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NEW ZEALAND AOTEAROA

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Why a Feminist Law Bulletin?

The Feminist Law Bulletin:

- *Identifies when feminist issues arise in policy, legislative proposals, and the practice of law;*
- *Provides an opportunity for exploration and discussion of some of these issues;*
- *Enables a general readership to gain an introduction to feminist analysis of the law.*

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The Conscience of the Law:

"Justice is the right of the weaker"
Joseph Joubert (1754-1824)

Most of us know from our own experience the role of conscience in our lives. It is that inner voice, intuition, or value–based knowledge that guides us on what we believe is right or wrong, fair or unfair.

Just as humans have this element to their lives, so too, the law has a "conscience" by which it is guided. A conscience that is exercised by judges. When judges refer to the "conscience of the law" they are generally referring to those values which guide them to decide, in any given case, what is "fair" or "just." Legal history contains numerous examples of the conscience of the law being invoked where a purely mechanical or technical application of the law would result in a patently unfair outcome.

It is surprising then, that so few judges are prepared to talk about the values that guide this legal conscience. However, last year Justice Thomas (as he then was) gave the Harkness Henry Lecture at Waikato Law School and in it, he explored the notion of the conscience of the law.

The following article explores the concept and is based on an interview with this recently retired Court of Appeal Judge.

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What do you think the conscience of the law is really concerned with?
Put simply, it is the principle of non-exploitation. It is Aristotle's idea of corrective justice which is echoed through the common law and in equity.

Does the vulnerability to exploitation, the weakness of the weaker if you like, arise from a power imbalance of some kind – whether the state over an individual or economic power as between individuals?
Indeed, and the conscience of the law will, as I see it, defend the poor against the mighty, the powerless against the powerful, and the weak against the strong.

The law of equity itself developed through judges looking at what was fair, what was equitable, and making rules to ensure that people were not exploited. The law of trusts is a prime example. But in the law of evidence, too, we see judges making decisions based on non-exploitation and fairness – the laws on hearsay evidence, for example. Yet in New Zealand, we do not really talk about "the rule of law" in the same way that, for example, English judges do.

Why is that?
Well, there is a strong view from some that such concepts are "woolly" and that there should not be an activist approach to the law. This has really only developed in the last ten years.

This seems to contrasts strongly with, for example, the 1980s in New Zealand and the role played by the Court of Appeal at that time.
Perhaps the bigger issue is the need to acknowledge that judges make law and that they face choices when making the law.

Is there also an issue about judicial leadership in its relationship to Parliament and the Executive?
A United States jurist, Professor Jaffey, once referred to this relationship between Parliament and the Courts as a "fruitful partnership in the law making business together" with the courts being the junior partner.

Once you accept that Courts make law then it is immediately obvious that applying legislation is not a mechanical or straightforward exercise. In part this reflects that fact that people's lives are not mechanical or straightforward. For example, situations will arise that Parliament did not envisage or the statute may be deliberately vague so that the law will develop as the Courts make decisions.

Perhaps it is a fiction then to think that in those cases the Courts are giving effect to Parliament's intention – are they really trying to find "justice" in the particular case?
Well certainly the formulistic approach can get in the way in the circumstances of a particular case.

What about the recent moves (such as the Interpretation Act 1998) to allow more material to be available for the Courts when interpreting statutes, such as Select Committee reports and so on?
Well some of those materials have always been available and some overseas jurisdictions have used them more than others. But this lingering effect of formulism, this idea that the courts simply apply the law that Parliament passes, has on-going effects in terms of when and why judges decide to make law in a particular case.

Do you think there is a healthy debate about legal jurisprudence in New Zealand?
Well, jurisprudence is sadly neglected in my view. Even the basics of civics such as what Parliament is, what the Executive and Cabinet are, how Ministers operate, and the role of the Courts. Those really basic things about how our democracy works, are not even taught in many schools.

As for jurisprudence, there is a dearth of jurisprudential academics in New Zealand and no-one really stands out compared to specialists in other areas, such as Taggart on Administrative Law. I think the result is a lack of understanding of the legal process and

the role that lawyers have to play in that. This makes it even easier for a mechanistic approach to develop among lawyers and reflects an ignorance of justice and a lack of understanding about the dynamics of the common law.

This is important for case management by lawyers, too, because in many cases lawyers are really asking the courts to make law. This lack of clarity can also be reflected in, for example, the use of expert witnesses who are used in an adversarial process and who do not understand their role in assisting the court.

So this is where the conscience of the law becomes critical then? Because judges do make law and in doing so have to exercise their judgement with some kind conscience about what is "just" or "fair" in a particular case?
You know the law does not just exist for judges and lawyers. It exists to serve the community. It is not a sport for judges and lawyers but is there to serve the community and to do justice and be up to date in doing so. There must therefore be a basic principle to guide that service and the principle of non-exploitation at the heart of the quote by Joseph Joubert, really summarises the essence of that.

