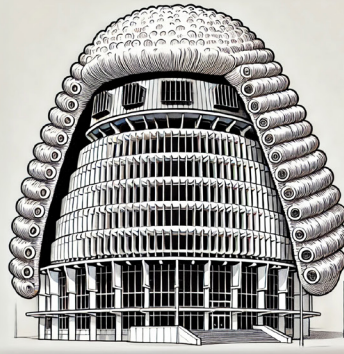


REPORT SUMMARY



THE
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Who Makes the Law?

Reining in the Supreme Court

Roger Partridge

Recent decisions from New Zealand's Supreme Court have sparked widespread alarm. They show a court that has misunderstood its role and overstepped its bounds. The Court's approach raises a very serious question for voters: Just who makes the law in New Zealand? Is it democratically elected politicians or unaccountable judges?

The proper constitutional role of the courts is a subject of sharp debate in many parts of the common law world, with the United States Supreme Court being a cautionary tale. If we wish to maintain trust and confidence in our courts, it is a caution we would be wise not to ignore.

The Supreme Court's recent decisions reveal two troubling trends. First, the Court has adopted a loose approach to interpreting and applying laws passed by Parliament. The Court is increasingly stretching or even ignoring clear wording to reach outcomes it likes better. Second, the Court is reshaping long-standing legal rules based on what the judges see as 'changing social values'.

The 'three strikes' case of *Fitzgerald v R* is a good example of the first problem. Despite clear statutory language requiring judges to impose maximum sentences for third-strike offences, the Supreme Court effectively rewrote the law to avoid what it saw as an unjust outcome. While many (me included) may have disliked the three strikes law, it was Parliament's prerogative to pass it, and the Court should have applied it as written.

The Peter Ellis case starkly illustrates the second trend. Despite the case having no particular Māori connection, the Court took into account tikanga Māori considerations in deciding that Ellis's appeal against convictions could continue after his death. Three judges went further, indicating that any issue of law before the courts may need to be addressed in the light of tikanga.

This decision overturned longstanding rules for recognising tikanga as law and did so without setting out a clear new framework. The result is a legal vacuum that undermines the certainty and consistency required by the rule of law. Remarkably, the Court made this decision even though Parliament had already tasked the Law Commission with studying the role of tikanga in our legal system. By rushing ahead, the Court sidestepped this careful, democratic process.

These and other recent decisions show the Court has lost sight of key ideas that shape how we govern ourselves: the separation of powers, the sovereignty of Parliament, and the rule of law.

This shift by the Court upends the careful balance between judges and Parliament that underpins our system of government. It weakens the democratic standing of our laws and makes them less steady and foreseeable. When courts rewrite laws and reshape settled rules, people and businesses can no longer trust clear wording or steady case law to guide their actions. This strikes at the heart of the rule of law.

This power struggle between the Courts and Parliament is not new. When the Supreme Court was set up by Parliament in 2003, the Supreme Court Act explicitly affirmed that the court's creation would not change "New Zealand's ongoing commitment to the rule of law and the sovereignty of Parliament."

This principle of parliamentary sovereignty means that Parliament, as the elected representative of the people, has the ultimate authority to make or unmake any law. The courts, including the Supreme Court, are meant to interpret and apply these laws, not to create or modify them based on their own preferences.

At the time, then-Deputy Prime Minister Michael Cullen warned of the risk of "constitutional change by stealth" if judges were to find a "higher law" modifying Parliament's standing. His foresight now seems prophetic.

Despite the clear statutory affirmations of the Supreme Court's function, the Court's activist tendencies have seen it stray beyond its constitutional limits.

The concerns expressed in our report are echoed by others. In a lecture earlier this year marking the Supreme Court's 20th birthday, former Law Commissioner Jack Hodder KC warned of a coming time of "unprecedentedly sharp political debate" about the role of the Court.

Former Otago University Law Professor James Allan has gone further, describing an emerging "imperial judiciary... where the top judges... are giving themselves newfound power at the expense of the elected branches of government. Under the cover of purportedly applying the law, they are usurping power to themselves."

Critics might say an activist court shields rights and checks bad laws. But this view misses the point of how we govern ourselves. It means unelected judges can override the will of voters spoken through Parliament. This waters down our democracy and makes laws less clear and steady.

The Court's recent decisions show we are now at a turning point. Will we keep sliding towards rule by judicial decree? Or will Parliament act to restore the right balance between judges and elected lawmakers?

To tackle these worries, the report puts forward several ways for Parliament to reassert its standing and rein in judicial overreach. These include passing targeted laws to overturn problematic rulings, clarifying the meaning of 'rule of law', tightening rules for how courts interpret laws, and reforming how senior judges are chosen.

These choices give Parliament options for tackling judicial overreach. None of them threaten judicial freedom or the rule of law. Instead, they aim to uphold these key values. They will help make sure the courts stay within their proper bounds.

ABOUT THE AUTHOR

Roger Partridge is chair of The New Zealand Initiative and a senior fellow in its research team. He is a regular columnist in the New Zealand Herald, writing on public policy and legal issues. His research reports include *Who Guards the Guards? Regulatory Governance in New Zealand* (2018), *Work in Progress: Why Fair Pay Agreements would be bad for labour* (2019), *The Rule of Law or the Law of Rulers* (2020), *Nothing costs nothing: Why unjustified dismissal laws should not apply to the highly paid* (2021), *Reassessing the Regulators: The good, the bad and the Commerce Commission* (2022), and *Prescription for Prosperity: A Briefing to the Incoming Government* (2023).

Roger was a litigation partner at law firm Bell Gully from 1992 to 2015 and the firm's chair from 2007 to 2014. He is an Honorary Fellow and former executive director of the Legal Research Foundation, a charitable foundation associated with the University of Auckland Law School and is a former member of the New Zealand Law Society Council, the governing body of the legal profession.

Roger has Bachelor of Commerce (Economics) and Law (Hons) degrees from the University of Auckland and a Master of Law degree with first class honours from the University of Cambridge.