

ANOTHER NEW PROVINCE ...

An address delivered by the Hon Mary Gaudron, first female judge of the High Court of Australia, in honour of Ethel Benjamin, first female lawyer to gain admission in New Zealand. (Dunedin, 14 August 2009)

I am greatly honoured to have been invited to give the 2009 Ethel Benjamin address, the more so because I am not a New Zealander and, unfortunately, have had very few contacts with your beautiful country. This should disqualify from speaking on an occasion such as this. However, I do so in tribute to those courageous women, particularly Ethel Benjamin, who paved that rather rocky road that eventually led to the present level of acceptance of women within the legal profession. Without their pioneering spirit and their professionalism, I, for one, would not be here today.

I feel decidedly uncomfortable speaking in a foreign legal environment, lest my ignorance of local practice and developments should result in a grave waste of everyone's time. Although the New Zealand and Australian legal systems share a British common law heritage and, thus, have much in common, there is, as far as I know, only one area of the law in which they shared a unique and common background. That was compulsory arbitration for the resolution of industrial disputes. I have sometimes remarked on less serious occasions that, as with the lamington, a stale sponge cake cut into cubes and rolled in chocolate icing sugar and desiccated coconut, and Australian Rules Football, compulsory arbitration was an experiment all other countries thought it healthier to avoid. However, it was an experiment that both countries embraced with enthusiasm and, early in the 20th century, Henry Bourne Higgins, a Justice of the High Court of Australia and the first President of the Court of Conciliation and Arbitration published a book on the subject entitled "A New Province for Law and Order". It is with apologies to him that I have entitled this speech "Another New Province ..".

In referring to the Australasian experiment of compulsory arbitration, I have used the past tense. I do not know to what extent it survives in New Zealand. In Australia it survives only in a much diminished form. Just as with the modern rule against perpetuities and the Rule in Shelley's Case, compulsory arbitration of industrial disputes is an area in which the knowledge I rather painfully acquired is now substantially worthless. Although I have no regrets about the modern rule against perpetuities or the Rule in Shelley's Case, I do have some nostalgia with respect to compulsory arbitration. I grew up in a staunchly Trade Union family and my first knowledge of the workings of the law, albeit that that knowledge was entirely vicarious and largely anecdotal, was in the context of compulsory arbitration. One of those anecdotes concerned a family member who had taken part in a strike in contravention of a bans clause. He and the other strikers were charged with contempt and each was asked by the Judge whether he had anything to say as to why he should not be fined ten pounds, which was a rather large amount of money in those days. Family legend has it that, when asked, my relative replied that ten Pounds was not half the measure of the contempt he had for the Court whereupon the Judge replied "Very well, twenty Pounds".

One of the consequences of compulsory arbitration in Australia was that there developed a set of rights pertaining to Trade Unions and to persons as members of Trade Unions, but there was relatively scant development of the law of employment, as such. That was left to the law of contract, the law of negligence, workers' compensation law and, later, anti-discrimination law. By some legal mechanism, not quite amounting to a legal fiction, individual employment contracts incorporated the terms of any award that covered the work involved, allowing the employee to sue for breach of the award. In addition, some States enacted laws enabling contracts pursuant to which a person performed work in an industry to be set aside if they were harsh, unjust or unconscionable. Those statutory provisions are very useful in relation to persons who perform work as so-called "independent contractors", but they have not resulted in the development of a cohesive law of employment.

Outside the field of family law, employment law is probably the most important area of law for women. Social and economic developments have dictated that women in western economies now work for the whole or a substantial part of their lives. However, in many respects, women workers have particular needs that have not always been fully recognised, such as the needs arising from their family responsibilities. Moreover, they do not always have the same career opportunities or, indeed, the same financial rewards as their male counterparts. It is within this context that I believe there is a need for a cohesive law of employment. And it is within this context that I thought I would say something of the work of the Administrative Tribunal of the International Labour Organization.

The Tribunal consists of seven judges, each from different countries. At present, there are judges from France, Switzerland, Senegal, Italy, Argentina, Australia and Canada, the last two being female. The Tribunal has jurisdiction with respect to the terms and conditions of appointment of persons employed by the International Labour Organization and some fifty or so other international organisations. Most but not all of these organisations are specialised agencies of the United Nations, such as the World Health Organization, the Food and Agriculture Organization and the International Atomic Energy Agency, but they do not include the United Nations, itself, or its Funds and Programmes.

