

**ADDRESS TO THE CANADIAN CHAPTER
OF THE INTERNATIONAL ASSOCIATION OF WOMEN JUDGES'
CONFERENCE**

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***JUSTICE for One Half of the Human Race?
Responding to Mary Wollstonecraft's Challenge***

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Tena koutou, nga wahine toa o te tika, nga tangata toa o te tika. Kei te mihi atu ahau ki a koutou katoa kua tae mai i nga hau e wha.

Tena koutou, tena koutou, tena koutou katoa.

Greetings to you chiefly women and men of the law. I have greeted you who have come from the 4 winds. Greetings to all of you, in the native language of my land.

Introduction

It is a great privilege and pleasure for me to have the opportunity to address this conference of the Canadian Chapter of the International Association of Women Judges. The New Zealand Chapter of IAWJ has not to date attempted anything as ambitious as this and I expect to learn much to take home both from the programme itself and as importantly, from the informal contact such meetings enable. The ties between our jurisdictions are close. I would like to acknowledge in particular the very considerable assistance we have had over many years from the National Judicial Institute. I have many warm friendships with Canadian judges which I am delighted to be able to renew here and expand. We have much in common. Even where we go different paths, our common heritage means that we have much to learn from each other.

The increasing numbers of women on the bench in my jurisdiction as well as in yours has greatly reduced the "peer deprivation" formerly experienced by women judges.¹ But it has not entirely dispelled the perception described in 2001 by Claire L'Heureux-Dubé that women judges remain "outsiders".² I want to suggest that there is good as well

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¹ Patricia Wald "Some Real-Life Observations about Judging" (1992) 26 Ind L Rev 173 at 179.

² Claire L'Heureux-Dubé "Outsiders on the Bench: The Continuing Struggle for Equality" (2001) 16 Wis Women's LJ 15.

as not so good in this. There are considerable risks for the health of a legal system when judging within it is undertaken by “insiders”. So the perspective of difference and the habits of doubt and care that it encourages are reasons why we need judges who are outsiders. And if peer support for each other is no longer the principal reason for women judges to gather in a conference such as this, reflecting on the difference women bring to judging and how the benefits for our communities of that difference can be retained even as we increase in numbers is good reason to meet as (mainly) women judges.

In my title for this address I have invoked Mary Wollstonecraft’s call for “JUSTICE for one half of the human race”.³ The “one half of the human race” referred to were the women of the human race. As the themes of this conference allow us to explore, the claim for equality of women and men is far from realised. I want to touch on some of the ways in which our societies and the law continue to lag. But my immediate point is that the end sought by Mary Wollstonecraft was equality, not a turning of the tables of disadvantage. Her claim was for human rights. It was a demand for justice for all the human race.

The “justice” Wollstonecraft looked to (and put in capital letters) was not formal but substantive. Without equality, she wrote, “morality will never gain ground”.⁴ With equality, women could set about reforming the world.⁵ The suffragettes who followed similarly did not consider that gaining the vote for women was the end of the struggle. It was necessary for women to have the vote in order to change the world. Perhaps these aspirations were naïve, as Bertha Wilson once suggested.⁶ But perhaps it is too early to tell.

Justice

I start with justice. Is it romantic to take the view that the role of the judge is to deliver justice? Sir Gerard Brennan, Chief Justice of Australia, thought so.⁷ And Lord Devlin considered that the “social service” the judge renders to the community is “the removal of a sense of injustice”.⁸ Mary Wollstonecraft, for her part, was not afraid to equate justice with morality.⁹

³ Mary Wollstonecraft *A Vindication of the Rights of Woman: with strictures on political and moral subjects* (2nd ed, printed for J Johnson, London, 1792).

⁴ *Ibid*, at 321.

⁵ *Ibid*, at 92–93.

⁶ Bertha Wilson “Law in Society: The Place of Sexual Equality” (1983) 13 *Manitoba LJ* 221 at 223.

⁷ Gerard Brennan “Why be a Judge” (New Zealand High Court and Court of Appeal Judges’ Conference, Dunedin, 12–13 April 1996).

⁸ Lord Devlin “Judges and Lawmakers” (1976) 39 *MLR* 1 at 3.

⁹ Wollstonecraft, above n 3, at 431.

Lawyers have been a little more coy, a circumstance that the legal historian, Holdsworth, attributes to the hold of positivism on law in the last two centuries, to the impoverishment of ethical reasoning through strict separation of morals from law.¹⁰ I doubt whether public expectations have ever been as austere. Lord Radcliffe made the point that something has gone wrong if law is only a rule of rules to which people adhere for the purely practical reason of keeping out of trouble.¹¹ Law, he thought, responds to a deeply held ethical need, which is why Aristotle believed law to be “the principal and most perfect branch of ethics”.¹²

I hope I may be excused a parade of a little national pride in mentioning that New Zealand’s greatest jurist, Sir John Salmond, was not deflected by positivist dogma. Salmond was described by Herbert Hart as among the first to break out from the shadow of John Austin and to stress the moral content of law.¹³ The “law-creating power” of judges,¹⁴ which Salmond was early to recognise, were he thought to be found in the “principles of natural justice, practical expediency, and common sense”,¹⁵ although he allowed that judges were very rarely candid about their methodology.

