a just system in a democratic state.

One should get rid of a few myths and misconceptions about the topic. The first is that there is some kind of dichotomy between merit and the appointment of women as if, on an equal playing field, more men would be appointed as judges than women. A merit system would not be infected with this error. A system based purely on merit would be likely to see men and women thriving equally.

A second myth is that experience and merit are somehow equal. The argument runs that women, either individually or as a group, have not had as much experience as men, either individually or as a group, and therefore cannot be considered on an equal footing with men when it comes to judicial appointments. There are several problems with this argument. The first is to assume that experience as an advocate equals capacity to be a fine judge. Each one of us can think of many examples which prove that it is not true. The second problem is that such statements perpetuate the discrimination that women have faced as barristers by accepting that a further consequence of this discriminatory treatment is that it should prevent them from being in a position where they could be appointed judges. Bundled with these misconceptions is the view that a diverse judiciary will not be an elite judiciary whereas in fact widening the pool ensures the best people are considered for appointment.

I am fortunate to sit as a member of the Supreme Court of Queensland where the then Attorney-General, the Honourable Matt Foley MLA, made a decision that he would actively consider the appointment of

women to the court. As a result seven out of the 24 judges of the court of which I am member, are women. I therefore have the pleasure of sitting with a number of industrious, intelligent, fair minded female, as well as male, colleagues. The court has not suffered in any way whether in terms of its throughput, its intellectual life or the standards of its judgments. Indeed I would suggest quite the contrary.

The under-representation of women in the judiciary and in Australia their complete absence until the appointment of Roma Mitchell to the Supreme Court of South Australia in 1965, led to women being treated not as equals but as what Simone de Beauvoir referred to as the *other* – beings with a different, less rational and hence less reliable view of the world. This reflected itself in the type of legal reasoning which was applied to women. Let me give an example.

The evidence of women and children was historically treated with suspicion in the criminal courts.[1] In part this was due to the insidious influence of myths and stereotypes and in part, particularly where they claimed to be victims of sexual offences, it was due to rules relating to the corroboration of the evidence of such witnesses. Judges routinely warn juries that it is dangerous to convict on the uncorroborated evidence of an accomplice. Such evidence is by its very nature considered less reliable.

Unfortunately, however, the rule did not stop there. Let me give a reasonably recent example of the way the rule extended, offensively, to put victims of sex crimes in the same category as accomplices. As

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[1] DJ Bonface, "Ruining a Good Boy for the Sake of a Bad Girl: False Accusation Theory in Sexual Offences, and New South Wales Limitations Periods – Gone But Not Forgotten" (1994) 6 *Current issues in Criminal Justice* 54.

recently as 1987, the Law Lords who comprise the Judicial Committee of the Privy Council in London held:[2]

> "The rule requiring a warning to be given to a jury of the danger of convicting on uncorroborated evidence applies to accomplices, victims of alleged sexual offences and children of tender years. It will be convenient to refer to these categories as 'suspect witnesses'.
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> It is precisely because the evidence of a witness in one of the categories which their Lordships for convenience have called 'suspect witnesses' may be of questionable reliability for a variety of reasons, familiar to generations of judges but not immediately apparent to jurors, that juries must be warned of the danger of convicting on that evidence if not corroborated; in short because it is suspect evidence."

The generations of judges to whom they refer did not include women. Until last year there had never been a female judge in the House of Lords, England's highest court of appeal. 2001 was the first year a woman, Dame Sian Elias, sat on the Privy Council[3] but that was only because she is the Chief Justice of New Zealand and entitled because of her position to sit in the Privy Council.

The rule to which I referred, that the evidence of "victims of alleged sexual offences" had to be corroborated, drew upon various obnoxious stereotypes:

(a) that women are irrational and unreliable;

(b) that a woman was either an unwilling participant in a sexual offence or if she was not, she was a whore or an

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2 *A-G of Hong Kong v Wong* [1987] AC 501 at 509, 511.

3 *The Times*, 6 February 2001, p. 9.

adulterer. A woman could not in law therefore be raped by her husband;[4]

(c) that, from the male perspective, rape is an easy accusation to make and a very difficult one to disprove.

This rule led to various complex, and once more arguably stereotypical, evidentiary rules such as:

(a) fresh complaint. A woman was expected to complain of a sexual offence against her at the first reasonable opportunity – doing so is said to be expected of a truthful woman who has been sexually assaulted.[5] If she did not so complain, the jury would be able to take that in account in deciding whether to believe her;[6] and

(b) distress. The distressed condition of a woman or girl as observed by third persons was said to be capable of corroborating her complaint of rape. However the rule could be used to further humiliate a female victim. In a Queensland case decided in 1965,[7] a number of men were convicted after a 17 year old trainee nurse was pack-raped. After the first pack-rape, the victim escaped but was then taken by other men to a rubbish dump where she was raped by five more men. She was taken elsewhere, again raped by the same men and then abandoned. She was admitted to hospital where she was a patient for eight

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4 M. Hale, *Historia Placitorum Coronae*, 1734 at 636 quoted in G. Geis, "Lord Hale, Witches and Rape" (1978) 5 *British Journal of Law and Society* 26 at 40 – 41.

