Women Delivering Justice: A Call for Diverse Thinking

By Justice Susan Glazebrook DNZM[1]

Tihei mauri ora
Te whare e tū nei, tēnā koe
Te papa i waho nei, tēnā koe
Te mana whenua o tēnei rohe, tēnā koutou
Te hunga mate ki te hunga mate, haere haere haere
E ngā mana, e ngā reo, e rau rangatira mā
Tēnā koutou, tēnā koutou, tēnā tatou katoa

I have greeted you in te reo Māori, the language of the indigenous people of Aotearoa New Zealand. I acknowledged the building we are in and the land on which it stands. I paid tribute to the indigenous custodians of this land and recognised and remembered our ancestors. Finally, I greeted all of you as distinguished guests.

Why did I do this? One reason is that te reo Māori is one of the three official languages of New Zealand, along New Zealand sign language and English.[2] But more importantly in this forum about diversity in the judiciary, I greeted you in te reo Māori because it is essential that modern judiciaries attempt to understand not just the law but the societies they serve. This includes reflecting on and recognising the effects of colonisation on the indigenous peoples of the world.

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2 See Māori Language Act 1987 and New Zealand Sign Language Act 2006. English, unlike te reo Māori and New Zealand sign language, has never been formally recognised as an official language of New Zealand (although Clayton Mitchell MP's bill, still waiting to be drawn, attempts to give it that status: Clayton Mitchell "English an Official Language of New Zealand Bill" (13 February 2018) New Zealand Parliament <www.parliament.nz>.

Colonisation robbed indigenous peoples of their system of laws, their lands, their control over their resources and often their language.[3] All this has led to disproportionate social and economic deprivation. For example, in 1840 Māori collectively controlled the majority of the land in New Zealand. Now, even with modern redress for past injustices,[4] collectively owned Māori land accounts only for some five per cent of New Zealand's total land area.[5]

Māori have worse health outcomes than the rest of the population[6] and lower educational achievements.[7] They are more likely to be taken from their families and put into state care[8], a

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3 In New Zealand, the loss of te reo Māori has been attributed to government policies designed to encourage assimilation of Māori into European society and to the rapid urbanisation of the Māori population in the 1950s and 1960s: Ministry of Social Development "Cultural Identity" (June 2016) The Social Report 2016 – Te pūrongo oranga tangata <http://socialreport.msd.govt.nz>. Steps have been made to revive te reo Māori since the passing of the Māori Language Act 1987, including kōhanga reo (full reo and tikanga immersion early childhood education), Māori immersion and bilingual schools, and Te Taura Whiri i Te Reo Māori (the Māori Language Commission). The Waitangi Tribunal has called for more action to protect the reo from the New Zealand Government: Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011).

4 See "Settling historical Treaty of Waitangi claims" (2019) New Zealand Government <www.govt.nz>. The Treaty of Waitangi was signed on 6 February 1840 by about 40 Māori chiefs and by Lieutenant Governor William Hobson for the British Crown (and by the end of 1840, about 500 chiefs had signed the Treaty). The Waitangi Tribunal, established by the Treaty of Waitangi Act 1975, has the authority to hear grievances related to breaches of the Treaty of Waitangi. For more on the Tribunal, see <www.waitangitribunal.govt.nz>. For more information on the Treaty see Claudia Orange *The Treaty of Waitangi* (3rd ed, Bridget Williams Books, Wellington, 2011) and Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

5 "Part 2: Māori Land – What Is It and How Is It Administered?" (2004) Controller and Auditor-General <www.oag.govt.nz>.

6 Māori have a lower life expectancy at birth than non-Māori: Statistics New Zealand "Life expectancy" (May 2015) NZ Social Indicators <archive.stats.govt.nz>. Māori also have higher rates of mental illness, suicide and diabetes: see "Tatau Kahukura: Māori health statistics" *Ministry of Health* (8 October 2015) <www.health.govt.nz>. An inquiry into the treatment of Māori in the health system is currently underway: Waitangi Tribunal *Health Services and Outcome Kaupapa Inquiry* (Wai 2575). The Tribunal's Stage One Report was released on 1 July 2019 and found multiple breaches of the Treaty of Waitangi regarding the primary health care system in response to funding, accountability, performance and partnership.