Whether or not a strict separation of law and morals ever accorded with popular conceptions of law, modern statements of rights make it impossible to maintain a purely formal vision of law as a collection of value-neutral rules. Claims which invoke human rights must engage with substantive outcomes. That is why a number of commentators have expressed the view that human rights are revolutionising our understanding of law.¹⁶ Habermas suggests that rights have become the “architectonic principles of the legal order”.¹⁷

¹⁰ William Searle Holdsworth *Some Lessons from our Legal History* (The Macmillan Co, New York, 1928) at 158.

¹¹ See Lord Radcliffe “Law and the Democratic State” in *Not In Feather Beds: Some Collected Papers* (Hamish Hamilton, London, 1968).

¹² As cited in William Blackstone *Commentaries on the Laws of England: Book the First* (Dawsons of Pall Mall, London, 1966) at 27.

¹³ HLA Hart “Positivism and the Separation of Law and Morals” (1957) 71 Harv L Rev 593 at 605.

¹⁴ John W Salmond “The Theory of Judicial Precedents” (1900) 16 LQR 376 at 379.

¹⁵ *Ibid*, at 389.

¹⁶ See, for example, Martin Loughlin *The Idea of Public Law* (Oxford University Press, Oxford, 2003) at 127.

¹⁷ Jürgen Habermas *Between Facts and Norms* (Polity Press, Cambridge, 1996) at 247. See also Robert Alexy *A Theory of Constitutional Rights* (Oxford University Press, Oxford, 2002), in which Alexy argues that constitutional rights impose optimisation requirements on the legal order.

I am not sure that the implications have been sufficiently grasped. We need to develop ethical reasoning under which we can attempt Mary Wollstonecraft's separation of "unchangeable morals from local manners".¹⁸ Majoritarian or utilitarian calculation is no longer good enough and risks real erosion of human rights. And there is real risk to judicial legitimacy if the value judgment arrived at is seen as reflecting the personal worldview of the judge.

A substantial impediment to the necessary development of ethical insight is the baggage judges inevitably carry. Felix Frankfurter identified the critical quality of the judge as the "power to discover and suppress his prejudices".¹⁹ That is easier said than done, particularly if judges come from narrow and privileged sections of society. This is what Oliver Wendell Holmes referred to as the "unexpressed major premise" in judging.²⁰ It is the unconscious worldview of the secure and complacent. There is nothing new in it. Lord Devlin pointed to the English judges who applied a "Victorian Bill of Rights" when interpreting legislation which they thought interfered with freedom of contract and the sacredness of property.²¹ Similar worldviews led to the hostility of the US Supreme Court to the Roosevelt reforms. During the 1970s New Zealand judges hostile to the reforms introduced by matrimonial property legislation had no insight into the extent to which their own worldviews as to traditional roles in marriage were responsible for bias in approach. They did not appreciate the extent to which their views were out of step with the community, as reflected in the legislation.

Cultural values and gender and class assumptions may distort impartiality quite unconsciously. If judges come from narrow sections of society, mixing with other "insiders" who think as they do, discovering and suppressing such unconscious prejudice is difficult. Some commentators have seen the period of "backsliding" in administrative law in England in the first half of the twentieth century as attributable to the cosy relationship that developed between judges and administrators who were educated in the same schools and ate in the same clubs.²² They thought they were on the same side. Even judges who pride themselves on strict legality may not see that they are captured by a particular ideology because of their narrow life experiences.

¹⁸ Wollstonecraft, above n 3, at 93.

¹⁹ Felix Frankfurter "The Appointment of a Justice" in Philip B Kurland (ed) *Felix Frankfurter on the Supreme Court* (Oxford University Press, London, 1970) 211 at 216-7.

²⁰ Oliver Wendell Holmes *The Common Law* (Little Brown and Company, Boston, 1881) at 36.

²¹ Lord Devlin *The Judge* (Oxford University Press, Oxford, 1981) at 15.

²² Sir William Wade *Constitutional Fundamentals* (Stevens and Sons, London, 1980) at 78.

I have mentioned human rights and the articulation of ethical values which is I think inescapable in claims of right. But I do not think it fanciful to suggest that there has also been a shift in the way law is seen. A South African academic coined the term “culture of justification” to describe this change.²³ It is a view that has struck a chord with commentators and judges in other jurisdictions.²⁴ Although the prevalence of post-war statements of rights perhaps provided the principal impetus for this shift and rights litigation is a principal arena for such justification, similar shifts are to be seen throughout modern government and wherever power is exercised over others. So freedom of information statutes (which, at least in my jurisdiction contain requirements for reasons)²⁵ and disclosure of personal information held by employers under privacy legislation²⁶ all indicate contemporary community expectations about justification. And since the deliberative processes of the courts provide the best known model of public reasoning and are the forum in which claims of right under statements of right are publicly made, it is perhaps not surprising that legal process seems to be playing an increasing role in the public life of many jurisdictions.

