Some Thoughts on Judicial Diversity in the New Supreme Court Era

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> [W]e have a keen appreciation of the task ahead; a consciousness of the solemn trust we undertake; and a willingness to respond to the expectation with which this reform has been undertaken. (Speech by the Rt Hon Dame Sian Elias, Chief Justice of New Zealand, on the occasion of the first sitting of the New Zealand Supreme Court, 1 July 2004).

I. Introduction

The past couple of decades have seen many significant legal and constitutional developments in New Zealand. Some of these developments have directly impacted on the New Zealand court system and judiciary. Arguably, the most significant judicial reform development has been the abolishment of appeals to the Judicial Committee of the Privy Council[1] and the concomitant establishment of the Supreme Court of New Zealand.[2] The abolishment of appeals to the Privy Council was mooted as far back as 1904 by the then Chief Justice, Sir Robert Stout. It has taken nearly a century to accomplish, but New Zealand now has a court of final appeal based on its own shores.[3]

In this article, I submit that the establishment of this new apex court requires a rethink of who our judges are, what they do and how they do it. Essentially, it requires a rethink of what it means to be a judge, particularly in light of the changing 'face' of New Zealand.[4] This raises the important issues of judicial selection and appointment, which, in a diverse society like New Zealand with both bicultural and multicultural dimensions, is inextricably coupled with judicial diversity.

II. The Role of the Judiciary

The question of what role judges in a democracy fulfils – or should fulfil – has become important in the modern world. It is increasingly a question that both governments and citizens ask because of the increasing powers of judges to review laws and conduct that affect public institutions and citizens. In jurisdictions where judges have the power to declare laws or conduct invalid, the thin line between the functions of the legislative and judicial branches of government – and the limits

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1 Hereinafter 'the Privy Council'.

2 Supreme Court Act 2003. The Act came into force on 1 January 2004 with the new Supreme Court empowered to hear appeals from 1 July 2004. For a short history of the Supreme Court, <http://www.courtsofnz.govt.nz/about/supreme/history> at 16 October 2008.

3 For an overview of the historical development of the abolition process, see Terence Arnold, 'Update on the Supreme Court' (speech to the Legal Research Foundation Annual General Meeting, 7 August 2003) <http://www.crownlaw.govt.nz/uploads/UpdateSC.PDF> at 16 October 2008.

4 My focus in this paper is on the superior court judiciary.

imposed on each branch by the other – are particularly important and controversial issues. In jurisdictions where the legislature is supreme, the boundaries between the branches of government are also becoming progressively blurred as judges test the limits of the doctrine of separation of powers. This is also true in New Zealand.

There is no doubt that the establishment of the Supreme Court heralds a new age for New Zealand. It allows New Zealand to stand on its own feet – judicially speaking. Section 3(1) of the Supreme Court Act 2003 sets out the purpose of the Act:

> (1) The purpose of this Act is—
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> (a) to establish within New Zealand a new court of final appeal comprising New Zealand judges—
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> (i) to recognise that New Zealand is an independent nation with its own history and traditions; and
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> (ii) to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions; and
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> (iii) to improve access to justice ...

The purpose of the Act is helpful in determining the purpose of the Supreme Court. As I read it, the main function of the new court is to serve as a court of final instance setting binding precedent for lower courts. Additionally, the court – and its judges – has a symbolic role. In the words of the Chief Justice, 'we know that we serve an idea much bigger than all of us'.[5] This role includes bringing a distinctive New Zealand approach to the administration of justice and the resolution of disputes, including legal matters relating to the Treaty of Waitangi. It places a heavy burden on the court as an institution, and the individual judges who constitute it. New Zealand now has a final appellate court staffed by New Zealand judges with a knowledge and understanding of New Zealand law, society and the context within which the law operates. It is a further step in cutting the umbilical cord with its former ruler and contributes to the developing sense of a distinct New Zealand identity.

