THE TROUBLE SHE CAUSED.
8 MAY 1997

INTRODUCTION

Kia Ora, Koutou Katoa.

It is a great privilege and honour to have been invited to present this lecture today, and I thank you for the opportunity.

Imagine for a moment the world into which Ethel Benjamin emerged as a newly admitted Barrister and Solicitor of the Supreme Court of New Zealand. 100 years ago the women of New Zealand had been able to vote in parliamentary elections for almost four years and for over 25 years in Dunedin had had access to state secondary education. The Scottish settlers of Dunedin placed a great store by education and by 1897 increasing numbers of girls and young women were beginning tertiary study. The year earlier Ethel Benjamin had completed her law degree. Due, however, to the assiduous work of William Downie Stewart, the Member of Parliament for Otago, the 1882 Law Practitioners Act required that a solicitor or barrister of the Supreme Court of New Zealand be a male person only.[1] His actions stimulated a three way struggle to change the legislation: the law practitioners adamantly opposing the notion that women be admitted to practice in the legal profession; the politicians who ranged themselves on both sides of the debate as they had over the vote for women; and the women lobbyists fresh from a close-run victory to obtain the vote in 1893.

On 11 September 1896 the Female Law Practitioners Act received the Royal assent. It was in fact a political trade-off between the government and a legal profession in disarray over fraudulent and negligent practices and needing better disciplinary powers. In return for providing those powers the government, wishing to appease women and to gain their votes, demanded that the Law Societies abandon their opposition to

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1 For a full account see *Without Prejudice: Women in the Law*, Gill Gatfield

women joining the profession. Neither the stalwarts of the profession nor the members of Parliament, such as the redoubtable William Downie Stewart, who vehemently opposed women having the opportunity to practise law, seriously thought that many women would wish to join the profession. Indeed for many years, and even during my time as a law clerk in Dunedin, most women lawyers did not hold practising certificates and were employed in much the same way as legal executives are today. Among their responsibilities included, of course, the need to attend to their own typing.

In the social climate which prevailed at the end of the nineteenth century Ethel Benjamin's work for women and children and for the liquor industry must have raised many a patrician eyebrow. In the early days of the colony over-consumption of alcohol caused many problems, including the obvious one that women and children suffered from increasing poverty as the family income was spent at the pub. The Women's Christian Temperance Union was very strong in Dunedin and its support was pivotal in obtaining the vote for women. The suffrage movement was based in part on a firm belief that if women had the vote they would ensure that access to liquor was much reduced. In that climate antagonistic to alcohol, it is extraordinary that a new female practitioner would have the courage to flout society's views and act for the purveyors of what my grandmother called "the demon drink".

This evening I would like to consider whether the world in which Ethel Benjamin began legal practice has changed and explore some of the themes of discrimination which affect women, both from the perspective of New Zealand and internationally. I will discuss these themes particularly in relation to women and the law.

WOMEN AND HUMAN RIGHTS

The affirmation and implementation of human rights principles form the foundation of a just society. Such issues cannot be dismissed as of concern only to academics or the international community; they are vital to the peace and prosperity of every society. It has become increasingly apparent that the human rights issues which affect women in particular play a critical part in the quest to achieve a just and fair society. Women's place in every community is vital to the well-being of that society; without their work, both in the formal sector and in the family, most communities would not survive. Neither should it be overlooked that women constitute a significant portion of the world's population. As Mao Zedong is reported to have said: *"Women hold up half the sky"*.

It is now well recognised that enhancing women's status and enforcing their rights on an equal basis with men will do much to achieve the objectives of Equality, Development and Peace adopted at the Fourth World Conference on Women held in Beijing in September 1995.

In 1993 the World Conference on Human Rights had concluded that:

> "The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community. ... The World Conference on Human Rights urges Governments, institutions, intergovernmental and non-governmental organizations to intensify their

> efforts for the protection and promotion of human rights of women and the girl-child."[2]

During the World Conference on Human Rights two significant issues were stressed: first, the universality of human rights, described as:

> "the common language of all humanity"[3]

and, secondly, the importance of including and emphasising the particular nature of women's human rights.

Successive United Nations conferences and regional meetings have concluded that issues critical to the future well-being of the world's people, such as resource development coupled with protection of the environment, the pursuit of peace and the improvement of basic human rights such as health and education are all heavily dependent on an improvement in the status of women. And this improvement is needed urgently in all nations, not only in the developing nations and those nations which are torn by years of war and civil disruption. For it is now well known that although most nations promise equality of opportunity for women, few come close to delivering it. That failure has a huge impact on the ability of half the world's population to contribute fully to the economic, social and cultural, civil and political spheres of the community's activities. In all nations women earn less from paid employment than men; they have less likelihood of inheriting land and other assets than their brothers; they are more likely to be physically assaulted regularly by members of their own families; they are less likely to serve in governments in senior positions; and they are likely to be the sole bread winner for about one-quarter of the world's families. And now they are being infected with the HIV/AIDS virus at a faster rate than men simply because they lack the

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2 World Conference on Human Rights, *The Vienna Declaration and Programme of Action*, June 1993, para 18, p 33.

3 Boutros Boutros-Ghali, Secretary-General of the United Nations' Opening Statement to the World Conference on Human Rights

information with which to protect themselves, or the right or ability to refuse intimate relationships, whether with their own husbands or with the rapist.