5 *R v Lillyman* [1896] 2 QB 167; Hawkins' Pleas of the Crown: "It is a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact." A woman was expected to raise a hue and cry as a preliminary to an accusation of rape: *R v Osborne* [1905] 1 KB 551.

6 *Kilby v The Queen* (1973) 129 CLR 460 at 465.

7 *R v Richards* [1965] Qd R 354.

weeks, emerging from time to time to give evidence at committal hearings. The witness who first saw her after she had been so brutally raped said she was in a dazed and hysterical condition, dishevelled and dirty.[8] The accused each gave evidence alleging she had consented. The court held on appeal:[9]

> "I have come to the conclusion that the evidence had no weight as corroboration and that it should not have been left to the jury as corroborative evidence at all … I [do not] think that in the circumstances of these cases, the evidence tended to show that the crimes charged in the indictments had been committed. It seems to me that the complainant's dishevelled condition is equivocal; as the Judge suggested to the jury in one of the cases, it may have been caused by rough handling during a succession of acts of intercourse to which she had consented. Her condition of distress could also perhaps have been caused by remorse. The evidence, therefore, lacks both the essential characteristics of corroborative evidence. It did not, in my opinion, in any of the cases, confirm the evidence that the crimes had been committed, or that the accused committed them."

Is it any wonder that women were reluctant to press ahead with such charges after they were the victims of an offence if they were to be then further victimized by such attitudes. The case had a chilling effect on me as I was about the same age as the young woman involved and it was still cited as an authority when I studied law.

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8 (supra) at 360.

9 (supra) at 360.

These rules have been changed by statute and I am unaware of any other case in which distress following an alleged pack-rape has been held to be ambivalent and the authority of the decision I referred to has subsequently been rejected.[10] The High Court in Australia has observed that the assumption that a victim of a sexual offence will complain at the first reasonable opportunity is an assumption of doubtful validity.[11]

But how did our laws become infected with these attitudes? As I have noted, the first reason was that women were not amongst the decision makers within the system. Secondly, many of the men who were, held biased views about women which went unchallenged. One of these was the seventeenth century judge Lord Hale who is the source of many of the inaccurate observations about women who had been sexually assaulted. It was he who first made the inaccurate observation that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[12] This comment can still be heard today in legal circles as conventional wisdom, so Lord Hale's observations about women in other contexts are therefore instructive.

Ironically, one of the most notorious witches' trials of the seventeenth century was held before the same Sir Matthew Hale, who was a fervent believer in witchcraft.[13] During the course of the trial an experiment was

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10 *R v McK* [1986] 1 Qd R 476 at 481; *R v Major and Lawrence* [1998] 1 Qd R 317.

11 *M v The Queen* (1994) 181 CLR 487 at 515; *Suresh v R* (1998) 72 ALJR 769 at 770; see also *R v Schneider* QCA No 128 of 1998 at [11] – [12] per Thomas JA.

12 S.C. Taylor, "'And Now Your Honour, for my next Trick …' Yet Another Defence Tactic to Construct the Mad, Bad and Colluding Mother and Daughter in Intrafamilial Sexual Assault Trials" (2000) 14 *Australian Feminist Law Journal* 121 at 125.

13 G. Geis, 'Lord Hale, Witches and Rape' (1978) 5 *British Journal of Law and Society* 26; G. Geis, 'Revisiting Lord Hale, Misogyny, Witchcraft and Rape' (1986) 10 *Criminal Law Journal* 319.

conducted. The children who were said to be bewitched went into paroxysms when they saw the putative witches. The fits stopped only when the alleged witch touched the children. An experiment was carried out where the accused witch was sent for when the child was in such a state but an apron was held in front of the child's face so she could not see who touched her. Another old woman touched the child. The paroxysm immediately ceased. The doubts of the sceptics were confirmed. But Lord Hale accepted the unlikely explanation given by the father of the children who claimed that this was positive proof of bewitchment since it was obviously further sorcery that led the children into error. The two unfortunate widows were convicted and hung. He was, it seems, as gullible about accusations of witchcraft against women as he was sceptical of claims of rape by women.

Unfortunately, Lord Hale's adages with regard to rape and the reliability of the evidence of women who claimed to be victims remained as unquestioned axioms of the law long after his deluded views on witchcraft had been forgotten.

