P437 PERESE, S. The selection of judicial candidates in New Zealand.

Simativa Perese

The selection of Judicial Candidates in New Zealand

The Potential for Political Abuse

Research paper for Litigation

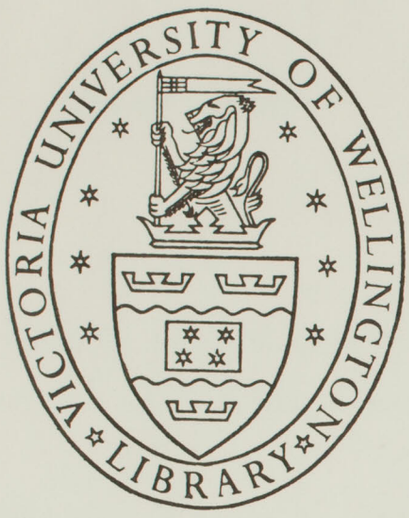
LLM (LAWS 541)

Law Faculty

Victoria University of Wellington

Wellington 1989

PERESE, S. The selection of judicial candidates in New Zealand.



Contents **Page**

Introduction

The title of this paper is self evident. According to the Rt Hon. Geoffrey Palmer, Minister of Justice, (as he was) "the selective process is entirely a matter of accepted informal tradition".[1] If that acceptance be the test of suitability, the inquiry ends forthwith. However, the substance of Palmer's exposition is fraught with difficulties. The Minister writes:[2]

It is a process which the public has little or no understanding. But there is little public criticism of the mechanics of the selection process either.

With respect, the statements pose quite difficult problems. How can the public criticise that of which they have little or no understanding? Further, the Minister tacitly assumes silence amounts to acceptance. Moreover, the statements point to a much larger and more significant constitutional issue. That is, given the powers of judges, both statutory and inherent, and the prevalence of their decisions in the ordinary course of activities, why are their appointments shrouded in mystery? The corollary of that concern is whether there is some mystery which ought, in the public interest, to be continued.

It remains therefore, for an overt admission that the aim of this paper is to provide a platform for informal discussion, both within and beyond legal circles, on the selection process in New Zealand. The writer's particular concern is on the potential danger of "political" appointments. The writer submits an appointment is political when the appointee is selected for his partisan political sympathies. As such, the writer discusses why the govrenment of the day may want to make such an appointment. Further, how and by what means such an intention could be effected. Later the paper analyses the selection difficulties experienced in overseas jurisdictions. The paper also provides a possible reform measure.

We begin our examination by analysing the mechanics of our informal tradition.

The Selection Procedure: A Summary

Who is eligible?

It appears the statutory provisions do no more than assert threshold standings:[3]

No person shall be appointed a Judge unless he has held a practising certificate as a barrister or solicitor for at least 7 years.

The Judicature Act makes provision for thirty one HIgh Court Judges and a Chief Justice.[4] Whereas the District Couts Act provides for ninety eight District Court Judges and a Chief District Court Judge. [5]

Other necessary pre-requisites are determined by the recommender. At the District Court level, former Chief District Court Judge Peter Trapski looked for:[6]

-Someone who could move a high volume of work;

-Geographically, many District Court Judges worked together, so it was important to appoint a person who could work as part of a team;

-Prospects wih good communication skills:

-Prospects willing to make sacrifices and who showed commitment to their work.

For the High Court and Court of Appeal, former Chief Justice Sir Ronald Davison considered:[7]

-The prospect's age. Around 50 was the optimum time period;

-Extent and experience at the bar, particularly in the criminal field.

-Work rate. Given time constraints, it is important to furnish a decision within a reasonable time;

-Most importantly, the prospect had to exhibit good judgment. This aspect was determined by the way a prospect presented the relevant issues of a case

Chief Judge Trapski and Sir Ronald held dossiers on prospective judges. Judge Trapski's compilation contained around one hundred and fifty potentials. Without further research, the high

number suggests there are many capable candidates.

At the Court of Appeal level, the President of that Court is always consulted.[8] The present incumbent Sir Robin Cooke commented on the need to appoint people with a bi-cultural approach. In his Honour's opinion, multi-cultural problems are among the greatest this country has to face.

A candidate's intellectual capacity is another primary requirement. Other eligibility factors can be elicited from disqualification considerations. [9] These include past or present problems with Trust funds and marital status. A person whos marriage has been dissolved is not barred from the bench. Rather, a person who has not reached a proper resolution to the dissolution proceedings, and who takes up with another, will be precluded.

The Decision Makers

A High Court Judge is appointed by the Governor General in the name and on behalf of Her Majesty. [10] A District Court Judge is appointed by the Governor General by warrant under his hand.[11] Whether the Governor General appoints on behalf of Her Majesty or by warrant is of little practical signficance. Rather, a District Court appointment by warrant indicates the statutory origins of that Court.[12] Further, as Ellis QC (as he was) avers, Her Majesty is able to appoint a District Court Judge under the Royal Powers Act 1953.[13]

The statutory provisions highlight the only formal phase of the process. It is thus a matter of convention that judges at either level are in fact chosen by the Attorney-General. The Attorney has the final decision upon recommendations received from the Chief Justice for High Court and Court of Appeal, and Chief District Court Judge for District Court aappointments.

The mechanics appear to be straightforward.[14] The Chief Judges, from their dossiers, consult other members of the bench. Three names are thereafter tendered for the Attorney's consideration and final decision. Discussions between the Attorney and respective Chief Judge, is followed with consultation initiated by the Solicitor-General on behalf of the Attorney. The Solicitor-General may seek the opinions of members of the bar, Law Society, Secretary for Justice or other persons wih relevant information.[15]

PERESE, S. The selection of judicial candidates in New Zealand.

In comparison to the statutory pronouncements, the consultative process is informal. Its usefulness relies heavily on those holding the key positions. Obviously that state of affairs can be attacked on different grounds. The first, and most striking is the lack of consistency in judicial appointments more generally. It is a matter of practice that consultations are at all relevant in the appointment of judges to the District, High and Court of Appeal benches. In contrast the Minster of Social Welfare must consult the Minster of Justice before an appointment to the Social Security Appeal Authority;[16] the Minister of Justice must consult the Minster of Housing before a Residential Tenancies Tribunal appointment.[17] The begging question is whether formalised consultations will add anything to the quality of the final appoinment. That question will be analysed later in the paper.

A second ground of discourse is to question whether we can put our trust in the informal process. It must satisfy the task of collating and giving due weight the complex array of factors that need to be considered in making a judicial appointment. As Professor Shetreet puts it:[18]

> The quality of the judges in any system largely depends upon the method of their appointment and the standards applied by the appointing authorities in the process of the selection of judges.

Further, as Geoffrey Palmer agrees, Lord Gardiner asserts:[19]

> However good the law is, if a judge is appointed who ought not to have been made a judge, then everything is wrong.

The writer has already briefly adverted to the mechanics of our selection process. The following analysis provides more substantive information on how the final decisioin is arrived at.

The selection assumption is premised on the limited perception that one candidate stands alone as the obvious choice. However, the reality is somewhat less effusive. Sir Ronald Davison commented that in his time as Chief Justice, of the thirty appointments he had been part, three of his first choices for judgeships were flatly refused as unacceptable. In one of the three rejections, he was not told why the candidate had been passed over, nor if rejection was due to the candidate not being of the required caibre. For the other two, the candidates were of the necessary standard, but rejected

for other reasons which made their suitability questionable. Again he was not privy to Attorney Generals reasons. Sir Ronald contended that those rejections aside, his first choice would not as a matter of course be accepted. Instead, one of the three, ranked in merit, would be accepted and appointed.

From this practice, there arise these considerations. First, the selection is from a range of candidates proposed by the Chief Justice. Second, there are disparate views as to the proposed and final appointments. The views may in themselves be safety checks on any purported abuse by the Chief Justice. The *stare decesis* of rejection, provides two further considerations. It is not beyond the realms of possibility for the Attorney to reject all three aspirants. Hence it is possibly a little misleading to aver that the Attorney is limited to three choices. Further, and more importantly, the rejection precedence is tacit support for the proposition that in the final analysis, the Attorney has appointed the person wants, for whatever reason.

As a statistical analogy, the three first choice rejections, out of thirty appointments is a ten percent failure rate that the writer finds unacceptable. That percentage rate is probably too low, given Sir Ronald's contention of his first choice not always being accepted. The writer submits the true percentage rate could not be worked out, without a quite onerous undertaking by Sir Ronald to review his confidential documents. To that end, the writer did not want to push his luck. Irrespective of that true figure, the writer can still justify his discontent, with the available information. As shown it is the Chief Justice who evaluates the potential candidates, and by custom tenders the three people he considers most appropriate. It is therefore a consideration which is not undertaken lightly, particularly since he must rank his selections in order of preference. Moreover, the writer submits, the Chief Justice in his positions of judge and administrator, is more acutely aware of judicial temperament and hence more able to objectify a candidate's skills.

To conclude this section, the writer submits the current process of decision making raises the concern of who is best able to judge a potential candidate. The informality of the process detracts from our confidence in the selection system. It rather, impedes constructive criticisms.

How does one "get noticed"?

As a caveat to the following discussion, it must be noted that a judgeship is no longer solely regarded as an accolade. [20] Rather, it is now more often perceived as a career opportunity. Accordingly there is enormous difficulty in persuading the 'final choice' to take up the appointment. Perhaps as Sir Ronald points out, the difficulty lies with the economics of an appointment. A leading candidate may well have to take a substantial drop in income. However, the new superannuation package[21] may equalise any such loss, thereby enhancing the viability of accepting an appointment.

