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Occupation Arbitrator, Barrister, Educator, Lawyer, Senior Counsel

Summary

Rashda Rana SC is a Barrister, Arbitrator and Mediator. She has worked at the Bar in London, in various states in Australia and in the Asia Pacific region, notably Hong Kong, Singapore, Malaysia and China, for the past 20 years. Most recently, she was the General Counsel for Lend Lease Project Management & Construction. Rashda is also an Adjunct Professor at The Sydney University Law School. She was appointed Senior Counsel in 2014.

Rana is the President of ArbitralWomen, the Immediate Past President of the Australian branch of the Chartered Institute of Arbitrators (CIArb), the Founding Member and former Vice Chair of the Society of Construction Law Australia, a Fellow and former Director of the Australian Centre for International Commercial Arbitration (ACICA), Fellow of Institute of Arbitrators & Mediators Australia (IAMA), Fellow of Commercial Law Association of Australia (CLAA) and the Australian representative to the ICC Taskforce on Subcontracting and the ICC Taskforce on Public Procurement.

Go to ‘Details’ below to read a reflective essay written by Rashda Rana for the Trailblazing Women and the Law Project.

Details

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Events in life, some brought about deliberately, others by happenstance, often give rise to circumstances that lead to the generation of new and sometimes surprising passions or the development of a passion that otherwise lies latent. My passion turned out to be initially international arbitration and then as a necessary off-shoot which emerged through experience, the need for diversity and equality in the legal profession, more specifically, gender diversity and equality in the worldwide dispute resolution industry.

Most astounding for me has been the slow realisation that in the first quarter of the 21st Century we are still talking about gender equality and trying to find ways to achieve it at all levels of society. After decades of supposed equality, however, a recurring and disturbing issue in the workplace remains the differential and unequal treatment of and responses to women in the workplace. How does a woman deal with that if, like me, your job depends on being heard?

Everything I do professionally depends entirely on my voice being heard. I have three main professional roles: as advocate, as arbitrator and as teacher. The most critical demand made by each role is clear, effective and persuasive oral communication.

As an advocate, I am the mouthpiece of my client. I might be appearing before 1, 3, 5, 7 or 10 judges or 1 or 3 arbitrators. They are usually of the pale, male and stale variety. Usually, I am the only woman in the room or the court. In this role, the most significant rule that applies to the proceedings is that parties are afforded natural justice. This is usually understood to mean that the parties are entitled to have their dispute determined by an impartial and independent decision maker and that they have the right to be heard. In order to fulfil this role properly and effectively not only do I, on behalf of my client, need to ensure that I am heard but that I am actively heard such that I can persuade the listener of my point of view, my submission, my case theory.

Next, as an arbitrator either with 2 other co-arbitrators and a number of advocates appearing before me (all usually male), my voice also needs to be heard. In this role, I am required to control the proceedings and make decisions which the parties are required to follow or comply with. Unlike the position of a judge, who has coercive powers to ensure compliance the role of arbitrator does not have coercive powers and does not necessarily bring with it authority. The authority has to be imposed by deed or demand.

Thirdly, I am also a teacher, a role that relies heavily on the teacher being heard. In the 21st century, the real test of a good teacher, whether make or female, is to get across the message without the use of visual aids! I have seen panic on the faces of students when I say we are going to listen, think and discuss as opposed to type like automata everything the teacher is saying without switching on the brain cells!

The legal profession is not the only profession in which women experience unequal treatment. Discrimination or gender bias,

whether deliberate or unconscious, is everywhere.

For a long time now, I have been the only Australian female barrister actively involved in international arbitration outside Australia. I am, for instance, the only Australian female barrister listed on the arbitration panels of a number of significant regional arbitral institutions. In 2013, I was the first female President of the Australian branch of the Chartered Institute of Arbitrators.

It is not a new organisation. The Chartered Institute of Arbitrators is celebrating its centenary this year (2015). It is an elite, international dispute resolution body with members from all over the world. I don't know why I should have been the first female President as late as 2013 when there are so many highly competent women in the field of dispute resolution. I don't know why I am the only female barrister listed on arbitration panels around the world. It seems that women are still required to be better than their male counterparts in order to be heard, seen or accepted.

