"DIVERSITY AND LAW"

Ethel Benjamin Commemorative Address
By The Rt. Hon. Dame Sian Elias, GNZM, Chief Justice of New Zealand
at Dunedin on Thursday 18 May 2000

Dame Silvia Cartwright, who delivered the first Ethel Benjamin Commemorative Address in 1997 was able to claim in common with Ethel Benjamin a fine education at both Otago Girls and Otago University. Both are institutions which have made a disproportionate and beneficial contribution to New Zealand society. I come from further North and so I did not have the same advantage of academic excellence in this town where the education of women has always been encouraged.

I went to a Church school in Auckland. Our venerable and beautiful hall had inscribed around its walls biblical texts. Even in those days one struck me as rather startling in the circumstances. After all, we were an all-girl school and all our teachers were female. The text was "Let us now praise famous men and our fathers that begat us".

It is a real pleasure tonight to speak at a gathering to commemorate a woman who is marked not just for being famous in her time or indeed for doing what comes naturally (if that really is why we were enjoined to praise our fathers that begat us). We commemorate Ethel Benjamin because she dared to be different and although she flared comparatively briefly in our southern skies, she changed our direction.

I have to say that I do not recollect ever hearing about Ethel Benjamin during my time as a law student or as a young woman practitioner. That I think is a measure of how the story of our profession has been dominated by male perceptions. I am not sure that has changed. I have recently been shown a copy of the reminiscences of an outstanding lawyer of his experience of life in the courts over the past 30 years. Although he is generous, indeed lavish, in his acknowledgement of the increasing role played by women in the last ten years, we completely escape his notice during the 1970s. Since I regard that decade as perhaps the most vibrant in my professional life, it is sobering to realise that, in recollection at least, I and my female colleagues appear to have had little impact. The increase in the number of women entering the profession in the 1980s coincides, in this writer's estimation, with a "greying" of the profession. He does not suggest there is cause and effect in this. But the sad truth is that the colourful advocates of the golden age of the oral tradition he describes and whose passing he laments were inevitably male.

If I had had the good fortune to start my legal career in this City, I would undoubtedly have heard of Ethel Benjamin much earlier. The memories of "the trouble she caused" might have steeled me, as it did Dame Silvia Cartwright. Indeed, this City's admirable tradition of independent and able women practitioners had little echo in Auckland when I started out. I would like to have

known of Ethel Benjamin. It would have encouraged me in some of my own troublemaking. As it was, it was not until the greater numbers of women came into the profession in the 1980s and with the work undertaken by the Otago Women Lawyers Society that I heard her name and first saw that haunting photograph.

In her 1997 address, Dame Silvia speculated that, perhaps insulated by the support of her parents, Ethel Benjamin may have been oblivious to or contemptuous of the storm swirling around her**.** I don't believe for a moment she was oblivious or contemptuous of the storm she caused. The eyes show the hurt. And self-exile was the ultimate response. And although her advertisements for work may have been outwardly defiant, only those who cannot attract work know it gnaws at self-esteem. For a number of able women, those are still the conditions under which they practice. They are conditions of private pain and some public humiliation. It is not surprising that women in the legal profession continue to exhibit the restlessness shown by Ethel Benjamin. The movements in and out of the profession, the attempts to regroup and change direction, are still familiar patterns today. There are still women lawyers who, like Ethel Benjamin, operate restaurants, try unlikely specialities, set up their own firms or go to the bar with no work assured to them, and who throw themselves into unpaid work for unfashionable causes because they feel invisible and undervalued by traditional practice. And the wider barriers to equality faced by women in our society, addressed by Ethel Benjamin in her time through the Dunedin Society for the Protection of Women and Children – the problems of violence, poverty and disadvantage, remain substantial challenges to us today.

So it is impossible in considering her life to be wholeheartedly glad for Ethel Benjamin. Or, in celebrating her, to celebrate without reserve the accomplishments of women in our profession and in wider society. There is still much to be done. That there should be further to go on the journey started by Ethel Benjamin reflects the intractability of the issues of gender which remain to be addressed in the next wave to secure the equality of women.