7 In 2017 Māori had the lowest rate of students leaving secondary education with the highest level of school qualification, NCEA level three: 35.6 per cent of Māori obtained level 3, compared to European/Pākehā rates of 57.2 per cent: "School leavers with NCEA level 3 or above" (September 2018) Education Counts <www.educationcounts.govt.nz>. See also Statistics New Zealand "18-year-olds with higher qualifications" (February 2017) NZ Social Indicators <archive.stats.govt.nz>.

8 Uplifting of Māori newborn babies by the State from their families has recently been brought into the public eye after an uplifting in a regional hospital in May 2019: see "Children's Commission Andrew Becroft announces review into Oranga Tamariki's child uplift policies" *New Zealand Herald* (online ed, 16 June 2019); and Melanie Reid "New Zealand's own 'stolen generation': The babies taken by Oranga Tamariki" *Stuff* (online ed, 12 June 2019). ("Stolen Generation" refers to the removal of Aboriginal and Torres Strait Islander children from their parents by the Australian government in the 1900s-1960s: see the Australian Institution of Aboriginal and Torres Strait Islander Studies' website <https://aiatsis.govt.au>). See also articles by a family lawyer and social worker respective for other views on uplifting newborns in New

system which is claimed to have exposed large numbers of vulnerable children to abuse.[9] Māori are generally more likely to live in straightened financial circumstances.[10] They also generally have poorer labour market outcomes compared to the rest of New Zealanders.[11]

Māori make up some 15 per cent of New Zealand's population, but over half of the prison population is Māori.[12] The position is particularly bad for Māori women, who make up 62 per cent of female prisoners.[13] Some of these prison figures will be related to relative deprivation but some will be due to (largely unconscious) bias at all stages of the criminal justice system.[14]

Like other colonised nations, Māori had their own customary systems that regulated their society. These were based on collective values and relationships of kinship with people and

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Zealand: "The other side of the Oranga Tamariki baby uplift story" *Stuff* (online ed, 19 June 2019); "Open letter: Oranga Tamariki social workers in 'terrible almost untenable position' *Stuff* (online ed, 3 July 2019).

9 See Judge Carolyn Henwood, Chair *Final Report of The Confidential Listening and Assistance Service* (2015), which led to the current Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions (see <http://abuseinstatecare.royalcommission.govt.nz/>).

10 Māori people are overrepresented in lower paid jobs. As at June 2018, the average woman earns $27.41 per hour, whereas the average Māori woman earns $24.26. Additionally, the average man earns $31.82 per hour, whereas the average Māori man only earns $26.08: "Pay gaps by ethnicity and gender" (15 August 2018) Coalition for Equal Value, Equal Pay <www.cevepnz.org.nz>.

11 In 2017, Māori made up 28.1 per cent of the unemployed population. The Māori unemployment rate was 10.8 per cent as compared to the national unemployment rate of 4.9 per cent: Ministry of Business, Innovation and Employment Hikina Whakatutuki *Māori in the Labour Market* (September 2017) at iv.

12 As at 31 March 2019, 51.3 per cent of the New Zealand prison population is Māori and 11.6 per cent are Pasifika: see Department of Corrections "Prison Facts and Statistics – March 2019" <www.corrections.govt.nz> (as compared to Māori comprising 14.9 per cent and Pasifika peoples comprising 7 per cent of the national population: Statistics New Zealand "Major ethnic groups in New Zealand" (29 January 2015) <www.stats.govt.nz>).

