

BIAS AND THE SPECIAL PLACE OF THE SUPREME COURT

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Introduction

Perhaps due to inadvertent cultural bleed through the mass media or perhaps purely as a result of the long common law tradition of fetishising judges, the lawmaking powers of Supreme Courts seem to be a frequent matter of fascination and reprobation. The arrival of New Zealand's very own has done little to discourage curiosity.

At the same time, what was once a perennial and much cherished left-wing hobby, that of railing against the judges, their backgrounds and their ideologically driven decisions seems in this age of rights and political correctness to be ever more fertile ground for conservatives and the media to clamour about judicial activism.

An examination then of how the law seeks to control the background beliefs, values and politics of these High Priests without depriving us of judges and how much power they exercise seems, all flippancy aside, long overdue.

Chapter 1: The Judge as Law-maker and the Law they make

1.1 Positivism, realism and the modern position

The modern acknowledgement of the positive lawmaking role of judges in the law and the rejection of the declaratory role of the judge has been addressed by Lord Reid of Drem, one of the most distinguished modern British judges as follows:

“Those with a taste for fairytales seem to have thought that in some Aladdin’s cave there is hidden the Common Law in all its splendour and on a judge’s appointment there descends upon him knowledge of the magic words Open Sesame. ... But we do not believe in fairytales anymore.”¹

This declaratory theory was one that commanded the respect and acknowledgement of many of the dominant figures of the common law, with some referring to it as the Blackstonian conception of law², and its influence being seen in the former Chief Justice of Australia’s Sir Owen Dixon’s advocacy of an era of “strict and complete legalism”³. It also predominated as the dominant theory in the House of Lords from the early 19th century⁴ until the formal death of the House’s strict rule as to its own precedents with the 1966 Practice Statement though the practical decline had probably started much earlier. Curiously this is in spite of the fact that from the 1870s in England and ab initio in New Zealand, the Law Courts exercised shared jurisdiction in equity, a system which has always acknowledged individualism and capacity for change⁵.

The rejection of the declaratory theory of the law is the result of positivist jurisprudence beginning with Austin and Bentham and principally represented by the Professor H.L.A. Hart. They emphasised that both statutory and common law were human constructs, tied not to precepts of natural law or some hidden conception of the common law but to the positive choices of rule making authorities: the

¹ Lord Reid, “The Judge as Law Maker” (1972) 12 *Journal of Society of Public Teachers of Law* 22

² H K Lucke, “The Common Law: Judicial Impartiality and Judge-made Law” (1982) 98 *LQR* 29, 33

³ *Swearing In of Sir Owen Dixon as Chief Justice* (1952) 85 *CLR* xiv

⁴ R Stevens, *Law and Politics – The House of Lords as a Judicial Body, 1800-1976* (1979) 79

⁵ M Kirby, “Julius Stone and the High Court of Australia” (1997) 20 *UNSWLJ* 239

legislatures and the judges. Hart's belief lay in the incompleteness and indeterminacy of the law which he saw as stemming from the "open texture of rules", generality of standards, indeterminacy of language and the degree of uncertainty in the system of precedent⁶. These combine to create situations where the legal materials run out, leaving discretion and a choice of outcomes. As Hart expressed it:

"the rule making authority must exercise a discretion, and there is no possibility of treating the question raised by the various cases as if there were one uniquely correct answer to be found ..."⁷

In a form that seems hard to improve on and provides a concise summary of the prevalent modern positivist strain of thought, Paterson summarises Hart's view on the nature of the choice in lawmaking. There is Hart's conviction that:

"hard cases ... are not determined by the mandatory sources of law. This is not to say that they have a licence to make arbitrary choices. ... judges are under an obligation to search conscientiously for the best available solution to a case. Moreover in reaching for a decision by 'informed, impartial choice', they must deploy an acceptable general principle, i.e. one derived from a permissive or persuasive source of law. ... hard cases do not necessarily have a single correct answer on the basis of the existing law. ... in such cases no litigant is legally entitled to demand that the judge choose in one rather than another permissible way."⁸

Hart's complex positivism also owes much of its background to reflection upon the older American school of legal realism represented broadly by the works of figures such as Oliver Wendell Holmes, Jerome Frank and Karl Llewellyn. These writers played a key role in exposing the existence of discretion and the malleability of precedent based reasoning though they can be said to have far more strongly emphasised the role of judicial law making and the particular nature of the common law than did Hart, who sought through tools such as the rule of recognition to build a much wider theory of jurisprudence.

1.2 Dworkin's Challenge

⁶ M D A Fredman, *Lloyd's Introduction to Jurisprudence* (6th ed, 1994) 1389

⁷ H L A Hart, *The Concept of Law* (2nd ed, 1994) 132

⁸ A Paterson, *The Law Lords* (1982) 190-191

Together these movements brought about the widespread rejection of law as an inherently self-completing system and the assertion that it was not subject to the preferences of those legislating within it. While the classical conception of the declaratory theory has little persuasive effect anymore, there have been attempts to redeem the concept of law as a determinate, self-sufficient and internally coherent system, apart from the influence of the moral and political concerns of the agents responsible for its administration. The leading example of this new denial of personal preference choice in lawmaking is American legal philosopher Ronald Dworkin and the theory of principled adjudication, found in his works, first *Taking Rights Seriously* and then, *Law's Empire* as applied by his idealised judge persona: Hercules.

The mode of reasoning he proposes leads Hercules to reject the proposition that judges have a legislative function in filling the gaps left by the rules in hard cases and to affirm that legal materials and the institutional role can lead to right answers. His rebuttal of Hart's proposition above then reads:

“It is no longer so clear that either common sense of realism supports the objection that there can be no right answer, but only a range of acceptable answers in a hard case.”⁹

Dworkin elaborates a theory that he sees as leading to the rejection of the positivist account of rules, hard cases and choice in lawmaking. The four pillars of his argument are the concept of an institutional theory, the assertion of non-rule legal standards, the criterion of fit and finally the right answers that emerge as a result of these devices and which are independent of the adjudicator's personal morality or preferences.

Dworkin identifies Hercules as being able to avoid the effect of personal convictions on the law by the adoption of an initial scheme of reasoning. For constitutional law, including bill of rights determinations, Hercules adopts a form of institutional theory, which guides or determines aspects of his decision-making:

“ He would begin, ... by setting out and refining the constitutional theory he has already used.”¹⁰

⁹ R Dworkin, *Taking Rights Seriously* (1977) 290

In respect of civil cases Dworkin advocates another thesis of giving effect to parties' conceptions about rights which seems to play a similar role to this initial assumption of a political theory in constitutional cases¹¹.

Secondly the Herculean judge is then able to look to the rules and precedents of his system and to find that when they run out or enter into a zone of uncertain application that the extension or rejection of the rule can be justified by reference to other standards apparent in the law. The other principal standard which Dworkin places importance on is the principles of law, which he distinguishes from mere policies. Dworkin believes that the principles of law help to unite precedents providing coherency to the law and additional legal sources to draw on when the rules, as it were, run out. They are fundamental in determining hard cases by creating a web of law from which answers can be found without resorting to outside discretion.

This is partly due to the third of Dworkin's major theoretical assertions: his criterion of fit which seeks to apply the judge's institutional theory to find the principle that best fits the situation. When necessary it will also allow the judge to override one principle with another not on the grounds of personal preference for litigants or a particular development of the law but because it best suits the institutional theory, contributes to the completeness of the law and ties the principle into a coherent web¹². This is developed further in *Law's Empire* where the principle which is found to be ultimately applicable "both fits and justifies some complex part of the legal practices, that ... provides an attractive way to see, in the structure of that practice, the consistency of principle that law requires"¹³.

The final part of Dworkin's work is to draw these strands together to produce a picture of "law as integrity"¹⁴ which draws on his earlier claim that his method of adjudication can produce right answers found at places in *Taking Rights Seriously*¹⁵.

¹⁰ R Dworkin, *Taking Rights Seriously* (1977) 116

¹¹ J W Harris, *Legal Philosophies* (1980) 178-179

¹² R Dworkin, *Taking Rights Seriously* (1977) 116

¹³ R Dworkin, *Law's Empire* (1986) 228

¹⁴ N E Simmonds, *Central Issues in Jurisprudence* (2nd ed, 2002) 214

¹⁵ R Dworkin, *Taking Rights Seriously* (1977) 290

Dworkin's assertions are not without some merit, in the absence of a result dictated by rules or which falls within the 'penumbra of uncertainty' of a rule, his work recognises that other sources and legal standards may be applicable and that judges will attempt to make the result that they reach coherent with the legal system as a whole, seeking to ensure their decisions flow from or fit within the context of the principles of the law. There is some debate as to whether this importance of principle is merely a misstatement by Dworkin of rules as simply formulaic rather than themselves embodying policy or principles as critics have suggested¹⁶. Yet his distinction seems convenient and useful as it separates out propositions of a clear formulaic type which we take to be determinative if applicable (rules) from those standards which rest "not on authoritative creation and the absence of authoritative repeal, but on a developing and changing tradition"¹⁷. Principles then weigh in decision-making rather than being affirmed or rejected utterly like rules. The effect of principles on hard cases is to suggest answers or directions in which the law may consistently develop rather than its development beyond existing rules being entirely free.

1.3 Dworkin's Theory Examined

The substantive claims of Dworkin's theory have however proved much more contentious, principally his claim that it is possible for any judge, in the absence of error or bad faith to find the right answer to any legal question. The primary difficulty is in the meaning of the term right answer which he uses and the confusion that this engendered¹⁸.

The primary objection, from a pragmatic or normative standpoint, that is normally raised is that in matters over which competent practitioners and judges disagree, it is extremely difficult to find any basis upon which to maintain that Hercules' answer would be objectively correct. Dworkin has labelled this the critique from external scepticism and believes that it one which effectively engages with his theory as his claim is not to the provision of answers which are correct in any objectively correct

¹⁶ J W Harris, *Legal Philosophies* (1980) 173 - 175

¹⁷ *Ibid*, 176

¹⁸ M D A Fredman, *Lloyd's Introduction to Jurisprudence* (6th ed, 1994) 1398-1399

but which are faithful to the internal coherency of the system, the distinctiveness of law and the rights of those caught up in it¹⁹.

Dworkin's claims as to the initial theory upon which Hercules fixes himself are as Dworkin admits a personal determination and decisive of the result that any particular judge might reach, noting that: "the impact of Hercules' own judgments will be pervasive though some of these will be controversial" though he follows this immediately by stating: "But they will not enter his calculations in such a way that different parts of the theory he constructs can be attributed to his independent convictions rather than to the body of law he must justify"²⁰.