The writer when trying to ascertain how candidates came to the notice of the Chief Judges, received varied and contradictory information. The information was gained from those who supposedly were informed as to the selection procedures. That the information was contradictory underlines how shrouded in mystery the process really is. Tis poor that the public have no or little understanding of the process, but for the players in the system to also be relatively ignorant is appalling. The writer threrupon interviewed the former Chief Judges to get definitive statements.

> One does not apply for a High Court judgeship. Therefore, you can only really draw attention to yourself in the courts. Sir Ronald's dossier was compiled according to the experiences of all High Court Judges.[22]

> Candidates for District Court judgeships also come to the fore in the courts. Further, one can apply to be a District Court Judge. The direct method involves an approach to the Chief District Court Judge, Secretary for Justice, or President of the District Law Society or National Law Society. The direct mode of notice existed prior to Geoffrey Palmer's Wairakei initiative. The Minister during a District Court Judges conference outlined proposals to "open up the process by which judges are selected or appointed". [23] One proposal was to invited practitioners to make approaches, for four District Court Judgeships, to the Chief District Court Judge, Solicitor General or Secretary for Justice. The value of the Minister's proposal must therefore be seen as consolidating the direct, but hitherto informal practice.

The Minister's invitation resulted in fifty five responses.[24] The majority of those were from lawyers who had already been noted by Chief Judge Trapski as being of the necessary calibre. However, two replies were from candidates of the required calibre, but till their applications,

PERESE, S. The selection of judicial candidates in New Zealand.

neither the decision maker or recommender knew of them. If those two applcations were expressed as a statistical failure rate, it would be reasonably acceptable. However, one could equally argue, given the prominence of judicial decisions, any such failure must be discountenanced. At least at a conceptual level, a compelling query exists as to the number of meritorious candidates, in total, who have been previously overlooked. However, one should not get carried away and impute the failure to those saddled with the onerous task of keeping dossiers and making recommendations. The reality of limited resources means that one must view the responses in a more positive way. That is to say, the majority of the replies were from those already considered as belonging to the "possibles" list.

Some of the fifty five respondents expressed interest in High Court appointments. Whether the direct approach is used for that Court remains to be seen. The writer though agrees with Judge Trapski's view that the type of person most suitable for judicial appointment is s/he who is too busy to apply !

The uncertain system?

The writer's research is as conclusive as possible. There is, sadly, a paucity of literature on the selection process in New Zealand. Hence, if anyone should know how people come to the attention of the recommenders, it ought to be the chief recommenders. That there are a number of disparate views on the precise mechanics of selection, highlights how uncertain our system is. Whilst it can be appreciated that the Minister's initiative has formalised the hitherto informal, it nevertheless does not abate fears, that viewed objectively, we the public do not know what happens behind closed doors. Further, it is the writer's understanding, the Wairakei initiative was an experiment. It is unclear whether the method of approach will be used again in the future. In relation to the Chief Judges, the writer has elicited their selection criteria. But given the formalisation of applications, at the District Court level, one needs to further inquire into the criteria countenanced by the Solicitor General and Secretary for Justice. An inquiry which would probably be premised by an analysis into the positions themselves, and how the present incumbents became appointed. It is further most unsatisfactory that we do not know by what standards the Attorney General accepts/rejects applications. The writer was refused an interview with the Rt Hon Geoffrey Palmer on these matters, and thus subject to some public statement we whether, members of the public or legal fraternity, will remain out in the cold.

The Selection Process: A Critique

Our process is informal. As such its success relies intimately on the professionalism of those in the key positions. To date, there have been no feelings or allegations of a politically motivated appointment. As stated, the writer submits an appointment is political when the appointee is selected for his partisan political sympathies. In a country where there is no Bill of Rights, that state of affairs may be quite consistent. In that respect, it is a testament to the integrity of the process that Sir Ronald Davision confidently asserts, a person's political leanings were never discussed in the consultation phase. Religion did not feature either. The writer doubts whether Sir Ronald's confidence can be interpreted as sufficient reason to celebrate an anticipation of future advertence to such noble ethics. It is not beyond the realms of posibility that New Zealand law will someday be subject to a Bill of Rights. Further, excepting the existence of a Bill of Rights, there appears an alarming trend whereby politically sensitive issues are left to the Courts to determine. At the time of writing, it appears the proposed Maori Fishing Bill will leave to the High and Court of Appeal, the task of specifying Maori fishing rights. If the proposal does require such an exercise of judicial power, it is readily concievable the court's resolutions will materially affect not only New Zealands fishing industry, but also our economy. They in turn will affect the government's chances of re-election. Theoretically a political appointment may legitimate government policy, negating the government having to pass the effective legislation, and opening itself up to unfavourable public reaction. The writer does not proffer comments on politically sensitive issues which have been determined by the courts already. To do so, one would run the risk of imputing politically motivated judgment's to some judges. But note, all the writer has attempted to do with the fishing example is introduce why a government may want to, in future, make a political appointment. A full discussion on this point will follow shortly.

The non-issues

For the sake of completeness, the writer first proffers reasons as to why some of the popular attacks on the selection process do not, in reality , provide sufficient justification for reform. The charges to be discussed have a habit of arousing passionate debates. It is hoped the writer's submissions will be received as constructive perspectives.

The often touted justifications for reform are:

(1) Judges are chosen from a narrow sector of the community, and thus their

decisions do not a represent the will of society; and

(2) Women are discriminated against in the appointment process.

An unrepresentative bench?

This question must be analysed in respect of the limitations of class, age, education and elite standing at the bar. Focussing first on class.

Class

Class or social status are inter-changeable terms. The argument proposes judges belong to the upper class of society. Thus their decisions reflect that class' views, whatever they are. However, one needs to but research the information available on the twelve High Court appointments made by the Rt Hon Geoffrey Palmer over the last five years, to recognise some interesting features.[25] All twelve appointees have extensive practical experience. Nine were Queen's Counsel, representing their experience at the bar, and probably their level of income.[26] If class in New Zealand is measured by economic wealth, then it is safe to surmise that our Judges do belong to the upper echelons of society. However, that classification per se does not import improper motives. Nor does it place a limitation on the way in which a judge is to exercise power. It is submitted the utterances of Lord Abinger on vicarious liability in *Priestly v Fowler*[27] have now found their rightful place and audience, in front of frustrated Legal System students. There is no evidence that in New Zealand, wealth or social status have somehow cocooned practitioners, who later become judges, away from the normal courses of life. To assert otherwise is plainly absurd. Reverting to the appointees' biographies justifies that conclusion. Gault J, apart from being a Patent and Intellectual Property specialist was also the President of the New Zealand Golf Association.[28] Gallen J was raised in the small Hawke Bay farming town of Waipawa, and an active participant in the affairs of the Presbyterian Social Services Association of Hawke Bay and Poverty Bay.[29] Smellie J has been chairman of the Equal Opportunities Committee.[30] Ellis J, former member of the Legal Aid Board,[31] has also been President of the Royal Forest and Bird Protection Society.[32] And perhaps the most colourful appointee was Doogue J. His Honour was Chairman of Amnesty International,[33] Chairman of the Nelson/Malborough National Parks and Reserves Board,[34] member of the Nelson Land Committee, President of the Nelson Institute and President of the Suter Arts Society.[34]

Age

In Sir Ronald Davison's opinion, Geoffrey Palmer preferred to appoint younger judges. This practice it appears was also evident between 1968 - 1972.[35] Age it is argued is a barrier to being in touch with, and appreciative of, younger ideas. Older judges are perceived as the crucible of conservatism. That argument however, belies the reality of a lawyer's advocacy training and function whereby lateral mental agility has become the hallmark of leading practitioners. But, if as was Palmer's preference to appoint younger judges, then how young should they be. It appears as young as Thirty three. A 1989 decision saw the appointment of District Court Judge Green.[36] With respect, one must question the decision. Have relatively young Judges gained sufficient experience? Most especially in light of the Law Commission's reformatory measures to increase the jurisdiction of the District Court as a Court of first instance.[37] The Law Commission have proposed the District Court have jurisdiction over all criminal prosecution, where there is a right to trial by jury, subject to the transfer of a complex or generally important case to the High Court.[38] Further the Law Commission envisaged the District Court to have concurrent civil jurisdiction with the High Court, except in cases involving statutory supervisory powers, the judicial review of Administrative actions, or the exercise of the High Court's inherent jurisdiction.[39]

The writer submits Judge Green is perhaps an exceptional case. However, should the practice of appointing practitioners in their early thirties become widespread, then it will require close examination.

Education

This is another elite therefore unrepresentative based argument. Its main proposer, Professor Griffiths, with his Oxbridge educated Judge analysis, has received quite scathing criticisms.[40] The Professor's argument proposes a judge deciding an issue in accordance with the values of her educational backround. Hence the Oxbridge acronym. This is a breakdown of the Education Institutes patronised by our twelve judges.[41]

Auckland University : 3 Henry J

	Smellie J
	Anderson J
Victoria University : 5	Ellis J
	Gault J
	Gallen J
	McGechan J
	Doogue J
Canterbury University : 3	Williamson J
	Wylie J
	Tipping J
Otago University : 1	Robertson J

If the Professor is right, and the writer doubts, then the spread of appointments does not necessarily lead to the conclusion of one Universities' psyche being foisted upon the general public. That there are more graduates from Victoria University, merely affirms the superiority of Wellington's Law School in New Zealand.