13 Department of Corrections *Women's Experiences of Re-offending and Rehabilitation* (2016) at "Female Offenders in New Zealand – Ethnicity" <www.corrections.govt.nz>. See also Te Aniwa Hurihanganui "Study: Why do so many Māori end up behind bars?" *Radio New Zealand* (online ed, New Zealand, 4 October 2018).

14 In 2015, the Police Commissioner admitted to this "unconscious bias" that results in Māori people being more severely punished than non-Māori people for similar transgressions: Action Station *They're our Whānau* (2018) at 10–17. See also Elizabeth Stanley and Riki Mihaere "The Problems and Promise of International Rights in the Challenge to Māori Imprisonment" (2019) 8 International Journal for Crime, Justice and Social Democracy 1. Bias against racial and ethnic minorities at all stages of the criminal justice system exists in other jurisdictions as well, including the United States: *Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance* (March 2018).

with the land. Central to the relationship of people and that land was the notion of guardianship and conservation of the land and the other resources they used to live.[15]

As in in most colonised nations, the law in New Zealand became that of the colonisers and this played its part in the injustices suffered by Māori.[16] This was the case despite Māori customary law (tikanga) being in theory part of the common law in New Zealand, as it should have been in all common law jurisdictions.[17]

Further, until recently, the international human rights framework favoured individual rights over collective rights.[18] The 1948 Universal Declaration on Human Rights, the foundation of modern human rights, does not contain any collective rights and does not even refer to self-determination.[19] The fullest expression of collective rights eventually came in 2007 with the UN Declaration on the Rights of Indigenous Peoples. However, reconciliation of apparent conflicts between collective and individual rights remains largely unresolved.[20]

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15 Māori customary law, also often referred to as "tikanga Māori", is underpinned by values such as whanaungatanga and kaitiakitanga. Whanaungatanga places great importance on the relationship between all things, including that between land and people, and encompasses identifying not as an individual but as part of a collective whole: Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [130]–[136]. The value of kaitiakitanga can be understood as the obligation of stewardship, connected to the values of tapu, which acknowledges the sacred character of all things, and mana, which provides the authority for the exercise of kaitiakitanga: Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [163]–[166]. For further information see Richard Benton, Alex Frame, Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013).

16 In New Zealand, for example, the Native Land Court, created in 1862, imposed colonial ideas of individual land ownership onto Māori, a concept that did not accord with the Māori view of their relationship with the land. David Williams *Te Kooti Tango Whenua* (Huia Publishers, Wellington, 1999) at 51–56; and also Richard Boast *The Native Land Court* (Brookers, Wellington, 2013).

17 In New Zealand, see the leading case of *Takamore v Clarke* [2012] NZSC 116, [2012], [2013] 2 NZLR 733. In Australia, see Australian Law Reform Commission *Recognition of Aboriginal Customary Law*s (1986) at [61]–[62]. See also A N Allot "The Judicial Ascertainment of Customary Law in British Africa" (1957) 20 MLR 244.

18 *Universal Declaration of Human Rights* GA Res 217A (1948). See for example Johanna Gibson "The UDHR and the Group: Individual and Community Rights to Culture" (2008) Hamline J Pub L & Pol'y 285 at 294.

19 The later International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976) [ICCPR] and International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1966, entered into force 3 January 1976) [ICESCR] both contain the right to self-determination: ICCPR, art 1(1) and ICESCR, art 1(1) which both provide that "by virtue of that right [all peoples] determine their political status and freely pursue their economic, social and cultural development".

20 For commentary see Claire Charters "Finding the Rights Balance: A Methodology to Balance Indigenous Peoples' Rights and Human Rights in Decision-making" [2017] NZ L Rev 553.