This however means that the criterion of fit is dependant on this starting assumption and that answers can and will differentiate from judge to judge though the causes of difference, he claims, are more the result of foundational disagreements than an immediate exercise of preference in the case or between the values or principles at hand.

Secondly the criterion of fit is bound to suffer from its own internally subjective difficulties in that the multiplicity of principles in law can, in hard cases, offer no clear result, especially if judges are as Dworkin seems to suggest meant to judge whether a principle may be in the ascendant or falling into decline. Yet these judgments must be based on the sources of law and precedents which are in themselves only collections of opinions of other adjudicators who suffer from a similar difficulty, making Dworkin's claim to the consistent web that law provides tenuous.

Yet principles and fit may both reinforce the degree of reasoning required of judges and may move us a little from the strong Hartian sense of the lawmakers discretion to something narrower but which does not yet approach the very weak sense of discretion proffered by Dworkin. As Harris articulates it:

"judges do not see themselves as free in hard cases to make choices based on personal preference rather than reasons. ... a judge's personal morality, or

¹⁹ R Dworkin, *Law's Empire* (1986) 78-85

²⁰ R Dworkin, *Taking Rights Seriously* (1977) 117

his personal assessment of what is good, will dictate which of an open-ended set of possible second order reasons he will give for saying that one side has the better case.”²¹

The conclusion then with regard to Dworkin’s theory must be that he has made a curious effort to spell out a model of the adjudicative process that rises above realist and positivist conceptions of the law and in the course of it; he has provided several valuable insights. This ambitious project has even humorously, with Lord Reid’s comments in mind, been called the ‘Noble Dream’²². However Dworkin’s difficulty is that he merely manages to shift the role of personal beliefs to a different level of abstraction and that in proposing right answers he can perhaps at most be said to mean decisions made in good faith, in a principled manner within the institutional context but not without reference to personal beliefs and to at least some of the value preferences of the judge. The limitations of both systemic objectivity and personal subjectivity of decision making are apparent within the law but both are recognisably constrained²³.

The picture of the law that results from this inquiry is still one of positivist and realist incompleteness, though perhaps richer as a result of some of Dworkin’s insights. Nonetheless the law is still open to development and exposition by judges in a lawmaking capacity which turns not on the nature of the law but on some of the judge’s own personal beliefs and preferences such that: “there remains a consensus of opinion, that within certain narrow and clearly defined limits, new law is created by the judiciary”²⁴. This belief is equally prevalent among those who exercise such lawmaking abilities at the highest levels, other than Lord Reid, we can add Lord Devlin²⁵, Chief Justice of Canada Beverly McLachlin²⁶ and a majority of the Law Lords in Paterson’s study²⁷ as a short list. That judges make and maintain the common law by adapting it to changing circumstances is a proposition which

²¹ J W Harris, *Legal Philosophies* (1980) 188

²² S Lee, *Judging Judges* (1988) 20

²³ G Frug, “ A Critical Theory of Law” (1989) 1 *Legal Education Review* 43

²⁴ M D A Fredman, *Lloyd’s Introduction to Jurisprudence* (6th ed, 1994) 1403

²⁵ P Devlin, *The Judge* (1979) ch 1

²⁶ B McLachlin, *A Canadian judgment : the lectures of Chief Justice Beverley McLachlin in New Zealand, April 2003* (2004) 2

²⁷ A Paterson, *The Law Lords* (1982) 192-194

although resting, as seen above, on a complex and disputable base, is now seen as very close to incontrovertible and it is often said that “Realism is dead, we are all Realists now”²⁸.

1.4 The Meaning of Judicial Lawmaking

It seems a generally affirmed proposition that judges do in fact make law in the course of their judicial work. That there is such near universal agreement to the proposition is understandable perhaps it because subsists only at the highest possible level of generality, for

“as every undergraduate should know [,] the answer to the question, ‘Do judges make law?’ depends in part on the meaning given to ‘make’ and ‘law’. This is no mere quibble about words but is elementary.”²⁹

There is perhaps neither the will nor certainly the wisdom herein to fully develop the argument as to what extent and under what circumstances judges exercise lawmaking powers though it seems eminently clear that judges can and do create, define, restrict and extinguish such devices of the law as rights, rules, meanings and principles. *Hosking v Runting*³⁰ for instance, provides a very clear example of the creation of a legal device with new remedies and obligations in tort law. The picture may become progressively more blurry in other areas and other situations.

An example of the difficulty of defining lawmaking can be found in the distinction that some would insist upon between common law lawmaking and statutory interpretation. Lord Devlin defines the interpretation of statutes *contra* the lawmaking of the common law in insisting “there can be no general warrant authorizing the judges to do anything except interpret and apply”³¹.

Even if one is to accept this definition and only ‘interpret’ traditional statute law (leaving aside such broadly worded statutes as the New Zealand Bill of Rights Act

²⁸ W L Twining, *Karl Llewellyn and the Realist Movement* (1973) 382

²⁹ V Windeyer, “Book Review: Final Appeal – A Study of the House of Lords in its Judicial Capacity” (1973) 89 LQR 282, 283

³⁰ [2005] 1 NZLR 1

³¹ P Devlin, *The Judge* (1979) 9

1990 for the moment) the question still must be asked whether in interpreting a statutory provision, lawmaking, in the sense that a class of individuals or interests is being defined as subject to the operation of the statute, is taking place. Lord Oliver puts the opposite view on judicial lawmaking to Devlin observing that: “the judge in a common-law system is always and necessarily legislating in one sense of the word, even when all that he is doing is interpreting the expressions which Parliament has chosen to use in a statute.”³²

It is even possible to go further and expand the definition beyond positive acts. Lawmaking is frequently seen as a creative or positive act of the judiciary and yet Lord Radcliffe in his criticism’s of the authors of *Final Appeal* cautions both at the use of the word creative and the purely positive picture of judicial lawmaking by indicating a definition of lawmaking, though not one he seemingly approves of, flowing from negative acts:

“Nearly all the decisions handed down will be seen to fill out or amplify the body of the law, adding their contribution to a structure that is continually being enlarged. ... -- or can it only be creative if the decision allows the act to be upset ? ”³³

It is particularly apt in the case of an appeal court asked to overturn or review its own decision or an otherwise established body of law, as decisions which affect the content of the law will be made by all members of the Court; a decision to uphold a precedent though negative in effect is still perhaps a decision that makes law if only by preserving it. The positive picture of lawmaking and the adjective creative then may ignore the fact that even in dismissals or refusal of leave to appeal, there represents a conscious choice in the mind of the judge which affects the content of the law. Creative risks becoming meaningless as it will only apply to choices to change the law in a progressive or novel fashion and not to equally reasoned choices to preserve it³⁴. This wide positive and negative definition of lawmaking may at the appellate level merge indistinguishably with the very function of judicial decision making, which makes it a difficult though not indefensible understanding of the judge’s lawmaking powers.

³² J Evans & Lord Oliver of Aylmerton, *Legal reasoning and judicial activism : two views* (1992) 29

³³ Lord Radcliffe, “Book Review: *Final Appeal – A Study of the House of Lords in its Judicial Capacity*” (1973) 36 MLR 563

³⁴ *Ibid*, 565

While it is not essential to establish a firm definition of judicial lawmaking for the purposes of this piece, even the weakest of these understandings of judicial lawmaking allows considerable room for judicial choice in outcomes and in establishing the existence of this choice, one also suggests the potential for misuse and necessity of impartiality.

1.5 Variations in Law and Variations in Lawmaking

It is also apparent that while judges can generally make law, the sort of law which they make and the conditions under which they make it will vary broadly since law itself and the decisions that judges must make are far from uniform. The matters with which courts and ultimately perhaps appellate courts are called upon to deal with range from highly technical, purely legal self regulating law such as is found in the interpreting of the High Court Rules or exercising the inherent jurisdiction, through areas which are similarly legal but which have noticeable social effect such as the criminal law or the law of tort before arriving finally at those decisions whose legal content seems low or near nonexistent and which instead involve complex and contentious ethical or political content. In such cases the courts will still normally present as the arbitrator, perhaps in recognition of their general role as forums for debate and justification in the resolution of conflicts.

In the minimally legal category, one example might be *Re A (Children) (Conjoined Twins: Surgical Separation)*³⁵ an English Court of Appeal decision with serious ethical underpinnings and only a façade of legal argument. Equally Lord Reid while advocating strongly against the taking of any political position recognised that the House of Lords specifically may sometimes have to determine deeply divisive social and political issues:

“It also means that he must not take sides on political issues. When public opinion is sharply divided on any question – whether or not the division is on party lines – no judge ought in my view to lean to one side or the other if

³⁵ [2000] 3 F. C. R. 577 (C. A.)

that can possibly be avoided. *But sometimes we get a case that is very difficult to avoid.*³⁶

The cases in which courts are called upon to make law in are likely to be varied, involving a greater or lesser body of background legal principle and relevancy, such that the real opportunity for exercises of the lawmaking role of judges and the societal effect of such lawmaking will vary from case to case.

1.6 The Limits of Judicial Lawmaking

The realisation of the judicial lawmaking role brings frequent and misinformed comparisons between the lawmaking role of judges and that of legislatures and hasty complaints as to the democratic illegitimacy of the latter.

Atiyah concisely captures the basic points of difference and restriction on judicial lawmaking in a Westminster system of government. There are three key limitations:

1. the subordination of judicial lawmaking to legislative lawmaking and the ultimate reversibility of judicial decisions
2. the fact that parliament can move of its initiative whereas courts are limited to the cases coming before them and:
3. “Parliament’s law-making powers are vastly more extensive than those of the Courts. Parliament can create new institutions ... or new posts ... which courts could clearly not do. Parliament can wholly rebuild great bodies of law ... and furthermore it can do it in one fell swoop. Courts move slowly their law-making powers can only be exercised step by step, case by case. They are largely confined to filling gaps in the law or developing existing principles in new directions. ...[though] case law if left to develop by itself, can, over many years build great new legal principle.”³⁷

It is clear that the lawmaking role that judges exercise, at least within New Zealand’s constitutional framework, labours under significant limitations when compared to a

³⁶ Lord Reid of Drem, “The Judge as Law Maker” (1972) 12 *Journal of Society of Public Teachers of Law* 23 [italics added]

³⁷ P S Atiyah *Law and Modern Society* (2nd ed 1995) 194

legislative lawmaking process and operates in a far more involuntary fashion and is ultimately accountable to Parliament.

Chapter 2: The Meaning of Impartiality and the Rationales within it

2.1 Impartiality

One of the qualities that seems necessary for any complex system of law to come into being, is that comes to consist of more than purely subjective individual decisions on the case. This quality of law is synonymous with the expression the rule of law in the most basic of its many meanings³⁸.