These barriers to attainment of equality apply as much in a small but comparatively wealthy country like New Zealand as they do in the nations which we traditionally associate with discriminatory conduct towards women. If women are not to remain disproportionately represented amongst the world's poorest, with all the resulting health problems and lack of community and political participation, there must be both reform of the law and a reform of attitudes, traditions and beliefs which all nations have developed into an ethic which, upon examination, nonetheless has no ethical basis.

THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

Women's human rights have long been a concern of the United Nations. From 1948 when the Universal Declaration of Human Rights was adopted by the General Assembly, the United Nations has acknowledged that the principle of equality for women and men is a basic human right. However, it rapidly became clear that simply because women were part of the human race, their humanity did not guarantee their rights would be acknowledged and their dignity as equal human beings affirmed and protected.

As we all know, when a state pays scant heed to or tramples on the human rights of its own citizens, or in times of internal or international conflict, both women and men will suffer. But women will often suffer separately and additionally because of their gender. It was with this understanding that the Convention was developed. The process began in 1967 and what was for its time a remarkable instrument was finally adopted by the General Assembly in 1979.

The Convention is a comprehensive charter, the primary focus of which is the protection and promotion of the human rights of women. As at February 1997 the Convention had been ratified by 156 states of the 185 United Nations member nations. While many states do not acknowledge the contribution that women make to the economy, to the family and to society, the Convention emphasises that discrimination in any of these areas of human life will hamper economic growth and prosperity and will detrimentally affect society in general. It also recognises the role of education of both men and women in changing attitudes, so equality of rights and responsibility become accepted, and prejudices and practices based on tradition or stereotype are overcome. Another important feature of the Convention is its explicit recognition of the goal of actual as well as legal equality and of the need for temporary special measures to achieve that.

Eleanor Roosevelt as early as 1958 saw human rights thus:

> "Where after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any map of the world. Yet they *are* the world of the individual person: the neighbourhood he lives in; the school or college he attends; the factory, farms or office where he works. Such are the places where every man, woman or child seeks equal justice, equal opportunity, equal dignity, without discrimination. Unless these rights have meaning there, they have little meaning anywhere."[4]

Given that it is in private life that women's rights are violated daily in every village, city and country in the world, the Convention places particular emphasis on the protection of women's rights in both the public and private spheres. The

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4 Remarks made by Eleanor Roosevelt at a ceremony at the United Nations, New York, March 27, 1958, in Phillips *You In Human Rights* 2 (1967) quoted in *Human Rights of Women* edited by Rebecca J Cook, at p 90.

committee of CEDAW in a recent General Recommendation[5] opened its discussion of equality in marriage and family relations thus:

> "Public and private life
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> Historically, human activity in public and private life has been viewed differently and regulated accordingly. In all societies women who have traditionally performed their roles in the private or domestic sphere have long had those activities treated as inferior.
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> As such activities are invaluable for the survival of society, there can be no justification for applying different and discriminatory laws or customs to them. Reports of States parties disclose that there are still countries where de jure equality does not exist. Women are thereby prevented from having equal access to resources and from enjoying equality of status in the family and society. Even where de jure equality exists, all societies assign different roles, which are regarded as inferior, to women. In this way, principles of justice and equality ... are being violated."

The need to ensure that women's rights are to be protected in both public and private life is an essential undertaking for states which have ratified the Convention. It is also one of the most difficult to implement. While there are states which themselves violate women's rights in the private sphere, most frequently the violations are perpetrated by individuals and it will often be the state's acquiescence in that discrimination or violence against women which results in it failing to implement the provisions of the Convention.

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5 *Equality in marriage and family relations*, General Recommendation No. 21 (13th session, 1994)

The Convention provides a code against which ratifying nations can measure their commitment to human rights and particularly to those affecting women. The obligations assumed are wide ranging. In the Convention the definition of discrimination against women is:

> "... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing of nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

Trends of discrimination against women

As you will appreciate, the Committee on the Elimination of All Forms of Discrimination Against Women considers large numbers of reports from States Parties each year. Themes of discrimination against women which are common to all countries emerge and form the basis for detailed examination and analysis. Those which may be of interest include:

- **the low numbers of women occupying positions of influence in public and political life**

It is perhaps to be expected that I will wish to rehearse the reasons for encouraging the far greater participation of women in public life. There is much to gain in ensuring that women take their place alongside men in the public life of the community and in the judiciary[6]. The community has much to lose if it does not draw on the talents and education of one half of its population, and every institution which serves the public ought to reflect its composition. In that way it can be, and appear to be, responsive to the needs of all sectors.

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6 See Chief Justice's comments advocating a better gender mix in the judiciary in *Report of the New Zealand Judiciary 1996*, at pp 6-7.

- **women's economic position**

In many parts of the world economic stabilisation and adjustment programmes have either been imposed by institutions such as the World Bank or adopted voluntarily, as has occurred in this country. Increasingly it is recognised that stringent programmes have a disproportionate effect on women unless they are coupled with measures to ensure that women's contribution to the nation's development is adequately measured and protected.

As the analysis of trends and statistics provided in *The World's Women*[7] puts it:

> "Economic crises and stabilization and adjustment programmes have brought increased hardships to many people in much of the developing world, especially the heavily indebted countries, and these have particularly affected women. With the stabilization and adjustment processes relying heavily on cuts in government spending, women have been disproportionately squeezed out of public sector employment. Cuts in such government services as health, child care, family planning and education have hit women particularly hard, setting back women's earlier gains. Women generally depend more on health services than men because of child-bearing, because of their responsibility for their family's health and because they outlive men and require more services in old age.
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> The burden of inflation has fallen heavily on women who are responsible for procuring staple goods for the household. Often stabilization and adjustment plans have mandated wage freezes, the resources for

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7 *The World's Women 1970-1990: Trends and Statistics* (1991) UN Publication ISBN 92-1-161313-2 at p 95.

obtaining goods have dwindled, and women have had to increase their working hours just to ensure their families' survival. In addition, the costs of imported processed goods or time-saving technologies have become prohibitive for many people - and again the increased work burden has fallen mainly on women.