Standing at the Bar

The New Zealand Legal Profession is distinct from its English counterpart. Whereas in New Zealand a lawyer is admitted as a Barrister and Solicitor, the English prefer to maintain the tradition of a lawyer being admitted as one or the other. As Pannick suggests, the practice of selecting from the ranks of leading barristers severely restricts the range of potential candidates.[42] Such a practice, by analogy, also precludes academic lawyers from the appointment arena. On this last point, the New Zealand experience suggests otherwise. Of the twelve appointees, four have academic backgrounds. That is to say, at the time of the their appointment, they had held or were holding

PERESE, S. The selection of judicial candidates in New Zealand.

lectureship positions. Robertson J was a part time lecturer at Otago University between 1969 and 1984. [43]Tipping J has been a tutor at the University of Canterbury in Evidence and Commercial Law, and was Moderator for the Law Schools in the Law of Torts.[44] McGechan J was a part time lecturer at Victoria University[45] and Anderson J was a tutor at Auckland University.[46] Despite their Honours' contributions to academia, they cannot be categorised as purely academic lawyers prior to their appointments. Be that as it may,the crucial question that needs to be considered is whether the seniority criteria ought to command the influence that it does at all levels of appointments. Lord Hewart is cited as an example of a senior advocate who was unable to temper his adversarial approach after being appointed to the bench.[47] On the one side is the arguement that seniority should not predetermine or influence heavily all appointments. Former Canadian Supreme Court Chief Justice Harold Laski is reported as suggesting to Lord Chancellor Sankey that his Lordship ought to consider appointing an academic lawyer.[48] Similarly, Pannick suggests that English solicitors ought not to be disregarded *in toto*.[49] Contrary arguments that are put forward are equally compelling. As Samuels J[50] maintains:[51]

> ...the best way of maintaining judicial competency is to appoint reasonably competent judges, who already know enough to embark on their new task with tolerable efficiency.

Further, in so far as purely academic lawyers are concerned, former English High Court Judge R Megarry's scathing remarks may still find favour in some circles. Megarry asserts:[52]

> the academic's tempo of life is quite different. It is one thing for ideas and theories to evolve and be tested over the years in the study and lecture room, and another thing to judge competing theories in the hot-house of the courtroom.

It is submitted there are a number of interesting, if not provocative arguments to be made. However, they are beyond the scope of this paper. In the final analysis, it is a matter that approaches the preference of the final decision maker. Thus untill we can ascertain those thoughts, one would simply be making arguments which may simply not be sustainable. Moreover, by itself, the argument against the status quo, if correct, would not be conclusive enough to warrant the substantial reform that this paper will propose.

Women and the Bench

It may be comforting to the protagonists on this issue that the most recent Attorney General, former

Chief Justice and former Chief District Court Judge all held very strong and positive views on women being represented on the bench. That however is not to say that the latest appointments have been in some way token. Rather, as Sir Ronald and Chief Judge Trapski aver, first, like any other appointment, they had to be the most favourable of the available candidates. The issue of representativeness is generally confused with concomitant concerns. Noteably, some argue the lack of representation is a consequence of discrimination. The argument is founded on the belief that judges are appointed by, and selected from, the 'old boys network'. The assertion is spurious. As Sir Robin Cooke points out,[53] "in current practice there is no such network". His Honour labels the analogy "misleading" and "most unfortunate". The writer accepts Sir Robin's comments, and further suggests, if there had been an old boys network then it ought to be regarded as past history and now irrelevant. Hodder, fifteen years ago, revealed that of the three thousand practising lawyers, fifty were women.[54] Further, of those fifty, only one or two had a significant practice in court.[55] If we recognise that primarily judges are selected according to their practice at the bar, then it is no strain either to realise why women were not appointed.

The make-up of the bar has without doubt been irrevocably changed since then. Sian Elias and Lowell Goddard have been admitted to the Inner Bar.[56] As Sir Robin Cooke affirms:[57]
They and the women who are already serving as District Court Judges, a High Çourt Master, and in Law society office are the first wave of a tide of women coming into prominence in the practice and administration of New Zealand Law.

To reiterate the controversial issue previously canvassed, judges are chosen from, generally, the most experienced members of the bar. As such, it is only a matter of time before the first woman High Court Judge is to be appointed.

The writer does not dismiss charges of discrimination completely. Claims of women not being given the same opportunities to become experienced practitioners may be valid. According to the New Zealand Law Society Poll ,conducted in association with United Building Society, in mid 1987:[58]
Sixty-six percent of female respondents agreed that female lawyers are not given the same opportunity to do more challenging and prestigious work, but only 19 percent of men agreed.
If this claim is sustainable, then the concerns ought to be directed at, as the writer suspects, its sociological cause. That women are not getting the necessary opportunities, to build up experience,

does not mean the selection process is at fault for an unrepresentative bench. The selection process is by its very nature discriminatory. Thus untill there are equal numbers of men and women at the bar, one cannot say the selection process discriminates against women as a class . The process discriminates against practitioners with relatively little or no substantial experience. That women are over-represented in this category does not mean they are being discriminated against. Rather it is a class of practitioner which is discriminated against. One will also find many male practitioners in that class.

The writer has submitted a number of non-issues and it will serve to make a few conluding remarks. The writer's classification as non-issues, does not preclude the same points constituting substantial concerns in the context of the judicial system as a whole. The focus has necessarily had to be limited to a consideration of the selection process. Although the process does not exist in a vacuum, it nevertheless is important to recognise that by themselves, even if they were issues, the resultant concerns would not justify the substantial reforms this paper will go on to submit. For instance, it is realistic to conclude given the greater number of women entering the legal profession, that there will as a matter of statistical probability, be more women judges appointed in the future. Thus whilst it is a valid concern, it has been categorised as a non-issue because it is a self correcting anomaly. Further, the purported issues of age, class and education merely serve to signpost the persuasive dangers we could encounter. Therefore, if we countenanced a new selection process, those purported issues would persuade us to initiate proposals to subvert, so far as possible, the selection of judges who may become unwilling to act in the best interests of the society at large, be unresponsive to changing social mores or purport to intergrate the peculiar psyche of her education into the law.

Having considered those popular attacks, it is now possible to focus on the real cause for concern: the potential for abuse viz-a-viz political patronage. It is first necessary to consider the role of judicial independence. It will then become apparent, why a government would need to make an appointment of someone who countenances its political ideologies, if it were to rely upon that judge to resolve sensitive issues in the way that it would want. For instance, someone who shares the same views as to economic policy, race relations or on penalties for violent crime.

PERESE, S. The selection of judicial candidates in New Zealand.

Judicial Independence and party politics

Initially, this section attempts to define what is meant by judicial independence. The writer then seeks to consider the intergrity of independence.

The scope of Judicial independence

Our New Zealand Judiciary derives a large measure of its independence from the Act Settlement 1701, which states:

That after the said limitation shall take effect as aforesaid, judges' commissions be made quandiu se bene gesserint,[59] and their salaries be ascertained and established; but upon the address of both houses of Parliament it may be lawful to remove them.

There are a number of points to note. First, judicial independence means a judge does not hold office at the pleasure of the Crown.[60] Once appointed, they are, potentially, there till the statutory retirement age of sixty eight.[61] As Geoffrey Palmer asserts, we have yet in this country to determine the meanings of "misbehaviour" or "inability".[62] It is only upon those grounds that a judge can be dismissed from office. Thus Judge Green, cited earlier in the paper, now aged thirty three, could expect to preside for yet another thirty five years. The independence of tenure is further entrenched by the Act of Settlement's pronouncement for judge's salaries to be ascertained and fixed. Accordingly, section 9A of the Judicature Act 1908 requires judge's salaries to be set by the Higher Salaries Commission, and they are to be paid out of the Consolidated Account.

Notwithstanding the independence of tenure, there is a further perception of judicial independence which we need to recognise. According to former Chief Justice Sir Richard Wild, Judges "are bound by their oaths to deny the right of the Crown to direct them".[63] The oath thus requires judges to decide issues independently. In other words, judges are liberated from political pressures to decide otherwise.

However upon closer analysis, Judicial independence when expressed as a denial of the crown's right to direct, can only prevail over matters which are deemed justiciable. The writer accordingly, now attempts to define this understanding of judicial independence.

It is trite law that Parliamentary sovereignty means it can reduce or increase the range of matters over which the court can exercise its jurisdiction. There are copious examples of instances where a court's jurisdiction has been abated. One of the most striking was the enactment of the Accident Compensation Act 1972. A unanimous Court of Appeal decision in *Hayward v Phillips* [64] held that the Accident Compensation Commission were given exclusive jurisdiction to determine whether someone has suffered personal injury by accident in New Zealand. Nowithstanding that decision, it remains within the ambit of the High Court to consider appeals on questions of law from that Commission.[65] Examples of where Parliament has increased the court's jurisdiction, are equally numerous. Every provision which leaves the Court a discretion or which is poorly drafted can be viewed as part of this category.