Despite the usual practice of avoiding findings of actual bias, the law places great emphasis on impartiality and for judges the making of decisions including exercises of choice in the development of the law are meant to be for proper reasons and on proper grounds. Some reasons are immediately identifiable as wrong or unjustified. That a judge should decide a matter based solely on like, dislike or association with the parties or some interest is clearly recognisable as wrong when one considers the aforementioned conception of the rule of law or of systemic law. Equally the involvement of some interest personal to the decision maker such as a pecuniary stake destroys the basic conception of the judge as a third party arbitrator between the parties.

Adjudication, particularly judicial lawmaking imposes certain flaws upon the notion of impartiality, as we know it can never result in an equality of outcomes:

“... the reason courts appear in almost every society, is the logic of the triad. ... there is a basic common sense appeal to the notion that if two persons find themselves in conflict, and they cannot resolve it themselves, they should resort to a third person”³⁹

It is clear then the equality of result of the decision cannot be our object, so it must be the decision making process that we seek to render impartial. A charge of partiality can therefore be maintained against a decision not where the decision itself disfavors some party but where the reasoning is in particular directed against some aspect of

³⁸ P A Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed, 2007) ch 6

³⁹ M Shapiro, “Judicial Independence: The English Experience” (1977) 55 NCLR 577

that party. Raban suggests that we can categorise a partial decision as one slewed by the use of preferences and suggest the following scheme for determining unacceptable uses of preferences:

“To be partial towards something is to have a *preference* towards it. Partial adjudication consists in giving preference to a certain person, or a certain group, or a certain interest, or a certain ideology, or even a certain moral position. ... a judge may prefer a person or a group or an ideology *without* being partial: a preference for an honest litigant over a dishonest one ... would not constitute condemnable judicial partiality. The sort of preferences which implicate the danger of partiality must be, in some way, *unjustifiable*.”⁴⁰

This assessment is backed by the comments of members of the Supreme Court of Canada that: “not every favourable or unfavourable disposition attracts the label of bias or prejudice ... it cannot be said that those who condemn Hitler are biased or prejudiced. This unfavourable disposition is objectively justifiable ... it is not ‘wrongful or inappropriate’”.⁴¹

Is there then any way to can say that the use of preferences which stem from attitudes or preferences in a broad sense are wrong or unjustifiable by reference to either an external standard of the correctness of moral beliefs or by reference to the internal structures of the law ?

2.2 Moral Standards and Value Conflicts

For the first we would have to be able to identify some philosophical system which objectively determines what value propositions are or are not correct absolutely. Reasoning from preferences which this system determined not to be correct could be would be improper and possibly partial.

The obvious answer is that there id no such system for determining the wrongness of value preferences. There are no clear moral answers to many of society’s questions

⁴⁰ O Raban, *Modern Legal Theory and Judicial Impartility* (2003) 1

⁴¹ *R v RDS* [1997] 3 SCR 484 para 105

and many fundamental conceptions such as fairness, justice or rights are highly contestable, and even where values are known our society is pluralistic to them.

The modern value pluralism of Isaiah can serve as a model for demonstrating these disagreements and conflicts. First basic value pluralism⁴² asserts that there are in fact multiple distinct values (ie liberty, equality, and fraternity) at play in our moral calculations. Compare this with monist theories like utilitarianism which have only a single value. The second and principal meaning of value pluralism is that there exists both a multitude of values and no determinative way of asserting the truth of them. Berlin's work maintained that not only are there a multiplicity of values which may and do often conflict but that in many cases there will be method by which one can resolve a conflict or create a rank ordering of these principles either in the individual case or in general. While the scope of its meaning remains debateable, this principle of incommensurability seems to hold that these values cannot be translated into any common denominator for the purposes of comparison and that no rational principle, such as a rule of priority, exists to resolve these conflicts⁴³. As George Crowder summarises it:

“There are many human goods, we can know objectively what these are and some of them are universal. But they are sometimes ‘incommensurable’ ... so different from one another that each has its own character and force, untranslatable into the terms of any other. When they come into conflict ... the choices between them will be hard choices ... because we will not be able to apply any simple rule that reduces the rival goods to a common denominator or ... a single hierarchy that applies in all cases.”⁴⁴

Value pluralism is relevant to law. Dworkin recognises the existence of insurmountably contested moral propositions whose conflicts though not morally determinable he seeks to resolve within the context of legal decisions⁴⁵.

⁴² There are two very distinct senses in the field of moral philosophy. E Mason, "Value Pluralism", *The Stanford Encyclopedia of Philosophy (Fall 2008 Edition)*, E N Zalta (ed), <<http://plato.stanford.edu/archives/fall2008/entries/value-pluralism/>> (last accessed 6 October 2008)

⁴³ W N R Lucy, "Adjudication for Pluralists" (1996) 16 OJLS 380-387

⁴⁴ G Chowder, *Isaiah Berlin – Liberty and Pluralism* (2004) 4

⁴⁵ R Dworkin, *Taking Rights Seriously* (1977) 283-285

The criticisms of value pluralism range over a number of areas, philosophical distinctiveness from moral relativism to the more concrete objections that seek to limit the overriding importance that personal value judgments and the lack of a societal moral consensus might pose especially to the development of the law. Sadurski offers practical reason and Rawl's foundational understandings as ameliorating the problems that value pluralism poses⁴⁶.

Rawls attempts to offer a solution: "The real task is to discover and formulate the deeper bases of agreement *which one hopes* are embedded in common sense, or even to originate and fashion starting points for common understanding by expressing in a new form the convictions found in the historical tradition by connecting them with a wide range of people's considered convictions"⁴⁷ A search for deeper agreement is in some ways fruitful, one might suppose that the whole system of courts is an agreement to resolve conflict impersonally but it is unlikely to reach up to those cases of strong moral incommensurability such as the competition of values in *Gillick v West Norfolk and Wisbech Area Health Authority*⁴⁸ or to resolve dire conflicts of legal principle.

It is suggested that practical reason: "typically asks, of a set of alternatives for action none of which has yet been performed, what one ought to do, or what it would be best to do. In practical reasoning agents attempt to assess and weigh their reasons for action, the considerations that speak for and against alternative courses of action that are open to them."⁴⁹ The availability of this mode of thought, the encapsulation of alternatives in arguments of parties and the fact that judge "is furnished with an in-tray and an-out ... an out tray. What he is not allowed is a 'too difficult basket'"⁵⁰ means that even where aware of the subjective resolution of the conflict, judges are obliged to act. Practical reason allows us to see how judges escape philosophical paralysis to make law in the face of moral uncertainty but does not definitively resolve the incommensurability conflict at a theoretical level.

⁴⁶ W Sadurski, *Moral Pluralism and Legal Neutrality* (1990) ch 3

⁴⁷ W Sadurski, *Moral Pluralism and Legal Neutrality* (1990) 57-61

⁴⁸ [1985] 3 All ER 402 (HL)

⁴⁹ J R Wallace, "Practical Reason", *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), E N Zalta (ed), <<http://plato.stanford.edu/archives/fall2008/entries/practical-reason/>> (last accessed 6 October 2008)

⁵⁰ J Evans & Lord Oliver of Aylmerton, *Legal reasoning and judicial activism : two views* (1992) 33

Though we again find that complexity and difficulty underlie the fact that value positions are equally strongly and rationally maintained in society, it is one that the public and the judiciary regard as inevitable. Accepting the account of value pluralism, this then deprives us of any moral standard by reference to which the use of certain value preferences can be determined as the use of improper preferences.

2.3 Legal Conceptions of Impartiality

Impartiality then must derive its content and standards from principles that are inherent to the law and subsist within it.

Some biases may prove clearly identifiable and even formulaic. Where a judicial decision maker can be identified as having erred in their decision and the presence of a motivating factor behind that decision is apparent, then it will be easy to assess and determine a lack of impartiality (error + motive = bias) but is likely to be of limited effect. The concept of legal error depends on the existence of prior authority, a strong rule of a range of specified results deviations from which will be erroneous. Sentencing or certain quantitative awards of damages are of this sort of legal decision making, where there is a grossly excessive or light sentence and personal animosity or enmity exists in respect of the person being sentenced then bias is likely to be clearly demonstrable.

The problem is instances where the decision cannot be definitively demonstrated as an error: judicial law making in novel situations being a perfect example. A ruling which for the first time establishes X not Y where both are feasible legal answers it cannot be said to be an error. In a positivist tradition, X can only ever be established as an error by either the legislature or by the court of last resort by itself choosing rather than, as we have seen, discovering any objectively right answer. This fundamental point was captured by US Supreme Court Justice Robert Jackson: “We are not final because we are infallible, but we are infallible only because we are final.”⁵¹ Similarly a fictitious Court of Appeal notes:

⁵¹ *Brown v. Allen*, 344 US 443 (1953) 540

“The House of Lords, as an appellate tribunal, is composed eminent and experienced lawyers; but ...only by a small margin more eminent and experienced than the lawyers who compose this Court; ... the only real difference is that the House of Lords has the last word.”⁵²

Such a model will do well to detect instances of actual bias which can be corrected on appeal, though they are fortunately rare⁵³. It is insufficient to manage the problem of impartiality prior to trial and the maintenance of the appearance of impartiality in other types of decisions and particularly in choice based positive lawmaking decisions.

This occurs where a motive or possible motive is identifiable and its effect is indeterminable or unknowable, where it may or may not have influenced the direction in which the judge has taken the law. Where the outcome may have been affected, the possibility that it was cannot easily be dismissed. Even where the decision is made by a judge who is personally scrupulously impartial, the lack of any inevitability of outcome and the presence of a factor which could have influenced that outcome may damage confidence in the decision or for provide an unsatisfied party to impeach it and attempt to avoid its result. For this reason an honest and unmoved judge may still be disqualified to uphold the public confidence in the administration of justice:

“not only to prevent the distorting influence of actual bias, but also to protect the decision-making process by ensuring that, however disinterested the decision-maker is in fact, the circumstances should not give rise to the appearance or risk of bias.”⁵⁴

The famous aphorism of Lord Hewart in *R v Sussex Justices Ex parte McCarthy*⁵⁵ that: ““justice must not only be done but should manifestly and undoubtedly be seen to be done” is frequently invoked in this context and Lord Devlin raises the necessity of the unimpeachability of the decision:“impartiality and the appearance or it are the supreme judicial virtues. It is the verdict that matters, and if it is incorrupt it is acceptable. To be incorrupt it must bear the stamp of a fair trial. The judge who does

⁵² A P Herbert, *Uncommon Law* (4th ed, 1972) Methuen, London. The case is *Haddock v Board of Inland Revenue*.