Rising interest rates, another result of structural adjustment, also have an insidious effect on women. Because women lack collateral and are discriminated against by formal lending institutions, they have much less access to formal credit than men. So, they must rely more on informal lending institutions that charge very high interest rates - pushed up even higher by rising formal rates. An increasing part of women's meagre operating surplus then has to be spent on these payments, adding even more to their work burden."

The Beijing Platform for Action at the 1995 United Nations Fourth World Conference on Women states:

"Today more than 1 billion people live in extreme poverty; the overwhelming majority of them are women. In the past decade the number of women living in poverty has increased disproportionately to the number of men, and the risk of falling into poverty is higher for women than for men. Poverty is particularly acute among women living in rural households.

Women are poorer because they have fewer economic opportunities and less autonomy than men. Their access to economic resources, education and training, and support services is limited. They also have very little participation in the way decisions are made. The rigidity of socially prescribed roles for women and the tendency to

scale back social services have increased the burden of poverty on women."

According to a report in *The Dominion* in October 1994, the top 20% of New Zealand households received 45% of the country's gross income in 1993 (compared with 35% in the late 1970s). Their share was expected to grow to 50% by 1997 to 1998, leaving about 3% for the poorest one-fifth of the population. Consistent with the analysis in the Beijing Platform for Action, the bottom one-fifth of households overwhelmingly comprise female, Maori and Pacific Islanders. One must add into the equation the fact that in New Zealand, as in every other nation in the world, women will be the great majority of those who have the responsibility for the children in the one-quarter of families which are headed by sole parents, women work longer hours in both paid and unpaid employment than men, and that as the state reduces its role in formal welfare programmes it is the women in the community who assume the responsibility for the sick, the aged and the very young. Moreover, in New Zealand there is as yet no policy of paid maternity leave, a distinction shared now by very few countries, and nor is there any formal subsidy for child-care expenses. Women's ability to participate in the workforce and public life of the community is therefore severely constrained.

- **the low level of literacy among women, particularly in developing countries, and the low level of legal literacy among all women**

Women or men who are illiterate or have a poor education are more likely to have large families because they are less able to have easy access to family planning advice. This has an impact on the environment, on the health of the population and on a nation's economy. Women who are educated are better able to provide for their children in a world where around 25% of the families are totally supported by women.[8] Women who

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8 *The World's Women 1970-1990: Trends and Statistics* (1991) UN Publication ISBN 92-1-161313-2 at p 18.

are educated and literate can more readily access public information concerning health and justice, to name but two.

Legal literacy is of critical importance if women are to know their rights and obligations and how to exercise them. Few women in developing countries have any concept of their legal entitlement. It is common for the committee of CEDAW to learn that although (to give one example) a law prohibiting the giving of dowry is in place, in the rural areas that law is unknown or simply ignored. In developed countries such as New Zealand where legislation and the common law guarantees equality, it is women's access to the justice system that is their greatest obstacle.

Because in all countries women earn less than men, are very much the minority in positions of power and influence, and have a far greater burden of work, both paid and unpaid, they have neither the time nor the resources to take their disputes to a court or to promote changes in unequal laws. Increasingly legal literacy campaigns are helping to make women fully aware of their legal rights and to encourage access to legal redress, particularly for low income women. In New Zealand the important Law Commission project *Women's Access to Justice* highlights the issues. In its consultation paper *Women's Access to Legal Advice and Representation* the Law Commission acknowledges that both women and men experience barriers to obtaining legal advice and representation but women experience particular problems because of the effects of gender. The report quotes The Australian Law Reform Commission definition of gender as:

> "A social construction [which] arises from the commonly held values, beliefs and perspectives of an identifiable group of people. It develops over time and becomes part of the culture of the group. Gender describes more than biological differences between men and women. It includes the ways in which those differences, whether real or perceived,

> have been valued, used and relied upon to classify women and men and to assign roles and expectations to them. The significance of this is that the lives and experiences of women and men, including their experience of the legal system, occur within complex sets of differing social and cultural expectations".[9]

The New Zealand Law Commission notes that:

> "Although the effects of gender unite to some degree the experiences of women as a group as they seek to obtain legal advice and representation services, their experiences can vary widely. Other social forces such as ethnicity, age, sexual orientation and disability all operate in distinct ways to affect access to legal advice and representation services."[10]

Women, and for that matter the men, who need legal advice and representation will very often find themselves entering an alien world; one where lawyers and judges speak a different language, dress expensively and work in luxuriously appointed premises. The distinction is particularly marked for women because of their over-representation in the poorest sectors of society.

With these factors in mind the Law Commission isolated the following barriers which women must overcome to obtain and use legal services:

- Finding legal advice and representation
- Choosing an appropriate legal service provider
- Working with the legal service provider

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9 *Equality Before the Law* (ALRC DP54 1993) 1.

10 *Women's Access to Justice*, NZLC Miscellaneous Paper 9, April 1997, p 4.

