

Diversity, Equity, and Inclusion in the Practice of Law and Dispute Resolution

A Virtual Lecture for the Professors, Fellows, and Students of the ICU Rotary Peace Center,¹ on January 20, 2022

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I am honored and privileged to speak with you today. My thanks to Arakaki-sensei for inviting me to speak. My thanks also to the ICU Rotary Peace Center Fellows for suggesting my topic and for their help and insights as I prepared. My thanks, too, to each person I mention in what I'm about to say.

1. Dignity

My topic is diversity, equity, and inclusion, or DEI as we call it in the U.S., in the practice of law and in alternative dispute resolution, or ADR as it's commonly called. That's a bit of alphabet soup, I realize. Arbitration and mediation are by far the most common forms of ADR.

Before speaking of DEI, I must define it.

When I became Chair of the New York State Bar Association's International Section last June, I made advancing DEI the first of the International Section's priorities for my upcoming term. The editor of the New York State Bar Association's monthly newspaper asked me to answer some

¹<https://rotaryicu.wordpress.com>.

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questions about my goals for my term. One question asked me to define DEI.

Before answering that question, I spoke with my colleague who is our law firm's DEI partner, Daniel L. Morriss. I'll speak more of the role of a DEI partner later. D.L., as he's known, said that DEI means that people of all social, racial, ethnic, or cultural backgrounds, and different genders and sexual orientations, have a seat at the table, are able to participate fully in decisions affecting their lives, and are in control of their own destinies and happiness.

Understood this way, I believe that the achievement of DEI is synonymous with the achievement of the dignity of each and every person in the world. You, me, everyone.

The fundamentality of human dignity and its synonymity with DEI is found in religious and spiritual beliefs. It is the basis also of the Universal Declaration of Human Rights, which the UN General Assembly proclaimed in 1948.

Article 22 states that, “[e]veryone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

As I was preparing to speak today, the ICU Rotary Peace Center Fellows reminded me that Eleanor Roosevelt was instrumental in the drafting the Universal Declaration of Rights. My late brother, Paul, worked in his retirement as a U.S. Park Service Ranger at the Roosevelt Presidential Library in Hyde Park, New York. One of his favorite tasks was taking visitors to

Val-Kill Cottage, which was Eleanor Roosevelt’s private retreat about 2 miles from the Roosevelt mansion.

So, what role do the rule of law and the human rights framework play in advancing human dignity, in advancing DEI?

In *Zen*, the moon is a metaphor for what is true or, more precisely, what it’s really all about. And it is said in *Zen* that a finger may point you to the moon, but the finger pointing to the moon is not the moon itself.

I believe this is an apt way to consider the rule of law and human rights. These are, I submit, fingers that point to the moon. The moon, what it’s all about, is the dignity of each person.

On the website of the United Nations I read that “the backbone of the freedom to live in dignity is the international human rights framework” and that “the rule of law and human rights are two sides of the same principle, the freedom to live in dignity.”³ This, I believe, supports the view that the rule of law and human rights are how we advance and achieve the dignity of each and every person on this big blue marble we call Earth.

2. Legal Practice

In the U.S. in 2020, the murder of George Floyd, a Black man, by a police officer during an arrest and the protests that followed, as well as the violence against Asians because of allegations that the pandemic originated in China, were wake-up calls. Those and other incidents of hate spurred many well-known law firms to take seriously the advancement of DEI.

I’m proud that my firm, Hinshaw & Culbertson, had a long-standing commitment to DEI well before 2020. As just one

³<https://www.un.org/ruleoflaw/rule-of-law-and-human-rights>.

example, among the top 200 U.S. law firms, Hinshaw has earned a grade of 100% on the Corporate Equality Index of the Human Rights Campaign *since 2010*. The Human Rights Campaign is the largest LGBTQ advocacy organization in the U.S.

I was quite proud, too, when a client I brought to the firm, a Fortune 500 company, consistently ranked Hinshaw annually as one of top five firms, of the many firms that company used nationwide, that met the company's DEI goals.

Based on my experience, law firms need to put a partner who is a diverse person in charge of advancing DEI within the firm. We've done that at Hinshaw. The DEI partner should have real authority to effect change and should have direct access to the firm's highest level of management. In many firms, that would be the partner in charge of the firm or the chair of the firm's management committee. The DEI partner should be centrally involved in the recruitment and training of lawyers. The DEI partner should also be front and center in efforts to retain attorneys who are diverse persons, which has been a challenge for law firms historically. The DEI partner should prepare policies and goals for reaching DEI objectives, and the law firm's management must enforce those policies and goals. The DEI partner should be authorized to organize meetings, workshops, town halls, and other programs that are focused on issues of DEI.