⁵³ Pannick, *Judges*, (1987) cites the example of an Ohio judge dismissed for giving very lenient sentences to women in return for sexual favours in 1980 as his single direct example.

⁵⁴ Lord Woolf, J Jowell & A Le Sueur, *Principles of Judicial Review* (1999) 413

⁵⁵ [1924] KB 256

not appear impartial is as useless to the process as ... an augerer who tampers with the entrails.”⁵⁶

That judge’s should present with both impartiality and the appearance thereof is therefore generally agreed but the underlying rationale and the organisation of legal rules that apply to the disqualification of judges is less clear.

2.5 The Different Legal Rationales

Various themes and rationales are clearly at work in attempting to incorporate the concept of impartiality within law; one need only compare the academic writings which offer various understandings as to the rationale behind judicial disqualification for bias and judicial statements.

The first clearly identifiable rationale is that by which the test is commonly known, the maxim: *nemo esse iudex in causa sua* – no one should be a judge in his own cause. At its most basic level this principle seems more a definitional one than one of impartiality. Any system however removed from our current constitutional and ethical principles has the basic and categorical separation between the roles of judge and party that cannot be collapsed⁵⁷. It is also however frequently seen as one of the bases of impartiality as well however.

Wade & Forsyth maintain that the idea that a judge should not be a party to or materially involved in litigation forms the basis of the rule against bias⁵⁸. Allars calls it the conflict of interest rationale⁵⁹. This idea effectively excludes judges from deciding cases in which they have a pecuniary interest or another interest so close as to make the party’s case their own and those cases in which the judge has closeness to the object or persons involved in the litigation so as it to make him personally interested in or affected by it. It accounts for a large number of situations where by association with the party the judge potential for bias exists. The existence of such a

⁵⁶ P Devlin, *The Judge* (1979) 4

⁵⁷ Such as ancient Jewish law for instance, according to R E Flamm, *Judicial Disqualification : recusal and disqualification of judges* (2nd ed 2007)

⁵⁸ W Wade & C Forsyth, *Administrative Law* (9th ed, 2004) 450

⁵⁹ M Allars, “Citizenship Theory and the Public Confidence Rationale for the Bias Rule” (2001) 18(1) *Law in Context* 19

personal connection has traditionally been taken to found either an automatic or near automatic discretionary disqualification. The Judicial Review Handbook expresses the view that:

“Where the decision-maker is a “party” to the matter, or has a direct interest (pecuniary or not) in its outcome in common with a party, this is treated as “presumed bias”.”⁶⁰

Though adequately capturing impartiality in cases like *Dimes*⁶¹ or *R v Sussex JJ*⁶², *nemo iudex* seems insufficient in other respects. Particularly in instances which though involving clear derogation from the role of an impartial arbitrator, do not reflect a conflation of the interests of the parties and judge or anything more than tenuously described as the judge’s cause. Things like prior comments and personal background of the judge in matters such as religion or politics which do not neatly equate to interests or causes but still suggest that the judge’s decision might be the result of unjustifiable preferences. As Lord Browne Wilkinson put it:

“in some other way [a judge’s] conduct or behaviour may give rise to a suspicion that he is not impartial ... This second type of case is not strictly speaking an application of the principle that a man must not be a judge in his own cause ...”⁶³

The second possible rationale underlying impartiality in law is that the judge in question should avoid preferences that tend to obscure their ability to judge the matter before them in an impartial manner. As Taylor notes in his examination of judicial review:

“Neither the word bias nor the Latin maxim adequately expresses the ambit of the principle. ... Bias is a predisposition to decide ... an issue in a certain way which does not leave one’s mind properly open to persuasion. ... an inability to exercise one’s functions impartially in a particular case. The predisposition may stem from ... ideology and inclination”⁶⁴

⁶⁰ M Fordham, *Judicial Review Handbook* (4th ed, 2004) 1044

⁶¹ *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HL Cas 759

⁶² *R v Sussex Justices; Ex parte McCarthy* [1924] KB 256

⁶³ *R v Bow Street Stipendiary Magistrate, ex parte Pinochet (No 2)* [2000] 1 AC 119, 132-133

⁶⁴ G D S Taylor, *Judicial Review: A New Zealand Perspective* (1991) 13.46

This rationale draws on the adversarial common law and political public reason where parties' arguments are intended to sway and convince the judge in the matter at hand. This model of decision-making will naturally be damaged by preferences that exclude the decision-maker from reaching conclusions on the merits of the case such as attitude (positive or negative) to a party, a strongly expressed prior opinion or personal prejudice. As the Canadian Supreme Court remarked:

“True impartiality ... requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.”⁶⁵

This rationale is also limited in its ability to explain the workings of impartiality at law as it cannot be extended to cover all expressions of prior views as they will have done as barristers, speakers, editors and even in prior judgments. Good faith statements as to what constitutes the law are inescapable and uncontroversial for most practitioners and judges. Obviously not all of these can be disqualifying but the rationale of predetermination or close-mindedness alone provides no easy escape from them.

Thirdly, the rationale most frequently used to attempt to achieve the appearance of impartiality is the elimination of the possibility or apprehension of bias. This approach focuses on a more heuristic examination of factors claimed to be potentially prejudicial and attempts to assess whether there is any potential possibility or instinct that they might affect the result in the case or convey an impression of bias.

Allars notes:

“Whether a reasonable observer would reasonably apprehend prejudgement [or prejudice] is a hypothesis posed by the reviewing court to enable it to form a judgment as to whether public confidence would be damaged as a result of the judge hearing the matter.”⁶⁶

Equally it has been expressed as a sense of apprehension or discontent such that:

“Disqualification is required if an ... observer would entertain reasonable questions about the judge's impartiality”⁶⁷.

⁶⁵ *R v RDS* [1997] 3 SCR 484 para 35

⁶⁶ M Allars, “Citizenship Theory and the Public Confidence Rationale for the Bias Rule” (2001) 18(1) *Law in Context* 18

⁶⁷ *Liteky v United States* 510 US 540 (1994), 564

This approach or rationale has the advantage of subsuming into itself the concerns of predetermination and *nemo judex* and easily applicable to the variety of other interests, human interactions and attitudes that may present a challenge to impartiality but which are not easily classified within the above rationales. It does perhaps though suffer for its generality in that the elements of reasonableness and apprehension work in a far more impressionistic and general fashion than the more categorical cause or predetermination rationales.

Finally, there is the theme in the legal treatment of impartiality is the importance of pragmatism and robustness of the judicial process. As the New Court of Appeal in *Muir v Commissioner of Inland Revenue*⁶⁸ noted:

“The requirement of independence and impartiality of a judge is counterbalanced by the judge’s duty to sit, at least where grounds for disqualification do not exist in fact or in law. This duty in This duty in itself helps protect judicial independence against manoeuvring by parties hoping to improve their chances of having a given matter determined by a particular judge ... or to gain ... advantages through delay or interruption.”

The importance of avoiding the easy ouster of judges or ‘judge-shopping’ to borrow the American term is a permanent theme in discussion of impartiality, for while impartiality is necessary to uphold the rule of law, a test that is overly generous in disqualifying judges is likely to have precisely the opposite effect.

Two other ideas are important within this pragmatic or restraint ethic. The first is an emphasis on judicial ethics and the judicial oath and a degree of unwillingness to assume an easy breach of the oath or the office, thus the terms of the judicial oath are to be found repeated in several judgments⁶⁹ and the Court of Appeal has observed that: “The reasonable observer will not, for instance, lightly assume that a Judge has put aside his or her professional oath, or indeed his or her professional training”⁷⁰. The second is that the grounds for an allegation of want of impartiality should not be too remote, speculative or fanciful. All judges will have rich and ample human backgrounds and the law

⁶⁸ [2007] 3 NZLR 495

⁶⁹ *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 para 33, *Helow v Advocate General* [2007] CSIH 5 para 3

⁷⁰ *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 para 96

should not be too sensitive to aspects of these which disclose no real possibility of bias as it would make the disqualification of judges too easy.

2.5 Differences in Impartiality among Courts

There are however some crucial differences in the operation of these limitations between trial and appellate courts, particularly final appellate courts. The first major difference lies in the powers of determining fact that many trial judges in the civil and criminal fields will exercise. While it is not a matter of lawmaking and so can have little impact outside of the immediate case, there exists significant judicial discretion in deciding on the credibility of witnesses or which of conflicting sets of testimony to prefer and hand in hand with this discretion exists the risk that facts may be unduly promoted or manipulated to support the judge's partiality. The strength of this power, the lack of any effective form of supervision of it and the vast number of trial hearings as opposed to appellate ones makes it a power that is perhaps underestimated in the assessment of partiality and the jurisprudence of judging though Jerome Frank was keen to draw attention to what he called fact scepticism⁷¹. While the importance of and potential for partiality in the fact finding role is perhaps an underappreciated one, it is not one that greatly troubles most appellate courts. Most appellate Courts have limited if any powers to accept new evidence or conduct hearings on matters of fact and so the fact finding discretion remains an area where trial or first instance judges enjoy a greater potential for partiality than their appellate bench brothers.

Contrary to this however is the lesser degree of limitation exercised over appellate court discretion by the fidelity to law requirement. Most appellate courts retain some ability to modify the legal rules and sources upon which they rely, Courts of Final Appeal ultimately control the validity of every (non-statutory) definition, rule, principle or source that lower courts rely on in making their decisions and which in some way limits their choice in deciding and thus minimise or eliminate the partiality of the decision.

⁷¹ M D A Fredman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) Sweet & Maxwell: London 803-804, 827-830

Arriving at this conclusion that impartiality with regard to value or judicial attitudes is inevitably a very weak formal concept and especially given that it is overall more so for Courts of Final Appeal than for trial courts in most circumstances, the question then becomes one of how our system is best prepared to deal with this both in the legal doctrine as it seeks to exclude impartiality and in the structural composition and procedure of the New Zealand Supreme Court.

Chapter 3: The General Function of the Appellate Process and its application in New Zealand

3.1 Constitutional Place of the Courts

The first major observation must be of the place that our Supreme Court and the judiciary as a whole occupy within New Zealand's constitutional structure. Curiously the constitution of New Zealand, a small nation on the edge of the South Pacific is perhaps now the purest remaining example of the traditional system of Westminster democracy. Four features of that system are more prominently maintained in our constitution than anywhere else:

1. an unwritten, unprotected constitution
2. parliamentary sovereignty
3. unitary state
4. semi-fused executive and legislative branches

The first, second and third of these features are of crucial importance to the debate that surrounds the question of whether in making law, judges impose their personal preferences, in that their decisions can never be final and binding upon the political process.