In Canada (as in New Zealand), we have what the late Peter Birks called a “flat, secular, plural, sophisticated democracy” in which law is “life blood ... and ... constantly under scrutiny”.²⁷ He thought that law, in such a society, is a means of achieving “equilibrium”.²⁸ Law, is of course, more than the sum of enacted and judge-made rules, as I have already suggested. It includes the law-mindedness by which people adjust their own conduct.²⁹ And I do not mean to claim that social “equilibrium” is best achieved, or indeed is ever achieved, through litigation alone. In some cases public acceptance of a court’s decision may achieve equilibrium. But it is the acceptance that is critical. In other cases the exposition of the issues through the deliberative processes of court proceedings and the marshalling of the reasons of justice for one position or another may be critical in achieving the leap in insight that the unpopular and overlooked have just claims. In such cases, legal processes provide a temporary “stay against confusion”,³⁰

²³ Etienne Mureinik “Emerging from Emergency: Human Rights in South Africa” (1994) 92 Mich L Rev 1977 at 1986.

²⁴ See, for example, Murray Gleeson “Outcome Process and the Rule of Law” (2006) 65 AJPA 5 at 12.

²⁵ Official Information Act 1982 (NZ), s 19.

²⁶ Privacy Act 1993 (NZ), s 6.

²⁷ Peter Birks “The academic and the practitioner” (1998) 18 LS 397 at 402.

²⁸ Peter Birks “Adjudication and interpretation in the common law: a century of change” (1994) 14 LS 156 at 174–175.

²⁹ Sir John Baker referred in this way to the “whole world of law which never sees a courtroom”: JH Baker “Why the History of English Law has not been finished” (2000) 59 CLJ 62 at 78.

³⁰ Robert Frost “The Figure a Poem Makes” in *Collected Poems of Robert Frost* (Henry Holt & Company, New York, 1939).

informing a wider social debate and allowing the political processes space to achieve “equilibrium”. This is the notion of “dialogue” most developed in Canada.³¹ Whether through acceptance of court determinations, or through informing the political response through the deliberative method of the courts, there are significant implications in these modern conditions for the role of judges and in particular for the reasoning they adopt.

As modern litigation pushes us to explore the substantive values of our legal systems, candour in expressing the real reasons for decision is essential to the legitimacy of judicial decision-making. Ronald Dworkin says that the strictures and doubts, which are now part of popular culture, add to the appeal of the deliberative forum provided by the courts.³² If so, it is important that they be directly addressed in judicial reasoning. So too, Amartya Sen has stressed the importance of public reasoning in evaluative judgments.³³ Explanation of the plurality of the reasons to be accommodated is, he thinks, key to the acceptability of judicial decision-making. Bringing all arguments into assessment protects the public rationality of law.³⁴ Incompleteness is inescapable because “[w]e do not live in an ‘all or nothing’ world”.³⁵ So partial ordering after impartial reasoning is the best to be hoped for if the decision maker is unable after critical scrutiny to discard every competing consideration save one. The pursuit of justice sees us bound up with “what [it is] like to be a human being”.³⁶

So in hard cases patient exposition of the doubts and limits of judicial reasoning is more valuable than a show of confidence. Room must be left for second thoughts which, as Lord Reid reminded us in his “fairly tale” address, are “generally” better.³⁷ And judges must recognise that they act within an overall view of law as a “form of institutionalised discourse or practice or mode of argument” which is partially political in effect, as the late Professor Neil MacCormick long argued.³⁸ We need to be respectful of community expectations of law. Full justification for the exercise of judicial authority is necessary respect for human dignity.

³¹ See, e.g., Peter W Hogg and Allison A Bushell “The Charter of Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall LJ 75.

³² Ronald Dworkin “The Judge’s New Role: Should Personal Convictions Count?” (2003) JICJ 4 at 12.

³³ Amartya Sen *The Idea of Justice* (Penguin Books Ltd, London, 2009).

³⁴ *Ibid*, at 392–398.

³⁵ *Ibid*, at 398.

³⁶ *Ibid*, at 414.

³⁷ Lord Reid “The Judge as Law Maker” (1972) 12 J Soc of Public Teachers of Law 22 at 29.

³⁸ Neil MacCormick “Beyond the Sovereign State” (1993) 56 MLR 1.

To fulfil their roles under modern conditions, judges need insight into the values of their societies. Without such insight, they will not convince in their identification of what is in the public interest in a particular case, what is demonstrably justified in a free and democratic society, and what is “reasonable” or “fair”. Such standards cannot be evaded in modern legislation. Diversity in appointments therefore matters. Women and minorities are well suited to participate in justified judging. Their experiences do not prompt complacency or certainty – and they know how to listen and watch. I want to say a little more about the contribution we can expect from women judges.

Women judges

I am one who thinks that the benefit to be obtained through the appointment of women judges is not only the visibility of difference, important as that has been in breaking down stereotypes and conferring democratic legitimacy on the judiciary. Although she herself said the opposite, I think the fact that Sandra Day O’Connor got to decide cases as a woman was every bit as important as the fact that she was a woman who got to decide cases.³⁹ The perspective women bring from different life experiences is beneficial not only for judging women. Similar arguments to those used to justify discrimination against women in the past have been used to justify discrimination on the grounds of race, sexual orientation, and disability. The life experiences of women and minorities are very different from the life experiences of the men who were judges when I started in legal practice and who are still disproportionately represented on the bench. Elizabeth Evatt, the Australian Judge, has expressed the view that women and minority judges are more likely to realise how often claimed objectivity is marred by unconscious biases.⁴⁰ And that insight, as I have tried to explain, seems to me to be critical in ethical response to claims for justice encountered in the courts.