From that general consideration of jurisdiction, the focus now shifts to an analysis of what Sir Richard means by the word "right". The issue being whether the "right" of parliament to direct, by virtue of parliamentary intention as expressed in legislation, absolute or qualified.? The writer submits the "right" is qualified. If the contrary meaning were given to Sir Richard's contention, the declaration of a judge being able to deny Parliament's absolute right is unsustainable. It would deny the sovereign right of Parliament to enact legislation to effect its intentions. The writer thus interprets Sir Richard to be saying, it is a judge's duty to deny the qualified right of the crown to direct her. The writer points to the following assertion from Gallen J to exact the nature of the qualification. His Honour says:[66]

> While it may be said that a Judge has an obligation to consider questions of interpretation from the point of view of the intention of the Legislature, a Judge also has obligations to those who are subject to it.

It is clear from Gallen J's assertion, there are two distinct obligations. The first, is premised on Parliament's competence to enact legislation to direct certain courses of activities. The second obligation is owed by a Judge to those who become subject to the law. Parliament's right to direct must necessarily be qualified as it cannot be effected unless the intention is clearly expressed and unequivocal. The obligations, in respect of provisions with ambiguous interpretations, are therefore reconcilable. For those provisions, the writer submits a judge enjoys a measure of independence free from parliamentary direction. That is however not to claim judges are free to decide the law as it takes their fancy. Rather the judge when the intention is unclear, has the duty to consider the facts of each case, and decide whether it may be the intention of the provision to sanction

the actions of the instant defendant. For provisions where there are mixed intentions, she must decide which intention to give effect to in view on the merits of the case.

For the sake of completeness, the writer points out the 1978 Royal Commission on the Courts, definition of the value of judicial indepence as being "the only real bulwark against arbitrary power".[67] However, with respect, the Commissioner's view is erroneous. The writer draws on Dicey's sentiments that parliament has the legal power to provide for the murder of all blue eyed babies.[68] As Professor Ken Keith asserts "as a matter of law, the Courts cannot deny that sovereignty".[69] The writer adds, in light of the previous discussion, a court cannot deny the sovereignty if it is unequivocally expressed. Particularly so in our jurisdiction where we have no Bill of Rights, entrenching the right to life.

To conclude, judicial independence may be perceived as the independence of tenure. Further, the concept relates to the independent assessment of statutory provisions, to clarfy or prescribe the purported intention of the legislature.

Judicial Independence and political pressure

The strength judicial independence provides the biggest motive for abuse. In Lord Keith of Kinkel's opinion, "it is undesirable that anybody holding a judicial office should appear to be associated with any party political view at all."[70] The merit of such a declaration must be viewed in the context of both political party affilliation, and in the judgments themselves. On the first point, Sir Robin Cooke expressed to the writer, since becoming judge in 1972, he has refrained from exercising his franchise. [71] On the second point, Sir Robin would submit that individual political sympathies do not have any significant influence on a collective judgment,[72] citing *Wybrow v Chief Electoral Office* [73] as confirmation.

Recent history provides a number of examples of elected politicians attacking members of the Judiciary. At the outset, the writer adverts thereader to the following constitutional principles as summarised by Professor de Smith. That learned author writes:[74]

> ...by convention judges must refrain from politically partisan activities; and although they can criticise the working and content of legislation and the conduct of

PERESE, S. The selection of judicial candidates in New Zealand.

> members of the executive they should be careful not to take sides in matters of political controversy ... [In addition], by convention members of the Executive are expected to preserve a reciprocal restraint when commenting on the words and deeds of judges, though if criticised by a judge they are not obliged to remain mute, and if a judge makes politically controversial remarks a robust answer can be offered.

The Standing Orders of the House of Representatives states:

> 179 Unbecoming References to the House, Judiciary, etc.- No member shall use unbecoming words against the House or any member thereof against any member of the Judiciary or against any stature unless for the purpose of moving for its repeal or in speaking to any such motion.

Despite those constitutional rules, Members of Parliament like John Banks have chosen to make political attacks on the Judiciary of a personal nature. The attack the writer finds most distasteful was made in 1984, in Parliament.[75] The member for Whangarei criticised " weak kneed judicial officers who let the police down time and time again... spending too much time mollycoddling the thugs.". The criticism is distasteful in respect of the imputing the characteristic of being "weak kneed" to a Judge. Further, in respect of the Judges paternalistic attitude to thugs. Furthermore, the suggestion that Judges are there to legitimate the causes of the police as of right, is most disconcerting. The writer submits the attack reflects Mr Bank's apparent ignorance of basic Constitutional principles. The writer countenances Member of Parliament Mr Minogue's (as he was) sentiments: "What is the purpose of a politician who publicly insults a Judge? What is his purpose if it's not intimidation?"[76] Mr Banks' most recent attack drew criticism from New Zealand Law Society President Graham Cowley. Mr Cowley issued this media statement:[77]

It is a well established principle that anyone is free to criticise a sentence or a decision the courts. This principle relates to a criticism or discussion of the sentence or decision only. It is destructive of the judicial system to descend to criticism of the Judge personally when it is the sentence or decision to which the remarks should properly be directed.

Our system of justice is built strongly on separation between the judiciary and the executive arm of the government. The freedom of citizens of any country is reliant upon an independent judiciary.

The writer submits the criticism was long overdue. The Auckland District Law Society noted when Mr Banks made some of his judicial attacks, he was a member of the National Government.[78] They thus expressed surprise and disappointment that the "Attorney-General had not been more outspoken in that role in defence of the Judiciary against the recurring political attacks."[79] The Attorney General of the time was a member of the National government.[80] That inertia may point to another disturbing cosideration. It suggests the discordant functions of Attorney-General and Minister of Justice being held by the same person. That is to say, the function of Attorney General cannot, in practice, be fully exercised by a hybrid person who can be compromised by partisan politics. Moreover, in light of that consideration, one would not expect to find some form of collective responsibility binding successive Attorney-Generals to defend personal attacks on judges not chosen by them personally.

Despite the barbed attacks by some elected politicians, the Judiciary remain stoutly independent.

A politician as the final arbiter

From the foregoing discussion it will be apparent if the government was to make a political appointment, it must appoint someone who already ascribes to its ideologies. As upon appointment the judge becomes independent. The writer proposes that the most substantial reason for reform is the need to remove this potential for partisan political patronage. Patronage which makes a mockery of litigation on all types of issues. Most particularly those contentious issues which are delicately balanced, and their resolution depends on the interpretation of the policy the law aims to regulate.

With the ensuing discussion, the writer seeks to establish, the Attorney General, in respect of his appointment power, as a potential conduit effecting the government's will, viz-a-viz the appointment of judges with homogenous political views. Alternately, as a conduit, the Attorney General can circumscribe the appointment of a candidate with diametrically opposed political views.

The office of Attorney General

The Attorney General is a prerogative officer appointed by the Governor General on the advice of the Prime Minister.[81] According to Smith L J "everybody knows that the Attorney-General is the head of the English Bar."[82] In New Zealand, that eminent status has mostly been held concurrently with the Portfolio for Justice.[83] It is therefore submitted experience shows the office to have been held by a political being in three respects. First as a political candidate elected according to partisan ideologies and policies. Second, the prerogative has been exercised in favour of those elected politicians of the government of the day. Thirdly, and an associated point, the prerogative has been mostly exercised in favour of those elected politicians who form the executive arm of the government. There does therefore exist in theory the opportunity for the position to be used as a conduit effecting government ideology.

The Attorney General and political nuetrality?

In the English system, from whence our prerogative has evolved,[84] it is accepted practice for the Attorney General to not be also a Cabinet Minister. According to Professor Brookfield, "the practice is seen to be consistent with the independence from political pressure that is expected of an Attorney General."[85] The English practice, and concern is not alien to New Zealand. For ten years, the Attorney-Generals Act 1866 expressly declared, an Attorney-General could not also be a Cabinet Minister or member of either House of the Legislature. The New Zealand Parliamentary Debates chronicle heated debate during the second reading of the repealing Attorney General Bill 1876.[86] The full implications of those debates must be viewed in the context of the many functions of the Attorney General. For our purposes, the sometimes strong sentiments are not lost in the consideration of politically motivated appointment. The Hon. Mr Waterhouse, in the Legislative Council argued:[87]

> If the Law Officers of the Crown held political offices, it would be impossible for them, in the consideration of various matters to which their attention might be invited, not to labour under the influence of this bias.

If one accepts the Honourable member's submission, the tacit presumption is all appointments since 1876, have been influenced by partisan political bias. As since the passing of the Attorney General Act 1876, the position of Attorney General has been held by a member, of the government or executive. The writer submits Mr Waterhouse's view cannot be easily dismissed. To reiterate Sir

Ronald Davison's comment, he did not discuss with the Attorney, a candidate's political standing. That however, does not preclude from the realm of possibility, the Attorney General independently eliciting the information. Further, the charge of political patronage is a sensitive issue. It would therefore be unlikely for the Attorney General to require the Chief Justice of New Zealand to furnish data on a candidates political persuasion. If partisan bias has affected the outcome of an appointment, the writer prefers to err on the conservative, by classifying them as bona fide mistakes or mere inadvertance.

The writer submits one must draw an important distinction. The previous discussion has focussed on a political appointment predicated on the candidate's political standing. The candidate's stance, synonymous with the government's, gives the government the opportunity to leave sensitive political issues to the courts. Further, with an eye to the future, such appointees may make it difficult for future governments to give effect to their particular policies. The Attorney General, in this sense, can satisfy such an intention by being the conduit effecting government policy. There is on the other hand a distinct and perhaps more restricted way to view political appointments. The alternate appreciation centers on the ideology of the person holding the Attorney General's position. It would be his personal ideologies ,and not the government's, which are effected upon the exercise of the appointment power. The justification for the latter appointment is summarised by Kirby J[88] (as he was):[89]

> Politicians know that governments come and go. By judicial appointment they enjoy the possibility of influencing public affairs long after they have themselves relinquished power, voluntarily or involuntarily.

