The 65th Session of the Commission on the Status of Women

Woman Delivering Justice:

Achieving Gender Parity in the Justice Sector Speech

18 March 2021

Justice Susan Glazebrook[1]

E nga māreikura o te ao, e aku whaea

Tēnā koutou, tēnā koutou.

Mauria mai te aroha me te mamae

Ki ō tātou mate

Mo te tokorua hoki i hinga ki Afghanistan

Haere nga mate, haere atu rā

Tātou te hunga ora

Tēnā tātou katoa[2]

I have greeted you all in te reo Māori, the language of the indigenous people of Aotearoa/New Zealand and one of the official languages of my country.

As is customary, I have acknowledged those who have gone before us and without whom we would not be where we are today. In particular, I acknowledged Judge Qadria Yasini and Judge

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1 Judge of Te Kōti Mana Nui | Supreme Court of New Zealand and President of the International Association of Women Judges. Speech given at the 65th Session of the Commission on the Status of Women Side Event on Women Delivering Justice: Achieving Gender Parity in the Justice Sector which was sponsored by the International Development Organisation [IDLO], the International Association of Women Judges [IAWJ], the American Bar Association [ABA], the Institute for African Women in Law [IAWL], Permanent Mission of New Zealand to the United Nations Te Aka Aorere, and the Permanent Mission of Italy to the United Nations. For a live recording of the speech, see "Women Delivering Justice: Achieving Gender Parity in the Justice Sector - CSW65 Side Event" (18 March 2021) UN Web TV <https://webtv.un.org> at 23:56–29:38. I thank my clerk, Don Lye, for his assistance with the preparation of this speech.

2 Translation from Māori: Noble women of the world, my mothers, I greet you, as we gather, I ask that you bring with you the memories of those who have passed on, that we may grieve together at their loss, particularly we remember the two judges from Afghanistan who recently fell, with that I turn to you the living and bid you greeting again. I thank Justice Joe Williams, judge of Te Kōti Mana Nui | Supreme Court of New Zealand, for the gift of this mihi whakatau and its translation.

Zakia Herawi, two of my sister judges from Afghanistan who were gunned down and killed on their way to perform their judicial functions in the Supreme Court.[3] Their deaths are a major tragedy for their families, their loved ones and their colleagues both in Afghanistan and globally. We mourn them.

Violence against public figures has wider implications and these are very relevant to our topic today. The killings were part of a wider campaign of violence targeting public figures who support a move towards a more inclusive and fair society in Afghanistan. Women public figures have been especially targeted in an obvious attempt to intimidate not only women holding public office but women generally. It is an attack on the very heart of society, the rule of law and equality.

I pay tribute to and salute the courage of all those judges and public figures everywhere in the world who continue to perform their public service duties in the face of violence and danger and in these times of COVID, the real risk of death by disease.

This is not the time to discuss in detail security or other measures that may avert tragedies in the future. I do, however, venture to suggest that ensuring the equal representation of and true equality of women in the justice sector is one of the most important protective measures. Protective not just of the safety of women judges through safety in numbers but also protective of justice and equality more generally.

Gender parity in the justice sector makes a number of important contributions to society:

(a) it improves the legitimacy of justice institutions;[4]

(b) it strengthens equality of opportunity for women;[5] and

(c) it improves justice outcomes (because of the diversity of experience and knowledge on the bench).[6]

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3 "Official Statement on the Killings of Women Judges in Afghanistan" (23 February 2021) IAWJ <www.iawj.org>.

4 Lady Hale, Deputy President of the Supreme Court of the United Kingdom "Judges, Power and Accountability: Constitutional Implications of Judicial Selection" (speech to Constitutional Law Summer School, Belfast, 11 August 2017) at 4.

5 Lady Hale, above n 4, at 4. See also Rosemary Hunter "More than Just a Different Face? Judicial Diversity and Decision-making" (2015) 68 CLP 119 at 123.

6 Lady Hale, above n 4, at 4. See also JUSTICE *Increasing Judicial Diversity: An Update* (29 January 2020) at [1.12].

And it would be remiss not to mention the enriching contribution to judicial institutions and to society in general that is brought by other traditionally disadvantaged groups when they achieve judicial office.

In the short time available I cannot cover all aspects of what is needed to achieve a truly diverse judiciary so I thought I would concentrate on what I consider to be the false dichotomy between merit and diversity.[7]

On the one hand, there is the proposition that those selected to be judges should be the most highly qualified and capable persons in society. This is because the decisions that judges make have significant consequences for society not to mention the very personal consequences for the parties.[8] It is therefore has been argued that merit should be the only touchstone when considering judicial appointments.[9] This may in time lead to gender equality as meritorious women candidates emerge,[10] but diversity should not be allowed to diminish quality.[11]

On the other hand, those advocating for diversity say that this is too narrow a view. Merit is vital but the judiciary also needs to be representative (and hence diverse) in order to serve the population.[12] They therefore argue that diversity should be seen as an element of merit and effectively engrafted onto the merit requirements for the role of judge.[13] On this view merit is intrinsic to and not contradictory or secondary to merit.[14]

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7 This phrase has also been used by Baroness Brenda Hale: Erika Rackley *Women, Judging and the Judiciary: From difference to diversity* (Routledge, Abingdon (Oxon), 2013) at xiv.

8 This is especially significant given the increasing recognition that judges do not simply apply the law, but also have to reach decisions in relation to politically controversial policy issues: Kate Malleson "Rethinking the Merit Principle in Judicial Selection" (2006) 33 Brit J Law & Soc 126 at 134.