I've personally benefited from several such programs. One program was designed to raise awareness of what are called microaggressions. A microaggression is statement or action that, often unintentionally or unconsciously, denigrates members of a marginalized group. An example is saying "you're very articulate" to a person of color. Another is "your name is so hard to pronounce." Saying, "a person's color or gender makes no

difference to me” denies that person’s experience. Learning how my words may impact someone, and training myself to interrupt unconscious biases, are leading me to be as inclusive-minded as I strive to be.

3. ADR

I’ve been involved in the arbitration of commercial disputes throughout my 30+ years in the law. In 2016, the editors of an on-line news-wire, called *Law360 International Arbitration*, asked me to answers to some questions.

One question was: What are trends you see that are affecting the practice of international arbitration?

My answer began: “The most positive trend is the recognition of the need for diversity among both the arbitrators themselves and the lawyers for the parties.”

I’m pleased to say that that is where things are going and considerable progress has been made. I’m disappointed to report that there’s still a ways to go.

So why is DEI in the appointment of arbitrators and arbitral panels important. For one, it is the right thing to do. Moreover, it’s good business because diverse perspectives foster innovative thinking as well as solutions the parties may never have considered. Research bears this out. Time and again, studies show that companies with more women and people of color included in key business decisions resulted in more profitability. For instance, a 2018 study by Boston Consulting Group, reported companies with more diverse teams achieved 19% higher revenue due to innovation achieved through diverse perspectives.

Diverse perspectives also increase the likelihood that the

resolution will be fair in the minds of all involved. Moreover, Reliance on a narrow range of qualifications creates blind-spots, and blind-spots usually impede getting to yes and a win-win result. Instead, as Dr. Dolly Chugh writes in her book *The Person You Mean to Be*, “[w]e need to train our eyes to look for the things we do not see by seeking perspectives from people different than us. We need to ask the questions we are intuitively not going to think of, those that might prove us wrong rather than right. We need to ask for people outside our echo chambers to share their experiences by earning their trust that we will listen fully to what they have to say. We need to keep asking questions when there is consensus in the data or in the room by resisting the urge to assume that the majority speaks for the minority.”

Last November, I had the pleasure to finally travel outside the U.S. and interact in-person with others. I went to Dublin, Ireland, for Dublin International Arbitration Day, where I moderated a panel on diversity and inclusion in international arbitration. It was my honor and privilege that the panelists were four remarkable women who are at the forefront of advancing diversity and inclusion in international arbitration. It was as a result of my participation on that panel that the ICU Rotary Peace Center Fellows asked me to discuss DEI in international arbitration and mediation today.

One panelist was Dr. Jackie van Haersolte van Hof, the Director General since 2014 of the prestigious London Court of International Arbitration. Dr. van Hof also teaches arbitration at Leiden University.

Another panelist was Dr. Patricia Shaughnessy, a member of the International Chamber of Commerce Court of Arbitration and a professor at Stockholm University, where she teaches about

international disputes and commercial law.

Another panelist was Maureen Ryan, the General Counsel of Atlas Renewable Energy, a Latin-American renewable energy company based in Miami, Florida.

Last but not least, panelist Dana McGrath is the President of Arbitral Women and an independent arbitrator in New York. She is also a member of the Steering Committee of the Equal Representation in Arbitration Pledge, also known simply as the “Arbitration Pledge,” and Racial Equality for Arbitration Lawyers.

The conference was not recorded on Zoom so I’ll share with you some of what was discussed.

We discussed Arbitral Women. It is an international, non-governmental organization that brings together women international dispute resolution practitioners. It was founded in 1993 and today has over thousand members in over 40 nations. One of its missions is to advance the interests of women practitioners and promote women and diversity in international ADR.

We discussed the Arbitration Pledge, which was established in 2015 and was the brainchild of Prof. van Hof. The Pledge seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve fair representation as soon practically possible, with the ultimate goal of full parity. The Pledge establishes concrete and actionable steps that the arbitration community can and must take towards achieving these objectives and the ultimate goal of full parity.