The Chief Justice links the creation of the new court with the aspirations for justice that existed at the time of the signing of the Treaty of Waitangi:[6]

> What we should celebrate is the aspiration for the delivery of justice which has prompted the creation of the Court. Those aspirations have been with us from the very beginning. In February 1840 at Waitangi much of the debate was about law and its administration. I doubt whether any country was founded with such expectations of law as ours. The creation of a final Court of Appeal in New Zealand furthers those aspirations for justice.

There is an expectation that the Supreme Court will be conscious of these aspirations in the performance of its obligations. The establishment of the Supreme Court provides an opportunity for the judiciary as a whole to reflect on its role in responding to these aspirations. The Supreme Court, staffed by New Zealand judges, has a general and a statutory obligation to ensure that justice is done with an understanding of New Zealand history and conditions. The aspirations referred to by the Chief Justice should not be ignored. This requires the discharge of the judicial

5 Dame Sian Elias, Speech on the occasion of the first sitting of the Supreme Court, Wellington, 1 July 2004 <http://www.courtsofnz.govt.nz/from/speeches-and-papers/#speechpaper-list-first-sitting> at 16 October 2008.

6 Ibid.

function in a particular, distinctive New Zealand context. It appears that the role players are aware of this. In the words of Richard Dobson QC, speaking at the first sitting of the Supreme Court:[7]

> Your Honours are of this society, and are exposed to and at all times aware of all that is going on, from the aspirations of many groups of New Zealanders for the best conditions to foster social and economic well-being, and mutual respect for the differences between us, to politicians and commentators fulminating on the elusive line between development and creation of the law, and also to the desirable business conditions for a small relatively affluent country where most economic activity is done in small businesses, as components of a country particularly dependent for our standard of living on matters beyond our shores and therefore largely beyond our control. We are in an era of heightened awareness of human rights and expectations that the Courts will recognise and enforce them. In this, we reflect aspirations in many countries, but they are tempered perhaps, by the beginnings of acknowledgments that the law cannot provide a complete remedy for every recognised wrong. The law must reflect the society it regulates and this Court will foster confidence as its judgments demonstrate and understanding of all those tensions and aspirations.

In dealing with the cases before them, the Supreme Court should respond appropriately to the aspirations underlying the creation of the new court. The vexing question is how the court should go about doing this. The primary role of the judge has always been and will remain the same: to resolve disputes through the interpretation and application of the law. It is not what the judge does that is changing, but the way in which it is done. Hodder's description of the judge as 'a philosopher-king in the democracy' no longer has a place in the Supreme Court era.[8] Judges are more than mere positivist functionaries and mechanical interpreters of the law. Underlying everything a judge does, is a principled commitment to justice, and the rendering of justice in a comprehensible and accessible way. The Supreme Court has to provide the leadership in this regard. Daily, judges consider competing interests and values which require the exercise of discretion. They have a duty to pursue and advance the values that underlie a democratic legal system and its basis of the rule of law and right to equality. As expressed by Justice Baragwanath recently:[9]

> Confidence in the judges is a component of confidence in the rule of law. Unless Māori (and other minorities) feel that the legal system is *their* legal system the estrangement of many from the law will continue and perhaps accentuate.

It is legitimately within the domain of judges to choose interpretations of law that will advance this cause. Legislation such as the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, and also the Treaty of Waitangi, invite the courts to provide more specific content to generally framed provisions. It is also hoped that the court will contribute to the further development of a bicultural jurisprudence, including that '[t]he evolving common law of New Zealand should respond to the distinctiveness and dignity of Māori.'[10]

I am not proposing that the judiciary usurps the power reserved for the legislature by legislating from the bench. New Zealand is a democracy, not a judocracy or dikastocracy.[11] It is not

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7 Robert Dobson QC, on behalf of the New Zealand Bar Association, on the occasion of the first sitting of the Supreme Court, Wellington, 1 July 2004 <http://www.courtsofnz.govt.nz/from/speeches-and-papers/#speechpaper-list-first-sitting> at 16 October 2008.