I want tonight to speak about the role of law, the profession and the courts in securing equality. And because Ethel Benjamin was not only a woman, but a member of a racial minority, I would like to develop the theme of equality and law more generally. It is not in the field of gender equality alone that we are still starting out. As I entered the legal profession in the 1970s, I was ignorant not only of Ethel Benjamin. I had very little idea of some of the major issues that have increasingly engaged our society in the last decade. So, although I had written in the area of constitutional law and human rights, I had never even read the text of the Treaty of Waitangi. Indeed, I never did have occasion to read it until in 1981, by one of those accidents that changes lives (and it certainly changed mine) I was asked to help Nganeko Minhinnick with her Waitangi Tribunal claim in relation to the Manukau Harbour.

Equality is seen in our society as a human right. There are some who think that human rights claims or "rights talk" as it is slightingly referred to, are to be deprecated and that the universality of human rights norms is over-stated. As Professor Ignatieff has pointed out, however, the global diffusion of rights language

would never have occurred if the rights had not been themselves "authentically attractive propositions to millions of people who are trapped by custom, culture or religious norms".

In any event, I am not sure that the international trend and the domestic adoption of statements of human rights can now be reversed. Increasingly, the response of domestic legal institutions and laws is shaped by international covenants and institutions. This is an aspect of the shrinking of the world which has already had profound implications for all aspects of New Zealand life.

New Zealand is a founding member of the United Nations and has acceded to all major international conventions, including the International Covenant on Civil, Political and Social Rights 1966 (ICCPR) and its First Optional Protocol 1966, the Convention on Elimination of all Forms of Discrimination against Women 1979 and now, its Optional Protocol.

The accession to the Optional Protocols means that our legal system is now scrutinised for compliance with the international covenants and that the decisions of our courts are taken on an international world stage. These influences should not be under-estimated. We are only at the beginning of the process. It is in the area of human rights that the standards of the international community have greatest impact.

In New Zealand, that impact is explicitly recognised by Parliament in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. Behind these Acts stand the international covenants and further back still, the great 18th century declarations of the rights of man which they echo. Arising from the constitutions adopted upon those philosophies and arising out of the international obligations undertaken through the United Nations and by regional groupings of nations, a substantial body of case law has developed. Not surprisingly, this case law has influenced the New Zealand courts in their approach to the New Zealand legislation.

The international case law is likely to receive fresh impetus from the English Human Rights Act 1998. Traditionally, we have been more comfortable with English precedents than decisions of other common law jurisdictions operating under written constitutions.

The notion of equality underlies the United Nations Declaration[1] and the Covenants which implement it. It is an ideal as old as the world. But it is fair to acknowledge that it has developed in its application. The 18th century rhetoric did not apply to slaves or women. After slavery was abolished and women obtained the right to vote, to hold property and public office and to join occupations such as the law, formerly closed to them, human rights legislation addressed overt racism and sexism. This legislation, like the United Nations Covenants, gained impetus through the dreadful events of World War II. That was a war in which Ethel Benjamin herself was a casualty. Thus in the 1960s and 1970s in New Zealand we embarked upon a programme of legislative reform to secure equality between

[1] The Universal Declaration of Human Rights was adopted by the UN on 10 December 1948.

men and women and to prohibit discrimination on the grounds of race. With that foundation we need now to address what Sir Stephen Sedley has described as "the snake in the legal grass":[2] the unequal effect of equal laws.

The despondent truth is that decades of formal equality in the eyes of the law have not led to real equality. Increasingly, feminists and members of cultural and ethnic minorities are questioning the liberal legal tradition's emphasis upon statements of equal rights. In a recent thought-provoking work, Sandra Fredman has pointed out that equality in law will never achieve equality in fact while gender inequalities are part of the social system in which law operates.[3]

So, for example, the strategy of formal equality does not work for women who undertake traditional female activities and responsibilities. Unpaid caring responsibilities are largely ignored. Fredman is of the view that "the undervaluing or ignoring of child-care is a key to women's continuing disadvantage". In New Zealand our principal family law statutes were enacted in the first drive to achieve formal equality between men and women. They are now widely thought to have emphasised such formal equality at the expense of the majority of women who shoulder a disproportionate burden in unpaid family care. Such responsibilities effectively deprive most women of the opportunity to benefit from the legal equality formally secured.

Joanne Morris's report for the Law Commission on Women's Access to Legal Services demonstrates the gap between law and reality for most women.[4] Although it is not uncontroversial, it is based upon the experiences of more than 3,000 women interviewed at more than 100 meetings. Themes identified by Joanne Morris as pervasive, include "control" and "communication".