I do not suggest it is necessary for judges to have had personal experience of direct or indirect discrimination in order to recognise it and address it in their work. But it helps. And through the appointment of women, I think we have seen shifts in the attitudes of judges from more traditional backgrounds, which can be attributed to working contact with people who have experienced discrimination.

³⁹ See discussion of Sandra Day O’Connor’s position on this issue in: Nancy Maveety “Difference in Judicial Discourse” (2010) 6 *Politics & Gender* 452 at 453–454.

⁴⁰ Quoted in Sean Cooney “Gender and Judicial Selection: Should There Be More Women on the Courts?” (1993) 19 *MULR* 20 at 25.

Women judges have made a more direct contribution to a shift in judging than influencing colleagues and exploding in their own work the stereotypes about women. I think you only need to look at the record of the early women appointed to the bench in a number of jurisdictions to see a different take on the matters coming before the Court. Sandra Day O'Connor herself saw issues of equality everywhere. As did Bertha Wilson of the Supreme Court of Canada, and Mary Gaudron of the High Court of Australia. Their experiences, I believe, made them sensitive to difference and the inequalities it leads to, often quite unconsciously.

If, as I have tried to suggest, the expression of reasons is of great importance in an age of justification, then the advent of women judges has brought I think a different voice. I think it is possible to see in the expression of women judges a willingness to avoid euphemisms and to confront the realities of the lives of the men and women in the cases. The expression is often more tart and memorable than that of their male colleagues, perhaps acknowledging a different audience, or at any rate, an audience.

So, Justice Bertha Wilson in *R v Lavallee*, exposing the absurdity of applying the standard of the "reasonable man" to a battered spouse said:⁴¹

If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men don't typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to the circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man".

In 1990, reading that made me want to stand up and cheer.

The matrimonial property case in the House of Lords, *Miller v Miller*, presents a contrast in the styles of two great judges.⁴² The elegant and spare prose of Lord Nicholls and his steadfast adherence to principle is to be contrasted with the snapshots from experience that pepper the judgment of Baroness Hale and etch themselves into the memory, and her care not to depart from community expectations. Both are judgments informed by deep humanity. I'm not sure that I don't prefer the higher ground taken by Lord Nicholls, on the one point of disagreement (interestingly, his was to the advantage of the woman in the particular litigation). But again, it is Lady Hale's judgment that set me cheering. It could not I think have been written by a man. Let me count the ways:

⁴¹ *R v Lavallee* [1990] 1 SCR 852 at 874.

⁴² *Miller v Miller* [2006] UKHL 24, [2006] 3 All ER 1.

- First, there's the laconic "Even dual career families are difficult to manage with completely equal opportunity for both";⁴³
- Then, the unanswerable view that, post divorce, "The breadwinner's unimpaired and unimpeded earning capacity is a powerful resource which can frequently repair any loss of capital after an unequal contribution";⁴⁴
- Next, there's the complete put-down of murmurings of "stellar" contributions (justifying unequal sharing): "A domestic goddess self-evidently makes a 'stellar' contribution ..."⁴⁵
- There's the cold and accurate observation, "If the money maker had not had a wife to look after him, no doubt he would have found others to do it for him";⁴⁶
- And a pitiless send-off for the view that the wife did not deserve compensation for her loss of career because she chose and enjoyed domesticity:⁴⁷

The fact that she might have wanted to do this is neither here nor there. Most breadwinners want to go on breadwinning. The fact that they enjoy their work does not disentitle them to a proper share in the fruits of their labours.

In the judgments of judges from unconventional backgrounds such as Thurgood Marshall, or Mary Gaudron, or Brenda Hale, or the judges of the Constitutional Court of South Africa, it is possible to see a perspective that is different. I have said on another occasion that I do not think it fanciful to see in the work of judges from such diverse backgrounds an emphasis on human dignity; a greater scrupulousness not to wound or slight; a willingness to express doubt and to change one's mind; and a sense of obligation to lay out the full reasons for decision and to confront any influence openly. The different experiences of such judges are strengths they bring to their work.

Although it is more controversial to say so, I am of the view that such different perspectives cannot but impact upon substantive outcomes in judging. That is not to say that a new impermissible bias is in play. Baroness Hale was I think completely correct to answer her own

⁴³ Ibid, at [138].

⁴⁴ Ibid, at [142].

⁴⁵ Ibid, at [146].

⁴⁶ Ibid, at [151].

⁴⁷ Ibid, at [154].

question as to whether her feminist beliefs could be reconciled with her judicial function with the question posed by Sandra Berns: "... is it still suggested that, in some matters at least, a black judge or a woman judge would be somehow biased while a white male judge would be impartial and neutral?"⁴⁸ As Lady Hale herself emphasised:⁴⁹

It is the connection between the judge's beliefs and how she goes about her judging which is what matters, not the beliefs themselves.