8 Jack Hodder, 'Judicial Appointments in New Zealand' (1974) *New Zealand Law Journal* 80, 81.

9 The Hon Justice Baragwanath, 'The Evolution of Treaty Jurisprudence' (2007) *Waikato Law Review* 1, 10.

10 Ibid 4.

11 *Du Plessis v De Klerk* 1996 3 SA 850 (CC), para 181. The term dikastocracy is used to describe a government by judges. It is derived from the Greek word 'dikastos', meaning judge.

my belief that 'nothing matters beyond politically desirable results, however achieved'.[12] Justice Albie Sachs, of the Constitutional Court of South Africa, made the following appropriate observation in *Du Plessis v De Klerk*:[13]

> The judicial function simply does not lend itself to the kinds of factual enquiries, cost-benefit analyses, political compromises, investigations of administrative/enforcement capacities, implementation strategies and budgetary priority decisions, which appropriate decision-making on social, economic and political questions requires. Nor does it permit the kinds of pluralistic public interventions, press scrutiny, periods for reflection and the possibility of later amendments, which are part and parcel of Parliamentary procedure.

The judiciary cannot – and should not – have the same functions as the legislature. The separation of powers should be maintained. However, the separation of powers does not mean that each branch should perform their functions in isolation, and with disregard of the other branches. The three branches of government are partners in the *trias politica*. They are also partners in the lawmaking process. Political realities dictate that the lawmaking process is a collaborative effort. I am not proposing that the Supreme Court should take centre stage as the lead actor on the political stage; rather, I am pleading for it to have equal billing with the other two main players. They have separate but complementary powers. It is only in this way that the Supreme Court will be able to fulfil its purpose and deliver on the promises that underlie its establishment. Through the performance of its functions, the judiciary should engage in dialogue with the other branches, particularly the legislature. Dialogue is part and parcel of the democratic process.

Decisions should however always be solidly grounded in law. The court is a court of law, not a court of justice. In the words of Dennis Davis, a former professor of law and now judge in South Africa, 'judges must themselves be careful not to allow their conceptions of the substantive good to intrude into decisions so that they overreach themselves and encroach upon a political terrain where they can subvert rather than promote the democratic enterprise'.[14] In a parliamentary supremacy like New Zealand, the court can only go as far as the laws made by Parliament allow it to go. The Chief Justice herself addressed this issue at the first sitting of the Supreme Court:[15]

> Those who worry about upheaval in our law may not understand how conservative judicial method must be even in a common law system. No judgment is isolated from the existing order, A judge must always ensure that a decision fits within it, both to achieve a just solution for the parties and to maintain the order for future cases, which can only be dimly foreseen. Judicial decisions must be legitimate. That means they must always be justified through reasons. Only through reasons is fidelity to the judicial obligation to do right according to law demonstrated. Courts cannot have agendas. They respond to actual controversies brought before them by real litigants. And their judgments must be their own vindication. But judgments will not convince if they stray from established doctrine and precedent except for sound reason, laid out for all to assess.

Respect for legal precedent needs to be maintained, but the courts should have the courage to deviate if and when required to do so. As so eloquently put by Justice Albie Sachs:[16]

> There is a time to be cautious and a time to be bold, a time for discretion to be the better part of valour and a time for valour to be the better part of discretion. And it would appear that there is no logic intrinsic

12 Robert H Bork, *The Tempting of America: The Political Seduction of the Law* (1990) 1.

13 *Du Plessis v De Klerk* above n 11, para 178.

14 Dennis Davis, 'John Mowbray Didcott: The Jurisprudence of Justification' (1999) 116 *South African Law Journal* 416, 421.

15 Elias, above n 5.

16 Justice Albie Sachs, 'Book review' (2001) *University of Toronto Law Journal* 87, 90.

> to the judicial function itself that can tell us when the clock strikes for valour and when for caution. The question becomes not one of whether but when; I would love to see of theory of when...