By "control" is meant the perception of the women interviewed that they are limited in their ability to decide whether and how to use the justice system to resolve the particular problems which affected them and their families.[5]

What is clear from the Law Commission study paper is that the legal profession is not good at disseminating the information women need. Indeed the profession is part of the communication problem. A constant theme in reports of women to the Law Commission was that their lawyers lacked the communication skills to lay out the options for them.

The experiences of Maori women, the subject of distinct report by the Law Commission,[6] makes it clear that the problems of communication are compounded by the different cultural backgrounds of Maori women and non-Maori lawyers.

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[2] Rt. Hon. Lord Justice Sir Stephen Sedley in *Freedom, Law and Justice* (1999) London 41.
[3] Sandra Fredman *Women and the Law* (1997) Oxford.
[4] Morris, *Women's Access to Legal Services* (June 1999) NZLC SP1.
[5] Ibid. para 185.
[6] *Justice: The Experiences of Maori Women* (April 1999) NZLC R53.

Ultimately, the wider issues of communication skills need to be addressed as part of the training for lawyers. My colleague Justice Blanchard of the Court of Appeal has suggested that the most effective response to the Law Commission's study paper findings would be to insist upon better skills acquisition by those practising law.

The extent to which substantive equality lags is striking. The briefing papers of the Ministry of Women Affairs to the incoming Minister, published in March, demonstrate both gender and cultural deficits. The statistics there recorded show both the continuing gap in earnings between women and men and the disparity in economic independence between the genders. They also demonstrate graphically the disparities between Maori and non-Maori women. The demographic projections included in the same report show why we ignore these disparities at our peril. The female population below the age of 30 is increasingly Maori. In 1996 those in the category below 10 years of age, are almost twice as numerous as their non-Maori female counterparts. That trend continues in the projections to 2051.

Overall, the ethnic diversity of our population is steadily increasing. In the 1996 census, those identifying with the major ethnic group were 72% pakeha, 14.5% Maori, 4.8% Pacific Islander, 4.4% Asian, with "others" being less than 0.5%. Pakeha are a demographically older population than the other ethnic groups.

This diversity is a source of national strength. But it raises some serious challenges as to the law's ability to protect, recognise and affirm the right to difference of ethnic and cultural minorities.

It must be acknowledged that the role of law in promoting cultural tolerance is a very limited one. That is because, as we have learned through experience with criminal law and other laws which promote social good by imposing sanctions, you cannot modify behaviour by law alone. I think it is worth taking a moment to consider the experience with crime. The increasing ferocity of punishment in 18th century England produced no reduction in crime. The introduction of the professional police force by Sir Robert Peel did. In the current climate of concern about the incidence of violent offending, it is important when considering calls for harsher sentences to remember that experience.

Proper conduct can be promoted on a consistent and regular basis only by the mainstream processes of socialisation. They include personal moral standards but they also include the inducements which arise out of social and cultural networks which are the source of expectations and interdependence. These networks are not only a surer protection against criminal activity, they also work to promote commercial morality, fair dealing between contracting parties, conscientious exercise of power and environmental responsibility. The law has a part to play, but it is only a part - and it is at the bottom of the cliff for those who have fallen over. We should not claim for our legal system more than it can deliver.

Amongst the mainstream processes of socialisation which are the real guarantee of community harmony, I mentioned cultural networks of mutual expectation and

interdependence. Cultural groupings which are not recognised, which have no sense of mutual expectation with others in the community and which feel isolated or denigrated, are not positive forces within our community. They are potentially highly destructive. The validity our society gives to its cultural minorities is therefore very much in the wider community interest.

The argument that the recognition of distinct cultural values detracts from the general principle that laws must apply equally to all is often over-stated. The common law, which we inherited from England, was in origin the custom of England. Wherever it was imposed in the British Empire, it picked up local customs, some of application only to distinct cultural or ethnic groupings within each society. In an early case, the Privy Council recognised that English notions of property law were inadequate to deal with the religious practices of India. The court recognised and gave effect in law to the personality of an idol which was a family god. When the High Court of Australia brought down its *Mabo* decision,[7] it was in fact applying conventional principles of the common law as developed by the Privy Council last century. The common law scoops up the custom of any place in which it is applied, except to the extent that custom has been abrogated by statute.