Questions of the legitimacy of the role of the Supreme Court in using debateable personal preferences are then in New Zealand far less severe than in countries where a range of instruments and arrangements make the Courts final arbitrators of lawmaking and federal questions, such as in the United States, Canada, Australia and Israel. The tension that exists between the respective accountabilities and role legitimacies of democratic bodies and courts as to the resolution of value questions is therefore largely avoided in New Zealand. The New Zealand Bill of Rights Act may be a limited exception since it involves broad rights balancing exercises though it is much more limited than comparable instruments as it functions only as an interpretative tool⁷² and is vastly different in effect from the prominent Canadian and American rights instruments. The lack of such enabling instruments for judges has led

⁷² ss4-6 New Zealand Bill Of Rights Act 1990, cf. Section 4 Human Rights Act 1998 (UK)

to a judicial culture perceived as relatively lacking in political significance⁷³ though appellate decisions do occasionally attain political significance and provoke public reaction such as in *Ngati Apa v Attorney General*⁷⁴.

The question then must be what function we see appellate courts and New Zealand's Supreme Court in its particular context as playing with regard to lawmaking, use of personal preferences and impartiality.

3.2 The Function of Collegiate and Appellate Courts

Collegiate appellate courts play a role in all of the major systems of contemporary law, from the international Appeal Chamber of the ICC, to specialised civil law appellate courts like the Cour de Cassation and Conseil d'Etat to hierarchically unified courts of final appeal in common law jurisdictions. Given the ubiquity of collegiate appeal courts, two key questions seem to arise: what are the functions of appeal courts and why are they composed of a number of judges.

Within the English context, the argument has been put that an appeals process is necessary for two related reasons:

“The first is best termed review. This is a means of correcting mistakes at first instance and of creating some kind of continuity, consistency and certainty in the administration of justice. The second is termed supervision. This is the process of laying down fresh precedents ... updating old ones for the guidance of lower courts In a small number of cases this also consists in resolving legal questions of a particularly high order both of legal difficulty and of public importance”⁷⁵

This division and categorisation of purpose is substantially supported by the Report of the New Zealand Law Commission on the Structure of our Courts⁷⁶ that with second tier appeals the function is less error correction or review than a supervisory and

⁷³ C Guarnieri & P Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (2002) 3

⁷⁴ [2003] 3 NZLR 643

⁷⁵ A Le Sueur, *Building the UK's New Supreme Court: National and Comparative Perspectives* (2004) 226

⁷⁶ New Zealand Law Commission Law Report No. 7: Structure of the Courts

lawmaking one: “the special character of the second appeal: the emphasis is on the court’s role of reviewing, clarifying and if appropriate developing the law.”

However in his review of *Final Appeal* Lord Radcliffe provides a more sceptical assessment of the function of supervision noting:

“To supervise the function of judicial lawmaking, would require ... not only a well organised investigatory machine to watch and analyse the many sources of that output but also power to send for, amend and overrule any judgment that was decided to be a departure from the proper course of the law.”

While the willingness of the party to appeal is a crucial factor in the lawmaking and supervisory capacity of a final appeal court, Lord Radcliffe with all respect, perhaps misstates the nature of supervision, in that *Final Appeal* and surrounding works seem to establish the role of supervision as one of policy or course setting and of clarification and occasionally unification of lower precedents into a compelling general direction. Decisions such as the House of Lords supervision of the inquiry to be undertaken in negligence (*Donoghue v Stevenson*⁷⁷, *Anns v Merton Borough Council*⁷⁸, *Murphy v Brentwood District Council*⁷⁹) or the decision of NZ Court of Appeal to survey and attempt to cohesively bring together scattered High Court jurisprudence on breaches of privacy⁸⁰ or the still evolving jurisprudence in the area of relationship property disparity⁸¹ exemplify more than error correction or minor restatement and instead show a more concerned attempt to monitor the evolution of principles and policy. Lord Rodger of Earlsferry provides a more refined and balanced formulation of this appeal role which seems to fit within the proposed supervision function and negates some of the criticisms of Lord Radcliffe:

“Appeal courts, with a far ranging jurisdiction, undoubtedly introduce a new factor into any legal system. ... their judgments are intended to bring consistency to the decisions of the courts. It is ... a cardinal error to imagine that, even with a modern system of appeal courts ... legal developments are

⁷⁷ [1932] A.C. 562

⁷⁸ [1978] A.C. 728

⁷⁹ [1990] 2 All ER 908

⁸⁰ *Hosking v Runting* [2005] 1 NZLR 1

⁸¹ M Henaghan & B Atkin, *Family Law Policy in New Zealand* (1992) ch 4

the result of some grand strategy on the part of the judges that has gradually unfolded and continues to unfold.”⁸²

So while there can be no court that realistically sees itself as actively seized of and carrying out a general mandate, final appellate courts do still find themselves with the opportunity to choose to develop and remake areas of law in certain directions when they are presented with appropriate facts and a litigant willing to appeal.

The error correction function certainly remains an important function for both a court of appeal and a final appellate court though in different proportions for each. Where a judge or body misdirects itself, or its decision is in ignorance of a relevant rule in a case where the law is taken to be relatively clearly established then the function of the first appeal will be to merely set the decision back in tune with the established rule or correct it according to that rule. That an initial appellate Court might also misdirect itself or decide *per incuriam* is also a possibility though probably a smaller one with the presence of a greater number and it is hoped a group of more technically able judges. Still then the mistakes of an intermediate appellate court will provide some work for the final appellate court.

The second function necessarily involves a greater degree of consideration of conflicts of principles underlying legal rules, the continuing suitability of established legal rules or precedents and the consideration of issues of policy in the law. Even if we modify Hart’s position by reference to Dworkin’s emphasis on background principles, these can still be seen as the quintessential hard cases, in that judges are forced to engage with the edges where the law runs out or make strong value judgments as to the balance between competing principles or rights. The most basic and perhaps most frequent of these conflicts is, as Paterson suggests⁸³, that between the necessity of consistency in the law and the interests of justice or fairness which require replacing a rule that no longer represents sound social or legal policy.

With regard to the supervisory function as identified in *Final Appeal*, it essentially turns upon the responsibility of the final appellate court for providing a definitive

⁸² Lord Rodger of Earlsferry, “What are Appeal Courts for ?” (2004) 10(4) OLR 518

⁸³ A Paterson, *The Law Lords* (1982) 123-126

final answer in those cases that fall within that widely acknowledged category of cases that raise points of legal novelty, difficulty or conflict of law and principle. The purpose served by instituting collegiate courts of appeal, composed of many members can be traced from the initial origins of appellate courts in both New Zealand and England: where appeals were originally resolved by referral to merely a larger body of the senior (the equivalent to High Court level) judges en masse or en banc, this process continued in New Zealand until as late as the establishment of the permanent incarnation of the Court of Appeal in 1958.

The purpose of courts with multiple members is manifold; first there are ultimately many more eyes with which and perspectives from which to probe the question(s) at issue. Furthermore it means that the arguments of counsel must respond to a broader range of positions than is the case before a judge sole where they may be able to appeal simply to some known facet of the trial judge's reasoning. Counsel in an appeal situation must therefore build their arguments such as to convince a range of judges with individual approaches or opinions rather than tailoring them to the known proclivities of reason or belief of a single trial judge

By stripping away the veil of the declaratory theory and accepting judicial individuality, the importance of the composition of appellate courts naturally becomes more important as each member will bring a somewhat different perspective to the approach to the legal problems presented on appeal. The presence of several different judges should bring a broader range of perspectives and approaches to bear on the issue and provide that issues argued on appeal are more fully canvassed and argued.

How closely then or in what proportions does the work of the two collegiate appellate courts of New Zealand conform to this division of labour ?

3.3 Appellate Courts in New Zealand: The Past

The last thirty years has been a major period of change in the structure of New Zealand's court hierarchy. Since the report of the Royal Commission on the Courts in

1978 (and a subsequent Law Commission Report⁸⁴) the structure of the Courts has changed immensely. The recent institution of a Supreme Court of New Zealand is the culminating step of this process.

The role of the Privy Council as a final appellate court for New Zealand was a limited one both quantitatively by reference to its numerical caseload and qualitatively by reference to its jurisprudential effect. Between 1958 and 1996, never more than one per cent of Court of Appeal judgments continued to the Privy Council⁸⁵ (with only four criminal appeals in total between 1958 and 1996)⁸⁶ and the caseload from New Zealand in its final years of full operation (2003 and 2004) was still small⁸⁷. By comparison the Supreme Court in the period between the beginning of its operation⁸⁸ and October 2007 had already determined some 53 substantive appeals as well as many leave applications⁸⁹. Appeals to the Privy Council were costly and burdensome to conduct at such a distance, legal aid in respect of civil appeals was restricted⁹⁰, the jurisdiction for criminal appeals was a rarely exercised exceptional exercise of the prerogative⁹¹ and appeals for specialist courts and tribunals such as the Employment Court⁹² or certain cases were statutorily barred. In cases with a strongly indigenous element or settled New Zealand practice, the Board was somewhat deferential to the New Zealand context given the gradual development of a New Zealand legal culture:

“The Board stated it was reluctant to differ from decisions reached by the Court of Appeal on New Zealand procedure under New Zealand rules ... questions such as the adequacy of a judge’s direction to the jury were not ones where the Board would substitute its own answer for that given by the Commonwealth appellate court.”⁹³

⁸⁴ New Zealand Law Commission Law Report No. 7: Structure of the Courts

⁸⁵ P Spiller, *New Zealand Court of Appeal – 1958-1996: A History* (2002) 359-360

⁸⁶ *Ibid*, 362.