In time, some issues relating to judicial precedent may arise: for example, would the court change its treatment of judicial authority as it develops a bank of its own case law, including progressively moving away from past Privy Council decisions and English case law generally, like the Supreme Court of Canada did? I think that in New Zealand expectations are high that the Supreme Court will set the tone for the rest of the judiciary. They are the guardians of New Zealand and the protectors against potential abuse by the two other branches of the *trias politica*. Like I stated before, the judiciary represents an essential component of the machine that is New Zealand democracy. Judges are quite literally the edge that cuts the law. They represent the face and the force of the law. This carries with it an onerous responsibility: a responsibility to carry the law through to those whom it affects in a way that will command their respect and acceptance. In order for them to maintain legitimacy, there is a dire need for the judiciaries of the world to evolve to meet the needs of the communities they serve and within which they operate.

The reality is that as the world changes, the world's judiciaries need to change to keep pace. The new world culture of human rights and substantive justice require this. This is also true for New Zealand and particularly the Supreme Court. The judiciary is widely regarded as a conservative institution; change is slow. However, I submit that the establishment of the Supreme Court is a catalyst for such change. To my mind, a diverse judiciary that is more reflective of New Zealand will assist in realising the aspirations and ideals articulated earlier in this article.

III. Judicial Diversity

It is a fact that our culture, religion, values, life experiences and a range of other factors colour the way that we see – and judge – the world. New Zealanders are not all alike, nor are our values. We do not all look the same, and we do not all think the same. Judges are no different. They are human beings, first and foremost. New Zealand has a diverse, pluralist society. It is not only composed of Pakeha and Māori people, but also people from other ethnic and cultural backgrounds. The latest statistics show that although the overwhelming majority of the population is still persons of European descent, ethnic diversity continues to increase.[17] The 'face' of New Zealand has changed over the past decades, and it is continuing to change. The judiciary needs to keep up with this changing 'face'. There is a need to acknowledge diversity, and to understand it.

The New Zealand judiciary has been criticised as not being sufficiently representative of the cultures and communities whom it serves. In the words of Spiller:[18]

> There has been considerable criticism of the so-called 'unhealthy uniformity' of the judiciary. It has been claimed by some that the 'judicial club' was 'almost exclusively composed of ageing Pakeha men, drawn from the legal and social elite', who 'cannot be expected to identify with, or even understand, the demands of Māori as tangata whenua, minority cultures, women or the poor.

17 Ministry of Social Development, *The Social Report* 2008. <http://www.socialreport.msd.govt.nz/people/ethnic-composition-population.html> at 16 October 2008. In 2006, Māori made up 14.6% of the total New Zealand population compared with 13% in 1991. The Asian ethnic group is now the third largest group, at 9.2%, ahead of Pacific peoples, at 6.9%. According to 2001-based medium population projections, by 2021 the Māori population is projected to be 17%, the Pacific people 9% and the Asian population 15%. In 2006, Europeans made up 77.6% of the population.

18 P Spiller, J Finn and R Boast, *A New Zealand Legal History* (2nd ed, 2001) 222.

It is a fact that until recently the members of the High Court and Court of Appeal were overwhelmingly male and European. Spiller provides an analysis of the backgrounds and professional experiences of the New Zealand judiciary up to 2001 prior to their elevation to the Bench,[19] while Hodder did a study of judicial appointments in New Zealand for the period 1946-1972.[20] The research reveals, unsurprisingly, that the superior courts judiciary was at the time overwhelmingly staffed with European males with very similar backgrounds and professional experience.

Much has been written on the issue of diversity, particularly gender diversity.[21] Diversity is a complex and multi-faceted concept. There is sometimes a tendency to oversimplify the concept by reducing it only to elements of race and gender. The reality is that people identify with somebody with whom they have something in common; race, culture and gender are very basic but fundamental identifiers. It engenders trust and confidence, which ultimately impacts on the legitimacy of the judiciary, and the legitimacy of the justice system as a whole. The reasons in favour of judicial diversity range from the symbolic to the substantive, and are often intertwined. A fundamental tenet underlying the arguments is that the judicial function, including judicial thinking, is not the exclusive domain of a single, privileged group with a single, privileged perspective of life and law.