In New Zealand, we have forgotten much of our own legal history when we claim that it is a fundamental tenet of English and New Zealand law that there is one law for all. In the early years of the colony, different penal provisions attached to Maori and non-Maori. In part that was in recognition of profound Maori abhorrence of imprisonment as a form of punishment and different notions of property which made it unjust to apply dishonesty offences to Maori. The Maori Welfare Act 1962, only recently repealed, held open the possibility of marae courts in minor matters. Until the new Constitution Act was enacted in 1986 the New Zealand Constitution Act continued a provision first brought in by the Imperial Parliament in 1852 which permitted Maori districts to administer their own laws provided they were not repugnant to the laws of humanity. Repugnancy to the laws of England or the general laws of New Zealand did not matter.

So too our laws have recognised informal Maori marriage and adoptions and recognised tangi leave. For all our history we have maintained a separate system for the ownership and alienation of Maori land. Maori land is explicitly exempted from the provisions of the Matrimonial Property Act 1976. Statutes such as the Resource Management Act 1991 and its predecessors in the town and country planning legislation, have given explicit recognition to Maori cultural values.[8] The Maori Community Development Act 1962 provides for Maori Wardens to exercise control over other Maori and perform minor policing roles. Under the Evidence Act, exceptions to the rule against hearsay are made for evidence of Maori custom.

Leaving aside the special place of Maori in New Zealand society, other legislation

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[7] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (HCA).

[8] Section 7 of the Resource Management Act 1991 obliges those exercising functions and powers under the Act to have particular regard to Maori cultural and environmental values through the concept of kaitiakitanga. Section 6 of the Act specifies the "relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" as one of five matters of national importance.

and court practice permits the recognition of minority cultural values. That is particularly the case in family law where the courts have invoked Article 30 of the UN Convention of the Rights of the Child 1989 in being guided by the principles that a child should be able to know and enjoy his or her own culture and language. The Children, Young Persons and Their Families Act 1989 specifically recognises cultural issues. It is based on the assumption that children are best raised within their own cultural context and with their own people. It permits tribal elders to take leadership roles in family group discussions.

Under the Mental Health (Compulsory Assessment and Treatment) Act 1992, courts and tribunals exercising powers under the Act are required to do so "with proper respect for the person's cultural and ethnic identity, language and religious or ethical beliefs" and the significance to the patient of his or her ties with family, whanau, hapu, iwi and others.[9]

By s16 of the Criminal Justice Act, cultural evidence is able to be called on sentencing. In a number of cases the sentences imposed have been tempered by the context of cultural value.[10]

An Australian commentator, Parkinson, has questioned the extent to which law can reflect cultural diversity:

> The question which arises for Australia's legal system is whether it can or should embrace a wider concept of cultural diversity than is involved in passing anti-discrimination laws and providing interpreters in courts. Can a society with deep roots in European traditions of law and life, embrace the cultural identities of other societies without losing its own? Is it possible for there to be one set of laws which applies to all, irrespective of race or religion, which is at the same time "multicultural"? [11]

The provisions I have already reviewed in our own law, not comprehensively by any means, indicates that in New Zealand we may have moved past that question.

What still remains is where we draw the line. At present, the only guide is legislation based upon the International Conventions recognising the human rights of others. What is missing is any identification of national shared values against which the limits can be drawn. It is difficult to imagine the French debate about the clothing of religious minorities in public schools being conducted in New Zealand as an issue of first principle. In France it was based upon the secularity of the State set up by the French Constitution.

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[9] Mental Health (Compulsory Assessment and Treatment) Act 1992, s 5.

[10] See *R v Alinizi* (CA280/97, 25 November 1997); *R v Martin* (HC, Auckland, T191/97, 23 March 1998, Morris J); *Nishikata & Ors v Police* (HC, Wellington, AP126/99, 22 July 1999, Gendall J); *R v Poloa* (CA434/93, 23 February 1994); *Katoa v Department of Social Welfare* (1991) 7 CRNZ 44; *R v Watson* (CA360/90, CA361/90, CA362/90, 19 April 1991); *R v Bibi* [1980] 1 WLR 1193 (CA UK).

[11] Parkinson, "Taking Multiculturalism Seriously: Marriage Law and the Rights of Minorities" (1996) 16 Sydney Law Review 473, 505.

Such articulation of shared values may yet be developed in a national constitutional crucible, or it may be left to be worked out on a piecemeal basis through legislation or, by default, by court decision.

These are not primarily or preferably questions for the courts. If they are not picked up and decided by the wider community, however, human rights legislation will make it difficult for the courts to evade extremely difficult questions.