Of course, in judging, personal beliefs or sympathies cannot deflect a judge from doing what is right according to law in the particular case. That would be to be false to the judicial oath. The reasons given by the judge must justify the outcome and be convincing in law. But "how the judge goes about her judging" seems to me to be critical. A willingness to question and to re-think from first principles, a preparedness to try harder, closer attention to facts and context; such *effort* (perhaps prompted by a feminist perspective) may well produce, justifiably, a different outcome than would be reached by a judge with less spur to imagination. I should like to think so. And I think the law can only benefit from such care.

Such process is illustrated in Australia by the work of the first woman Judge of the High Court, Mary Gaudron. It has been said of Mary Gaudron that "non-discrimination" emerges in her judgments as an "organising principle" of the constitution in Australia.⁵⁰ And discrimination she recognises to arise as much out of the "equal treatment of unequals" as out of the unequal treatment of equals.⁵¹ Judges cannot have agendas. But they, like all those whose work is thinking, benefit from the spark to the imagination of a little passion.

So I agree with Professor Judith Resnik that there is nothing fundamentally incompatible about feminism and adjudication:⁵²

Adjudication is one instance of governmental deployment of power that has the potential for genuine contextualism, for taking seriously the needs of the individuals affected by decisions and shaping decisions accordingly. Precisely because adjudication is

⁴⁸ Cited in Baroness Hale of Richmond "A Minority Opinion" (2008) 154 Proceedings of the British Academy 319 at 327.

⁴⁹ Ibid, at 330.

⁵⁰ Henrik Kalowski "Gaudron, Mary Genevieve" in Tony Blackshield, Michael Coper and George Williams (eds) *The Oxford Companion to the High Court of Australia* (Oxford University Press, South Melbourne, 2001) 293 at 295.

⁵¹ *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, cited in *ibid*.

⁵² Judith Resnik "On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges" (1988) 61 S Cal L Rev 1877 at 1909.

socially embedded, it can be fluid and responsive. If we are able to reconceive the judicial role, we may well help those empowered to judge to use their powers in a way which we respect. Finally, power seems to me to be part of human construction, and feminists must speak to power as well as demand its reconstruction.

Contextual justice

So, if passion for justice for one half of the human race can, as I think, be a permissible spark to effort and imagination, let us think about some of the causes we have for passion. The topics I touch on will be developed in sessions. I do no more than remind you of a picture that will be depressingly familiar.

The intractability of the issue of gender equality in our societies more generally and in the international community is now evident. Despite international commitment to the equal rights of men and women since the Charter to the United Nations was adopted and recommitment through the international instruments which followed it, there remains in all societies a gap between the expectations and the reality of women's lives. The manifestations of inequality may be different in affluent societies like ours, but they are real enough. The extent and effect of violation of women's rights is staggering. In employment, education, and income in all societies, women come in well behind men. No country is immune from the problems of domestic violence against women. Such violence, as the CEDAW Committee has recognised, is "a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men".⁵³ Under-reporting of such violence means that we see only the tip of the iceberg. Domestic violence is a main inhibitor to the social advancement of women, but laws and enforcement agencies have been slow to respond. What is clear is that there are cultural inhibitors to the achievement of equal protection of the law for women. Whatever the positive law statements about equality, the reality of women's lives is shaped by the culture they live within, including the legal culture.

In New Zealand, Australia, and Canada there is a disparity between the number of women entering the legal profession and the number becoming partners in law firms or senior barristers.⁵⁴ Canada is well

⁵³ See General Recommendation 19 in: United Nations Committee on the Elimination of Discrimination Against Women (CEDAW) *CEDAW General Recommendations 19 and 20*, 11th sess, A/47/38 (1992).

⁵⁴ New Zealand women lawyers hold 44% of practising certificates, but only 18.24% are partners in firms: New Zealand Law Society "Typical New Zealand lawyer is male – for now" (2011) New Zealand Law Society website < www.lawsociety.org.nz > ; Human Rights Commission New Zealand Census of Women's Participation (Human Rights Commission, Wellington, 2010) at 38. In

ahead in the representation of women in the judiciary, with 32.1% of its judges of higher courts being female. 23.3% of New Zealand judges are women. In Australia the figure is 22.9%.⁵⁵ On each country's highest court, the comparison is somewhat different. 42.9% of the High Court of Australia's judges are female, with three of the seven judges being women. 44.4% of the Supreme Court of Canada's judges are women, with four of the nine judges being women. In New Zealand I regret to say that I am the only woman on the Supreme Court, consisting of five judges.⁵⁶

No woman is an island. We should not expect to see wealthy and educated women fully accepted in the legal profession while the standing of women in the wider community languishes. I want to mention those who carry particular disadvantages in our societies, women prisoners, at-risk young women, and elderly women, and to touch on the potentially amplifying effect for those who belong to racial and cultural minorities. I confine my discussion to a comparison of the position in Canada, Australia, and New Zealand, as broadly comparable jurisdictions.

The levels of women imprisoned in Canada, Australia, and New Zealand is comparable and low compared with the total prison population: 5% in Canada, 6.27% in New Zealand, and 8% in Australia.⁵⁷ But women prisoners have much higher rates of mental disorder than male prisoners and women in the general population. Australian women prisoners were found in a 2009 study to have high levels of mental health histories

Australia women account for only 15% of partners at major law firms: Angela Priestley "Women Leading with the Law" (2011) *Lawyers Weekly* < www.lawyersweekly.com.au > . There is very little nationwide data of this kind in Canada, but anecdotal evidence as well as evidence from individual states suggest that the trends are similar: for instance, in British Columbia, "women have been entering the legal profession ... in numbers equal to or greater than men for some time", but only around 20% of partners in large- and medium-sized firms are women: Dana F Hooker "Diversity in the Law: Arguments and Perspectives" (2011) 44 *UBC L Rev* 1 at 3.