Dr. van Hof explained how the Arbitration Pledge came

about. Dr. Hof told us that, just before she joined the London Court of International Arbitration in 2014, she was to speak about diversity and inclusion at an arbitration conference hosted by the International Court of Commercial Arbitration. Dr. van Hof said that, as she prepared for her talk, she was struck by the differences in how in different jurisdictions diversity is regulated, or not regulated, and how inclusive the arbitration scene is, or is not. She also learned in her research of an then-fledgling initiative by U.S. corporations to require their outside counsel to ensure inclusive teams. She discovered also about there was an initiative in the media industry in Denmark in which members promised to refuse to act, or refuse to take on projects, if they felt that the TV series, by way of one example, was not sufficiently inclusive. All this inspired Dr. van Hof to suggest at the ICCA conference that members of the arbitration industry establish what came to be called the Arbitration Pledge.

Dr. Hof said that, after much thought and discussion, it was decided to proceed with just gender diversity as the goal of the Pledge, and she believes that limiting the initial effort is likely the reason for the pledge's success. In 2015, about 16% of appointments of all arbitrator appointments were of women and, in 2020, that had risen to 33%.

Another of the topics we discussed was the value of mentorship in advancing DEI. Ms. McGrath pointed out to us how mentoring benefits both the mentor and the mentee:

Mentees:

- seek and receive advice and guidance critical to progressing in their careers in international dispute resolution.

- broaden their knowledge of international dispute resolution.
- enhance and expand their connections with diverse persons who are leaders in international dispute resolution.
- gain knowledge and skills that help them in their daily working lives.
- receive tailored insights as to how they can achieve their professional goals.

Mentors:

- develop the next generation of diverse leaders in international dispute resolution.
- improve diversity in the future leadership of corporations law firms, and consulting companies.
- enhance and expand their connections to junior diverse practitioners arbitrators mediators and experts.
- develop a larger talent pool of potential diverse arbitrators, mediators, and experts.
- benefit from potential opportunities for reverse mentorship.

Ms. Ryan provided the in-house, general counsel perspective. She spoke about prominent companies that are requiring their outside law firms to meet DEI goals. Hewlett Packard requires the firms it uses to meet diversity goals or face a 10% reduction in invoiced attorneys' fees. Microsoft, by contrast, provides law firms that meet its diversity goal a bonus. Facebook requires the law firms it uses to ensure that at least 33% of the legal teams working on Facebook matters are women and ethnic minorities and that such diverse persons be given leadership roles on the teams. Diversity and inclusion was of the

factors that GM and BP considered when they reduced the number of firms they use.

For both businesses and the law firms they use, this is not robotically simply checking a box and moving on to other business, however. As Dr. Shaughnessy explained, diversity and inclusion is not simply being invited to the party – it is being invited to the party to dance. It is, to use her example, a lawyer letting the client know that this particular diverse person we've put on the team is very well suited for the particular task.

What about racial and ethnic diversity? In January of last year, Racial Equality of Arbitration Lawyers was launched. Membership is free and it focuses on advocacy for inclusiveness of racially diverse arbitration, either as counsel or arbitrators. But equally importantly is access; to give access to those who are underrepresented in the community to the international arbitration field. That's done in part by partnering with arbitral institutions and other organizations that hold conferences to offer scholarships to racially diverse arbitration lawyers who are unknown or don't have the financial or other means to, for example, attend conferences.

Of course, a good way to remedy the lack of diverse persons on arbitration panels is to deliberately seek out diverse persons. Rather than seeking neutrals based simply on their background in the judiciary or big law, the parties should consider gender, color, and age, too. However, until recently, there were no national private rosters of arbitrators and mediators owned or operated by a person of color. In August 2020, Alterity ADR launched with a national roster of highly experienced mediators and arbitrators. Alterity ADR was the first national firm operated by a black woman, Marcie Dickson, and is now the largest private national

dispute resolution firm run by a person of color. Ms. Dickson created Alterity ADR with a mission to increase diversity, equity, and inclusion in the industry – and the roster of neutrals she has assembled is a great stride in the right direction.

4. International Bar Associations

As I mentioned earlier, I became Chair of the International Section of the New York State Bar Association in June and I promised to advance DEI, so I'll provide you with some examples of what we've done to advance DEI.

We started in Tokyo, actually, before I became Chair. In November 2019, the International Section held its annual global conference in Tokyo. The title of the conference was “A World of Many Voices, United In Our Diversity.” It featured a plenary session about human rights, and two of the three topics addressed were DEI and marriage equality. One of the lawyers from Japan's Lawyers for LGBT and Allies Network, or LLAN, was a panelist. LLAN's purpose is the provision of legal assistance to promote the understanding of LGBT and other sexual minorities in Japan and to eliminate discrimination based on sexual orientation or gender identity. Additionally, we held a plenary session on which the panelists were representatives of leading arbitration centers around the world, and it included a discussion of the Arbitration Pledge.