Does that mean that the community, too, needs to develop its conscience, its own sense of what is "just" or "fair?"
Well for many victims, especially in criminal cases, closure is very important. Having a sense that justice has been done so that they can get on with their lives. For example, their family member may have been murdered, but they are ordinary people who need to be able to have something, some way, to resolve the matter for themselves, and often the trial process (including appeals), has that function.

What is your vision for the future of jurisprudence in New Zealand?
That the lingering influence of formulism and the mechanical conceptualisation of the law will be eliminated altogether. So that we get a much more realistic and pragmatic approach to legal issues.

And that includes women?
Of course. And we have seen more feminist jurisprudence in law schools and more teaching about the Treaty of Waitangi and about Maori. But this is still being grafted on to jurisprudence instead of really testing the core of what we might call the theory of the law: why we have law and the role of the law in our society. In some respects, therefore, we have a long way to go in those areas.

So that in serving the community, in the future, there will be a recognition of the diversity of the community, of the diversity of women, for example, and that this will be reflected in a more activist approach to judicial law making?
We certainly need more innovative thinking. We need thinking which is outside the square that places lawyers and judges as mere tools to implement statute-based law and which recognises, instead, the dynamic role of the judges in making law and in exercising the conscience of the law in doing so.

Copies of Justice Thomas' lecture *"The Conscience of the Law"* are available in Waikato Law Review, Taumauri, (8), 2000.

CEDAW Update:

The Government is currently preparing its next report on compliance with the Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW). The Ministry of Women's Affairs has prepared a draft report, which is due for release and public consultation in early December. Consultation will continue until the end of February 2002. It will be available by email, in hard copy, and on the Ministry's website: www.mwa.govt.nz

There are opportunities for people to provide input to the Government report through the Ministry's CEDAW information pack, which contains a feedback form, and comment on the draft report.

In August and September this year, the Ministry held a series of regional workshops with a range of women's organisations, including the National Council of Women, Mäori Women's Welfare League, Women's Information Network, and Pacifica.

Women's organisations want to ensure that the issues raised in the consultation workshops are adequately reflected in the draft report and will be looking closely at the new document. In addition, women's organisations are preparing two shadow reports (one for Maori women and one for women generally), which will be presented to the United Nations CEDAW Committee alongside the Government report.

The shadow report will be prepared after the release of the draft Government report and is likely to be available for consultation in February 2002.

Comments on some of the issues raised by women's organisations are available on the National Council of Women website: www.ncwnz.co.nz

Matri*moan*ial Property: Getting it right and getting on with it

By Wendy Parker

The Property (Relationships) Act 1976 will be fully in force on 1 February 2002. Its effect is already being felt in many centres where the first available hearing dates now stretch into February and beyond. In cases where each party has a distinctly better chance under the old and the new Acts, jostling and procedural manoeuvres are fervently underway.

This is all occurring against a backdrop of criticism of the new law that at times borders on fear mongering. 'Gold-diggers' abound. The level of angst tells us something about the way in which the new law presents a threat to certain sectors of society. But is all the criticism having a wider effect? And is it either necessary or helpful?

Feminists involved in the legal system have waited 25 years to get these new laws through. It has taken considerable effort and a certain degree of tenacity. Waiting out Doug Graham's time as Minister of Justice, for example. Getting the point across that 'equality was not equity' when there was a real lack of hard data. Sustaining the final push in the brave new world of the father's rights movement. Supporting Margaret Wilson when few were. Making the effort to make a select committee submission when there never seemed to be enough time to do a proper job of it.

Of course, lawyers are trained to examine detail, to break down complex situations, to find the holes in any argument, to persuade, to advocate for clients – basically to look for problems. It's easy to nit pick. But aren't we more gainfully employed doing all we can to support the higher level equity principles of the new law? If we don't, there's a real danger that those principles will become diluted to the point of becoming ineffective.

The Property (Relationships) Act aims to assist all former relationship partners suffering economic disadvantage due to the division of labour during the relationship. In reality the majority of people in that category are women and the three-quarters of children affected by divorce that reside with their mothers (and chances are that the figures are similar for de facto couples). It is precisely these new family units that comprise a significant group of New Zealanders living in poverty.

As lawyers, we all have a responsibility to ensure that the new law has the best chance of making a positive difference for women and upholding the concepts of fairness and equity. This will require a culture shift and a new mindset for some in the legal profession. However, while these changes are new and take some adjusting to, it is vital that feminist lawyers do not shirk from patient and persistent explanation. We should not be swayed from this just because other lawyers have not yet understood the fundamental change from an equality of property division to an equity of outcome.