That appreciation of political appointments does not necessarily always lead abuse, in terms of the power being exercised if favour of appointees whose political sympathies lie with the government of the day. On the contrary, some appointments attributable to that alternate appreciation can be quite positive. An instant example may be the relatively recent increase in the number of women judges. That occurrence may be a manifestation of the Geoffrey Palmer's committment to equality of opportunity.

To conclude this part of the paper, the writer submits there is the opportunity for the government,

PERESE, S. The selection of judicial candidates in New Zealand.

using the Attorney General as the conduit, to make political appointments. It may want to effect its will on sensitive political issues, but realistically it cannot for fear of adverse public reaction in one way or the other. In that respect, the writer countenances and recognises the worth of Sir Robin Cooke's observation as perhaps highlighting the types of issues upon which the government may defer the decision to the courts. Sir Robin asserts, multi-cultural problems are the greatest this country will have to face. A court comprised of judges sharing the government's true view is thus a very useful device to effect those intentions. The most likely court appears to be the Court of Appeal. It is that court in which matters of law and statutory policy are determined. As such the writer does not accept the Law Commission's recommendation to abolish the Privy Council as New Zealand's final appellate court.[90] It may, if the selection process is abused, provide an independent view on sensitive matters.

Further, abuse may occur as a consequence of the Attorney General applying idiosyncratic standards. The writer submits there is a pressing need for the Attorney General to make public the parameters within which appointments are made.

As a final matter, by analogy it is apparent that in the same way in which a political appointment is made, an appointment may be rejected by virtue of the candidates political sympathies being inconsistent with the governments. Thus again one may suggest the same types of arguments, as canvassed previously.

Is there a check on a political appointment?

The short awnser is no. Given the independence of the judge, how will we know when a judge will have decided in accordance with the reason for which she was appointed? However, even if a political appointment were detectable, there appears from overseas experience a high degree of inertia impeding substantial selection reforms. A discussion shorlty.

Final decision makers; a comparative analysis

As stated, shortly the writer will show how entrenched the informal process of selection is overseas. But first a general discussion on the role of politics in the selection methods of other jurisdictions

PERESE, S. The selection of judicial candidates in New Zealand.

United States of America

Appointments to the State Judiciary are determined in one of four ways. There is the appointment by the State Governor, popular election, election by Legislature or appointment by the State Governer which is later subject to a public confirmation vote. For the Supreme Court, it is the President who makes the appointment, but the senate must confirm the appointment with a two thirds majority.

According to Mayer,[91] a Governor appointees are normally selected from the members of his/her party. Thus it is a rarity for the governor to make a non-political appointment, if at all an appointment of someone affiliated to the opposition. The election by legislature method is by its nature dominated by politics. Political considerations are further prominent for those seeking appointment by popular selection. Mayer's research concluded that of the thirty five states using popular selection, twenty one require the candidate to be supported by a Political Party.[92] Hence, active participation is a pre-requisite to success.

The writer does not propose at this stage, to deal with the American methods in great depth. An extensive discussion will follow later in the paper. In the limited context the writer now raises the American practices, one can conclude politics and political alliances materially affect a candidates chances of not only election, but also the retention of office upon election. That state of affairs raises its own special concerns. They will be discussed shortly in respect of the State of California's public confirmation of incumbent judges.

West Germany

Half the judges are elected by the Lower House of the Federal Parliament and half by the Upper House.[93]

England

The Queen upon the advice of the Prime Minister appoints the Lord Chancellor, all the Law Lords, the Lords Justices of Appeal, the Lord Chief Justice, the Master of the Rolls and the President of the

PERESE, S. The selection of judicial candidates in New Zealand.

Family Division.[94]

According to Shereet, the Lord Chancellor's appointment is normally based upon political grounds.[95] The position is comprised of a unique combination of tasks, and is comparable to our Attorney-General in three respects. First as chief legal advisor to the Government. Second as a member of the executive, and thirdly tenure of office is determined by and relies upon the Prime Minister being in office. There the parallels cease. The Lord Chancellor can be distinguished by his exercise of judicial powers, position as the speaker of the House of Lords, and as a frequent defender or expositor of government policy.[96] The Lord Chancellor advises the Prime Minister on potential candidates for appointments made by the Prime Minister. But he alone is responsible for the appointment of High Court (Puisne) and Circuit Judges, Recorders, Supreme Court Masters and Registrars, Stipendary Magistrates and County Court Registrars.

Conflict and the status quo

The writer has outlined why and how the potential abuse of political patronage may occur. However, the danger of such an abuse occuring is still classified as a mere possibility. There are overseas examples of where the danger is more than a potential. The writer submits them to be apparent abuses. Hence the following discussion. Consider for instance the sentiments of Samuels J. His Honour recognised in 1980, the vulnerability of the New South Wales system to political patronage, and then went on to say "appointments which might be said to be "political" have been rare."[97] In his Honour's opinion an appointment may be political if the appointee:[98]

-has sat as a member of the legislature; **or**

-has been an unsuccessful candidate for election in a party political interest; **or**

-has held office in a party machine; **and**

-**has been appointed by his own party.**

Samuels J then confirms, to his knowledge, three of the then thrity six judges of the Supreme Court might possibly saitisfy any of those criteria. With respect, those three cannot be classified as a "rare" political appointments. Perhaps if it was three in the last thrty six years it may remotely be so classified.

PERESE, S. The selection of judicial candidates in New Zealand.

Australia's judicial history provides another curious example. Former Labor Attorney-General and Cabinet Minister Lionel Murphy, was appointed in 1975 by Labor Prime Minister Gough Whitlam to the HIgh Court of Australia. The New South Wales Legislative Assembly expressed the concern of unrestrained patronage, and set up a Select Committee to inquire into the appointment procedure.[99] Its main recommendation was enacted, albeit slightly modified, and the High Court of Australia Act 1979 now provides for the Federal Government to consult the States on proposed appointments.[100] By way of completeness, one must note that the New Zealand experience shows one example of where one person has held the position of Attorney General and later was appointed a judge. Sir James Prendergast was appointed Attorney-General in 1867, following the statutory requirement for the position to be filled by a non-political person.[101] It would appear, that as a condition of his employment, he was promised the first vacancy on the benches.[102] The first vacancy occurred upon the death of Sir George Arney, the then Chief Justice.

The Australian examples serve to highlight how entrenched the conventions an appointment system are. Despite the apparent abuses of political patronage there appears to have been no great public outcry of abuse. Even the New South Wales Select Committee only went as far as recommending mandatory consultation, with the final decision remaining with the Federal Government. From that, one is entitled to question whether there was in fact a step forward, in the reformatory sense.

The writer has previously expressed Professor Shrereet's assertion, of the Lord Chancellor's position being filled by a political appointee. Yet there are two hallmark events which distinguish the appointment of the Lord Chancellor from the Australian examples. Cognizance of which leads to the conclusion that the Lord Chancellor's is an appointment made by a political figure as opposed to an appointment for party political sympathies.The first concerned a nineteenth century Prime Minister's attempted usurpation of the Lord Chancellor's convention based power to be the sole appointer of Puisne judges. Lord Chancellor Eldon is recorded as having reminded the King that for the Prime MInister to appoint that class of judge would be an abuse ofthe Lord Chancellor's position.[103] The Lord Chancellor's choice was thereafter appointed. Further, as Lord Jowitt L C stated in 1953: "I can fairly say that we have established a tradition in which 'politics' and 'influence' are now completely disregarded." The second monumental event concerns the very politically active Lord Hailsham L C. Having been a Labour Member of Parliament, Cabinet

PERESE, S. The selection of judicial candidates in New Zealand.

Minster and trouble shooter, his Lordship was appointed Lord Chancellor by a Conservative Prime Minister: Margaret Thatcher.[104]

But even if the writer is wrong with the argument that politics plays no discernable part in English appointments, history provides a sober consideration that ameliorates the risk of political appointees manifestly dislaying their sympathies on the bench. According to the Chief Justice of the State of Wisconsin Nathan Heffernan:[105]

> I suppose, of course, the great surprise to everbody was when Earl Warren was appointed Chief Justice of the United States by Eisenhower. He turned out to be the great champion of civil liberties when his background was thought different.

There are many points to be gleaned from Heffernan CJ's comments. The most pertinent of which is the frank realisation that the appointment criterion, perhaps including political sympathy, can only indicate what type of judge a candidate will make. As such, if political sympathy is the core reason for apointment, then that intention many never come to fruition.

For the sake of completeness, the writer makes a few comments on the demise of the late Justice Murphy of the High Court of Australia. The late judge was convicted of a charge of attempting to pervert the course of justice, by trying to influence the decision of an inferior court judge.[106] The trial judge, Cantor J in sentencing Lionel Murphy said:[107]

> The conviction of a judge for such an offence must result in a penalty which reflects the abhorence and disapproval of this court and of all right-thinking members of the community and, at the same time, stand as a dreadful warning to all who might similarly transgress. The commission of this crime has done a terrible injury to the administration of justice and in the minds of many, has adversely affected and raised doubts as to the integrity and standing of every judge in this country . . . Lionel Murphy, I sentence you to imprisonment for eighteen months.