9 Lord Sumption, Judge of the Supreme Court of the United Kingdom "Home Truths about Judicial Diversity" (Bar Council Law Reform Lecture, 15 November 2012) at 22–23. There are also arguments that merit as measured by examination and academic qualifications are arbitrary measures of human value but these arguments are outside the scope of this paper: see James Marriott "Academic intelligence is absurdly overvalued" *Times* (online ed, London, 2 June 2021).

10 Malleson, above n 8, at 137–138.

11 This is often described as a fear of dumbing down the judiciary: Rackley, above n 7, at 195.

12 Lady Hale, Deputy President of the Supreme Court of the United Kingdom "Appointments to the Supreme Court" (speech given at the Conference to mark the tenth anniversary of the Judicial Appointments Commission, University of Birmingham, 6 November 2015) at 15.

13 See for example Lord Bingham's suggestion that merit take into account "wider considerations, including the virtue of gender and ethnic diversity": Tom Bingham "The Law Lords: Who Has Served" in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds) *The Judicial House of Lords 1876–2009* (Oxford, Oxford University Press, 2009) 122 at 126.

14 JUSTICE, above n 6, at [1.16].

It will be obvious that I subscribe to the latter view, but I go further and say we need to challenge the very idea of merit as it is traditionally applied to judicial appointments. Like beauty, merit is in the eye of the beholder. It is commonly perceived as an objective standard, but the reality is that it is not. Instead, it is a social construct. The criteria to assess merit may appear neutral but these are based on those already thought to be successful in fulfilling the functions of the post (and who are predominantly male).[15] This results in the selection process unfairly advantaging candidates who are most similar to past appointees and to the selectors themselves.[16]

As such, rather than being a fair and transparent process that achieves gender diversity, the merit-based system becomes a process that excludes women and other groups on the basis that they lack 'merit' as defined by the current holders of power.[17]

These issues are exacerbated by discrimination, bias, stereotyping and structural inequalities in society as a whole, including in the judiciary itself.[18] In common law systems we will not have a truly diverse judiciary until there is a diverse legal profession at all levels.[19] In New Zealand, despite the number of women law graduates having exceeded that of their male counterparts since the early 1990s, women remain severely underrepresented in the higher echelons of the profession from which judges are traditionally appointed.[20] This phenomenon is widely replicated internationally.[21] In civil law systems, where entry to the judiciary is by

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15 Malleson, above n 8, at 135–137.

16 At 137. This is especially significant where the selectors of the judiciary are themselves judges as is the case in many countries.

17 See also Michael McHugh, Judge of the High Court of Australia: Michael McHugh "Women Justices for the High Court" (speech to the High Court Dinner hosted by the Western Australia Law Society, 27 October 2004): "[Women] are at a disadvantage in competing on merit, as that term has been defined and understood in a male-dominated profession."

18 For example, there have been reports of "casual racism and sexism" in the United Kingdom judiciary: Catherine Baksi "Judicial appointment system is 'institutionally discriminatory'" *Times* (online ed, London, 20 May 2021).

19 Diversity includes many things such as race, ethnicity, sexual orientation as well as background of experience, to name a few. For example, a 2019 report showed that two thirds of senior judges in the United Kingdom attended private schools and 71 per cent graduated from Oxbridge: Social Mobility Commission *Elitist Britain 2019: The educational background of Britain's leading people* (24 June 2019) at 5. Further, diversity in the legal profession is an issue that goes back to the law schools: see Imogen Little "Socio-economic Diversity in New Zealand Law Schools: A Case for Adopting a More Nuanced Approach to Admissions Schemes" [2020] NZ L Rev 336.

20 New Zealand Law Society Te Kāhui Ture o Aotearoa "By the numbers" (29 July 2020) <www.lawsociety.org.nz>. As of 14 April, the Law Society held records for 8341 practising female lawyers, 7257 male and three gender-diverse.

21 Ina Ganguli, Ricardo Hausmann and Martina Viarengo "Around the world in the legal profession: Women get in, but not up" VOXEU Centre for Economic Policy Research (9 July 2020) <voxeu.org>.

examination,[22] women often dominate at the lower levels of the judiciary but struggle to achieve parity at higher levels.[23] And worse, where the whole judiciary is dominated by women, its status can diminish.[24]So we have a lot of work to do.

I finish with a Māori proverb: I ōrea te tuātara ka patu ki waho. A problem is solved by continuing to find solutions. We will need creative thinking, adaptability and perseverance to achieve our end of a truly diverse judiciary.

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22 For example in France, Spain, Italy, and Portugal, examinations play a huge role in selection for the judiciary. In Italy an examination is the sole method for selection: Mary L Volcansek "Judicial Selection in Italy: A Civil Service Model with Partisan Results" in Kate Malleson and Peter H Russell (eds) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the Globe* (University of Toronto Press, Toronto, 2006) 159 at 163.

23 For example in France: Doris Marie Provine and Antoine Garapon "The Selection of Judges in France: Searching for a New Legitimacy" in Kate Malleson and Peter H Russell (eds) *Appointing Judges in an Age of Judicail Power: Critical Perspectives from Around the Globe* (University of Toronto Press, Toronto, 2006) 176 at 190.

24 Virtue Foundation *Senior Roundtable on Women and the Judiciary* (1 April 2011) at 30.