The reasons which prevent women from finding legal advice and representation are:

- Fear and cost of lawyers:

> "Lawyers cost, what, $150 per hour? Even if I can find a job that pays $15 an hour it would take me ten hours to earn what I pay for one hour from a lawyer. That's ridiculous."[11]

- Lack of information about the law:

> "I don't know anyone who knows about the law or where to go."[12]

> "I didn't know how to ring the Court or a lawyer because I couldn't find it in the phone book. For Doctors and Hospitals you look in the front."[13]

Many women speak of the barriers operating in their private worlds which prevent them obtaining legal advice. This is particularly so when there is a dispute in the family. Fear of violent partners prevents many women from seeking legal advice. Others fear their partner's ability to manipulate the legal system. Their male partners after all are more likely to operate in the business world, to have contacts, to understand the intricacies of commercial dealings or have the ability to hide income and assets from their wives. Maori women have a particular difficulty. One woman concerned about the shortage of Maori lawyers told the Law Commission:

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11 Ibid p 6.
12 Ibid p 6.
13 Ibid p 6.

> "It's horrible to say, but it is terrible communicating with Pakeha. The power goes to their heads and leaves their heart. The culture of Pakeha is not sensitive to our cultural ways. If someone would just try to understand our ways."

And:

> "We need more Maori women lawyers ... Someone who can understand where we come from as Maori. Someone who we do not have to explain ourselves to."[14]

Women who live in isolated or rural areas have even greater difficulties:

> "Nine times out of ten, people just can't afford the fares to travel. It's too expensive. When you weigh the fare up against the kids' bread on the table there is no choice."[15]

Without some basic knowledge of their rights, a reasonable degree of access to legal advice and representation at a cost which they can afford or with the assistance of legal aid, a very large percentage of New Zealand women cannot be said to have access to the law. The securing of human rights has been a hollow victory if women have little opportunity of obtaining legal redress.

- **the Court system**

Other barriers women face are those of the courtroom itself. Women and child complainants in trials or hearings involving allegations of sexual violence must, usually in the presence of a jury and with male lawyers, court takers and a judge observing, describe incidents which are deeply personal and invariably

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14 Ibid p 9.
15 Ibid p 11.

terrifying and sickening to recall. The rape complainant will often be challenged to concede that she consented to the sexual assault. A recent example in my court typically describes the ordeal. A woman found by a former partner with another man in her house was beaten by him so that her eye was injured and bleeding profusely and one tooth knocked out. The defence to the subsequent act was consent. Her behaviour following the attack was telling. She lay beside the man for at least an hour, then at about 2am got up and cleared away a large number of beer cans. She then took some secateurs to her neighbour's house and after asking the neighbour to call the police, returned to her own home where the man was still in bed. She went to the toilet.

This bald account may indicate to the casual observer that she was unperturbed by what had occurred. Bear in mind that she is in considerable pain from the eye injury and cannot stop the bleeding. In her evidence she explained that she waited until she was certain the accused was asleep, checked the depth of his sleep by clattering the beer cans so that if he woke she could explain she was doing the housework and, if he followed her next door, could say that she was returning the gardening implements to a neighbour - even though it was between 2 and 3am. She came back to the house for the same reason. If he woke and found her gone he would simply track her down as he had done in the past and attack her again.

It seems possible to me that male lawyers or judges would not necessarily understand the motivation behind her actions, whereas many women would immediately realise why she had acted in an apparently bizarre manner. To a woman the defence of consent tended to suggest a gap in understanding.

There are other indicators of the gulf between male and female perceptions of rape, which we should recall is thought to be one of the most under-reported crimes in New Zealand and with a

poor conviction rate[16]. In the standard direction for sexual violation by rape it is suggested that the judge directing the jury on the issue of consent might say this:

> "Consent means a true consent given by a person who is in a position to make a rational decision. ... the fact that a woman has refused intercourse or has resisted, by words or conduct, is normally evidence of a want of consent. There is a difference between not wanting intercourse and consenting or agreeing to it. ... a true consent may be given reluctantly or hesitantly or even tearfully. It may be regretted afterwards. If consent is given, even in that manner, provided it is without fear of the application of force or the result of actual or threatened force, then the act of sexual connection would not be rape - but submission to the inevitable, or submission out of despair when trapped, is not real consent."

I have some difficulty with the notion that consent can be given reluctantly, hesitantly or tearfully, and that words or actions indicating a refusal to consent only *normally* means no. To a woman, I would venture to suggest, that definition of consent is a contradiction in terms. But to many men, socialised from an early age to believe that women can be persuaded, it may not be an alien concept.

- **violence against women**

The nations of the world have become so disturbed at the prevalence of violence against women that a number of important steps have been taken to combat it. CEDAW takes great care when examining the reports of States Parties to ascertain the level of violence against women, whether it is ignored, condoned or even perpetrated by the state, and what

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16 Material collated by Rape Crisis from their clients between 1992 and 1996 shows that two-thirds (67.7%) of the rape survivors did not report the rape or sexual abuse to the police.

measures are in place to combat it. The United Nations has appointed a Special Rapporteur on violence against women and itself has developed a Declaration on the Elimination of Violence Against Women[17]. In that declaration the General Assembly affirmed that:

> "... violence against women both violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms, and [the General Assembly is] concerned about the long-standing failure to protect and promote those rights and freedoms in relation to violence against women."

Violence against women is defined in the Declaration as:

> "... any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."

Under Article 2:

> "Violence against women shall be understood to encompass, but not be limited to, the following:
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> (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

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17 G.A. Res. 48/104 (1994), 1 IHRR329 See also *Violence Against Women* CEDAW General Recommendation 19 (11th session, 1992).