The conviction was quashed on appeal by the New South Wales Supreme Court. However, the problems did not end there. Other charges of impropriety, were being investigated by a Commission of Inquiry. Murphy J returned to the bench. But, the reaction of his brethren judges, were mixed. It seems Chief Justice Gibbs was displeased with Murphy J's return. The Chief Justice issued a

statement saying it was essential for the integrity and reputation of any Judge of the Court, to be seen to be beyond question.[108] It was therefore undesirable for Murphy J to sit before the findings of the Commission of Inquiry were revealed. It appeared to Murphy J, the accord reached with the Chief Justice, that he not to sit till the allegations were refuted, was an accord of necessity. His Honour was under the impression, if he did not agree to the Chief Justices' wishes, then other Judges would go on strike.[109] The Commission of inquiry did not report. Lionel Murphy died, just under three months after the instigation of the Commission.[110]

There is not a great deal we can be satisfied with from the Murphy saga. It was never established if the improprieties were due to his attempt to enforce the politics of the Labor party. In the context of this paper, it must however be said, despite the problems surrounding Murphy J's political appointment, there is still no substantive move afoot in Australia to take the appointment function out of the hands of politicians.

The writer is an eternal optimist. It is hoped, we in New Zealand will act will more vigour at the first instance of a political appointment. An alternative to the current New Zealand practice of appointment was mooted in this county in 1973. The then Minister of Justice, the Hon A. M. Findlay QC, suggested the establishment of a Committee, if appointments were to be made from members of the legal profession who were not prominent members of the bar. [111] However, the constituent group that has received most attention on this matter was the 1978 Royal Commission on the Courts. The remainder of this paper analyses their major recommendation.

Reforms

A judicial commission

The idea of a Judicial Commission has been considered throughout the Commonwealth.[112] However, the proposals remain unactioned. In New Zealand the Judicial Commission was central to the Royal Commission's Report. It therefore touched uon a broad range of matters. This paper analyses the Commission as it relates to the appointment of judges. The relevant recommendations may be summarised:[113]

1. A Judicial Commission should be established to consist of:-

-the Chief Justice (Chairman)

-A Supreme Court Judge; (as it was)

-The Chief District Court Judge;

-The Solicitor General;

-The Secretary for Justice;

-Two members nominated by the New Zealand Law Society and appointed by the Governor General.

2. There was to be an Appointments Committee of the Commission with the following membership:-

-the Chief Justice; (Chairman) Except when his successor is being considered. In that circumstance, the Chief Justice would be replaced by a senior High Court Judge.

-the Chief District Court Judge

-Two non-political government appointees; eg. the Solicitor- General and the Secretary for Justice.

-two nominations from the New Zealand Law Society.

(3) The Appointment Committee was to advise and tender recommendations to the Attorney-General. The final decision remained with the Attorney-General for all judges, with the exception of the Chief Justice. That appointment to be made by the Prime Minister.

(4) The Attorney-General / Prime Minister could only appoint from the Appointment Committee's nominations. However, the Attorney or Prime Minister could reject all nominations.

(5) With the exception of the Chief Justice and Chief District Court Judge, membership of the Committee should not remain static.

(6) The committee was to provide the means of dealing with complaints against judges.

(7) Appointments to Statutory Tribunals should also be made by the committee, whenever practicable.

The recommendations do no more than formalise the practice of consultation . The power of appointment remains with the Attorney General and Prime Minister. If one takes the view that

formalising consultation adds little, then one is also entitled to submit that the proposed reform was of little consequence.

By comparison, the English Justice sub-committee recommended a much more useful measures for reform.[114] The sub-committee proposed the Lord Chancellor controlled the appointment machinery. Further, they recommended the establishment of an advisory appointments committee, its principle task being to collate informaton for appointments. The advisory committee would be comprised of representatives of the Law Society, the Bar, academic lawyers, the judiciary and "perhaps some lay members, eg. some higly trained and experienced personnel officers skilled in selection procedures." It is testament to how entrenched the selection procedures are in England, that the sub-committee's recommendations have not been adopted.

The New Zealand version of the Appointments Committee has since gone by the way. However, one notes the eventuality was not unexpected. The judiciary of the time rejected the proposal. It was felt improper that such a body could discipline judges, when Parliament itself could not except for reasons of misbehaviour or inability. It can be noted at this point, the Canadian Judicial Commission has the statutory power to recommend that a judge be removed from office.[115] In a relatively recent controversy the Commission held the actions of Justice Berger, of the Supreme Court of British Columbia, warranted a recommendation for removal, but chose not to exercise it. Berger J was considered by the Judicial Commission as indiscreet.[116] His Honour, in 1981, had delivered a number of speeches urging the adoption the draft Canadian Constitution when it included "native" or "aboriginal" peoples rights. Accordingly, when those rights were deleted, Berger J felt compelled to criticise the actions of those responsible.[117] In 1983, after considerable pressure from the Chief Justice who appeared to have sided with the Judicial Commission, Berger J resigned after twelve years on the bench.

The writer's reform

The writer propses that New Zealand adopts a Judicial Appointments Committee. A committee which has the Attorney-General as its chairman. It would also be comprised of the Chief Justice, President of the Court of Appeal and Chief District Court Judge. Further, like the English proposal,

an advisory panel is set up to process the applications. The writer would propose that this panel be co-ordinated by an able personnel officer. The risk of a political appointment may be perceived as a mere possibility. But the writer submits, it is a substantial risk. Substantial because of the surreptitious way in which it can be exercised. As stated earlier, if the government were to make a political appointment, they would appoint a person already ascribing to its ideologies. Have there been instances already in our judicial history? Bearing that in mind, perhaps the most important change; the Appointment Committee will be charged with making the appointment. Their decision shall be a collective one.

Alternative Reforms

It remains therefore, to discuss the more interesting reformatory alternatives. One may like to follow the path of some European countries who use career judges. Those judges are not appointed from the range of practicing lawyers, as outlined earlier in the paper. Rather, they undertake University education to learn how to become a judge.

Further, one may suggest, we use lay people as judges. As finders of fact, there seems to be no real reason why lay people are not used. However, whether at the District or High Court, a trial judge has not only to discern the material facts of a case, he must also give Jury directions on points of law. Particularly technical evidence hearsay and relevance rules. A lay person may obviously study those rules. But one could really question if at the end of that persuit, they could still be classified as a lay judge.

The often touted selection process for possible adoption in New Zealand is the American elective system. Hence the following discussion.

Selection by election: Have the Americans got it right!

Its merit is predicated on the view that the choice, is the will of the people. Moreover, it is the will of the constituents in whose area the judge will preside. Despite these noble assertions, the writer submits that the elective system is not a realistic alternative for New Zealand. There are a number of problems, both in its implementation and credibility. If elections are to be effective for New

Zealand, then judges ought to be chosen for specific areas by the populace of the area. As such quite significant administrative work would need to be done to work out jurisdictional boundaries. Would the areas be set according to general election boundaries, or perhaps be drawn according to crime statistics? We also come back to the question raised previously in the paper. Who is best able to choose a judge? Are there, and if so, what types of rules will prevail in election campaigns? There is the further problem of funding. Does it come form the public purse, or private contributions? Madam Justice Shirley Abrahamson of the Supreme Court of Wisconsin, supporter of the elective system explains her experience:[118]

> It is a big state you are running, in the mid of winter with snow, so technically it is difficult, Also you need to raise of a lot of money, and that raises special problems for the judiciary...There are groups that organise, usually along professional or occupational lines, and contribute money to campaigns in the United States. I did not take group money. My money came from individual contributions, which were limited in size...I think my average campaign contribution was about $25. So you have to see a lot of people and raise a lot of money. We tried to be sure not the take money from people who had cases pending, or cases that had just been decided, so it did not look as if I was being bought or paid off. We tried very hard to be free of any appearance of impropriety. But that raises difficulties in itself. In my particular situation, where we had, say, one thousand to two thousand people contributing, I could not possibly remember them all. So it might be that somebody would soon after come to the court, although we tried to avoid that...But it does raise problems, it does raise questions and gives me a discomfort level. I have no answer.

As with any system aimed at promoting the 'public interest', one needs to consider whether the public will warm to the invitation. There are ofcourse two divergent views. The first may be summarised by Abrahamson J. Her Honour says "we had an election earlier this month and something like ten to fifteen percent of the people voted. So that is sad."[119] The second view requires a little further ananlysis.

"Bye bye Birdie"[120] **and "Shaking the Judical Perch"**[121]

Those were the types of headlines to be seen in the popular press, in the lead up to the State of California's public retention vote of their Supreme Court Judges in 1986.

The barbs were directed at Chief Justice Rose Bird. Her Honour was appointed to that position in 1977 at the age of thirty seven.[122] According to one observer, "She had two strikes against her the day she was appointed: She was a young woman who had never been on the bench.".[123] The subsequent demise of Chief Justice Bird at the polls, highlights in the writer's view the inherent problems associated with selection by election, or in her Honour's case retention by election. Before the discussion, a brief overview of California's appointments procedure.

The confirmation and retention compromise[124]

Appointment to the California Supreme Court prior to 1934 was predicated upon a candidate winning a contested election, as provided by the Constitution. Tenure of office being ten years. But, it appears by the turn of the century, judicial campaigns to secure appointment's were, "every bit as bitter and controlled by political parties as those for other state-wide offices". There were two divergent schools of thought as to reform. One group maintained judges ought to be appointed for life. With the appointment to be made by the Governer. The other faction balked at the idea of giving the constitutional right of the people to select judges to the Governer.