⁸⁷ There were 10 appeals in 2003 and 13 in 2004, (Privy Council 2003 Judgment Index, <<http://www.privy-council.org.uk/output/Page331.asp>> (last accessed 6 October 2008)), (Privy Council 2004 Judgment Index, <<http://www.privy-council.org.uk/output/Page472.asp>> (last accessed 6 October 2008))

⁸⁸ 1st July 2004 per Supreme Court Act 2003 s55

⁸⁹ R Elvin, *To agree or not to agree : judicial dissent in the Supreme Court of New Zealand* (2007) Thesis (LL.B. (Hons.)) - University of Otago, 19

⁹⁰ Legal Services Act 2000 s7(1)(c) and prior Legal Aid Act 1969 s15(1)(g)

⁹¹ P Spiller, *New Zealand Court of Appeal – 1958-1996: A History* (2002) 355-356

⁹² Employment Relations Act 2000 s214(7), repealed by Supreme Court Act 2003 s48(1)

⁹³ P Spiller, *New Zealand Court of Appeal – 1958-1996: A History* (2002) 361

The judgment of the Board given by Lord Nicholls of Birkenhead in *Bottrill*⁹⁴, despite coming late in the life of the Privy Council's appellate role for New Zealand provides a general summary of the later attitude adopted:

“The importance, or weight, properly to be given to social considerations such as these is a matter of judgment. Clearly, a local Court, with its knowledge of local conditions, is much better placed to make this evaluative judgment than Their Lordships' Board. A Court composed of New Zealand Judges is better able to perceive where, on balance, the public interest lies than is a Court sitting in London whose members are wholly or predominantly United Kingdom Judges. Hence the practice of the Board is not to substitute its own views for those of the Court of Appeal on questions of the policy of the law in New Zealand.”⁹⁵

The Privy Council's limited exercise of either review and error correction or the more dynamic supervisory or developmental role, lead the Court of Appeal to adopt a greater responsibility for the developmental function alongside its already considerable role of error correction in appeals from lower courts. In review business much time is likely to be absorbed with routine appeals against sentences, remedies or vetting jury directions against established case law. Additionally with appeals from decisions involving a point of legal novelty or difficulty the first appeal court may still assume a lawmaking role. The Court of Appeal of England and Wales under Lord Denning from the 1950s through to the 1970s provided a fruitful domain for the development of the law, with Stevens noting: “much of his most creative work was done in the Court of Appeal, which he was convinced was a more important appeal court than the Lords”⁹⁶. The Right Honourable Justice Richardson in his discussion of the role of our Court of Appeal at the beginning of the 1980s noted the de facto final appellate status of the court: “in the daily run we function essentially as a court of last resort.”⁹⁷

Prior to the establishment of the Supreme Court, the brunt of both forms of work was borne by the Court of Appeal. Retiring President of the Court Sir Thaddeus McCarthy

⁹⁴ *A v Bottrill* [2003] 2 NZLR 721

⁹⁵ *Ibid*, para 55

⁹⁶ R Stevens, *Law and Politics – The House of Lords as a Judicial Body, 1800-1976* (1979) 489

⁹⁷ I Richardson, “The Role of an Appellate Judge” (1981) 5(1) OLR 1

once expressed some doubt as to whether the business of the Court of Appeal was properly conducted and consistency encouraged when the Court was overcommitted⁹⁸. The potential disadvantage with reference to intermediate courts of appeal is that the weight of routine work may by constraint of time prevent full exploration of the more difficult policy or technical cases or a delay in their handling.

3.4 The Supreme Court

The debates around the creation of an indigenous final appeal both in the legislature and the profession broadly address the two purposes of appeal. Though those in Parliament seem to involve a certain forgetfulness on the part of the members as to their own supreme legislative role and more relevantly a degree of concern as to appointments to the court being controlled by the Attorney-General⁹⁹. This wariness as to the process of appointments demonstrates an awareness of the members of the House of the still substantial role of judges in lawmaking, social and governmental control and also of their security of tenure.

The Supreme Court of New Zealand was established by the eponymous 2003 Act of Parliament putting an end to appeals to the Judicial Committee of the Privy Council¹⁰⁰. Given the Court of Appeal's long history of lawmaking, there have been suggestions within New Zealand that the Court of Appeal should continue in its current role and indeed that a second right of appeal is not necessary given the quasi-separation of the functional roles of the Court of Appeal¹⁰¹, the same argument has been addressed at times in the past with regard to the House of Lords as a final appellate court.¹⁰²

By reference to the legislation it can however be seen that the Supreme Court of New Zealand is more fully intended to conform with the supervisory and lawmaking appellate function identified by the authors of *Final Appeal*. The Court considers

⁹⁸ P Spiller, *New Zealand Court of Appeal – 1958-1996: A History* (2002) 30

⁹⁹ Hon B English (14 October 2003) 612 NZ Parliamentary Debates 9098-9099, Hon S Franks (14 October 2003) 612 NZ Parliamentary Debates 9103-9105, Hon J Tamihere (14 October 2003) 612 NZ Parliamentary Debates 9109

¹⁰⁰ Except in certain historical proceedings, Supreme Court Act 2003 ss42 & 50

¹⁰¹ J Smillie, "Who Wants Juristocracy?" (2006) 11(2) Otago LR 183

¹⁰² *Final Appeal – A Study of the House of Lords in its Judicial Capacity*, (1972) 375-389

questions only by its own grant of leave¹⁰³ and not by any right of appeal. Equally the criteria for such a grant restrict the court to acting where the matter is necessary in the interests of justice, the grounds for that being

- “(a) the appeal involves a matter of general or public importance; or
- (b) a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or
- (c) the appeal involves a matter of general commercial significance.”¹⁰⁴

Significant issues relating to the treaty of Waitangi are also included by S13(3). In a sense then the Supreme Court is bound to confine itself to cases of a complex, uncertain or conflicted nature, hard cases or what Lord Rodger of Earlsferry has humorously referred to as cases that “raise a sexy point”¹⁰⁵. The ability of a final appellate court to control its own caseload through the granting of leave to appeal rather than appeals as of right seems an essential feature of a court charged with supervisory functions. Pringle notes in regard to leave for final appeals that

“To allow appeals as of right would swamp a court of final appeal with cases that provide the court with no opportunity to fulfil its broader obligation to settle the law ... the leave jurisdiction of a court of final appeal, and its rigorous and selective application, is integral to the successful functioning of such a court.”¹⁰⁶

¹⁰³ Supreme Court Act 2003 s12

¹⁰⁴ Supreme Court Act s13(2)

¹⁰⁵ Lord Rodger of Earlsferry, “What are Appeal Courts for?” (2004) 10(4) OLR 523

¹⁰⁶ J Pringle, “Leave to Appeal and the Proposed Supreme Court of New Zealand” [2003] NZLR 74

Chapter 4: The Law of Impartiality and the Courts

Ensuring the impartiality of decision-makers falls within the rubric of administrative law. For judicial or quasi-judicial decisions, it will usually be a ground of appeal from the original decision whereas for administrative authorities, it proceeds under the framework of judicial review though the law and legal tests are generally the same.

4.1 The Legal Test for Bias

Throughout the Commonwealth, there has been a strong trend in the law of bias towards the insistence on a unitary test for bias applicable to the multiplicative variety to public decision makers it controls from jury members to Ministers of the Crown¹⁰⁷. The beginnings of this trend can be identified in the decision of the High Court of Australia in the case of *Ebner v Official Trustee in Bankruptcy*¹⁰⁸ where the Court favoured the abolition of the automatic disqualification test found in *Dimes*¹⁰⁹ in favour of a single unitary test for reasonable apprehension of bias and affirmed the application of this standard to all decision making bodies. Similar unitary approaches which test only for the appearance of bias rationale appear to be in place in Canada¹¹⁰ and in South Africa¹¹¹. Our Court of Appeal has only recently, in the case of *Muir*¹¹², confirmed the application of the reasonable apprehension of bias test in New Zealand after some uncertainty¹¹³.

By contrast English case law maintains and has haphazardly extended the automatic disqualification rule in *Pinochet*¹¹⁴ though also qualifying it with a de minimis exception in the New Zealand fashion¹¹⁵ while in the realm of apparent bias moving from a test of *real danger of bias*¹¹⁶ to one of *real possibility of bias*¹¹⁷.

¹⁰⁷ D Feldman (ed), *English Public Law* (2004) 15.71 & 15.73,

P A Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed, 2007) 24.5

¹⁰⁸ [2000] 205 CLR 337 (hereafter *Ebner*)

¹⁰⁹ *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HL Cas 759

¹¹⁰ *R v RDS* [1997] 3 SCR 484

¹¹¹ *President of the Republic of South Africa & Ors v South African Rugby Football Union & Ors* [1999] 7 BCLR 725

¹¹² *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495

¹¹³ Joseph NZLR 1995

¹¹⁴ *R v Bow Street Stipendiary Magistrate, ex parte Pinochet (No 2)* [2000] 1 AC 119

¹¹⁵ *Locabail (UK) Ltd. v Bayfield Properties Ltd.* [2000] QB 451

¹¹⁶ *R v Gough* [1993] AC 646

The use of a single test for the whole range of decision making situations from purely curial, though to ministerial or inquisitorial decision making is, on its face, confusing. The difference in public expectations, in institutional roles, political accountability, and availability of reasoning between each of these categories of actors leads to the expectation that different approaches should apply to each category.

On the face of the law this appears not to be the case with the maintenance in each of the Commonwealth jurisdictions of the amenability to a single test. However the nature of the decision maker's position may in practice affect the strenuousness or intensity of review that is to be insisted upon in its application¹¹⁸. The Court of Appeal cautiously recognised the differences in the bodies subject to the scrutiny of the bias test and the consequent variation of intensity in regard to the Thomas Commission¹¹⁹:

“The Commissioner is not acting as a Judge, *he is not expected to project the same standards of detached impartiality* [italics added]. The standards expected of Courts may require the application to them of a different and stricter test ...”¹²⁰

The reasonableness criterion of the test then may be stretched to accommodate the circumstances of the decision maker as a factor in deciding whether their actions avoid the appearance of bias. While this exposition only acknowledges the difference between quasi-judicial and judicial officers or decision makers, from what has been demonstrated of the special distinct role of (final) appellate judges from that of trial judges in the vast number of cases, it begs the question of whether categorisation of judges as a whole can be supported and whether the test should be applied in a uniform fashion across courts.

4.2 Attitudinal bias

The current state of the law as it relates to the possible attitudes or values of judges as a reason for recusal uses the same general test: whether the judges history or an

¹¹⁷ *Porter v Magill* [2002] 2 AC 357

¹¹⁸ P A Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed, 2007) 24.5.4

¹¹⁹ *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252

¹²⁰ *Ibid*, 277

aspect of their personality can be said to “lead a fair minded lay observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case”¹²¹.

One form of attitudinal bias that is unlikely to be relevant to appellate courts but which may arise more easily in the work of a trial judge: the adverse reaction to parties or witnesses before the court in the course of a trial which may put in question the judge’s ability to bring an impartial mind to the matter. A paradigm example being the case of *El Faraghy v El Faraghy & Ors*¹²² where the apparently frustrated judge’s comments party of Middle Eastern origin were to the effect of: “gratuitously adding 'if he chose to depart on his flying carpet never to be seen again” The level of sarcasm and pointed ethnic nature of the comments were found to raise the possibility of bias though mere adverse comment as to the veracity of a witness’ evidence will usually be insufficient ¹²³.