Women involved in the legal system can support the intent of the new Property (Relationships) Act in many ways. For example:

- we can pursue settlements that uphold the notion of equity reflected in the Act, whether that is best achieved by formal or substantive equality;
- the insight gained from the new guiding principles in the Act, including speedy resolution, can be kept to the fore;
- real effort can be put into the early cases, particularly the landmark Court of Appeal cases that will no doubt set the tone, not only for future cases but for all those who bargain in the shadow of the law;
- support can be offered at all levels of the profession - ensuring that the QCs best able to present the new deal for women get the brief for important test cases;
- support also means sharing helpful cases around the profession, making sure that those lawyers who need these have access to them;
- we can comment on controversial cases, pointing out faulty reasoning or adding our voices in support. It is easy to forget the loneliness of the judicial officer forging a new social conscience;
- we can counter the often strident and emotional cries of the father's rights movement and cobble their misuse of the notion of equality;
- we can support and encourage our friends and family caught up in property disputes;
- we can make sure de facto and same-sex couples know about their new rights.

The message of the law is strong and clear. Having said that, it threatens a longstanding power base and will require steadfast application. The changes have been a long time coming. Let's work with each other and make sure the application of the new law will achieve its objective.

From the Net

http://www.wlansw.asn.au
Website of the Women Lawyers Association of New South Wales, Australia. Includes submissions, speeches, and links to other women lawyers association websites.

http://www.geocities.com/Athens/Acropolis/7001/kart_b.htm
Australian-based women and the law website with links to Canadian and United States of America women and the law articles and the National Women's Justice Coalition.

http://www.austlii.edu.au/
Website for the Australian Legal Information Institute with links to law reform agencies as well as cases and legislation from Australia, Ireland, the United Kingdom, New Zealand and the Pacific Islands.

http://www.aviva.org/
Monthly newsletter for women with information and activities world-wide.
Please tell us if you have other websites that we should know about.

Women and the Law: NZLS LAWASIA Conference

The New Zealand Law Conference took place in Christchurch in October. The Conference combined the Law Association for Asia and the Pacific (LAWASIA), the New Zealand Law Society Conference and the NZLS Family Law Section Conference with over 1000 people from New Zealand and around the world attending. There were two particularly good sessions for women lawyers: the Women's Breakfast and the Women Under the Law Panel.

At the Breakfast, which was chaired by Justice Judith Potter, Judge Caren Wickliffe (Ngati Porou and Rongowhakaata) and Marie Andrews (Aboriginal lawyer and law lecturer at the College of Indigenous Australian Peoples), spoke on a range of issues for indigenous women to an audience of over 70.

Judge Wickliffe spoke of Maori women's leadership, acknowledging those Maori women that had paved the way for her to now be a judge in the Maori Land Court. She noted that she was not the first Maori women to be appointed as a judge in New Zealand, Lowell Goddard, in the High Court, being appointed before her.

Judge Wickliffe spoke powerfully about Maori women's leadership in whanau, hapu and iwi and in the legal profession. She noted that Maori women leaders have a more participatory and consensual decision-making style and bring a spiritual understanding of Maori. This meant, in her view, that Maori women have a greater understanding of those Maori appearing before them.

She also noted that the Maori Land Court has a more inquisitorial jurisdiction and, as a result, there was more room for acknowledgement of Maori tikanga and more opportunity for a people centred approach in the preparation and presentation of applications before that Court.

Marie Andrews also spoke of issues for indigenous women. She made a powerful analogy between the events of September 11 in the United States and racism in Australia. She noted the "evil in the hearts of men" that we witnessed in the United States terrorist attacks and the need to embrace and understand that if we are to really address its causes. So too, she said, we must embrace and understand evil, such as racial and sexual terrorism, in our own lives and communities, if we are to work successfully to end it .

Ms Andrews told the story of the death of Colleen Richmond, shot and killed by Sydney Police a few years ago and how Colleen Richmond's Aboriginal, lesbian, poor world had collided with that of Australian policing, in a similar way to which worlds had collided in the terrorist attacks in the United States. Drawing a moving analogy what happens at the intersections of race, gender and sexuality and how a woman armed with a pocket-knife had been shot by Police, she asked what "justice" and "access to justice" meant for women. In the end, unless there can be access to justice for all, she said, "there is no justice: just us."

In the Women Under the Law Panel, three women (including Judge Wickliffe) talked of their experiences as women working in the law in the Pacific. Imrana Jalal, a human rights lawyer, was a former Human Rights Commissioner in Fiji, before resigning on principle in the political crisis in 2000. Ms Jalal talked about the vital role that women and lawyers (both male and female) played in the Fijian crisis, particularly in refusing to recognise the Government that attempted to install itself following the attempted coup by George Speight.

Dianne Kempe QC, of Bermuda, emphasised the importance of women lawyers taking their place on the international stage and bringing their leadership to issues around the world.

Copies of some of the materials presented by speakers are available from the New Zealand Law Society on CD ROM by writing to NZLS, PO Box 5041, Wellington.