Thereafter, a compromise was reached. The Governer makes the initial appointment. The appointee is confirmed by the Commission on Judicial Appointments, comprised of the Chief Justice, the senior Justice of the Courts of Appeal and the Attorney General. As an aside, it appears this confirmation is cosmetic. There has not been any instance where the Governer's appointee has not been confirmed. Further, the writer is unaware how it is that they decide, and persuant to what power they execute their function. Both those points are beyond the scope of context in which this paper raises the California experience. The Governer's appointee, once confirmed by the Commission, is then subject to public confirmation at the next general election. Thereafter, the judge's tenure is secure for at least twelve years. Upon the expiration of that period, a judge must win a public retention vote to continue for another twelve year period. If they so desired, after that twelve year term, they could again seek another twelve year term by a retention election. President of the California District Attorney's Association, Michael Bradbury, presents one way of viewing the elections:[125]

> The people would decide if a judge had given them the honest, intelligent and fearless services they have a right to expect.

A less clear cut way of viewing the elections is the following form Professor Zimring, of Berkeley Law School:[126]

> You walk the tightrope between democratic accountability and popular passion. Everybody agrees accountability is fine and passion stinks, but how do you tell the difference?

Chief Justice Bird and the polls

Prior to the her appointment as Chief Justice by Liberal Governer Jerry Brown, Rose Bird was an unknown. Her Honour won the confirmation vote by a slender 51.8% margin.[127] It is unclear why her Honour faced a retention vote before the end of the twelve year term.

When Chief Justice Bird lost the November 1986 retention election, she along with two other liberal appointees: Associate Justices Reynoso and Grodin who were also defeated, created judicial history. They were the first judges since the inception of the 1934 reform to have been defeated at the polls. Arguably, the associate justices lost their seats due to their appointments also being made by a liberal governer.

The issues were clearly defined. By public referendum, the State of California re-introduced capital punishment in 1977. Chief Justice Bird's opponents, publicised her Honour's record of voting to reverse all fifty five death sentences that were brought to the court. It may be of cursory interest to note a 1985 poll showed 83% of the respondents favoured the death penalty.[129] Thus in line with public opinion, if not parasitically so, Republican Governer George Deukmejian along with the California District Attorney's Association, accused Chief Justice Bird and the Supreme Court "of systematically blocking executions, and thus being soft on crime".[130] The anti-Bird lobby included the Crime Victims for Court Reform group, comprising victims of crime and their families, and in some cases the parents or spouses of murder victims.[131] The California District Attonery's Association's case was simple, Chief Justice Bird by voting agaist the death sentence, was not applying the law, as was the public's desire in bringing back the death sentence. Thus to the

Association, it was not a question of judicial independence, but of judicial incompetence. The argument however presumes the law was enacted in a form which was clear and unambiguous with no room for discretion. However, section 190.2 of the Penal Code of the State of California makes it clear, the penalty for a defendant found guilty of murder in the first degree, under certain special circumstances, is death or confinement for life without the possibility of parole. The section leaving the final penalty to judicial discretion, appears to the writer to sink the Association's contention. That is to say, even if first degree murder coming under the special circumstances is proved, a judge is not mandatorily required to pass a sentence of death. Moreover, it appears certain subdivisions of section 190.2 were unconstitutional. In *People v Davenport*,[132] Chief Justice Bird held a 1978 Penal Code ammendment to section 190.2, subdivision 9(18) as to the proof of torture, was unconstitutional. Her Honour relying on the authority of the United States Supreme Court judgment in *Godfrey v Georgia.*[133] In that decision, the Supreme Court held a capital sentencing must provide a meaningful basis for distinguishing the few cases in which the penalty is imposed, from the many cases in which it is not. Thus if a provision did not admit of a meaningful distinction, it violated the Eighth Ammendment of the American Constitution.

In Clyde Leland's opinion, senior assistant editor for the California Lawyer publication, voters are not interested in the finer points of constitutional law. Prior to Chief Justice Bird's ousting, Leland wrote:[134]

> In short, the public are not asking for a legalistic explanation of death sentence reversals. They seem to want swift and definite enforcement of capital punishment. While the political groups are debating, the court will be hearing more capital appeals, and each time another death sentence is reversed, the California District Attorney's Association and the anti- retention groups will be ready to charge that the court is ignoring the will of the people as expressed by the legislature.

The writer draws upon Leland's comments to show how open to abuse the election system is. To that end the writer submits the public were not presented with the proper considerations on which to base a sound judgment. Rather, the anti-Bird sectors seriously underminded the worth of retention elections. The campaign against Chief Justice Rose Bird began two years before the November 1986 election.[135] Over that period, they are reported to have ammassed at least $5 million.[136] It was master minded by Bill Roberts, who previously has been stragetist to Ronald Reagan's gubernatorial

PERESE, S. The selection of judicial candidates in New Zealand.

campaign in 1966.[137] The strategy included emotional and highly charged television, newspaper and radio commercials, house to house canvassing, direct mail advertising and public meetings to denounce the Chief Justice.[138] The California District Attorney's Association released a report claiming the court as "anti-law enforcement". [139] The gruesome facts of different cases were used in newspaper advertising campaigns.[140] The defendant in *People v Mozingo* won his appeal on the grounds that he was inadequately represented.[141] The court held the trial counsel rendered inadequate representation in failing to investigate possible diminished capacity or insanity defences, "which deprived the defendant of a potentially meritorious defence or mitigating circumstance".[142] The facts of the case. The defendant in his words "boned" his step-mother. In other words he sexually violated her by rape. Thereafter he proceeded to bind her naked body with wire. First wrapping one end of the wire around her ankles, and running the rest along her back to finally be secured around her neck. The defendant then pulled the slack of the wire tight, to bend her legs and head back, thus effecting a slow but sure method of strangulation. The writer submits, if one was not concerned with the death sentence you probably would be after the barrage of advertising criticising the court "who let the murderers go free".[143] By comparison, Rose Bird headed her own campaign. Her Honour having previously fired two campaign strategists because they wanted her to send "direct mail which said nasty things".[144] Finance also appeared to be a problem, estimated at around $1 million.[145]

The death sentence, provides two distinct considerations. First the killing must be classified as murder in the first degree that comes under the special circumstances provisions. Secondly, there is no compulsion that if the first requirement were satisfied, a death sentence would necessarily follow. From the writer's research, the Chief Justice's reversal judgments were based on question of law. That is to say, whether first degree murder under the special circumstances had been proved. In the case of *Mozingo* it could not be established if the defendant was guilty, due to the potentially meritorious defences of insanity or diminished responsibility. There was no question of whether to impose a death sentence or incarceration for life. The case did not get to the sentencing phase. Thus despite their opinion that Bird C J was incompetent, the public were not justified in rejecting a Judge who purported to act within the law. The case may have been different if the issue was as to penalty, in the sense ofthe charge being proved. In the writer's view, a judge ought to consider public opinion. The anti-Bird lobby painted the picture of her Honour effecting liberal views at the

PERESE, S. The selection of judicial candidates in New Zealand.

Bench. But, Penal legislation by its very nature, means a judge is placed in the peculiar position of ensuring justice is done, in respect of the legislation as the constructed or actual will of the people, and in respect of the individual. That is why we in New Zealand countenance the concept of Judicial Independence. Moreover, Judicial competence does not mean giving effect to the desire of the people, irrespective of how that desire is expressed in law. Rather in the writer's view, that is jucicial incompetence. The public of California cannot be imputed with the intention of rejecting competent judges, in the hope of replacing them with incompetent ones. It may have been the heat and odour of sun tan lotion which distracted their attention. But more likely, their perceptions of the Bird court were fueled by the emotional arguments of the anti-Bird lobby.

A further matter which needs to be briefly dealt with, is the degree of political influence prevalent in the lead up to the election. It appears the Chief Justice faced considerable pressure from Governer Deukmejian. And at times hitting back at campaign rallies, referring to the Governer as one of the bully boys out to get her election.[146] Governer Duekmejian had cause to be displeased with the Chief Justice. It was he who drafted the 1977 ammendment to the Penal Code, which brought back capital punishment. Further, if Rose Bird were defeated at the polls, and he retained the Governorship, it would be his task to appoint a new Chief Justice. Indeed upon the alienation of Rose Bird, Governer Deukmejian appointed Malcolm Lucas to the helm,[147] a judge he had previously appointed Supreme Court in 1984.[148]

PERESE, S. The selection of judicial candidates in New Zealand.

Conclusions

The writer has attempted to explain how our judges are appointed. It cannot be stressed enough, how strongly reliant the system is upon the integrity of those in the positions of power. One shudders to think what may happen if the potential for abuse became a reality. But, then how would one know given the strong measure of judicial independence which acts as a cloak to all and sundry.

The paper has outlined why a government may want to appoint someone with homogenous ideologies. For instance, someone who shares the same views as to economic policy, race relations or on penalties for violent crime or crime generally. The writer has also identified how the purported abuse may occur. The Attorney General is a political beast despite the rhetoric. The position whilst it is held by a politician will be the potential conduit for partisan patronage. Further, it is spurious to say the Attorney General, by being a politician is accountable for his appointments to the public. The suggestion is untenable given the lack of information as to how he exercises that function. Moreover, how many people know it is the Attorney General and not Minister of Justice who makes the appointment. The writer after speaking with different Justice Department officials was under the impression, appointments were made by the Minister of Justice. However, as later discovered and expressed in the paper, the appointment is made by the Attorney General. The two functions are distinct, but are often held by the same person. The point highlights the uncertainty as to how the process really works.