The most difficult question still lies then in regard to what might be called the social background, beliefs, value or preference set of the judge and when this should be sufficient to raise the apprehension of bias. Recognising judicial individuality means recognition of the inescapable humanity and life experience from which flow the judge’s individual persona and approach to the law. This life experience in itself cannot be allowed to solely determine questions of recusal or impartiality, since it is both valuable in allowing a judge to understand litigants and factual situations and secondly it by itself would provide an unfortunate and possibly easily exploited tactical route for counsel who seek only to win the case.

For this reason, a specially constituted English Court of Appeal comprising the Chief Justice, Master of the Rolls and the Vice-Chancellor gave the following statement in *Locabail* ¹²⁴ :

“It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided.

¹²¹ *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495, para 62

¹²² [2007] 3 FCR 711

¹²³ *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 para 98-100

¹²⁴ *Locabail (UK) Ltd. v Bayfield Properties Ltd.* [2000] QB 451

We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor ... ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, ...or previous political associations; or membership of social ... bodies; ...or previous judicial decisions; or extra-curricular utterances (...in textbooks, lectures, speeches, articles, interviews... [etc]); or previous receipt of instructions to act for or against any party ... or membership of the same Inn, circuit ...By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved ... if the judge were closely acquainted with any member of the public ... particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind ...We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.”

The heavy emphasis placed upon, and the extensive listing and categorisation of fact patterns suggests again that no simple principle or rationale is available to explain the disqualification of a judge for attitudinal bias.

4.3 Difficulty in Determining Attitudinal Bias

Given the varied range and difficulty of situations invoking the question of bias or impartiality in a judge the application of this part of the test becomes almost a measure of intuition on the part of the judges applying the test. Rather than a reflection of any of the four underlying themes present in the law of bias: i) the risk/possibility of bias, ii) *nemo judex*, iii) predetermination or close mindedness and iv) the concern for pragmatism / fair trials. These may be used to bolster the intuitive apprehension that it is (or is not) right that the judge should sit in any individual case.

The lack of any single complete rationale in discovering the appropriateness of a judge's sitting in a case, particularly across such a broad range of situations as the term attitudinal bias comprehends does not mean that it is impossible to say anything about the considerations that appear important. The following four cases can be called upon to demonstrate the range of situations and what might loosely be called factors which may suggest a bias of attitude. Equally however they affirm the lack of any consistent organising principle beyond intuitive reaction and the difficulty of divining "the ill defined line"¹²⁵ that separates the appearance of bias from what the courts consider to be fanciful, overly sensitive or unreal objections.

The first is *Helow v Advocate General*¹²⁶ before the Court of Session where, setting aside the particular Scots forms of legal language, the decision before a single judge of the Court was appealed for apparent bias. The appellant was a Palestinian refugee who was actively involved in the Belgian prosecution of former Israeli Prime Minister Sharon. The Lord Ordinary, Lady Cosgrove was a member of the International Association of Jewish Lawyers and Jurists, in whose magazine had been published critical accounts of the Belgian proceedings. Lady Cosgrove rejected the appellant's appeal from an immigration tribunal decision. While it is understandable that a party should not be able to object to the ethnicity of the judge, even if based on their own ethnicity, the personal commitments of the appellant and to a much lesser degree the judge make it a less clear case than one of pure ethnicity. The Court of Session in its judgment relied heavily upon pragmatic factors, remoteness of the

¹²⁵ *Vakautu v Kelly* (1989) 167 CLR 568, 571

¹²⁶ [2007] CSIH 5

claimed source of bias and a heavy emphasis on the judicial ethic and oath to dismiss the petition.

A second example, also by way of the Court of Session is *Davidson v Scottish Ministers*¹²⁷ where the House of Lords allowed the Appeal from the Inner House in a case of statutory interpretation, where one of the judges was previously the Lord-Advocate, the chief law officer of the Scottish Government, and had opined on the interpretation and effect of the bill in question when it was before of the House of Lords. Lord Hardie affirmed that interpretation in Davidson's case. The House of Lords seems to have regarded the difficulty in the case not as being only one of prior comment but of Lord Hardie's introducing and moving the Government policy as well:

“Lord Hardie was not simply promoting a relatively routine amendment. He committed himself to the view, which in the Extra Division the Scottish Ministers too were advocating, that the effect of sec 21 was that they were subject only to orders which were declaratory of the parties rights.”

The case is not necessarily a happy one and offers an example of great difficulty. It may be that the level of conviction expressed by the Lord-Advocate in explaining the effect of the amendment, may make it seem more his cause than objective legal advice on the affairs of his client such. Perhaps had Lord Hardie engaged an advocate to offer his independent opinion as to the effect of the provision, it would seem unreasonable to later exclude that advocate for bias. In this it may be that the Lord Advocate as the chief Scottish Law Officer is seen as too closely connected politically with the government such that his relationship is not one of advocate-client but that he is the mover of the government's cause.

Scottish law appears to provide a fertile ground for challenges of bias, the third exemplar case being that of *Hoekstra v Her Majesty's Advocate (No 2)*¹²⁸ a rehearing by a second bench of the High Court of Justiciary of an initial appeal heard by a bench of three Lord Commissioners of Justiciary, Lords McCluskey, Kirkwood and Hamilton. The case concerned the application of the European Convention for The Protection of Human Rights and Fundamental Freedoms to evidence obtained by

¹²⁷ [2005] SC 7

¹²⁸ [2000] SC 391

covert means in the criminal trial of the appellants for drug smuggling. The difficulty lay in Lord McCluskey's authorship of an article in the Scotland on Sunday broadsheet which was critical of the benefits to be derived from rights jurisprudence which had just been recently introduced into the country. In the words of the second bench's judgment:

“the references to the Convention offering a field day for crackpots and being a pain in the neck for judges and a goldmine for lawyers. . . . Those questions were made all the more insistent when the article purported to give the ‘Verdict’ of Lord McCluskey, pictured in his judicial wig.”

The second bench found that there was an apprehension of bias in the decision and set it aside. The judgment appears, though not explicitly to support the rationale that impartiality was lacking, because the strength of the comments:

“inevitably gave rise to questions about Lord McCluskey's ability, when sitting on the bench, to set aside these firmly held negative views of the Convention and of those who seek to invoke it.”

This seems to be an invocation of the rationale that the judge's views were so strongly held that the outcome risked being predetermined or the judge's mind closed to argument.

Most would agree that the above case passes over the line into a realm where the judge should not sit. The reasons for this are still difficult to express exactly within a legal formula but the existence of a group who are proximate and who would clearly be affected by the comments, much more strongly than, for example, in *Helow* captures the essence of the discomfort. The second is that almost certainly that: “Unfortunately, *the nature and tone of the language* used by Lord McCluskey does in our view give rise to such an apprehension. [italics added]”¹²⁹. The strenuousness setting it apart from a law journal article, editorial role or indeed a previous statement in judgment and strongly raising the spectre of predetermination.

The final exemplar is not a case in itself but the successful pre-trial challenge to a judge sitting in in the highly important House of Lords decision: *A v Secretary of*

¹²⁹ *Helow v Advocate General* [2007] CSIH 5, 401

*State*¹³⁰ also known as the *Belmarsh* decision. Lord Steyn has revealed he was asked to step down from the panel constituted to hear the case due to his previous statements on the law and situation in the case¹³¹. The question posed to a nine member House of Lords was whether the United Kingdom's scheme of indefinite detention for immigrants where no evidence sufficient to charge existed under the Anti-terrorism, Crime and Security Act 2001, was inconsistent with the UK's obligations under the arbitrary detention provisions of the ECHR. His Lordship maintains that the challenge from the Treasury Solicitor was motivated by his prior opinion that:

“In my view the suspension of Article 5 ECHR - which prevents arbitrary detention - so that people can be locked up without trial when there is no evidence on which they could be prosecuted is not in present circumstances justified”

Given in the course of a lecture published academically this statement seems carefully moderated and ranges far from the comments of Lord McCluskey. Yet the Treasury Solicitor's objection was obviously seen as sufficient in the eyes of some, though Lord Steyn does not disclose exactly how the decision was carried out. Though seems tentative and speculative on the paucity of materials, the suggestion here may be that the high profile of the case and the political content and effect of the matters that the Law Lords were being asked to consider may have influenced the approach to bias, in requiring a more sensitive handling of previous content than in a decision concerning more lawyer's law matters. This would suggest that the apprehension of bias and predetermination rationales may vary in sensitivity according to the subject matter and controversy of the case.

4.4 Special Considerations for The Supreme Court

Additional or particular considerations may apply to the Supreme Court and their role will be important in the assessment of a complaint of apparent bias against a Supreme Court judge.

¹³⁰ [2005] 2 AC 68

¹³¹ Lord Steyn, “Laying the Foundations of Human Rights Law in the United Kingdom” (2005) 10 EHRLR 349

First it should be noted that while House of Lords has served as a good common law analogue thus far because of its similar constitutional and legal position to our Supreme Court, the respective compositions distinguish the two in a way that is likely to be important for the question of impartiality.

The House of Lords and the Privy Council sit in an arrangement that can be called 'floating panels' with judges drawn from a varied though largely predictable pool of senior lawyers, the core being the Lords of Appeal in Ordinary, perhaps supplemented in the House of Lords by Lords of Appeal¹³² and, in the Privy Council, an additional mixture of British and Commonwealth judges appointed Privy Councillors¹³³. In neither however does the Lord Chancellor, an office that until recently seemed a wilful defiance of Montesquieu's life's work, have any longer a right to sit¹³⁴. The forthcoming UK Supreme Court will seemingly retain the ability to sit in multiple panels and call upon additional judges¹³⁵.

By comparison, the small size of New Zealand mandates that the Supreme Court of New Zealand is a court with a tightly regulated and largely fixed composition, more akin structurally to The High Court of Australia and The United States Supreme Court. The act states that the Court must consist of the Chief Justice and at least four and no more than five other judges appointed as Justices of the Supreme Court¹³⁶. The provision to co-opt acting judges to sit on the Court is also relatively limited, they must be retired Court of Appeal or Supreme Court judges who have not reached the age of 75 and that they should sit only in the case of vacancy¹³⁷ or where a permanent judge is unavailable to hear proceedings generally or more interestingly in specific proceedings¹³⁸. During the period 2004 to 2007, four acting judges sat in 18 instances out of the 53 decisions delivered¹³⁹.

¹³² (Retired Law Lords or senior judges) per Appellate Jurisdiction Act 1876 (UK) s5

¹³³ P Spiller, *New Zealand Court of Appeal – 1958-1996: A History* (2002) 293, 356-357

¹³⁴ (UK) Constitutional Reform Act 2005 Part 3

¹³⁵ Ibid.