With regard to gender diversity, the Chief Justice contends that although being a woman is not a sufficient qualification for being a judge, it is an important additional qualification.[22] She cites three reasons:[23]

- `The exclusion of women from the judiciary is contrary to the equality of men and women under international law and also the law of equality which underlies the rule of law in domestic jurisdictions.
- Women judges are necessary for the legitimacy of the judiciary in a democracy which values all individuals as equals.
- Women bring a 'distinct' perspective and experience to judging, which are essential for judging in a modern perspective.

It is the last two reasons that I should like to focus on. They are equally applicable to persons from other non-traditional minority pools from which the judiciary is usually drawn, including people from different ethnicities and sexual orientation. Women judges or judges from a particular ethnic group do not necessarily vote or rule differently from their other colleagues on the Bench. As Baroness Hale, the first and only female member of the Judicial Committee of the House of Lords states, '[o]ur loyalty is to the law and not to our race and gender'.[24] Rather, the benefit of a diverse judiciary is that it allows judges to interact and work with other judges who are different from themselves in some or other distinct way who are likely to have a different life experience

19 Ibid 187-247.

20 Hodder, above n 8, 82-85.

21 See for example Kate Malleson, 'Justifying gender equality on the bench: why difference won't do' (2003) 11 *Feminist Legal Studies* 1; Hamilton, 'The Law Council of Australia Policy 2001 on the process of judicial appointments: Any good news for future *female* judicial appointees?' (2001) *QUT Law and Justice Journal* 17.

22 Dame Sian Elias, 'Changing our world' (Address given to the International Association of Women Judges' Conference, Sydney, 4 May 2006) <http://www.courtsofnz.govt.nz/from/speeches-and-papers/#speechpaper-list-first-sitting> at 16 October 2008.

23 Ibid.

24 Baroness Hale, 'Equality and the Judiciary: Why Should We Want More Women Judges' (2001) *Public Law* 489, 499.

to their own. It allows judges from more traditional backgrounds to confront diverse perspectives and opinions which will ultimately improve the likelihood that the outcome of the case will be just and fair. It is these different experiences of women and persons from minority groups that add value to the judicial function. The diverse life experiences of judges add to a more comprehensive understanding of the broader context within which the law operates. It is particularly beneficial at appellate level, where judges jointly deliberate the outcome of cases. The focus should be on the court as an institution, and not the individual members who constitute the court. However, the interaction between the individual members, including how they deliberate, is important as it influences the group of individuals that makes up the institution itself. Diversity therefore appears to improve the legitimacy of the deliberation process and the resulting judgments.

Many in New Zealand seem sceptical about the idea of a diverse judiciary. Cox writes, '[w]hether a judge is seen as representative or not should have little, if any, bearing upon selection. Litigants, and defendants in criminal cases, expect and are entitled to the highest standards of judicial performance'.[25]

He calls the belief for the need of a more representative judiciary 'misguided': '[t]he bench, and the legal profession, are, or should be, committed to maintaining the highest standards of public service and not pandering to the notion that the bench should be "more representative." The bench cannot, and should not, be truly representative'.[26]

The former Solicitor-General and now Court of Appeal judge, Terence Arnold, supports judicial diversity, but cites a word of caution:[27]

> As in other comparable jurisdictions, there remains pressure to ensure that the Bench reflects the diversity of New Zealand society. Diversity does not, of course, mean sectional representation or quotas. It simply means that the picture of the judiciary that Jack Hodder revealed in his 1974 study is no longer acceptable – upper-middle class, middle-aged pakeha males from a relatively narrow educational background. But while diversity is a goal, no one argues seriously that merit should be sacrificed to achieve it. Diversity can be achieved within a merit-based appointments system – it simply requires some flexibility of approach.

As Spiller explains:[28]

> It has rightly been pointed out that it is important not to put human beings into watertight compartments, and that to be a good judge one cannot be all things to all people. At the same time a wider range of people on the bench would provide a breadth of views and different insights into the claims, personalities and situations of the range of litigants appearing before the court.

A New Zealand that acknowledges its bicultural and multicultural character requires a diverse judiciary. One of the greatest challenges facing the current Supreme Court bench is to break free from a possible perception that it is a case of the same old outfit merely repackaged with a new brand name.