Māori are not alone. Colonisation has had similar effects in other jurisdictions where there are indigenous populations. There are also other groups in society who suffer from similar disadvantages for different reasons, such as the disabled,[21] those from the LGBTQI communities,[22] migrant workers and refugees.[23]

I mention here too the particular effects colonisation has had on indigenous women. In many indigenous societies, women had traditional roles and customary authority. Colonial powers brought with them their own perceptions of the proper place of women and this meant that the effects of colonisation have been particularly acute for indigenous women.[24]

Women more generally have not been well served by the justice system in the past. For example, married women were seen as akin to mere chattels in inheritance laws.[25] Indeed, discriminatory laws persist today in many parts of the world.[26] But even outwardly neutral laws can be interpreted in a way that favours the status quo[27] in a world where privileged men

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21 Only 45 per cent of disabled adults are employed, as compared to 72 per cent of non-disabled adults. Additionally, disabled people are more likely to have lower incomes than non-disabled people: Ministry of Social Development "Key facts about disability in New Zealand" (December 2016) Office for Disability Issues <www.odi.govt.nz>.

22 For example, before the Homosexual Law Reform Act 1986, sexual relations between men was a crime in New Zealand. Still, in 2019, the New Zealand LGBTQI community experiences disproportionate levels of violence: Sarah Murphy "NZ told to improve human rights of LGBTQI people" *Radio New Zealand* (online ed, New Zealand, 22 January 2019).

23 See generally Ban Ki-moon, United Nations Secretary-General *In safety and dignity: addressing large movements of refugees and migrants* UN Doc A/70/59 (21 April 2016).

24 See Annie Mikaere "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 Waikato L Rev 125; Jennifer Corrin Care "Negotiating the Constitutional Conundrum: Balancing Cultural Identity with Principles of Gender Equality in Post-Colonial South Pacific Societies" (2006) 5 Indigenous Law Journal 51; Mema Motusaga "Women in Decision Making in Samoa" (PhD, Victoria University, Victoria, Australia, 2016); and Silia Pa'Usisi Finau "Women's Leadership in Traditional Villages in Samoa: The Cultural, Social, and Religious Challenges" (PhD, Victoria University of Wellington, 2017).

25 For example, before the Married Women's Property Act 1884 (NZ), a woman's legal personhood was subsumed into her husband's upon marriage. Under customary law in many parts of Africa, women cannot inherit property: see for example commentary in Anthony Diala "A critique of the judicial attitude towards matrimonial property rights under customary law in Nigeria's southern states" (2018) 18 African Human Rights Law Journal 100. While customary law traditionally included safeguards for widowed women, these protections disappeared under colonial rule as land became privatized and increasingly competitive to own: Mary Kimani "Women struggle to secure land rights" *United Nations Africa Renewal* (New York, April 2008) at 10; Uche Ewelukwa "Post-Colonialism, Gender, Customary Injustice: Widows in African Societies" (2002) 24 HRQ 424; and A Sanders "How customary is African customary law?" (1987) 20 Comparative and International Law Journal of Southern Africa 405.

26 Women also have more barriers to accessing justice: see IDLO *Justice for Women: High-level Group Report* (March 2019) at 14–34.

27 See also IDLO *Justice for Women*, above n 26, at 19.

disproportionately hold positions of power, including in the judiciary.[28] And it is also a world where those women who do form a minority in positions of power usually come from similar privileged backgrounds as their male colleagues.

More diverse judiciaries which reflect the societies they serve are an important step towards achieving a truly just system of justice. But diversity must apply to all levels of the judiciary and also to the rest of the justice system, including lawyers,[29] court staff, police, social workers and all others involved in the administration of justice.[30] There is compelling evidence that gender and other balance in governance and leadership roles correlates with better decision-making, organisational resilience and performance.[31] Having diverse perspectives improves the quality of debate, means that minority views that otherwise may not have been obvious to the majority are considered and plays a role in countering unconscious bias.[32]

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28 As at November 2015, women make up less than 50 per cent of judges in many judiciaries: 29.9 per cent in New Zealand, 25.2 per cent in England and Wales, 35.4 per cent in Canada, 33.4 per cent in Australia, and 33 per cent in the United States: "New Zealand's Judiciary and Gender" (11 November 2015) New Zealand Law Society <www.lawsociety.org>. Women also face opposition, gender role stereotypes, harassment, and discrimination that prevents them from fully and equally participating in the judiciary. International Commission of Jurists *Women and the Judiciary* (International Commission of Jurists, Geneva Forum Series no 1, September 2014) at 5–6.