The success of the conference inspired us to push to update the International Section's by-laws to include, first, a commitment to DEI with measurable goals, and second, the appointment of two Diversity Officers.

After I became Chair in June, we celebrated LGBTQ+ Pride Month, which is in June annually, with a virtual event on Japan's

Pride Day. We collaborated again with LLAN, and also with the New York State Bar Association's new LGBTQ Section. We also held our annual retreat on June 19th, Juneteenth, which is celebrated this year for the first time as a federal holiday. Juneteenth commemorates the end of slavery in the U.S. after our Civil War.

The second of my priorities as Chair is the entry into memoranda of understanding with bar associations around the world. A memorandum of understanding is a written agreement with a bar association in another nation in which the bar associations agree to cooperate in promoting exchanges between lawyers in both countries and advancing the rule of law. A memorandum of understanding expressly recognizes the importance of and the need for closer ties between people in the legal profession internationally. The bar associations agree also to promote the exchange of ideas about international legal issues through international programs, seminars, congresses, community outreach projects, and publications.

Since I became chair, we've entered into four memoranda of understanding and I'm likely to sign four more during this second half of my term. The first one I signed was with the Osaka Bar Association, and we called it a memorandum of friendship. With the help of an attorney fluent in Japanese and much practice on my own part, I was able to deliver my address in Japanese and then English. In my address, I looked back on my time in Japan at ICU decades ago and the friendships I formed. I looked back also on a summer during law school when I was at a legal trainee intern at Hamada & Matsumoto, now Mori, Hamada & Matsumoto. I looked forward to visiting Japan again and in order to visit old friends and make more friends.

5. Engagement

This raises the final topic I'll address: engagement. Engagement is reaching out, listening to, learning about, and getting to know people different from you. It means getting out of your comfort zone to learning about and actually experience cultures different from your own. While the word “engagement” is grammatically a noun, in practice it is a verb.

Engagement is the ingredient that gives DEI its flavor. It involves a connotation of the *koine* Greek word *agape* – the virtue that Paul of Tarsus, St. Paul to many, elevated over all others – a connotation of that word that means “loving encounter.” Paul is probably the patron saint of engagement given his travels and loving encounters with peoples throughout the Mediterranean.

I mentioned getting out of your comfort zone in order to truly engage. I should add that, if you're going to engage, engage all the way. I speak from experience. I attended a Jesuit prep school and university. When arrived at ICU a few months after graduation, I did something very much in the tradition of the Jesuits: I immersed myself in *Zen*. I spent weekends at *Zen* temples. I taught English at *Sankō-in*, a *Zen* convent in Koganei that supported itself by operating a restaurant that served *shōjin ryōri*. I took up *shōrin-ji kempō*. The highlight of my engagement was a two week homestay at a *Zen* temple in rural *Kyūshū* for the New Year's holiday.

The homestay in *Kyūshū* was 100% pure, undiluted engagement. The abbot, *Osho-san*, was a jolly, exuberant man and he took me on his daily rounds throughout the community. I met Japanese in all walks of life as they went about the business of their days. At the temple, I pounded rice into *moshi*, cut down

bamboo to make ceremonial bowls for a tea ceremony out of the nodes of the trees, and performed other chores in preparation for the New Year celebration.

Though this may sound heartless, a highlight of my homestay was a funeral. It was held at *Rakan-ji*, a magnificent temple built into a rocky cliff. The cliff's many large caves serve as the temple's rooms. The deceased was apparently a person of importance and *Osho-san* led a number of priests in attendance. I accompanied them outside onto a platform for a sacred meal in front of the crowd of mourners assembled. Several of the priests were visibly surprised, and pleased I think, that I was familiar with how to eat from and then clean and stack the bowls used at the sacred meal. I had learned those skills during the weekends I had spent at *Zen* temples. Engagement is a process, in which one experience builds on another; and when you truly engage, you'll often find appreciation just for making an effort, as I'm sure my handling of the bowls was not at all adept.

This is what ICU is really all about: engagement. It is ICU's mission. You can study about the rule of law and human rights anywhere, but ICU is where people of different nationalities and cultures gather with the express purpose and intention to engage with one another, by working and playing with, listening to, learning about, and getting to know each other. This is why institutions like ICU and the ICU Rotary Peace Center are so important, and I count myself fortunate to have spent a year of true engagement at ICU.

Thank you for listening.

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Kenkyūsei, 1985-86