⁵⁵ These figures have been compiled from a survey of information about judges that is available on the websites of the higher courts of New Zealand, Canada, and Australia.

⁵⁶ It is worth noting that in the United Kingdom women judges make up only 13.4% of judges in the higher courts (taking into account the Supreme Court, the Lords Justices of Appeal, the High Court Chancery Division, the High Court Queen's Bench Division, and the High Court Family Division). There is, of course, just one woman, Lady Hale, on the United Kingdom Supreme Court, consisting of eleven judges.

⁵⁷ See, for the Canadian figures, International Centre for Prison Studies "Prison Brief: Canada" (2010) < www.prisonstudies.org > ; for the Australian figures, Australian Bureau of Statistics "Prisoner Characteristics, Australia: Sex" (2010) < www.abs.gov.au > ; and for the New Zealand figures, Department of Corrections/Ara Poutama Aotearoa "Prison Facts and Statistics – December 2010" (2010) < www.corrections.govt.nz >

(57% compared with 17% for male prisoners), with 28% of women prisoners on mental health medication, compared with 37% of men.⁵⁸ In a study of those admitted to one Women's Prison in 2002 in New Zealand, 40% were thought to need mental health treatment.⁵⁹ In the Pacific region in Canada, female offenders have a mental disorder prevalence rate estimated at 50%.⁶⁰ In New Zealand in one study in Christchurch the lifetime prevalence of mental illness among female prisoners was put at 89%.⁶¹ There is a particularly strong link between drug dependency and criminal offending for women in all three countries. Self-harm by women in prison is high in all countries, with Canada reporting that 25% of women prisoners have a history of some form of self-harming behaviour.⁶²

Women prisoners have much higher rates of victimisation than women in the general population, and higher rates than male prisoners. Female prisoners have high life-time prevalence rates for post traumatic stress disorder (in New Zealand, 37% compared with 8.1% in the general population).⁶³ A striking feature of women's offending is the link between their own victimisation and the offending for which they are sentenced, whether for violence against their partners, for failing to protect children from violent partners, or for criminality in association with abusive partners. In all three countries, indigenous women are grossly overrepresented in prisons. So too are indigenous men, but the proportion of women exceeds that of the men.⁶⁴

⁵⁸ Australian Government: Australian Institute of Health and Welfare *The Health of Australia's Prisoners 2009* (2010) < www.abs.gov.au>

⁵⁹ Alcohol Advisory Council "Prevalence and Treatment of Offenders" (2007) < www.alcohol.org.nz>

⁶⁰ Office of the Correctional Investigator *Annual Report of the Correctional Investigator 2009-2010* (2010) < www.oci-bec.gc.ca>

⁶¹ See Christchurch Epidemiology Study, cited in Department of Corrections/Ara Poutama Aotearoa, above n 57.

⁶² Office of the Correctional Investigator *Annual Report of the Correctional Investigator 2009-2010* (2010) < <http://www.oci-bec.gc.ca>>

⁶³ Julia Tolmie "Women and the Criminal Justice System" in Warren Brookbanks and Julia Tolmie (eds) *Criminal Justice in New Zealand* (LexisNexis NZ, Wellington, 2007) 295 at 300.

⁶⁴ In New Zealand, although Maori comprise only 15% of the general population, 51% of male prison inmates are Maori, while 58% of female inmates are Maori: Khylee Quince "Maori and the Criminal Justice System in New Zealand" in Warren Brookbanks and Julia Tolmie (eds) *Criminal Justice in New Zealand* (LexisNexis NZ, Wellington 2007) 333 at 334. In Australia, indigenous female offenders make up 29.3% of the female prison population, whereas indigenous men make up 24.1% of the entire male prison population: Lorana Bartels *Indigenous Women's Offending Patterns: A Literature Review* (Australian Government: Australian Institute of Criminology, Canberra, 2010) at 9. This is the case despite the fact that Aboriginal Australians make up only 2.5% of the Australian population: Australian Bureau of Statistics "Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006" (2006) < www.abs.gov.au> . In Canada, as of 2006, while the Aboriginal population comprises only 2.7% of the total population, Aboriginal women offenders

The disadvantage and abuse that lie behind our prison populations starts from birth. In New Zealand 10 children are killed in domestic violence every year.⁶⁵ We have a high incidence of sexual and physical abuse of children. We have the highest rate of teenage suicide in the OECD.⁶⁶ In all measures of risk-taking (smoking, abuse of alcohol, pregnancy) we perform badly.⁶⁷ Because of cycles of intergenerational disadvantage, an estimated 10-20% of young people in New Zealand are assessed as being at risk.⁶⁸ Depression affects one fifth of young people by the age of 18. 75% are believed to have no treatment.⁶⁹ A quarter of all abused children become initiators of abuse.⁷⁰ And the evidence of poorer outcomes for Maori adolescents (who are thought to make up 50% of the estimated 5–15% of seriously at risk)⁷¹ is overwhelming.⁷² The number of young women offending violently is increasing.⁷³

