

“Merit should be principal criterion for judicial appointment”

Noel Cox

Whilst there is some merit in the suggestion periodically made (for instance by Catriona MacLennan, “Cast the net wider for effective judges”, *New Zealand Herald*, 10 May 2004) that judges should be more representative of the society they serve, I would maintain that the principal, and indeed pre-eminent, criterion for the appointment of members of the professional judiciary should be merit. Whether a judge is seen as representative or not should have little, if any, bearing upon their selection.

Litigants, and defendants in criminal cases, expect, and are entitled to, the highest standards of judicial performance. For this reason alone merit, not colour, sex, or political belief, should determine the selection of judges. By and large this standard has been achieved, without the need for any appointments commission.

There are other ways of selecting judges than that presently used in New Zealand, which relies (for senior appointments) on the Attorney-General, acting with the advice and support of the Chief Justice, advising the Governor-General of the names of appointees. The views of the judiciary, and of senior members of the legal profession, are sought. Attorneys-General have generally appreciated that, although they may be politicians, they are obliged to act in a non-partisan manner. The involvement of the Chief Justice normally ensures that the process works smoothly, though perhaps it is not as transparently as some might wish.

Indeed, it is possible to be too transparent. In many parts of the United States of America judges are elected, subjecting themselves to public scrutiny of a quite extraordinary kind. This may make them representative of the people, in a limited sense, but often results in a politicization of the judicial office which, I believe, would be unwelcome in this country. Even the appointment processes for more senior courts in America do not necessarily prevent this politicisation. At the highest level, the political allegiance and beliefs of candidates for the bench of the Supreme Court of the United States weigh as heavily, if not more heavily, than their judicial ability. This is unlikely to result in a truly representative judiciary, except in a narrow political sense.

Nor would the civil law systems necessarily be any more effective in ensuring a representative judiciary. In these jurisdictions the judges are, in effect, career civil servants. After an apprenticeship as a prosecuting counsel, they work their way up through the hierarchy of judicial appointments, promotion being dependent upon performance – and possibly (in some countries at least) – political favour.

Whether or not it is desirable for the judiciary to be representative of society as a whole (and this must be questioned), this is rarely, if ever, achieved under any system – except at a cost.

Our current system, which emphasises the selection of judges from among the body of experienced lawyers, puts a premium on courtroom experience. This is perhaps not surprising, given that the newly-appointed judges will be required to conduct trials. It

is inevitable that such a system should mean that a significant proportion of judges have been defence counsel. But that is not a bad preparation for judicial office. Nor are civil lawyers, or non-court lawyers, ignored.

Given the composition of the legal profession it is also scarcely surprising that judges were, in the past, predominantly white and male. But there are now, and have been for a number of years, more female law graduates than male. The number of lawyers from minority ethnic groups is increasing. As the numbers of women and minorities in practice, with the necessary experience, increases, so the number of judicial appointments from these groups will increase. But this should not be artificially hastened. To do so would do no one any favours. To appoint inexperienced lawyers to the judicial bench, simply out of a misguided belief in the need for the judiciary to be more representative, would harm public confidence in the ability of the judiciary as a whole.

The bench, and the legal profession, are, or should be, committed to maintaining the highest standards of public service, and not pandering to the notion that the bench should be “more representative”. The professional bench cannot, and should not, be truly representative. It should attract the general support of the community as able to provide quick, quality service of the highest standard. This is especially true in the High Court and the appellate courts (Court of Appeal and new Supreme Court of New Zealand), but also in the District Court. Well-qualified candidates from a wide range of backgrounds are eligible for appointment, but ultimately they are being appointed to a judicial office. This requires considerable legal experience, whatever their personal background. Any alteration to the method of appointing judges should have the aim of enhancing the quality of the appointees – already high – not making the judiciary a potential political football.

There is indeed room for the concept of a representative judiciary at the lowest level of the courts, where their jurisdiction is limited. Already we have part-time referees in the Disputes Tribunals, selected from a wider range of people than the professional judiciary can ever be. For many years the lay (non-lawyer) Justices of the Peace provided the mechanism through which even wider participation could be achieved, in criminal trials as well as civil disputes. In England and Wales today some 97% of civil cases begin and end in Magistrates Court. Regretfully, rather than utilising these part-time judicial officers in this manner, in New Zealand the role of the JP has been steadily reduced. As a consequence, we have lost much of the community involvement in the judiciary (except for juries, which raise other representation issues). The advent of the Community Magistrates a few years ago was a move to reverse this decline, but few could understand why the existing office of Justice of the Peace wasn't used.

JP's are a diverse and relative representative body, which could be entrusted with more civil and a genuine criminal jurisdiction (rather than just traffic offences), if the political will was present to do so. This could result in a much more representative judiciary, but without harming the quality of the full-time professional judiciary, which should remain selected solely on merit.

Dr Noel Cox is Senior Lecturer in Law at the Auckland University of Technology, and a Barrister. He is a member of the Courts Committee of the Auckland District Law Society, but the views expressed here do not necessarily represent those of the Committee.