I have never doubted my ability to perform as well as my male colleagues. Likewise, I never doubted the capabilities of my female peers in the law. I have tried to accept people on merit alone no matter what their background, race or gender. It was not until the last few years of the 20th Century, that the true plight of female lawyers dawned on me. Women lawyers were experiencing hurdles and problems in their careers as a result of gender bias. I had not myself been consciously aware that I had ever been discriminated against because of my gender. What was more apparent to me (especially when I arrived in Australia) was the constant references to racial differences as if that attribute might affect one's ability to perform.

Of course, I possess many attributes which can readily be the subject of discrimination. The most obvious is that I am a woman. But my Indian heritage makes me a target too. When I first arrived in Australia many people, especially taxi drivers (those great arbiters of social commentary) would ask, 'where are you from?' I'd say that I was from London (because I learnt very quickly that the way I pronounced 'England' sounded very much like India to them or perhaps that's what they wanted to hear). Anyway, to this response I'd often get (and still do) 'But, where are you really from?' Thus, the conversation would continue along those lines for a few more minutes, with some even braving the absurd line, 'but you don't look like you're English'. Of course, what they were referring to was my ethnic background, which, of course is an entirely different matter.

If I had been aware of gender bias then I had dismissed it as being an 'excuse'. After all, we lived in an enlightened world. The first meeting I attended of the Equal Opportunities Committee of the NSW Bar Association, chaired by Michael Slattery QC (as then was, now Justice Slattery of the NSW Supreme Court), however, opened my eyes to the true depth of a problem I had not even conceived existed. I resolved there and then to do what I could to bring the problem to light and to deal with it as best I could. The first project I got involved in was the emergency child care scheme for barristers. There was no one better suited to delving into this problem since my husband & I both worked and we had no family to support us in Australia (my family were all in London and my husband's in Ireland) and any friends who would otherwise be willing to help also worked.

How did I get to where I am?

My focus has always been to do things about which I am passionate. For that I must thank my family, particularly my father. I was lucky to have been brought up in a family environment in which everyone was encouraged to be themselves and to do what they enjoyed. After all, success follows those who follow their passions. With 2 older rough-and-tumble, rugger-bugger brothers and a father who treated each of us in the same way, I never noticed that my life had to be different from my brothers or male friends just because I was a girl. I remember my mother's horror at my father's suggestion that I should read for a conceptually based degree such as philosophy rather than mathematics which was my initial choice since that's where my interests seemed to lie. He was absolutely right. He never dictated to us. He guided us. It was always a discussion of the pros and cons of our proposed actions or decisions that he investigated with us. He taught us analysis and introspection.

Philosophy also helped me to think with clarity and reason persuasively – skills which have proved very useful in my career as a barrister. Loss of an academic grant made me switch from a life in academia to a vocational course in law that culminated in qualification as a barrister at the Bar of England & Wales.

I was persuaded by a highly regarded silk at the English Bar that being an advocate was not dissimilar to being an academic and so my life would not necessarily be that different in substance: barristers receive issues in a brief; academics think of them in the course of their work; barristers research the point in issue, as do academics; barristers prepare submissions as academics prepare papers or articles; barristers present the issue as set out in their submissions to a court of 1 or 3 or more judges who have some interest in what you are saying, academics present to 200 snotty nosed students who do not generally care what you are saying; barristers get an answer by way of a judgment; academics get 200 essays, none of which may have anything useful to say. I switched fairly readily.

The love of teaching, however, has never left me and so I have continued to teach at various levels from undergraduates to apex court judges.

Then came marriage to an Irishman who did not then want to live in London so we traversed the seas to Sydney where he had been living and where I knew there was an independent private Bar and so I could continue doing what I had been trained to do. It was not at all common in Sydney then (nor is it now) for people to go straight to the Bar. In England, after a straight law degree and Bar School, one could be a fully qualified barrister at about 23. In England it was also the practice to choose either the path of a solicitor or a barrister and to stick to that choice for life. There was very little movement between the professions. There is much more now. In Sydney, there has always been movement between the professions.

The admissions board did not make it easy for me, requiring me to sit 11 exams which I sat over 2 semesters. Apparently, the

Admissions Board simply could not understand how I could possibly have got any kind of practising certificate with a Diploma Course in Law. The lady I spoke to at the Board was incredulous and actually said to me over and over again, 'But I don't understand how you could've got the practising certificates. You don't have a law degree!'.