29 In the United Kingdom it is predicted that women will never reach half of practising barristers and that it will take over 30 years to for the percentage of female barristers to rise from 37 per cent to 44 per cent: The General Council of the Bar *Momentum Measures: Creating a Diverse Profession (Summary of Findings)* (2015) at 9.

30 See generally IDLO *Women Delivering Justice: Contributions, Barriers, Pathways* (November 2018).

31 See for example Economic and Social Commission for Western Asia (ESCWA) *Policy Brief Women in the Judiciary: A Stepping Stone towards Gender Justice* (United Nations, September 2018) at 5.

32 This is reflected in other spheres beyond the judiciary, such as corporate governance and politics. Companies with women outperform those without women – they are more profitable and innovative: see Vivian Hunt, Sara Price, Sundiatu Dixon-Fyle and Lareina Yee *Delivering Through Diversity* (McKinsey, 2018); and David Rock and Heidi Grant "Why Diverse Teams are Smarter" (4 November 2016) Harvard Business Review <www.hbr.org>. Diverse perspectives improve decision-making and create role models for minority groups looking to enter the workforce: see Ministry for Women *Increasing the Representation of Women on Private Sector Boards* (August 2016) at 11–13; and Helene Landemore "Why the Many are Smarter than the Few and Why it Matters" (2012) Journal of Public Deliberation 7.

More diverse courts are also essential to the perception of an equitable justice system and therefore to the rule of law.[33] Individuals from minorities may be less willing to turn to the courts if courts are perceived as only representing and reflecting the majority.[34] Having a judiciary that reflects the society it serves shows a commitment to equality.[35] As Lady Hale, the President of the UK Supreme Court, said, "our courts, and the lawyers who serve their clients in and out of court, must be as reflective as possible of the society they serve".[36] All members of the public need to feel that the justice system is available to them.

The belief, vision and reality that women and minorities can occupy positions of power is particularly important in post-conflict societies, given women and minorities are often disproportionately affected by the long-term effects of conflict.[37]

I venture to suggest, however, that mere numbers of women or other marginalised groups in the delivery of justice are not enough. To gain the full benefits of diversity, we need diverse thinking and understanding throughout the justice system. This requires commitment from all in the justice sector (including men), assisted by educational programmes tailored to the needs of the particular jurisdiction.[38] The organisation I represent here today, the International Association of Women Judges, has from its inception been committed to delivering such

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33 Beverly McLachlin, Chief Justice of Canada, has said that people, especially women, will be more sceptical of a legal system composed predominantly of "middle-aged men in pinstriped trousers" without much representation from women and minorities. Sian Elias, former Chief Justice of New Zealand, has said that having women in the judiciary "enhances public confidence" in the legal system: International Association of Women Judges *Twenty Five Years of Judging for Equality* (2016) at 5–8. Lady Hale, President of the United Kingdom Supreme Court, has also said that a diverse judiciary gives the courts "democratic legitimacy" because people see that the courts serve the whole community, not just the "privileged elite": Brenda Hale "Judges, Power and Accountability: Constitutional Implications of Judicial Selection" (speech to the Constitutional Law Summer School, Belfast, 11 August 2017).

34 See ESCWA *Policy Brief Women in the Judiciary*, above n 31, at 5; and Rosemary Hunter "More than Just a Different Face? Judicial Diversity and Decision-Making" (2015) 68 CLP 119 at 123.

35 Hunter, above n 34, at 123–124.

36 Brenda Hale "100 Years of Women in the Law" (Girton's Visitor's Anniversary Lecture 2019, Girton College, Cambridge, 2 May 2019).