If that is so, it has substantial implications for the role of the courts. There is room for some concern here. The role of the courts in our unwritten constitution is not well understood within the community. Without proper understanding the position of the courts is fragile and the balance of our constitutional arrangements is easily disturbed.

Cultural rights protections, such as are provided by the New Zealand Bill of Rights Act and the Human Rights Act, constitute restrictions upon the exercise of governmental power. It is the role of the courts to see that those restrictions are observed. Judicial check upon governmental power in this way is not new, but the Acts may throw up starker policy choices than the courts are generally called upon to make. Because rights are never absolute, some balancing will usually be necessary. When striking the correct balance is a matter of public controversy, the courts may be swept up in that controversy. If the role of the judiciary is imperfectly understood, the judiciary is very much exposed when it is forced into areas of public controversy. Judicial decisionmaking in areas of controversy for the community can too easily be characterised as usurpation of power by unelected and unaccountable judges.

That is a worryingly simple message which cannot be simply answered. The role of the courts is to enforce the law. The courts themselves are subject to the rule of law and for that reason cannot usurp powers lawfully exercised by other agencies. Parliament exercises authority over the courts only by statute. The judiciary enforces the law against individuals, institutions and the Executive.[12]

Although the New Zealand Bill of Rights Act and the Human Rights Act are both ordinary statutes, which can be trumped by other statutes, the Acts were designed to operate within the sphere which may broadly be termed “constitutional”. Under the New Zealand Bill of Rights Act the development of the common law is required to be in conformity with the Bill of Rights Act. The courts must interpret legislation consistently with the Bill of Rights Act unless the other Act is plainly inconsistent.[13]

The rights recognised by the Bill of Rights Act are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democractic society”.[14] In a recent decision the New Zealand Court of Appeal has said that ultimately, whether the limitation can or cannot be “demonstrably justified” in a free and democratic society is a matter of judgment which the court is obliged to make on behalf of the society which it serves and after considering all of the issues which

[12] *M. v. Home Office* [1994] 1 AC 377, 395 per Lord Templeman.
[13] New Zealand Bill of Rights Act 1990, ss 4, 6.
[14] New Zealand Bill of Rights Act 1990, s 5.

may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise".

Where the Bill of Rights Act and the Human Rights Act are likely to have their greatest impact is in providing the standards by which the courts judge the lawfulness of official and private conduct. Where unlawfulness is said to arise because the decisionmaker has struck the wrong balance between competing interests or where it is said the decisionmaker has been unreasonable or acted in a manner which is disproportionate, the courts traditionally have been largely adrift. Inevitably, the result has been deference to the decisionmaker and a lack of clarity and persuasiveness in judicial reasoning where, as Professor Taggart has put it, judgments are too often "characterised by assertions of unreasonableness or unfairness and little else".[15] The statements of rights provide a more focused and transparent methodology to assist the courts in exercising their supervisory jurisdiction.

The more fundamental the right, the more pressure there will be for judicial intervention. The right to maintain and develop a cultural identity is, in principle, a universal right. Article 27 of the International Covenant on Civil and Political Rights provides that persons belonging to ethnic, religious or linguistic minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language. The breadth of this right is subject only to the imposition of such limitations as may be necessary in the interest of public safety, order, health or morals, or "for the protection of the fundamental rights and freedoms of others" (Article 18(3)).

Article 27 is incorporated into New Zealand law by s 20 of the New Zealand Bill of Rights Act. Other relevant international provisions incorporated into the New Zealand domestic legislation are rights to be free from impermissible grounds of discrimination including those based on religious belief, ethical belief, colour, race, ethnic or national origins (including nationality or citizenship). Similarly equality before the courts and tribunals, the right to the principles of natural justice, freedom of thought, conscious and religion, freedom of expression, freedom of association and equality before the law, are all explicitly recognised both in the international covenants and in their reflective New Zealand statutes.

What these rights will mean in practice has yet to be fully addressed. There are two aspects of particular difficulty. The first is the extent to which a right to non-interference with cultural practices (the right to be left alone), is sufficient to protect minority cultures. The second is the extent to which particular cultural values can be adopted by law without infringing the fundamental principle of equality before the law.

No recognition of cultural values is absolute. Tolerance of cultural diversity is bounded by notions of reasonableness and public policy, as the courts have recognised in a number of cases. The International Covenant on Civil and Political

[15] Taggart, "Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990" [1998] Public Law 266, 278.