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs."[18]

It is now widely acknowledged that such violence prevents women from participating fully in the family, in the workplace and in their community. As with those who have a low level of literacy, those whose health is poor, those who earn an inadequate income, this reduced ability to participate in community life is a vast waste of the talents and education of one half of the world's population.

Moreover, in times of armed conflict, as demonstrated in recent years in the former Yugoslavia, in Rwanda, and now in Zaire, women suffer the ordinary torments of war equally with men - when they are shot or knifed they too bleed or die. But they suffer additionally because they are women. It is now well known that sexual attacks, primarily on young girls and women, are a feature of war, are used as a means of terrorising the civilian population and humiliating and degrading it; even, in the former Yugoslavia, as a means of producing children of the right ethnic blend. As we now watch events unfold in Zaire, we know that the majority of the refugees scattered through the jungles and dying of hunger, wounds or disease, will be women with young children or the elderly to care for. In all wars the vast majority of refugees are unarmed women with dependents to care for and who are easy prey for the soldiers on either side.

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18 And see CEDAW General Recommendation 19 (11th session, 1992) *Violence Against Women.*

Widespread trafficking in women leads inevitably to violence against them. Whether women are brought into countries in large numbers as mail-order brides, as domestic servants, or for prostitution, the vast majority are treated in a degrading or violent way in the host country. The threat to women in developing countries where they are unable to provide a living for themselves or their families is real: trafficking occurs on a huge scale in many parts of the world.

While the themes to which I have referred may overlap, there is an inference to be drawn that where women are not treated equally not only they and their families suffer, but the community itself loses access to an extremely valuable human resource. But equality of treatment does not always denote equality of outcome. Consequently, it is necessary both to address de jure the obstacles to women's equality and also to overcome the de facto obstacles to achieving that end. It is in this area that throughout the world the historic and serious impact of tradition, cultural practices and religion have affected women's position in society. The trends to which I have referred can be identified in every report before the committee. So too is there almost always a theme of unequal treatment because of the dictates of tradition or religion which are not necessarily enforced or condoned by the state. A contemporary example is the imposition on the women of Kabul of strict Islamic law by the Taleban. Without entering into the debate as to whether the religious law being imposed is a true interpretation of the teachings of the Koran, the outcome is that women in Afghanistan who must earn a living to support their families will be prevented from doing so. They must wear the veil and may not go out without a close male relative. They may not go to work or school.

The irony is that so many women are obliged to earn an income to provide for their families because the long wars in Afghanistan have resulted in the death or disability of their husbands, fathers or brothers.

In other parts of the world traditions which preclude women from eating at the same table as men, which require dowry payments, demand genital mutilation, or prevent women from owning land or inheriting on an equal basis with men, are all widespread practices with serious ramifications for women. While in New Zealand religious, cultural or traditional practices discriminating against women are not so dramatic, a brief review of the efforts many families will make to ensure that the sons take over the farmland, the discouragement of women's full participation in many churches and against speaking on the marae, all reflect attitudes which can have a serious outcome for women and which are reminiscent of more draconian traditions in other parts of the world.

OPTIONAL PROTOCOL[19]

Unlike other United Nations human rights instruments, CEDAW has no inherent powers to encourage States Parties' compliance with the Convention. While its primary role of examining the reports of States Parties is a valuable one, nonetheless individual women or groups of women whose rights are being violated or who live in countries which fail to implement the Convention have no direct means of having their grievances addressed. Recognising this gap in the Convention and the widespread failure to implement women's human rights, non-governmental organisations and the committee of CEDAW have proposed that an Optional Protocol to the women's Convention be adopted.[20] An Optional Protocol is effectively an addendum to the Convention which States Parties to the Convention can elect to ratify. It provides a mechanism by which women or groups of women may complain direct to the committee of CEDAW. There are models and precedents for such an instrument, both in the United Nations system and regionally. The International Covenant on Civil and Political Rights has a

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19 See Economic and Social Council Document E/CN.6/1997/WG/L.1 10 March 1997.

20 For an account of the process see *Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?,* Byrnes and Connors, Brooklyn Journal of International Law [Vol. XXI:3 1996].

First Optional Protocol which provides a vehicle for individuals to communicate direct with the Human Rights Committee. The Convention on the Elimination of Racial Discrimination and the Convention Against Torture both have similar procedures.

Following the drafting of a model Optional Protocol for CEDAW and with the impetus given by the Vienna Declaration and Programme of Action from the World Conference on Human Rights and the Beijing Platform for Action from the Fourth World Conference on Women, the General Assembly of the United Nations has now begun the process of drafting an instrument which will enable women or groups of women to bring their complaints direct to the committee. Such women must first be citizens of nations which have ratified both the Women's Convention and the Optional Protocol and must have exhausted their domestic remedies. While the notion of communications or complaints mechanism for CEDAW is now accepted, its terms remain the subject of intense debate. At a meeting of the Commission on the Status of Women held in New York in March 1997, some of the more controversial proposals for inclusion in the instrument were:

- **Standing**

The model protocol includes the right for groups of women or organisations to bring complaints on behalf of other women. There is a strong lobby which wishes to have standing limited to those individuals or groups of women who are directly affected by a failure to implement the Convention. Women's non-governmental organisations and the committee of CEDAW argue, however, that women's lack of literacy and legal literacy, the burden of work they bear, their reduced financial resources and the difficulties within their own families that most would face in bringing an international action, all preclude them from taking advantage of the procedures offered by an Optional Protocol. Indeed, as a significant number of violations of women's human rights occur in the private sphere of their lives,

many women may actually be physically endangered if they tried to bring a communication to the committee.