The aim of a more diverse judiciary should be a consideration in judicial selection and appointment. It should not be the primary consideration, but as either an additional requirement, or as part of an extended understanding of the merit requirement, it has an important role to play. In the guidelines for judicial appointments to the office of High Court judge, it is made clear that al-

25 Noel Cox, 'Merit should be the principal criterion for judicial appointment' (2004) 637 *Law Talk* 37, 38.

26 Ibid 38.

27 Terence Arnold, 'Judicial Appointments' (Address to the New Zealand Bar Association Conference, 21 August 2003) <http://www.crownlaw.govt.nz/uploads/JudicialAppointments.PDF> at 16 October 2008.

28 Spiller, above n 18, 234-5.

though there is a commitment to actively promoting diversity in the judiciary, taking in to account all appropriate attributes, appointments are still made on the basis of merit.[29]

Merit should therefore remain the primary criterion for selection. Judicial legitimacy demands it. The question of what constitutes merit is vexing. It has traditionally been understood to relate to legal knowledge and experience, including professional qualities and ability. Is it time to look beyond merit? I submit that it is not, but that the merit concept should be given a broader meaning. The requirements of excellence, experience and ability that are inherent in the merit requirement should never be compromised. However, merit should be defined sufficiently broadly to include achievements in legal activities that are wider than the traditional mould of litigation practice as a senior barrister or solicitor. The New Zealand criterion of 'demonstrated overall excellence in a legal occupation' appears to be in theory sufficiently wide to allow for candidates from non-traditional backgrounds to be considered.[30] There is precedent for the appointment of academics, government lawyers and judges from lower courts – all non-traditional feeding grounds – to the superior courts. The precise determination of what merit is, and whether somebody meets the merit requirement, is not a wholly objective exercise. This determination is not value-neutral, and this is why the questions of who selects the judges, and how they are selected, become crucial. In the words of the Chief Justice, '[p]ositive law is value laden. Who decides, matters'.[31] And because who decides matters, care needs to be taken to ensure that the best persons are selected for the role.

In recent years the selection and appointment of judges in New Zealand has been the subject of scrutinous debate. The debate intensified at the time of the selection and appointment of the judges of the new Supreme Court. At the time, a question of particular significance was whether a commission to select and/or appoint judges would be a solution to the problems raised by detractors of the selection and appointment processes that applied at the time. This prompted the publication of a public consultation paper entitled *Appointing Judges: a judicial appointments commission for New Zealand?*[32] Ultimately, a commission model was not adopted. The current model remains whereby appointments are made by the Governor-General on the recommendation of the Attorney-General.[33]

I favour a judicial selection commission with specifically proscribed functions and powers, as opposed to a judicial appointments commission. I agree with those who say that a judicial commission with unbridled power should be avoided. There is no question that the responsibility for appointment should remain with executive government. This is in line with the separation of powers. Rather, the issue, I suggest, is the selection of judges. Should the executive select the judges? In particular, who is consulted by the executive, the type and extent of consultation, and ultimately the force or binding power of such consultations? I favour a hybrid system, where the ultimate selection lies with the executive, but the choice is limited to a closed list of candidates recommended by a judicial selection commission. The current system has according to most reports not been abused because of scrupulous adherence to the constitutional conventions by the political

29 <http://www.justice.govt.nz/pubs/other/pamphlets/2003/judicial-appointments/high-court-judge.html> at 16 October 2008.

30 Ibid.

31 Elias, n 22 above.

32 Department of Justice (2003) <http://www.justice.govt.nz/pubs/reports/2004/judicial-appointment/index.html> at 16 October 2008.

33 For an overview of the appointments process, see 'Judicial Appointments: Office of High Court Judge' above n 29.

actors involved. However, there is no absolute guarantee that this will always be so. An independent judicial selection commission could act as a potential safeguard against abuse, and also ensure consistency and continuity in a judicial selection that recognizes diversity as an objective.