At the other end of life, the proportion of the aged within our communities is growing dramatically. Chief Justice McLachlin has referred in a paper on “Elder Law” to the profound challenges for our societies and the law in this development.⁷⁴ Issues of capacity, dignity, protection, and discrimination may require different approaches to how legal services are delivered, as well as reassessment of the substantive law. The ability to access medical and social services may diminish with age. Disability laws may need to expand to accommodate the coming tidal wave. It presents special ethical needs. We should expect that political priorities may push such reassessment, because the aging population is a voting population.

represent 30% of women in federal prisons; Aboriginal male offenders make up 18.5% of the male federal prison population. See Office of the Correctional Investigator “Backgrounder: Aboriginal Inmates” (2010) < www.oci-bec.gc.ca >
65 New Zealand Police “How to Deal with Family Violence” (2011) < www.police.govt.nz >

66 Office of the Prime Minister’s Science Advisory Committee *Improving the Transition: Reducing Psychological Morbidity during Adolescence – Interim Report, 1 July 2010* (Office of the Prime Minister’s Science Advisory Committee, Auckland, 2010) at 1.

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*, at 3.

70 *Ibid.*, at 5.

71 50% of persistent youth offenders (a group of 5–15% of all youth offenders) are Maori: Andrew Becroft “Youth Justice in New Zealand: Future Challenges” (New Zealand Youth Justice Conference, ‘Never Too Early, Never Too Late’, Wellington, 17–19 May 2004) at 37.

72 *Ibid.*

73 In 2007, there had been a fourfold increase in the number of imprisoned women offenders over the preceding 25 years: Alcohol Advisory Council “Prevalence and Treatment of Women Offenders” (2007) < www.alcohol.org.nz >

74 Beverley McLachlin “Elder Law: An Emerging Practice” (2009) 3 *Journal of International Aging Law and Policy* 1.

Globally, the proportion of those aged 60 and over is expected to double in the next fifty years,⁷⁵ with older women outnumbering older men.⁷⁶ Aging has a gendered dimension not only because women live longer than men (in Canada women make up 70% of those over 84), but because they have special vulnerabilities, including financial vulnerability.⁷⁷ In New Zealand, elderly women earn less than men and are slightly more likely to have a disability than men.⁷⁸ In Australia, 65% of those who suffer from dementia are women.⁷⁹

In Australia the Australian Bureau of Statistics in 2006 reported that older women are increasingly experiencing domestic violence. Although much abuse of older people is “spouse abuse grown old”, in many cases the abuse arises after the death of a partner. Elderly women are abused by a broader range of family members than men. Few studies have collected statistics on abuse of older people but some Australian studies suggest that 80-90% of the abuse reported in relation to older people was perpetrated by close family members.⁸⁰ Abuse may be emotional, as well as physical. And financial abuse and neglect are emerging as significant problems. Some studies have identified that caregiver stress is given as a major precipitating factor, particularly where resources are limited and caregivers have to juggle conflicting roles.⁸¹ Because of the high incidence of dependency and difficulties in communication, there is risk of collusion by service providers with the perpetrator of abuse.⁸²

The problem of abuse may not be evenly spread. Australian studies suggest that the potential for abuse is higher in rural communities.⁸³ It is thought there may be more reluctance to disclose abuse in more closely knit communities. Similarly, there are signs that abuse of the elderly may be more difficult to pick up in immigrant communities, within which in recent years the rate of immigration by older people has increased markedly.⁸⁴ Such people may be linguistically and culturally isolated. It

⁷⁵ United Nations Department of Economic and Social Affairs, Population Division “World Population Aging: 1950–2050” (United Nations, New York, 2002) at 11.

⁷⁶ Ibid, at 25.

⁷⁷ Public Health Agency of Canada “Who are Canada’s Seniors?” (2005) < www.phac-aspc.gc.ca>

⁷⁸ New Zealand Ministry of Women’s Affairs/Minitatanga Mo Nga Wahine “Quick facts” (2009) < www.mwa.govt.nz>

⁷⁹ Women’s Health Australia *Women, Health and Ageing Findings from the Australian Longitudinal Study on Women’s Health* (June 2010) < www.alsw.org.au>

⁸⁰ Susan Kurrle “Elder Abuse” (2004) 33 *Australian Family Physician* 807 at 809.

⁸¹ Ibid, at 810.

⁸² Dale Bagshaw, Sarah Wendt and Lana Zannettinno “Preventing the Abuse of Older People by Their Family Members” (Australian Domestic and Family Violence Clearinghouse, Stakeholder Paper No. 7, 2009) at 5.

⁸³ Ibid, at 7–8.

⁸⁴ Ibid, at 8–9.

is thought they may be fearful that disclosure of abuse will lead to their being cut off from their cultural communities.