- **Inquiry Procedure**

The Convention Against Torture has an inquiry procedure which it has used on a number of occasions and which would provide a useful model for the Optional Protocol to CEDAW. When the committee

> "receives reliable information indicating a serious or systematic violation by a States Party of rights in the Convention"

it may initiate an inquiry, which realistically cannot be conducted unless the country concerned acquieses. Such an inquiry would normally involve a visit to the country or countries concerned.

Non-governmental organisations have stressed the need to include this procedure in an Optional Protocol for CEDAW. They emphasise that

> "the committee should have the authority, on its own initiative and unhampered by political and other considerations, to examine any allegations concerning serious or systematic violations of the articles of the Convention ... The enquiry procedure would facilitate the examination of widespread violations such as fatwa-related violence, violence that crossed national borders and implicated several governments, such as trafficking, or violence against women in conflict situations."[21]

It envisages CEDAW working in close cooperation with other United Nations agencies in operating an inquiry procedure. For

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21 E/CN.6/1996/10 p 23.

example, in times of conflict the inquiry might operate in conjunction with the United Nations High Commission for Refugees or with the Special Rapporteur on Violence Against Women. There was initial widespread indifference or antagonism to the inclusion of an inquiry procedure, but progress has been remarkable. It now seems likely that this procedure will be available under the Optional Protocol.

There are many hurdles yet to be passed before an Optional Protocol providing a complaints procedure for women will be available. It should, however, be said that political opposition to such an instrument was originally overwhelming; but States Parties seem now to accept that this procedure is needed if the gulf between the de jure and de facto situation for women's human rights is to be bridged, that it is discriminatory if a procedure available under the ICCPR and the Torture and Race Conventions is not also available for women, and are too ashamed to articulate their privately held notions that a committee of women would not be equipped to monitor an Optional Protocol.

Efforts made by governments which are supportive of such initiatives, such as Austria, the Netherlands, the Philippines and South Africa, have also been of great assistance. New Zealand has as yet not determined what position it will take with regard to the ratification of a protocol, but it has expressed itself as being "anxious to find effective ways of addressing violations of the human rights of women".[22] It is now anticipated that the drafting of the Optional Protocol to the Convention will be completed at the next meeting of the Commission on the Status of Women to be held in March 1998. It is possible that in order to mark the fiftieth anniversary of the Universal Declaration on Human Rights and the fifth anniversary of the World Conference on Human Rights, which first urged the adoption of an Optional Protocol, the instrument will be completed and adopted by the General Assembly at the end of

22 E/CN.6/1996/10 p 9.

1998. I am optimistic that New Zealand will play a constructive role in ensuring that the instrument is effective and forward-looking and ultimately that this nation will be amongst the first to ratify it.

The provision of this instrument is an important step forward in ensuring that at an international level there is the power for women to encourage full recognition and implementation of their rights. It may seem ironic that in order to ensure this women support the drafting of yet another legal instrument. If nations fail to comply with their own constitutions or have in place policy which has the effect, if not the intention, of discriminating against women, then it is unlikely that a legal instrument, no matter how lofty, will change the situation. There are, however, two basic reasons. The first is the symbolic importance of such an instrument. The second is the provision of proper implementation machinery will enhance that available to women in their own countries. Provided that the women win the battle over the right to bring complaints on behalf of other women, then it is probable that major human rights violations of women will be examined in the United Nations system. This will be a powerful incentive to states to ensure that the gap between reality and the law is narrowed.

THE INFLUENCE OF THE CONVENTION ON THE WORK OF THE COURTS

As an international treaty the Convention has the potential to influence the law in several ways. The New Zealand Law Commission has summarised five major ways in which Courts may take a treaty into account.[23] They are:

- as a foundation of the Constitution;
- as relevant to the determination of the common law;
- as a declaratory statement of customary international law which is itself part of the law of the land;
- as evidence of public policy; and

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23 NZLC, *A New Zealand Guide to International Law and its Sources* (Report No 34 1996).

- as relevant to the interpretation of a statute.

Perhaps the most likely use of the Convention will be in arguments concerning the interpretation of statute, and there is some precedent for this in New Zealand.[24]

In a number of cases in New Zealand the Courts have accepted that the New Zealand Bill of Rights Act, which invokes certain of the provisions of the International Covenant of Civil and Political Rights, is relevant to the development of the common law.[25] The Courts may also be persuaded that, in an appropriate case, the common law should be developed consistently with the Women's Convention.

The Commonwealth has taken a lead in considering how international human rights principles can be incorporated into the domestic jurisprudence. At six separate Commonwealth Judicial Colloquia senior members of the judiciary have affirmed the Bangalore principles[26] reflecting the universality of human rights inherent in men and women and the vital duties of an independent judiciary in interpreting and applying national constitutions and laws in the light of those principles. From that initial and general approach to the issue of human rights two further colloquia were convened, in 1994 at Victoria Falls at Zimbabwe and in 1996 at Hong Kong, both examining the

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24 In *Van Gorkom v Attorney-General* [1977] 1 NZLR 535 (SC) Cooke J employed the (then) Declaration on the Elimination of Discrimination against Women, citing *8 Halsbury's Laws of England* (4th ed) para 844, which states that the social rights contained in the United Nations Declaration of Human Rights and the European Convention on Human Rights: "[M]ay be regarded ... as representing a legislative policy which might influence the courts in the interpretation of statute law."