37 As recognised by the United Nations Security Council in for example Resolutions 1325 and 1820. See more generally "Empowerment: Women & Gender Issues: Women, Gender & Peacebuilding Processes" (2008) Peacebuilding Initiative <www.peacebuildinginitiative.org>.

38 International Commission of Jurists *Women and the Judiciary* (International Commission of Jurists, Geneva Forum Series no 1, September 2014) at 7. The International Association of Judges, through its Jurisprudence of Equality Program, values judge-led education by encouraging groups of politically, religiously, and philosophically diverse judges to collaborate and combine their strengths and expertise: Anna Goldstein, International Association of Women Judges *Twenty Years of Judging for Equality* (2010) at 44–58.

educational programmes, concentrating in particular on issues that affect women and girls, such as domestic violence, trafficking, and sextortion.[39]

I also mention projects around the world to show that diversity of thought can affect decision making or, even where it cannot because of constraints of the law, at least mean that judgments are written taking into account different perspectives. I refer to the feminist judgments projects in various (mostly common law) jurisdictions where judgments have been rewritten, imagining that a feminist judge sits on the bench alongside the original judges.[40] Importantly, the judgments are written within the constraints, in terms of precedent, legislation, and relevant legal and social science research, which existed at the time.[41]

A key feature of many of the feminist judgments is recognising women's stories and experiences.[42] One particular feature of the New Zealand project was that it combined a feminist perspective with that of mana wāhine, a Māori women's perspective.[43] Those operating from the perspective of mana wāhine claim visible space for Māori women, identify rights and obligations that would uphold the mana (authority, prestige, spiritual power) of Māori women, place Māori concerns at the centre of the factual and legal analysis, apply legal tests to include Māori everyday reality and pay respect to Māori customary values and principles.[44]

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39 *The IAWJ: Twenty Five years of Judging for Equality* at 108–111. See also "Sextortion" (standing topic since May 2018) *BBC* <www.bbc.com>. Sextortion is defined as "the base of power to obtain a sexual benefit or advantage" or "a form of corruption in which sex, rather than money, is the currency of the bribe": International Association of Women Judges *Naming, Shaming, and Ending Sextortion* (2012) at 5. See generally International Association of Women Judges "Corruption and Sextortion" (2019) <www.iawj.org>.

40 For example Rosemary Hunter and others (eds) "Introducing the Feminist and Mana Wāhine Judgments" in Elisabeth McDonald, Rhonda Powell, Māmari Stephens and Rosemary Hunter (eds) *Feminist Judgments of Aotearoa New Zealand Te Rino: A Two-Stranded Rope* (Hart Publishing, Portland, 2017); Rosemary Hunter, Clare McGlynn, and Erika Rackley (eds) *Feminist Judgments From Theory to Practice* (Hart Publishing, Portland, 2010); and Heather Douglas and others (eds) *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, Portland, 2014).

41 Hunter, above n 34, at 130–131.

42 For example Janet McLean "*Brooker v Police* [2007] NZSC 307: Judgment" in Elisabeth McDonald, Rhonda Powell, Māmari Stephens and Rosemary Hunter (eds) *Feminist Judgments of Aotearoa*, above n 40, at 79; John Adams "*V v V* [2002] NZFLR 1105: Judgment" in *Feminist Judgments of Aotearoa* at 234; and Brenda Midson "*R v Wang* [1990] 2 NZLR 529: Judgment" in *Feminist Judgments of Aotearoa* at 504.

43 For example, Valmaine Toki "*R v Shashana Lee Te Tomo* [2012] NZHC 71: Judgment" in *Feminist Judgments of Aotearoa* at 522.

44 *Feminist Judgments of Aotearoa*, above n 40, at 45–47.

So to recap, a diverse judiciary not only gives the courts greater legitimacy, it also promotes the administration of justice and produces higher quality decisions and debate. We also, however, need to ensure diversity of thinking throughout the judiciary and the justice system as a whole.