Rights contains a mechanism for adjustment by preventing any person relying on rights which unduly limit other rights guaranteed by the covenant. In other words, all cultural practices must be considered against a human rights standard. If an ethnic practice or tradition would itself constitute a violation of human rights, it will not be sanctioned.[16]

In New Zealand, cultural practices which run contrary to deeply held social and legal traditions are proscribed by legislation. Thus, female genital mutilation and bigamy are made criminal offences under the Crimes Act 1961. On the other hand, in the United Kingdom the Road Traffic Act 1988 exempts Sikhs from having to wear safety helmets on motor bikes because of the interference with their religious freedom.[17] This statutory modification, it should be noted, followed a court decision in which the Court of Appeal was divided on the question whether the offence under the old legislation permitted religious belief to be accepted within the defence of necessity provided for. More controversially, perhaps, in Australia a Northern Territory law allowed the common law defence of duress to an Aboriginal woman who was compelled by threat of death or serious injury under tribal custom to fight in public with a woman involved with her husband.[18]

A right to cultural identity is sometimes expressed as one aspect of the right to be free from governmental interference recognised in respect of the United States Constitution by Justice Brandeis in *Olmstead v The United States* 277 US 438 at 478:

> The makers of our constitution… conferred, as against the government, the right to be let alone – the most comprehensive of rights and the rights most valued by civilised men.

It may be doubted whether this negative right is sufficient to preserve the culture of minority groups and their rights to participate. Preservation of minority culture and securing participation for minorities in public life require the mobilisation of resources. It is in this area that our traditional legal process may prove hollow protection. It is what has led the United States courts to develop the structural injunction, the device which led to busing of school children to ensure racially diverse school communities and on the other hand, the drawing of electoral boundaries to ensure that minority groups would be effectively represented in the electoral process. These have proved to be hugely divisive strategies even in a community where the rule of law and the place of the courts in the constitutional framework is well understood. I doubt whether the New Zealand courts could weather the storm that any attempt to invoke structural injunctive relief to give substantial effect to declarations of the rights of cultural minorities would provoke. Putting solid flesh upon abstract declarations is not something our courts are comfortable with.

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[16] See Art 5(1) of the ICCPR which prevents any person relying on rights guaranteed in the ICCPR to promote activities aimed at the destruction or undue limitation of other rights guaranteed by the ICCPR.
[17] Road Traffic Act 1988 (UK), s 16(2).
[18] *R v Isobel Phillips* (NT, Court of Summary Jurisdiction, 19 September 1983).

The challenges that litigation about rights bring to the courts are substantial. To date, the application of the Bill of Rights Act and the Human Rights Act have been confined largely to criminal law. More difficult issues still are likely to arise in the area of protection of cultural rights. They require assessment of the commitment the community is prepared to make to ensure the protection of cultural diversity. They entail judgments about community values and allocation of resources which many see as unsuitable for judicial determination. Human rights adjustments may be complex. Where there are a range of valid outcomes, the case will not always be suitable for judicial determination, Effective protection of cultural rights and effective protection of the rights to equality of women ultimately rest on community commitments, not statement of rights, nor the courts. But where a case is properly brought before the courts, Judges cannot avoid making decisions simply because the matter is difficult or politically contentious.

Some commentators seem to be under the impression that Judges are avid for the powers they are obliged to exercise under human rights legislation. That is wrong. It should not be thought that Judges welcome these cases. They are difficult, contentious and emotionally draining. As a Judge I have not had to order a life support machine to be turned off, or decide any case conducted under heavy political and community pressure. So I do not speak of my own experience here - but I have seen my colleagues wrestling with such cases and have seen the toll it exacts and as counsel in some of the more politically contentious cases of the past decade, I have seen the weight descend on the shoulders of the Judge at the end of the case. I would not have swapped positions willingly at all. This burden is not sought. But when it comes in a case properly constituted for judicial determination, it cannot be evaded consistently with the judicial oath.

Ethel Benjamin knew what it was to be a member of a minority group. She knew that formal equality before the law does not translate into substantive equality. She had more cause than most of us to know that law cannot provide sure protection for human rights in the absence of community commitment. She would not have claimed more for the law or the courts than they can deliver. No more do I. But Ethel Benjamin understood that minimum protections and the development of community acceptance of equality and justice are advanced by claim of right. And she would have expected us to continue to work for substantive equality.

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