Over the years, the Tribunal has developed its own jurisprudence, drawing on international norms and on those municipal laws with which its judges are familiar. The two basic principles of that jurisprudence are that employers owe a duty of care to their employees and must treat them with dignity. Further, employers must observe the principle of equality and must not act arbitrarily. Their decisions, even if discretionary, can be set aside if taken without authority, or if they overlook some material fact, show some procedural or formal defect, or a mistake of fact or of law, are an abuse of authority or draw clearly mistaken conclusions from the facts. Further, there are mutual obligations of good faith on the part of both employers and employees. Employees must conform to the standards of conduct for International

Civil Servants, including obeying the directives of their superiors. The Tribunal has power to order the performance of an employer's obligations, including by reinstatement, and to order the payment of material and moral damages. Moral damages are awarded for what is called "moral injury", as for example, where the action in question constitutes an affront to the dignity of the employee. Moral damages can be awarded in addition to material damages or, if there is no material damage, they can be awarded on their own.

Not all of the matters to which I have referred are properly described as principles. Of those that are, I would like to say a few words. Before doing so, I want to say something about legal principle. It has always seemed to me that, in some respects, English common law was deficient in that, rather than formulating legal principle, it, instead, developed the doctrine of precedent. A former Justice of the High Court of Australia once famously said of the doctrine of precedent that it was a doctrine eminently well designed for a nation of sheep. I suspect that means as much in New Zealand as it does in Australia. That having been said, I believe that the doctrine of precedent not only inhibited the elucidation of principle but also sometimes, resulted in the formulation of distinctions when there were no relevant differences. And that brings me to the principle of equality.

The principle of equality, in my view, is only imperfectly reflected in modern anti-discrimination laws. As a general rule, modern anti-discrimination law requires that certain differences be treated as irrelevant for specified purposes. Thus, for example, sex and race are treated as irrelevant in the field of employment. You will forgive me if my linguistic preferences lead me to use the term "sex" rather than "gender". When I went to school, nouns had gender and people had sex. Now, of course, it is the reverse. People have gender and nouns have sex and the many neologisms in the English language are clearly the result of sexual promiscuity on the part of the nouns. So, if you don't mind, I will stick to "sex". A person discriminates on the basis of sex, if his or her actions are based on sex – so-called "direct discrimination" – or if his or her actions disproportionately affect people of one sex rather than the other – "indirect discrimination" as it is called. The use of the terms "direct discrimination" and "indirect discrimination" is unfortunate. It has led some to believe that indirect discrimination is not real discrimination – just some sort of fiction invented to advance minority rights. That is not so. Direct and indirect discrimination are simply descriptive of the processes by which it is determined if people in the same position in fact and law have been treated differently.

The principle of equality is not the principle of uniformity. The principle of equality acknowledges difference and is, in that respect, somewhat subtler than modern anti-discrimination laws. The principle of equality requires that irrelevant considerations, such as age or sex in the field of employment, be ignored but that relevant differences be the subject of appropriately different treatment. Thus, for example, in the international civil service, the principle may require appropriately different treatment to take account of cultural or language differences. Perhaps, I can illustrate here by reference to a case concerning a French national who was said to have used inappropriate language in correspondence with her American superior. She

regularly used the expression “I demand”, clearly thinking that that, rather than the more innocuous “I ask”, was the English equivalent of “je demande”. So, too, in the domestic sphere, the principle of equality may require that, in a particular case, family responsibilities be taken into account when, for example, approving leave or requiring overtime. Modern anti-discrimination laws concentrate on a defined class and, thus, do not take account of individual differences in the same way as does the principle of equality.

The other two matters to which I would particularly like to refer are the duty of care and the obligation of good faith. The duty of care is not restricted to the duty to avoid a foreseeable risk of physical harm, that being the duty with which we are more familiar in the law of negligence as it applies between employer and employee. It also requires that an employer ensure that an employee is aware of his or her rights and responsibilities, particularly in relation to decisions that may impact adversely upon them. The obligation of good faith requires, amongst other things, that an employer draw inadequate performance to the attention of the employee concerned and that he or she be given a reasonable opportunity to improve before any adverse action is taken on the ground of performance. Similarly, it requires that employees be informed of the reason for an adverse decision and, in defending their actions, employers are restricted to the reasons initially given.

To some extent, the obligations to treat an employee with dignity and to act in good faith overlap with the principle of equality and the duty of care. Thus, for example, harassment often constitutes a breach of the duty of care, a breach of the principle of equality, a breach of the duty to treat an employee with dignity and a breach of the duty of good faith. There is a separate and important aspect to the duty of good faith. In the main, international civil servants work in a foreign country where their right of residence is dependent on their continued employment with the international organisation to which they belong. Thus, the duty to act in good faith requires that the organisation consult with the employee in relation to decisions that may impact on their continued employment, such as restructuring or retrenchment, and, usually, that efforts be made to find alternative positions.