25 Section 3 of the Bill of Rights provides that "This Bill of Rights applies only to acts done – (a) ... by the judicial [branch] of the government of New Zealand ... ". See *R v Hufflett* (Unreported CA 453/93 17 December 1993) where the Court said at p 7 "[T]he Bill of Rights applies to acts done by the judicial branch of the government of New Zealand. There is considerable force in the view that the Courts should accordingly recognise the Bill of Rights protections as and where appropriate in evolving the common law." It was accepted in *Solicitor General v Radio New Zealand* [1994] 1 NZLR 48, 58 that "the New Zealand Bill of Rights Act 1990 applies to ... acts done by the judicial branch of the Government under 3(a)." This was further accepted by Blanchard J in *Duff v Communicado* (Unreported HC Auckland CL 20/95 18 December 1995).

26 Developing Human Rights Jurisprudence, vol 3: *The Domestic Application of International Human Rights Norms* Judicial Colloqium in Bangalore 1988.

domestic application of international and regional human rights norms as they relate specifically to women.[27] Each Declaration emphasised the responsibilities placed on judicial officers. The Victoria Falls Declaration included for instance:

> "Judges and lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women."

In the Hong Kong Declaration:

> "The participants noted that many opportunities exist for Judges and other judicial officers to draw on the Convention of the Elimination of all Forms of Discrimination against Women and other international human rights instruments so as to interpret and apply creatively constitutional provisions, legislation, the common law and customary law. In so doing, they drew attention to the wealth of decisions from countries which shared jurisprudential traditions where Judges had engaged in such creative interpretation and application. The importance of educating the judiciary and the legal profession with respect to international human rights standards and principles relevant to gender issues was stressed, as well as the need for national judiciaries to carry out studies on gender bias in the judicial process. .... Participants identified a number of areas where there are clear violations of the human rights of women which might be addressed by the utilisation of international norms in domestic decision making. These included, in particular, discrimination in

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27 Commonwealth Secretariat Report of the Commonwealth Judicial Colloquium on Promoting the Human Rights of Women, Victoria Falls, Zimbabwe, August 1994, and Hong Kong, May 1996.

> matters of nationality, citizenship, poverty and inheritance, which has serious implications for the exercise and enjoyment by women of either the fundamental human rights. Participants also encouraged the review of legislation to ensure its consistency with international human rights obligations undertaken by individual countries."

In New Zealand amongst lawyers and the community at large there is a growing recognition of the need to reinterpret laws and traditions in the light of evolving social attitudes towards women, and international human rights norms. In New Zealand women's groups have begun to assist litigants in the process.

In a judgment delivered by the New Zealand Court of Appeal[28] last year the Auckland Women Lawyers' Association applied and was granted leave to appear as amicus curiae on the grounds that the case raised issues of considerable public importance - a role which the Court described (not without controversy) as having been of great assistance. The issue for the Court's determination was whether Ms Ruka lived in a relationship in the nature of a marriage. If she did then she was not entitled to the welfare payments she had received and the convictions for fraud under the provisions of the Social Security Act and the Crimes Act must stand. The Court found that the evidence had established that Ms Ruka had been repeatedly raped and beaten to the extent where she exhibited the condition of "learned helplessness" and was thereby "helpless to help herself". Her partner also refused to contribute financially to the support of their son or the household generally. The Court held that the phrase "relationship in the nature of a marriage" could not apply to one where there was no mutual commitment and where the facts established that there was no financial responsibility and interdependance. A relationship characterised by such serious violence did not disclose the commitment required.

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28 *Ruka v Department of Social Welfare* [1997] 1 NZLR 154.

In his judgment (at p 170) Thomas J referred also to the Domestic Violence Act 1995 which came into force on 1 July 1996 which:

> "... reflects the legislature's concern about the plight of woman [sic] who are the victims of domestic violence in domestic relationships by recognising that domestic violence, in all its forms, is unacceptable behaviour, and to ensure that, where it does occur, there is effective legal protection for its victims. (see s 5)
>
> Initiatives of this kind reflect the extensive work being undertaken at an international level to ensure that violence towards woman [sic] is recognised as a major barrier to women achieving fundamental human rights and freedoms. Ms Bates elaborated this work at some length and referred the Court to a number of declarations and recommendations which have emanated from various international bodies, including CEDAW (the Committee for the Elimination of Discrimination Against Women). While the importance of this work is recognised, it is not necessary to traverse the reports in this judgment. It is sufficient to acknowledge that they emphasise the disastrous effect of violence against women and the extensive impact which it has on the basic rights of women."

Where such proceedings are initiated there is no doubt but that the judiciary must take a leading role in familiarising itself with and applying universally recognised human rights principles affecting women.

But it must be recognised, however, that in many countries the majority of judges have little understanding of international human rights law or of the way in which gender bias has

become entrenched, not only in the institution itself but more generally in the administration of justice. One commentator has said:

> "... international law in general and international human rights law in particular is usually foreign to judges. Training is important to show judges how this body of law can be used domestically and to make this law more accessible to them."[29]

The first step for both counsel and the judiciary is to become familiar with the Convention on the Elimination of All Forms of Discrimination against Women and other relevant United Nations Conventions and apply them where there is a gap in the statute or common law, in the knowledge that an international Convention which has been ratified by New Zealand has real application.