The membership of such a commission is open to debate, but its independence should not be compromised. Independence is an absolute prerequisite. As a bare minimum, all stakeholders should be represented; to my mind, no stakeholder is more important than the community, whose acceptance and support are essential to the legitimacy of the judiciary. I therefore support the idea of lay membership. The extent of the lay representation is debatable, but it would probably have legitimacy issues if there is majority lay representation. The advantage of lay members is that they have the ability to look beyond the candidates' legal ability, to the other qualities that would make a good judge. It is crucially important though that the selection process is not over-politicized by the inclusion of a majority of politicians, either from the legislature or the executive. This is arguably the greatest shortcoming and criticism of the South African Judicial Service Commission, where there is an over-representation of politicians.[34]

How does one go about ensuring a diverse judiciary? Is the present system adequate, or should the aim of judicial diversity be formalised through the introduction of specific measures calculated to promote diversity? In other words, do we need a more aggressive policy of parity that essentially borders on affirmative action and a quota system, or will a more evolutionary approach achieve the desired results? In respect of the present system, the results are mixed. Justice Edward Durie was the first person of Māori descent to serve as a High Court judge until his retirement in 2006.[35] In September 2008, the appointment of Judge Joe Williams, Chief Māori Land Court judge and chairperson of the Waitangi Tribunal, to the High Court was announced. Justice Williams is currently the only person of Māori descent on the superior court bench. The Chief Justice is the sole female on the Supreme Court; two members of the Court of Appeal are female;[36] and eight judges on the High Court are female.[37] Justice Susan Glazebrook is currently the longest serving justice on the Court of Appeal, and is the most senior justice next to the President of the Court, William Young. According to the New Zealand Census on Women's Participation,[38] at 31 December 2007 there were 198 judges across all levels of the judiciary, of whom 51 were women. Reduced to a percentage, it means that 25.76 per cent of judges are women. Women are best represented on the Family Court, which is at District Court level, where 17 of the 45 judges are women. The report comments that '[t]he judiciary is another area where progress has all but stalled in terms of women's appointments'.[39] Elizabeth McDonald writes that there seemed to be a popular perception during the tenure of Margaret Wilson as Attorney-General that she favoured appointments on

34 See in general J Baloro and M Olivier 'Towards a legitimate South African judiciary: Transformation, independence and the promotion of democracy and human rights' (2001) 26 *Journal for Juridical Science* 31.

35 Justice Durie was appointed to the High Court in 2003 after serving as Chief Judge of the Māori Land Court for many years. He retired in 2006.

36 Justice Susan Glazebrook (appointed to the High Court in 2000; elevated to the Court of Appeal in 2002) and Justice Ellen France (appointed to the High Court in 2002; elevated to the Court of Appeal in 2006), both elevated from the High Court.

37 They are (year of appointment in brackets): Goddard (1995); Potter (1997); Winkelmann (2004); Courtney (2004); Andrews (2006); Mallon (2006); Duffy (2007); and French (2008).

38 Human Rights Commission, *New Zealand Census on Women's Participation* (2008) 69.

39 Ibid.

gender and ethnicity rather than merit.[40] McDonald cites interesting statistics: in the years 2000, 2001 and 2003, women were appointed in higher proportions to the Bench than men.[41] Writing in 2001, Spiller opines that 'there have been tangible moves towards making the judiciary more accountable to and reflective of broader society'.[42] He believes that the New Zealand judiciary is in a healthy overall state because of the preparedness of modern judges and Attorneys-General to address these issues, and that this hopefully points to the judiciary's continued adaptability to future change.[43]

It is important that any measure designed to further diversity has the support of the legal profession and the judiciary. In simple words, the insiders need to buy into it. In all probability, the idea of quotas and affirmative action to ensure diversity would not meet with the approval of the legal profession or the judiciary. In my opinion, a diverse judiciary can be achieved naturally without the need for drastic measures such as affirmative action or quotas.[44] The proviso is that the criteria for selection and appointment should be supplemented to incorporate criteria that broaden the pool of candidates to persons from backgrounds that have traditionally not been the main feeding area for the judiciary, and whose appointment will contribute to a more diverse judiciary with an understanding of law in the 21st century. Regarding affirmative action, there is also the likelihood that appointment of persons under such a policy may be perceived not to have been on merit, irrespective of whether they may otherwise have qualified on the merit requirement alone.