The principles to which I refer will necessarily have different application in different contexts. However, there is, I think, much to be said for the view that they should be basic to the law of employment. Even so, those principles will only ever be as good as the legal system in which they fall for application. New Zealand and Australia are fortunate in having robust legal systems with independent judges and practitioners. However, not all countries and institutions are so lucky. One of my recent tasks was to participate in the redesign of the internal justice system of the United Nations. Its earlier system had proved inadequate in the light of its expanded activities, particularly in countries where Peace Keeping Missions are stationed and, where, in general, the Rule of Law is little respected. The United Nations previously had a system similar to that of the International Labour Organization based on the French Administrative Law model but with more limited powers than the ILO Tribunal. Various factors had brought about a situation in which that system was described by the Redesign Panel as “extremely slow, under-resourced, inefficient and thus, ultimately, ineffective”. A new system has now been

implemented, largely along the lines recommended by the Redesign Panel, with an internal first instance Dispute Tribunal empowered to make binding decisions and, also, an Appeals Tribunal, both composed of professional and independent judges. One of those judges is your own Coral Shaw who was recently elected by the General Assembly to be a part time member of the Dispute Tribunal. It is heart warming to note that the pioneering spirit of New Zealand women lawyers is still much in evidence.

My work with the ILO Administrative Tribunal and my membership of the UN Redesign Panel have led me to think about the Rule of Law in the international context. In the course of my work with the UN Redesign Panel, I had occasion to encounter situations which resulted from the absence of the Rule of Law. Absence of the Rule of Law is not anarchy, a situation that, if it truly existed, might have its amusing aspects. In the absence of the Rule of Law, corruption prevails and the vacuum is filled by war lords and militias bent on imposing their own sense of order, often summarily and without regard to humanitarian considerations. For whatever reason, we did not get a “new world order” as so enthusiastically promised by some western ideologues with the collapse of communism. Instead, and for whatever reason, the last twenty years have seen a new world disorder, with so-called “ethnic cleansing”, sectarian violence, crimes against humanity and a growing number of refugees. In response to these problems, some people have advocated the invasion and/or occupation of other countries on humanitarian grounds. Indeed, now that we know that there were no weapons of mass destruction, the invasion of Iraq is usually justified on that basis. I do not wish to embark on an analysis of this idea save to say that I should have thought that invasion should be the last and not the first response to human rights abuses. Rather, I would advocate that thought be given to an International Rule of Law.

The International Criminal Court is certainly a promising beginning to an International Rule of Law. However, it does not have universal jurisdiction and its jurisdiction is confined to crime against international law and its powers limited to punishing those found guilty of those crimes. In the absence of universal jurisdiction, we are, unfortunately, going to see one or other of two possibilities. Either the guilty go unpunished or persons accused of crimes against humanity, as in the case of Saddam Hussein, will be put on trial by those who succeed them in power. I have little if any knowledge of the trial process that eventually led to the public execution of Saddam Hussein. I do know that a number of his defence lawyers were killed. One can only speculate as to the effect that their murder had on the fairness of his trial. But even if it were a fair trial, it surely would be more satisfying and productive of greater confidence if people in his position were tried by an impartial and independent international court in accordance with international law, rather than a court appointed by their successors in power or, as is more likely, by their political opponents.

The present world disorder and, to a large extent, the events that led to the invasion of Iraq lead me to think that we need a system to complement an International Criminal Court with universal jurisdiction. Perhaps, we could consider a

system whereby matters could be referred to the International Court of Justice on a majority vote of the General Assembly of the United Nations with an obligation on the part of the United Nations to take action to give effect to the decision of the Court. And in this respect, it may not be a bad thing if the UN peacekeeping role were expanded to enable the establishment of an independent legal system within the offending country.

Of course, what I have said is not well thought out and is properly characterised as “not so humble pie in the sky”. However, countries like New Zealand and Australia are affected by the failure of other countries to observe those basic norms of international law given expression in the Universal Declaration of Human Rights, even if only in consequence of our obligations under the Refugee Convention. I should here admit that in this last regard New Zealand has played a more honourable role than has sometimes been the case in Australia.

As lawyers we occupy a privileged position in our communities. It seems to me that, in consequence, we have a duty to think about and to give expression to ways in which our laws can be improved, and not just our domestic laws. I have spoken today of an international Rule of Law because I believe that a country that produced Ethel Benjamin is capable of giving us women lawyers who can make our world a better place.