JUDICIAL EDUATION

The second step is to ensure that those involved in the administration of justice, including the police, the legal profession and the judiciary, have a better understanding of the nature and extent of gender discrimination. When one recognises that the legal profession and the judiciary is comprised predominantly of men, particularly at the senior level, the void between our understanding of the community which we have sworn to serve and the reality for women is vast indeed. For this reason the judicial conference on gender equity to be held next week is a major initiative designed to provide information to the whole of the New Zealand judiciary who exercise power over and in relation to the lives of women, about the situation of women in New Zealand and the disadvantages under which they operate. The systemic nature of discrimination against women is as real in the New Zealand legal system as it is in any other country. Research

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29 *Human Rights of Women, National and International Perspectives*, edited by Rebecca J Cook, p 30.

demonstrates that within the judiciary the women judges understand better the lives which women live, even if there remains a gulf of privilege, education and wealth between us and most women litigants or witnesses. The education programme is led by our Chief Justice, thereby demonstrating his commitment to the project. During the conference, historic because it is the first time in New Zealand that judges from all benches will gather together for an education project, we will be provided with information on commonly held myths and stereotypes concerning women in the legal system, the impact on women of their socio-economic position in the community, the impact on all women of the pervasive level of violence in the community, and we will hear from a number of women themselves. Similar projects in other jurisdictions have demonstrated that judges emerge better able to understand the position of women in their society and therefore better able to discharge the judicial oath *"to do justice to all people without fear or favour, affection or ill will."*

ETHEL BENJAMIN

Perhaps many in this audience by now will think that I have forgotten the purpose of this occasion. Well, let me assure you that I have not.

Outward appearances suggest that in the last 100 years there has been a transformation to a just and fair society. Women in New Zealand now practise law in large numbers and comprise about 14% of the judiciary. Our court dress and society have changed but some traditions have not and many obstacles remain.

The fact that Ethel Benjamin immediately became a barrister suggests strongly that she had either been unsuccessful in obtaining employment in a local firm or simply recognised that she would have no hope of gaining a job where she would be treated the same way as the young male graduates. Certainly the fact that the charge against admission of women to the

profession was lead by a local lawyer and politician seems to suggest that the Otago District Law Society was less than enthusiastic at the prospect. She tilted at many windmills: from the start placing herself firmly in the middle of the front row of the formal photograph taken of the Otago legal profession in 1902, surviving a debate in which she was not, it appears, consulted over what court dress was appropriate for her, and she responded with spirit to complaints about her advertisements for work, saying that if she received briefs from the male members of the profession guaranteeing her a modest income there would be no need to advertise.

Is the situation very different today? Apart from the difficulties that younger women lawyers face in obtaining the better work in practice or partnerships, the senior and able women in the profession report that they are simply not being briefed. Justice Elias openly says that she accepted judicial appointment *"in order to practise law"*. Since taking silk in 1988 as the first woman to do so in New Zealand, she struggled to overcome the profession's antagonism to her admission to the inner Bar and to gain the level of work for which her formidable intellect and skills equip her.

Over the years I have many times tried to imagine how Ethel Benjamin would have coped. I can only conclude that she was a woman of rare intelligence and enormous courage. We do know that she was very determined. And perhaps the support she received from her parents, who appear to have been relatively privileged, might have made her oblivious to or contemptuous of the storm swirling around her.

My own time as a student, a law clerk and ultimately a qualified solicitor in Dunedin, 70 years later, provided me with many insights into Ethel Benjamin's career. My experiences are very similar to those of many other women lawyers. For a moment allow me to reminisce. My court dress was critiqued, not by the Law Society but by the presiding Judge in the Supreme Court. While studying crimes the lecturer declined to cover the

whole segment in the Crimes Act on sexual crimes. When I finally gained a job as a law clerk I was paid less than my similarly qualified male colleague and a number of the secretaries felt I ought to be doing my own typing. The first Bar dinner I attended was memorable for the fact that a barrister still in practice today - and I should mention appearing before me on occasion - spent the whole evening complaining loudly that I was ruining his evening. My first appearance in the High Court was marked by the then Crown Prosecutor covertly displaying an advertisement for panty-hose - a picture of a young woman barrister dressed in court dress, but with gown and skirt ending at thigh level. That picture, I am told, hung in the robing room for years until presented to me, suitably framed, on my appointment to the High Court Bench. Wherever I practised there were no facilities for women to change into court dress at any time until I was sworn in as a Judge in 1981. As recorded elsewhere,[30] my usual changing room was the public toilet at the court.

But the first occasion that I ever heard the name Ethel Benjamin was when in about 1965 I applied for a job as a law clerk in a Dunedin firm and was interviewed by a senior partner. Thinking in my naiveté that this must be an older woman practitioner who had perhaps recently retired, I made enquiries to find that she had ceased practising in Dunedin after the turn of the century. I felt an enormous empathy with her. Educated at the same state secondary school, she died three weeks before I was born and I entered the profession about 70 years after her. Thanks to Ethel Benjamin and what that senior practitioner described as "the trouble she caused", I was not hired by that firm. Thanks to that experience, I became determined to have a career in law and although turned down for employment simply because I am a woman on two further occasions, I managed to cling to the profession, in spite of its apparent desire to set me adrift.

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30 *Without Prejudice: Women in the Law*, Gill Gatfield

I have been a lawyer and Judge for 30 years now. I know that I have often been troublesome, and have not always known my place. But, rhetorically of course, I pose these questions: Is there still a need to be concerned about the participation of women in the profession, the judiciary and in public life generally? Is there still discrimination against women both in New Zealand and overseas? Am I and other women in the legal profession and the judiciary still viewed as trouble makers?

I do hope so.