¹³⁶ Supreme Court Act 2003 s17

¹³⁷ Supreme Court Act 2003 s23(5)(a)

¹³⁸ Supreme Court Act 2003 S23(5)(b)

¹³⁹ R Elvin, *To agree or not to agree : judicial dissent in the Supreme Court of New Zealand* (2007) Thesis (LL.B. (Hons.)) - University of Otago, 21

Lord Rodger of Earlsferry has noted¹⁴⁰ that role that the organisation and composition of the House of Lords in its judicial capacity may lead to differences of result and introduces an element of chance into decision making, the presiding of Lord Atkin rather than Lord Dunedin in *Donoghue v Stevenson*¹⁴¹ being a prime example. Composition and the possibility of its alteration by allegations of bias are an important matter then. If in a closely split decision such as *Brooker v Police*¹⁴², the decision were to be vacated à la *Pinochet*¹⁴³, the Supreme Court's largely fixed composition would make the substitution of a judge on rehearing potentially decisive of the appeal in a different manner and tactically important.

It is equally true that in fixed composition courts, where judges are appointed with security of tenure and sit on practically every case, the judges and the court as a result may acquire jurisprudential types or personas. The US Supreme Court is \ the clearest example of this phenomenon, periods of its history are commonly named for the influence and effect of the Chief Justice of the time and then analysed for variations and shifts therein among each of the members and the trend has begun to be replicated in Australia¹⁴⁴.

It is clear level of predictability of composition and outcome in the Supreme Court creates the situation where at the very least speculation as to and perhaps the possibility of a tactical advantage through allegations of bias will be entertained by Counsel. Whether the Court wishes to address this explicitly by way of comment in a case, a practice statement or some other vocal means remain to be seen. Equally however the possibility of tactical advantage may be used as a factor in the assessment of the genuineness of a challenge, the appearance of bias and the sensitivity with which it is to be addressed.

Secondly the typical career history of a Supreme Court Judge will involve a great deal of work additional to their judicial office. While the Kilmuir Rules against judges commenting in the media were a British measure they seem to reflect a general strain

¹⁴⁰ R Stevens, "The Role of a Final Appeal Court in a Democracy: The House of Lords Today" (1965) 28 MLR 518-519

¹⁴¹ [1932] A.C. 562

¹⁴² *R v Bow Street Stipendiary Magistrate, ex parte Pinochet (No 2)* [2000] 1 AC 119

¹⁴³ [2007] 3 NZLR 91

¹⁴⁴ C Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 3

of thought that it is inappropriate for judges to comment too openly outside the courtroom, especially in the media. It is however now *de rigueur* for judges to speak on legal matters within the profession and even for them to act as editors or contributing authors to legal publications. Judges of the Supreme Court are likely in their career to have amassed a reasonable number of such occurrences and as experienced and highly competent judges are likely to be no less in demand upon reaching the Supreme Court. There is an obvious value and yet a degree of risk in judges engaging with the legal community in that their statements and connections made may open them to charges of bias on the basis of statements made showing a tendency to decide a case in a particular way.

Another crucial consideration that factors into the appreciation of bias with regard to Supreme Courts is the function that a final appellate court adopts or could be expected to fulfil. Several different general and perhaps overlapping roles for the court are possible.

The first function that a court must naturally fulfil is definitional, that is to resolve conflicts brought before it. In every case that it does so it will succeed in making clear the law to be applied, even if it may be constrained only to a set of facts identical or indistinguishable from those that the case resolves. In this sense the decision itself and not the reasons or opinions serves to make and clarify the law.

Beyond the role of rendering a decision and establishing the law as clear on the single point in issue there are divergences as to the role of a final appellate court in developing and changing the law. The first major factor prompting these divergences is the place of the Court within the political structure of the state, those truly Supreme Courts will need to respond to different functional pressures than our Supreme Court.

As a sidenote, any of the following conceptions which depend for their efficacy on the existence of different points of view, will as a corollary depend on an apolitical process of appointment of final appellate judges, a temptation which of course will be harder to resist in systems with entrenched constitutions, the American experience of appointments for one having been compared to a process of personal scrutiny worthy

of the John Birch Society¹⁴⁵. The English system by contrast appears to have grown progressively less political over time¹⁴⁶ and New Zealand's system appears still to be dominated by convention of merit and qualification supplemented by documentation of the process of consultation and appointment¹⁴⁷.

Various conceptions of the proper lawmaking function of Supreme Courts are possible. Lord Devlin proposed that the role of a final appellate court in changing the law is to follow only the clearly established consensus of society when its judges agree that it is such¹⁴⁸. Canadian Chief Justice McLachlin, although speaking within a distinct constitutional context, identifies the role of the Supreme Court as creating and facilitating dialogue about Charter rights and law within the legal community and between the Court and Legislature¹⁴⁹. Finally the position of the House of Lords and the Privy Council (since the 1960s) on freedom of dissent suggests that the place of the final appellate court may be to provide a range of opinions and express differences on the suitability of the law, giving a range of solutions to its problems. Thus Legislatures or Law Commissions are presented with a range of perspectives on problems and several possible solutions even though the likelihood and historical frequency with which dissents are adopted is low¹⁵⁰.

Equally the existence of different preferences and perspectives will under the right conditions encourage a higher and more sophisticated level of argument, discussion and justification. In a court such as the House of Lords, it is strongly suggested¹⁵¹ that the process of oral argument and judicial interjection may be a matter not only of judge's seeking to expose weakness in counsel's argument but also of testing and critiquing the views of their colleagues. Where discussion is encouraged after the hearing it may also lead to valuable competition, comparison or broad consensus on

¹⁴⁵ R Stevens, "The Role of a Final Appeal Court in a Democracy: The House of Lords Today" (1965) 28 MLR 509

¹⁴⁶ H J Abraham, *The Judicial Process* (6th ed, 1993) 32, Lord Roskill, *Law Lords: Reactionaries or reformers* pgs 284 - 286

¹⁴⁷ P A Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed, 2007) 20.4.1

¹⁴⁸ P Devlin, *The Judge* (1979) ch 1

¹⁴⁹ B McLachlin, *A Canadian judgment : the lectures of Chief Justice Beverley McLachlin in New Zealand, April 2003* (2004) ch 1

¹⁵⁰ L Blom-Cooper & G Drewry, *Final Appeal – A Study of the House of Lords in its Judicial Capacity*, (1972) 84-87

¹⁵¹ A Paterson, *The Law Lords* (1982) MacMillan: Hong Kong 73-83

the legal principles and rule of law to be applied¹⁵². In the case where this is not achievable, a judge of an appellate court will be forced to strive to best answer the judgment of another member who holds apposite views. Hopefully these processes encourage a more thorough exploration, discussion and justification of the legal points of view finally adopted by the court or its individual member. Perhaps no ‘right answer’ is available but the most thorough one might be encouraged by the existence of multiple perspectives and amicable opposition.

No matter which of these models is adopted as a proper conception of the function that final appellate courts play beyond basic decision making it should be clear that all require a range of perspectives and approaches within the composition of its members. As Lord Reid noted even on basic points of legal method a variety of approaches exist and a mixture of them will be valuable:

“There are those who are sometimes to be referred to as black letter lawyers, careful men who like to go by the book or ... Lord Denning’s “timid souls”. ... there are those who want to press on, ... legal reformers.... lastly there are those who are impatient with technicalities and who are not content unless common sense prevails. All may be equally good lawyers but they will not always reach the same result. We want a balance of power and I should be sorry to see the day in this country ... when we are all drilled to think alike.”¹⁵³

The final appellate court then is more likely to be effective when it contains judges of different backgrounds, beliefs and values, even if only about the law.

Encouraging differing judicial perspective because of the distinct role of an appellate court from a trial court thus introduces another intuitive condition into the weighing of impartiality in final appellate courts. Due to the value of difference, the willingness to exclude value preferences might be expected to be lower in final appellate courts, since it may deprive the court of a valuable perspective and potential foil.

¹⁵² I Greene, C Baar, P McCormick, G Szablowski & M Thomas, *Final Appeal: Decision-making in Canadian Courts of Appeal* (1998) 63-64

¹⁵³ Lord Reid of Drem, “The Judge as Law Maker” (1972) 12 *Journal of Society of Public Teachers of Law* 22-23

Equally where counsel seek to exclude a judge who they consider to be ideologically unfavourable, there will probably be little difficulty in other counsel (in the same or later cases) finding a similar level of suggestive comment or background for a different judge of a different perspective. The process risks setting a low threshold for disqualification and a process of tit for tat recusal attempts that might lead to exclusion of perspectives on both ends of the judicial spectrum. In his historical conflict between Kirk and Court in 19th century Scotland, Lord Rodgers raises this very point:

“If the Lord President, Lord Justice Clerk and Lord Meadowbank had to step down, what about Lords Moncrieff, Jeffrey and Cockburn ? If you actually supposed that the judges would decide on the basis of their previous utterances and in breach of their judicial oath, then in order to get rid of the likely supporters on the other side, you would have to risk losing one or more of you own likely supporters. ... you might have reckoned that your best hope of success lay in your supporters winning over one or more of the uncommitted judges.”¹⁵⁴

The ouster then of judges who are suspected to be ideologically unsound is likely to damage a final appellate court ability to full play its role, whichever of the above is selected as its correct approach to lawmaking.

¹⁵⁴ Lord Rodger of Earlsferry, *The Courts, the Church and the Constitution: Aspects of the Disruption of 1843* (2008) 69-70

Conclusion

The reasonable apprehension of bias test for excluding judges who are or who appear to be wanting in impartiality is one that seems lacking in any solid organising principle other than the need to uphold the decisions of the courts and the appearance of justice. The myriad variety of human interests and interactions, also ensure that it can never coherently represent only a sole conception or rationale of what it is to be impartial. Through a combination of the reasonable person's viewpoint and the somewhat ill-defined reaction that is apprehension, its application in hard cases becomes a matter of intuition guided but not determined by small factors.

Given the trammelled and haphazard but still not insubstantial power of judges to chose new directions for the law by reference to personal preferences about society or about the law, the existence of a safeguard against the abuse or even the possibility of abuse seems wise.

The difficulty comes in applying this safeguard to the particular institution and the particular persona that is the Supreme Court and the Supreme Court judge. The special lawmaking role that the Supreme Courts exercises, even if involuntary and bound by Parliament, makes a strong case for the inclusion in the test for recusing Justices of the Supreme Court, additional factors. These factors should bring a degree more caution to the intuitive calculation of appearance of bias than that for trial or other appellate judges, to make disqualifications a degree less ready.

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