A very positive aspect of the current system is that it lists the criteria for appointment, and acknowledges the importance of diversity. The four general criteria are: legal ability; quality of character; personal technical skills; and reflection of society. The last mentioned criterion means that those appointed must be:[45]

> [A] person who is aware of, and sensitive to, the diversity of modern New Zealand society. It is very important that the judiciary comprise those with experience of the community of which the court is part and who clearly demonstrate their social awareness. The Report of the Royal Commission on the Courts in 1978 put the point as the need for 'a good knowledge, acquired by experience, of New Zealand life, customs and values'.

As stated before, the guidelines for appointment explicitly state a commitment to actively promoting diversity in the judiciary.

IV. Conclusion

It is still early days, but as it evolves, the Supreme Court will no doubt continue to develop an identity and voice of its own which is uniquely New Zealand and distinct from that of the Privy Council. The Supreme Court has not reached the stage where news of its decisions is the major news story of the day. I am doubtful that it ever will and perhaps it is better that it should remain

40 Elizabeth McDonald, 'Diversity in judicial appointments: the extent to which gender is a factor' (2005) 642 *Law Talk* 16.

41 Ibid 17. This is the percentage of actual number of female appointments made compared with the number of females eligible for appointment in a particular year.

42 Spiller, above n 18, 224.

43 Ibid 225.

44 South Africa has opted for a more aggressive approach. S 174(2) of the Constitution of the Republic of South Africa 1996 provides: 'The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.'

45 Above n 29.

so. However, I would caution against the notion of the Supreme Court as a quiet court in a quiet country, a phrase previously used to describe the Supreme Court of Canada.[46]

It is essential that the general population is aware of what judges do and how they do it. One way of achieving this is to ensure that judgments are clear to everybody affected by them. I think it is particularly important that the background and context, especially the social context within which decisions are made, especially in cases with substantial public interest, should be made clear. It is very encouraging that the website of the Supreme Court has a separate page dedicated to decisions of public interest, and that summaries of cases written in plain, understandable language are available.[47]

It is almost a decade since the elevation of Dame Sian Elias to the office of Chief Justice. Has progress been made in that time to improve the diversity of the judiciary? I think that any observer cannot deny that in the past ten years much more has been done to improve judicial diversity than at any previous time in New Zealand judicial history. Despite the inroads that have been made, it seems that the judicial world is still very much regarded as a man's world. In the words of Elias CJ, '[i]t is not surprising that women who exercise judicial authority continue to be outsiders who are watched more critically and who need constantly to justify their appointments and their work'.[48] The appointment of the most senior members of the Court of Appeal as the first judges of the Supreme Court represented 'continuity and progression, rather than radical change'.[49] This was sound policy at the time, but I think that the time has come to give some serious consideration to making an appointment that would contribute to diversifying the composition of the bench when next a vacancy arrives. More can still be done. The groundwork has been laid. Strategies should be put in place to identify candidates with judicial potential whose appointment would diversify the Bench's composition. It is not enough to call for expressions of interest, as persons from non-traditional backgrounds may not necessarily express such interest. Some proactive scouting may be required. If the pool of candidates from which these selections are made, is made sufficiently wide to incorporate all possible feeding grounds, including those from non-traditional backgrounds, there should be no reason why New Zealand should not achieve a more diverse judiciary.

46 P McCormick, *Supreme At Last* (2000) 1.

47 <http://www.courtsofnz.govt.nz/from/decisions/judgments> at 16 October 2008.

48 Elias, above n 22.

49 Margaret Wilson, Address of the Attorney-General on the occasion of the first sitting of the Supreme Court, Wellington, 1 July 2004 <http://www.courtsofnz.govt.nz/from/speeches-and-papers/#speechpaper-list-first-sitting> at 16 October 2008.