As a pointed broadside, the writer hopes the new Attorney General the Rt Hon David Lange, will take the time to spell out how decisions are made, with the view to inspiring future confidence in the procedure. It is simply not acceptable to aver, because there are no public criticisms the process is generally accepted. As the writer has shown, there is much that needs to be discussed and fears which need to be abated, before we the public and future players in the system can say, we accept.

Reform of any system can take one of two roads. The pragmatic road or ideal approach. The writer has chosen pragmatism. Given the size of our nation, we really only need slight administrative changes to negate many of the potential problems raised by this paper. Further, despite the notions of democracy the American election system appears to promote, the writer submits their system is

PERESE, S. The selection of judicial candidates in New Zealand.

not an ideal model. Its adoption in New Zealand would require too many modifications.

Footnotes

1 Law Talk(1987)288, 2
2 Idem
3 High Court; section 6 Judicature Act 1908

District Court;section 5(3)(a) Districts Court Act 1948
4 Section 4(1)
5 Section 5(2)
6 Interview with former Chief District Court Judge Trapski
7 Interview with former Chief Justice of New Zealand Sir Ronald Davison
8 Interview with Sir Robin Cooke President of the New Zealand Court of Appeal
9 Above n7
10 Section 2; Judicature Act 1908
11 Section 5; District Courts Act 1948
12 It is interesting to note that untill the Supreme Court Act 1858, Judges were appointed by warrant persuant to the Letters Patent 1840
13 AAT Ellis "Do we need a Judicial Commission" [1983] NZLR 206, 207
14 Above n7
15 Chief Judge Trapski said in his experience, once a candidate is recommended, then the person is normally told.
16 Section 12A; Social Security Act 1964
17 Section 67(3) Residential Tenancies Act 1982
18 S Shereet Judges on Trial (1976) 46. See also G Gardiner(later Lord Chancellor) "The machinery of Law Reform" L Q Rev 46, 47
19 Above n1
20 Above n6
21 Upon retirement a judge receives as supperannuation, two thirds of their final or retiring salary. Thus for a High Court judge on $140,000, the superannuation income is around $100,000 per annum. Alternately, a judge may opt for a cash payment: 20 years multiplied by 25% of the superannuation income. In that case, the per annum income is reduced to 75% of the supperannuation income
22 Sir Ronald held regular meetings with High Court Judges, and inter alia, he would elicit from them who they thought were prospective candidates
23 A Press release from the Office of the Minister of Justice (July 1988)
24 Above n6
25 The considerations exclude the appointment of Eichelbaum C J
26 Sir Ronald Davison was of the opinion that leading Barristers were earning between $250,000 and $400,00 p.a
27 Legal System
28 1988
29 [1984] NZLJ 15
30 [1986] NZLJ 39

PERESE, S. The selection of judicial candidates in New Zealand.

31 [1985] NZLJ 214
32 1976 - 1984
33 Above n30, 234
34 1966 - 1971
35 J Hodder "Judicial appointments in New Zealand" [1974] NZLJ 80, 85. Of the seven judges appointed to the Supreme Court (as it was), five were aged between 45 -49
36 Press Release on District Court Judge Green
37 Law Commission; Report No. 7 Structure of the Courts (1989)
38 Ibid xv
39 Ibid xiv
40 S Lee Judging Judges(1988), 33
41 New Zealand Law Journals 1984 - 1989
42 D Pannick Judges (1987), 54
43 [1988] NZLJ 62
44 [1987] NZLJ 7
45 [1986] NZLJ 234
46 [1987] NZLJ 191
47 R Jackson The Chief (1959) 157, 338. Lord Hewart was often criticised for taking sides. One Barrister refered to his Lordship as a dreadfully bad judge: C P Harvey The Advocates Devil (1958) 32,33
49 Above n42
50 Now Chief Justice of the Supreme Court of New South Wales
51 Samuels J "Judicial competency: How can it be maintained" [1980] ALJ 581, 585
52 R E Megarry Lawyer and Litigant in England (1962) 120,121
53 Above n8
54 Above n35, 85
55 Idem
56 15 April 1988 at Auckland
57 Rt Hon Sir Robin Cooke "Women in the law (1)" [1988] NZLJ 147
58 Law Talk (1987)255, 13
59 As long as he shall behave himself well
60 Section 7 District Courts Act 1947: Section 3 Judicature Act 1908
61 Section 7(2) District Courts Act 1947: Section 13 Judicature Act 1908
62 Above n1
63 Below n67, 195
64 [1980] 1 NZLR 181, 183
65 See Case J in *Jones v Accident Compensation Commission* [1980] 2 NZLR 379, 381
66 Law Commission: Preliminary Paper No. 8 Legislation and its interpretation [1988] 146
67 Report of the Royal Commission on the Courts (1978), 196
68 Dicey The Law of the Constitution (1885)1 ed, chapter 1
69 K Keith "A Judicial Commission? Some comments on the

PERESE, S. The selection of judicial candidates in New Zealand.

Independence of the Judiciary" [1983] NZLJ 239

70 G Sturgess and P Chubb Judging the world: Law and Politics in the Worlds leading Courts (1988), 285

71 Rt Hon Sir Robin Cooke "The Courts and public controversy" (1983) 5 Otago LR 357,359

72 Idem

73 [1980] 1 NZLR 147. Many Commentators at the time thought the decision was against the government

74 de Smith Constitutional and Administrative Law (1981)4 ed, 370

75 Auckland District Law Society Political attacks on the Judiciary (1984), 2

76 Ibid 3

77 Law Talk (1989)301, 12

78 Above n75, 1

79 Above n75, 7

80 The Rt Hon Jim Mclay

81 The office ceased to be stautory after the Civils List Act 1920 repealed the Civils List Act 1908. The 1908 Act made provision for the office persuant to the Constitution Act 1852. The 1852 Act provided for three permanent officials, of which the Attorney General was one, charged with Administrative tasks untill resposible government was formed

82 *Reg v Comptroller-General Patents, Ex parte Tomlinson* [1899] 1 Q B 909,913

83 There have been four exceptions;
- The Rt Hon G W Forbes in 1935 as Prime Minister held the office. That he was not a lawyer drew sharp criticism from the New Zealand Law Society:[1934] NZLJ 81;
- 1970 Sir John Marshall was Minister of Justice and Dan Riddiford Attorney General;
- !981 Peter Wilkinson was Minister of Justice and Jim McClay Attorney General;
-1989 Bill Jefferies is Minister of Justice and David Lange Attorney General.

84 See Williams J in *Solicitor-General ex rel Cargill v Dunedin City Corporation* (1875)1 Jur NS 1,14 where his Honour says the Crowns prerogatives are the same as in England, unless otherwise limited by statute

85 F M Brookfield "The Attorney General" [1978] NZLJ 334

86 See Parliamentary Debates (1876) 23, 20-22, 249-254

87 Ibid 250-251

88 Chief Justice of the Supreme Court of New South Wales

89 M Kirby The Judges (1983), 21. See also J A G Griffiths The Politics of the Judiciary (1977) 194

90 Above n37, 160

91 L Mayer The American Legal system (1964), 385

92 Ibid 384

93 Above n37,161

94 Above n18, 47

95 Above n18, 49

96 Per Lord Chancellor Kilmuir as cited by Shereet idem

PERESE, S. The selection of judicial candidates in New Zealand.

97 Above n51, 584
98 Idem
99 It may be of interest to note the Assembly had a non-labour majority
100 (1983)57 ALJ 320
101 See earlier discussion at page 32
102 Above n86, 254
103 Campbell Lives of the Lord Chancellors (1868) 8ed, 678
104 Above n40, 142
105 Above n70, 209
106 Ibid 239
107 Reported in "The Australian" 4th Sept 1985
108 Above n70, 241
109 Ibid 246
110 1986
111 Evening Post, Wellington 28 April 1973
112 England, Canada and Australia
113 Above n67, 198
114 The report of a Justice Sub-committee The Judiciary (1972) 30
115 Canadian Judges Act
116 Above n70, 406
117 Ibid 408
118 Ibid 139
119 Ibid 335
120 R Knight reported in National Review 12 Sept 1986, 42
121 R Lacayo reported in Time 15 Sept 1986, 76
122 Idem
123 C Leland "Whats at stake" [1985] C L 73
124 Ibid 37
125 M Bradbury "Judicial morality in a Democracy" [1985] C L 10
126 Above n121
127 Above n120
128 New York Times, New York 17 Jan 1986
129 Above n121
130 Above n128
131 Above n125
132 (1985)221 Cal Rptr 794
133 (1980)446 U S 420, 427
134 Above n123, 36
135 Above n121
136 Idem
137 Above n120
138 Above n121
139 Above n125
140 Above n134
141 [1983] C R 212
142 Ibid 217

143 Above n134
144 Above n121
145 Above n120
146 Newsweek 3 Nov 1986, 65
147 Lucas is listed as Chief Justiice in the California Law Reporter
148 Above n123, 38

The writer would like to thank the following contributors:

Sir Ronald Davison

Peter Trapski

Sir Robin Cooke

P437 PERESE, S. The selection of judicial candidates in New Zealand.