The Supreme Court in Canada has been at the forefront of endeavouring to redress the balance, to address and reject stereotypes. In *R v Ewanchuk*,[14] for example, the court roundly criticized the mythical assumptions made both by a trial judge who took the view that a woman who said "no" to sexual activity was really saying "yes", "try again", or "persuade me" and also by an appeal court judge who said of the woman who was sexually assaulted by the accused in his caravan when she went for a job interview, "it must be pointed out that the complainant did not present herself to [the accused] or enter his [caravan] in a bonnet and

[14] [1999] 1 SCR 330 at [87] – [88].

crinolines." He also thought it relevant to mention that she was a mother of a six-month-old baby and lived with her boyfriend and another couple. As Madam Justice L'Heureux–Dubé observed,[15] even though the appeal court judge asserted he had no intention of denigrating the complainant:

> "…one might wonder why he felt necessary to point out these aspects of the trial record. Could it be to express that the complainant is not a virgin? Or that she is a person of questionable moral character because she is not married and lives with her boyfriend and another couple? These comments made by an appellate judge help reinforce the myth that under such circumstances, either the complainant is less worthy of belief, she invited the sexual assault, or her sexual experience signals probable consent to further sexual activity. Based on those attributed assumptions, the implication is that if the complainant articulates her lack of consent by saying "no", she really does not mean it and even if she does, her refusal cannot be taken as seriously as if she were a girl of "good" moral character. "Inviting" sexual assault, according to those myths, lessens the guilt of the accused …"

Madam Justice L'Heureux–Dubé was one of three female Justices, which included the Chief Justice, of the Supreme Court of Canada. They represented one-third of the membership of the court and their numbers have since increased.

We are fortunate that the gender diversity of the judiciary has begun to change. Looking at some Australian statistics suggest that in recent years this shift has been quite profound. Just last week, the Australian government announced the appointment of Justice Susan Crennan to fill the vacancy left by the latest retirement on the High Court.[16]

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15 (supra) at [89].

16 This speech has been posted on the Supreme Court web site during the week which marks the centenary of the Queensland legislation which allowed women to become legal practitioners and during the week Justice Crennan that was sworn in as a justice of the High Court of Australia.

At the beginning of 1998, the Supreme Court of Queensland, of which I am a member, had only one female judge and 22 male judges. By the following year there were four female judges. Now on a court of 24 judges, 7 are female and 17 male. At almost 30% this is the highest proportion of female judges in any superior court in Australia with the exception of the Family Court. In 2002 in Australia, 28% of the Family Court judges, 17% of the Northern Territory Supreme Court, 12% of the Supreme Court of Western Australia, 10% of the Federal Court, 9% of the Supreme Court of New South Wales, 7% of the Supreme Court of South Australia and 6% of the Supreme Court of Victoria were female; and there were no female judges in Tasmania or the ACT.[17] The figures have dramatically improved: as at 1 September 2005, there were still 7 female judges of the Supreme Court of Queensland. However the Family Court percentage had risen to 35.42% (17 of 48); the Supreme Court of Western Australia now has 4 female judges amongst its 19 judges (21.05%); the Supreme Court of South Australia has 3 women of its 13 judges (23.08 per cent); Tasmania has appointed its first female judge; and the Supreme Court of Victoria now has a female Chief Justice and 5 female judges amongst its 34 judges. New South Wales has improved only slightly with 6 female judges out of 47 (12.77 per cent); the Federal Court now has only 6 out of 44 (a slight improvement at 13.64 per cent). The High Court has, however, been through a period with no female judge. Prior to Justice Crennan's appointment, there had only ever been one in its history, Justice Mary Gaudron who was appointed in 1987 and retired in 2003. With no female members it stood alone in this respect

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[17] Approximations based on the following statistics: Family Court of Australia – 15 female judges out of a total of 53 judges; Supreme Court of the Northern Territory – 1 female judge out of a total of 6 judges; Supreme Court of Western Australia – 2 female judges out of a total of 17 judges; Federal Court of Australia – 5 female judges out of a total of 49 judges; Supreme Court of New South Wales – 4 female judges out of a total of 45 judges; Supreme Court of South Australia – 1 female judge out of a total of 14 judges; Supreme Court of Victoria – 2 female judges out of a total of 31 judges.

amongst the final appeal courts of the United States, England and Wales, New Zealand, Canada, Ireland, India, Singapore, Nigeria and the Czech Republic to name but a few.[18]

In spite of some initial disquiet in the legal profession, this change to the composition of the judiciary has been well accepted by judges, the profession and most importantly by the public. Indeed, recent research suggests that the confidence that members of the public have in courts is affected by their perception of whether there is equal treatment by the courts so that women and minority groups are not discriminated against.[19] At least in modern times, judges have been very willing to accept others on merit alone. As barristers, many women have faced discrimination in briefing practices but nevertheless did not feel disadvantaged in court by being a woman. What judges are interested in is thorough preparation and fine argument. The gender of the advocate is unimportant unless one gender is being excluded because of that factor alone.