The Diploma Course in question is one designed for graduates who wish to convert to law. Successful completion of the Diploma course then puts candidates on par with law graduates. It's a one year intensive course in the 6 core subjects. In order to become a barrister, one is required to undertake the Bar Practice Training Course as well which is also over a year and includes a number of substantive legal subjects. If I recall correctly, out of the 100 students in my conversion course over 80% went on to become barristers.

The figures for barristers in London with that background is also approximately 80%. So, it was a very common path to becoming a barrister in London. But not so in Sydney. Indeed, I think I was the first barrister from England who wanted to go to the NSW Bar. When Stuart Littlemore modelled his female protagonist in the Curry Murder Books on me, I pointed out to him that, unlike his fictional character, Arabella Engineer, I did not come to Sydney because I had "failed as a barrister in London"!
I passed the tests.

During that time, my husband and I decided that it would probably be better to have our first child before I got going afresh, as it were, at the Bar in NSW. So our daughter arrived on 2 February 1994. 2nd February happens to be the date by which the beginning of the Bar Term is set. A few years later, my son would be born on the last day of the Bar Term that year. So, my children are truly Bar children.

Things progressed well and my international arbitration career continued to grow steadily. On one occasion, some 15 years ago, I was chastised by a senior member of the Bar for appearing in international arbitrations, that is to say, appearing before arbitrators (1 or 3) when I should be appearing before 'real' judges. Having been weaned on the dual tracks of the court system and arbitration, I could not quite understand his objection. Arbitrators before whom I was appearing in international arbitrations were eminent jurists in their own right. The same people might switch from being arbitrators to taking an appointment as a judge. I did not and do not think that judges are clothed with any magical powers (or divine inspiration) that makes them better decision makers than arbitrators. I sit as an arbitrator and I know my Awards are every bit as good as the judgments of my judge peers. Suffice it so say that this same senior practitioner has in the past few years been haranguing me to get him into international arbitrations!

In this time, the urge to do something about gender bias started to grow. As well as continuing my work at the NSW Bar Association and participating in mentoring schemes at the Bar, the Universities, and industry organisations, I joined ArbitralWomen. ArbitralWomen is an international networking organisation committed to promoting women in dispute resolution around the world. It was beginning to take a foothold then. Last year, in 2014, we celebrated 20 years and I became the President of ArbitralWomen. My column in the ArbitralWomen Newsletter regularly points to achievements in this field as well to failures which need rectification in the name of equality.

I know that, for me, the single most important factor in any success I may have achieved has been the support I have received from my male colleagues and most importantly my husband. It is because of the fact that my support came from male not female mentors that I have been actively promoting the importance of mentoring for women by women in dispute resolution. The mentoring program at ArbitralWomen is a very successful one. There are more and more women at higher echelons of the dispute resolution ladder who are prepared to give up their time freely to help others. There are, unfortunately, also plenty at the higher reaches who do not want to help, their mantra being, 'I did it myself so let them learn how to do it by themselves'. What these women forget is that men help each other all the time and in helping others promote themselves. What they also forget is what Madeleine Albright once said, 'There is a special place in hell for women who do not help other women!'

The last thing on one's mind when one makes the choice of a life partner is whether you will enjoy the same support from that person as you might be prepared to give back. The support can oftentimes be one way – support by the wife for the husband's needs, desires and goals. None of what I've done would have been possible without my husband's support and willingness to take over things, to pick up the running of the house, the care of the children every time I had to leave the country for work and his generally positive attitude to my goals. He also shares with me the drive to eradicate gender bias in all its forms.

It is not just my interest in gender diversity and equality that has been growing. The problem of gender bias and the need for diversity and equality has mushroomed in the past few years in many parts of the world. For instance, my old college (Pembroke) at Cambridge University has been celebrating 30 years of women at the College. The celebrations are timely and significant. This is a great achievement in itself, but to put it in context, this is 30 years in the life of a college that has existed as male only domain for over 800 years. I was invited back to talk about women in the workplace to current and former students of the college as well as others from the University.

In addition, as part of my work with ArbitralWomen, we prepared a Special Issue on 'Dealing with Diversity in International Arbitration' jointly with Transnational Dispute Management.

It is well acknowledged that the high demand for arbitration services has driven many governments to cultivate a pro-arbitration environment through new arbitration legislation and other mechanisms, and has led to the proliferation of international arbitral centres throughout the world. Likewise, many global law firms have also responded to this increased demand by aggressively entering new markets and deploying significant resources to those emerging regions. The expansion of international arbitration into new regions as well as steady growth in more established markets has not, however, been reflected in the greater participation of more women. Women are not getting the same opportunities as men, regardless of background.