Mediation services are being trialled in some jurisdictions to provide a buffer for the vulnerable, with victim safety and empowerment the priority. Advocacy services are being established and interagency collaboration is urged. These therapeutic developments are controversial in some quarters. They are seen by some as patronising of older people and as minimising criminal behaviour. It is likely that there will be challenges ahead for the courts. For our societies the ethical challenge is not to succumb to the bleak vision of old age put forward by Jacques in *As You Like It* as “second childishness and mere oblivion”.⁸⁵

The challenges in “judging women” are affected by the significant diversity in our communities. When I grew up in the New Zealand of the 1950s, the population consisted essentially of a Maori minority living mainly in rural areas and a European majority of predominantly British origin. The population was overwhelmingly Christian. There were unresolved issues about how the legal system recognised the indigenous Maori population, but it is fair to say that they hardly entered the wider public consciousness. The issues were either overlooked or it was comfortably assumed that assimilation would take care of them. Although there were pockets of other racial and cultural groups, they were almost invisible as distinct enclaves. They certainly did not assert any group rights. They were expected to fit in. Since they were at the end of the earth, lacking the modern methods of communication to provide cultural sustenance, they had little option but to fit in.

We in New Zealand have not been immune from the huge movements of people that have marked the last twenty years around much of the world. Today, we have a vibrant ethnic, cultural and religious mix. There has been huge immigration from the South Pacific Islands. The European majority is projected to decline as a percentage of the population, and it is an aging population. By 2040 40% of the workforce will be Polynesian (that is, Maori and Pacific Island people).⁸⁶ In addition, we have admitted immigrants from a wide range of countries in the Middle East, Asia and Africa, including those torn by internal wars. These groups are no longer uniformly Christian. The pace of change has been dramatic. For example, the first mosque was not built in New Zealand until 1979⁸⁷ and between 1996 and 2001 the numbers of

⁸⁵ In Act II, Scene VI.

⁸⁶ Joe Williams “Local Government in Aotearoa 2005 – 2040” (Local Government New Zealand conference, Christchurch, 2005).

⁸⁷ Islamic New Zealand “Islam in New Zealand – The First Mosque” (2011) Islamic New Zealand < islamicnz.com >

Moslem people in New Zealand increased by 74%.⁸⁸ Our new immigrants dress distinctly. They speak in many different languages, and in the courts this has impacted directly on our work. They are populations who have been admitted in numbers sufficient to make an impact. There are inevitable strains.

As recently as the 1980s New Zealand government publications about immigration stressed the virtues of assimilation. As immigration from non-Western countries increased from the late 1980s it became clear this aspiration is no longer feasible. Improvements in communication and movement of people have meant that new populations are not isolated, with no choice but to assimilate.

The recognition of diversity may prompt exceptions from general rules, which have to be defensible when measured against the general principle of equality before the law and other human rights. Jeremy Waldron and other liberals ask why the Hells Angel who wants to feel the wind in his hair as he rides his motorbike is entitled to less consideration than the Sikh in exemption from the obligation to wear a helmet.⁸⁹ In all jurisdictions, courts have been greatly exercised about religious clothing or insignia in secular schools. And in New Zealand, as well as in Canada, judges have had to confront the question of whether a witness can be compelled to remove her niqab when giving evidence.⁹⁰

These are very different questions from those our courts have traditionally been called upon to decide. They require judges to engage in ethical discourse. In such cases, honesty in exposition of all factors bearing on the decision is, as I have tried to suggest, best policy. But diversity in who gets to judge and the perspective they bring is critical for the legitimacy of such choices.

Conclusion

The themes of this conference deal with matters important to our work as judges. All judges should be concerned to know whether justice in outcome is being delivered to those who may have special vulnerabilities because of age, mental disorder, or cultural difference. Because the

⁸⁸ Statistics New Zealand “2001 Census of Population and Dwellings: Cultural Diversity Tables – Table 16: Religious Affiliation (Total Responses) and Sex” (2001) < www.stats.govt.nz >

⁸⁹ Jeremy Waldron “One Law for All? The Logic of Cultural Accommodation” (2002) 59 Wash & Lee L Rev 1 at 15.

⁹⁰ In New Zealand this issue was raised in *Police v Razamjoo* [2005] DCR 408 (DC). In Canada the equivalent case is *R v NS* [2010] ONCA 670. Leave was granted to appeal the decision to the Supreme Court of Canada on 17 March 2011. See, for a discussion of some of the issues: David Griffiths “Pluralism and the Law: New Zealand Accommodates the Burqa” (2005) 11 Otago Law Review 281.

formal equality of women is not matched by the reality of their lives, we know that such disadvantage may fall more heavily upon women. As women judges we have a particular interest in understanding such effects on women and it is understandable that at a conference of women judges we chose to pay special attention to them. They are not of course topics for women judges alone. All judges must be alert in their work to the unequal effect of apparently equal laws. And justice for women and for men is concerned with substantive outcomes, not the form of who gets to judge. But in addressing the difficult legal questions thrown up in our societies, we should expect women judges to make a difference. The effort to gain access to this role in itself only achieves, as Mary Gaudron recognised, “a larger share of the spoils” for a few affluent and well-educated women.⁹¹ We should be more ambitious than that. Mary Wollstonecraft’s challenge, as Mary Gaudron’s long after, was that we should strive to achieve justice for all the human race.

⁹¹ The Honourable Justice Mary Gaudron “Speech to Launch Australian Women Lawyers” (Melbourne, Victoria, 19 September 1997).