I suggest that the appointment of women as judges has two linked effects, although neither is easy to quantify. The first is that it demonstrates in a very tangible way that women have a right to take their place, an equal place, amongst those who govern our society, and secondly that justice should be dispensed by, as well as for, women as well as men.

Women as judges should and will, in my view, make a difference to the vindication of the rights of all people. Empirical research in the United

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18 M McHugh, "Women Justice for the High Court", Speech delivered at the High Court Dinner, 27 October 2004 (http://www.highcourt.gov.au/speeches/mchughj/mchughj_27oct04.htm, last accessed 8 September 2005).

19 S.C. Benesh and S.E. Howell, "Confidence in the Courts: A Comparison of Users and Non-Users" (2001) 19 *Behavioural Sciences and the Law* 199 at 211.

States has tended to confirm this. In an attempt to determine the decision making patterns of women judges, research was undertaken into the decision making of state supreme court judges from 1982 to 1998 in two substantive areas of law not generally identified as "women's issues": obscenity and death penalty sentencing. Controlling for other variables, the research found that women judges in state supreme courts tended to make more liberal decisions to uphold individual rights in both death penalty and obscenity cases. Interestingly, and as the researchers said, equally importantly, the presence of a woman on the court tended to increase the probability that male judges would adopt a similar position.[20]

In her article, 'Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts',[21] J.L. Peresie presented the results of her empirical study as to whether and how the presence of female judges on three-judge federal appellate courts in the United States affected collegial decision making. She examined cases alleging sexual harassment or sex discrimination decided between 1999 and 2001. The data showed that the presence of a female judge significantly increased the probability that the plaintiff would prevail.[22] Further the presence of a female judge significantly increased the probability that a male judge would also find for the plaintiff. Adding a female judge to the panel more than doubled the probability that a male judge ruled for the plaintiff in sexual harassment cases (increasing the probability from 16% to 35%) and nearly tripled this probability in sex

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20 D.R. Songer and K.A. Crews-Meyer, "Does Judge Gender Matter? Decision Making in State Supreme Courts" (2000) 81 *Social Science Quarterly* 750.

21 (2005) 114 Yale Law Journal 1759.

22 Controlling for other relevant factors, being female increased the probability that the judge found for the plaintiff by 86% (from 22% to 41%) in sexual harassment cases and by 65% (from 17% to 27%) in sex discrimination cases.

discrimination cases (increasing it from 11% to 30%). Peresie concluded:[23]

> "Judges' gender matters both to what the bench looks like and to what it decides".

The point is not to replace a judiciary which has been perhaps unconsciously biased in favour of a male point of view with one which is biased in favour of a female point of view, but to ensure that the public has faith that the court will be impartial and be able to recognise and therefore eliminate unconscious bias. This can only happen if we do not confuse objectivity as being defined by a male point of view or perspective.

The Senate Committee[24] of the Australian Parliament, which reported on Gender Bias and the Judiciary in May 1994, noted the arguments in favour of the appointment of more women to the judiciary were first that, to maintain public confidence in the judiciary, it must be *seen* to reflect the different parts of the population it serves and to offer role models for women. And second, the appointment of significant numbers of women is likely to affect the nature of judicial decision-making through potentially different decision-making styles, and by redressing areas of law developed from distinctly male perspectives such as those dealing with women's sexuality.[25]

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23 (supra) at 1787.

24 Parliament of the Commonwealth of Australia, *Gender Bias and the Judiciary*, Report by the Senate Standing Committee on Legal and Constitutional Affairs, 1994.

25 B. Naylor, "Equality Before the Law: Mission Impossible? A Review of the Australian Law Reform Commission's Report *Equality Before Law*" (1997) 23 *Monash University Law Review* 423 at 432 – 433.

Justice Mary Gaudron said on the formation of the Australian Women Lawyers in September 1997:[26]

> "I believe that having acknowledged and asserted their difference, women lawyers can, with the assistance of feminist legal theorists, question the assumptions in the law and in the administration of the law that work injustice, either because they proceed by reference to differences which do not exist or because they ignore those that do. And having become sensitive to those matters, it will not be long before there is a realisation of the need to be sensitive to the different experiences and circumstances of others, to articulate those differences when necessary and to question the assumptions of the law as it affects them. In short, to be sensitive to the needs of justice."

The argument for, and ultimately the justification for, a diverse judiciary is that it better serves the interest of justice for all members of society.

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[26] Hon. Justice M. Gaudron, "Speech to launch Australian Women Lawyers" (1998) 72 ALJ 119 at 123 – 124.