Statistics published by arbitral institutions indicate quite strongly that, more generally, there is a severe imbalance in the vast number of appointments whether by the parties or by the institution concerned–for instance, the London Court of International Arbitration (LCIA) annual report for 2013 shows that in 2013, 9.8% of the 162 appointees selected by the LCIA and 6.9% of the 160 appointees selected by the parties were female. The LCIA is the only institution which actively pushes for the appointment of female chairs of tribunals. The appointment of European and American arbitrators usually account for a large chunk of the pie, within that the thinnest, barely visible slivers represent female arbitrators. Further analysis of the numbers indicates that things are not really improving.

There are many studies which indicate there is a huge gender gap–for instance, the Institute for Continuing Legal Education in California has carried out studies which show that 85% of the women lawyers surveyed perceived a subtle, but pervasive, gender bias within the legal profession. Almost two-thirds agreed women lawyers are not accepted as equals by their male peers (see also 'Implicit Gender Bias in the Legal Profession: An Empirical Study' by Justin D Levinson & Danielle Young, Duke Journal of Gender Law & Policy Volume 18:1 2010). Despite the fact that approximately 60% of all law graduates are women, this figure steadily decreases over time and rank, such that, by the time we get to the managing partner level, only 4% are women.

The gender gap is to some extent perpetuated by deep-rooted cultural perceptions and misperceptions. In every field unconscious bias is evident and perpetuated. Many studies (for example 'Science faculty's subtle gender biases favour male students'–Moss-Racusina, PNAS, 2012) show categorically that unconsciously, we tend to like people who look like us, think like us and come from backgrounds similar to ours. This means that white men choose white men for board rooms, as counsel, as arbitrators, as judges. The bias clearly is not always unconscious–sometimes it is deliberate negative bias.

In the same report by the Institute for Continuing Legal Education, the findings were that 76% of those surveyed reported feelings of negative bias were from opposing counsel, 64% from clients, 48% from superiors, and 43% from peers. It is interesting to note that most feelings of negative bias were from opposing counsel, and the least was from peers. While 65% did not make any career changes due to these perceptions of negative bias, it is statistically significant that 35% did, and that 37% made no career changes because they believed it would not be any better elsewhere.

Affirmative action has and can effect change. It has been pioneered in many different sectors including; the political arena for numbers of MPs in any one party, the commercial arena, with demands on boards of organisations to have a certain percentage of female directors, in model briefing policies for female counsel to be briefed on cases and in the judiciary for numbers of female judges. For instance, women now account for 20.7% of board members in FTSE 100 companies.

In Australia, the latest percentage of women on ASX 200 boards is 19.8%. In the US, the percentage of S&P 500 companies with at least one female director is just over 90%, yet 10% of these companies still do not have women directors and 28% have just one. The European Commission aims to attain a 40% 'objective' of women in non-executive board member positions in large publicly listed companies by 2020 (see further EU Directive on Women on Boards in 2012). Even that is not enough. There are ways of introducing affirmative action in law and in particular arbitration, but it has to be accepted and taken up by lawyers (young and old) advising their clients, the clients themselves and other counsel and arbitrators. A cultural shift is needed, not just time, to get there.

To women 'coming through the ranks' in arbitration, I would say – persevere! Surround yourself with supportive people: family, friends, colleagues, bosses, mentors. Find support for your ideas, yourself, your career path.

Men overestimate their abilities and capabilities which, in itself, leads to greater confidence, confidence building in others, promotion, pay rises and so on, with their prospects shooting upwards. Women, on the other hand, routinely underestimate themselves leading to a lack of confidence and consequently others doubting their ability, slower promotion, less pay and so on, with their prospects spiralling downwards.

Women need to reverse that trend by helping themselves and helping others. They should be assertive without being aggressive, promote their skills and expertise. They should remember they don't need to mimic male behaviour, and, more importantly, they should be themselves.

Published resources

Article
Prominent barrister to lead arbitration body, O'Gorman, Brigid, 2013,
http://www.lawyersweekly.com.au/wig-chamber/news/14317-prominent-barrister-to-lead-arbitration-body

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Australian Women Lawyers as Active Citizens, Trailblazing Women Lawyers Project Team, 2016,
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