Henry Graham

The Democratic Deficit in Judicial Law-Making: Should Judges Consider Public Opinion?

LAWS 522 RESEARCH PAPER

Faculty of Law

Victoria University of Wellington

2015

Table of Contents

Abstract

It is important in any democratic society that law-makers consider the general views of the public and act in accordance with these. It is widely accepted that by doing so, laws will be made which benefit the majority of New Zealanders. However, the judicial branch of government is not commonly seen as a law-making body. As such, they usually fail to defer to public opinion, because their decisions do not have the effect of making new law. Judges merely apply the current law. It is often argued that the judiciary should have more power to create law, as they can protect minority rights and provide a more effective check on the supreme power of Parliament. This paper looks at various situations where judges could have more authority to make law. Emphasis is placed on controversial human rights issues. However, if we accept judges could have more law-making power, this raises a fundamental issue: What role should public opinion play in a reformed system? This paper focuses on the main arguments for and against judicial consideration of public opinion when judges are essentially making new law. It is ultimately concluded that judicial law-makers should consider public opinion as one of many relevant factors only in cases where the outcome has a law-making consequence that will affect a substantial portion of society. This restrictive outcome preserves the traditional role of the judiciary as a protector of human rights.

Key Words

Democracy; Judiciary; Judicial Law-Making; Public Opinion

I Introduction

The concept of democracy was first developed in Ancient Greece,[1] and it later spread around the world. Kostas Vlassopoulos wrote that after the end of the Second World War, democracy had become "the only possible political system in an egalitarian society".[2] Democracy is seen as an important foundation of any legal system, as power is vested in the ordinary people of a country. Therefore, popular public opinion is fundamental to effective law-making. In New Zealand, we have a legal system based on representative democracy, which means that citizens freely elect officials who create written laws.[3] In order to be re-elected, our representatives generally try to enact laws which reflect the wishes of the majority.[4] This means public opinion

[1] John Thorley *Athenian Democracy* (Routledge, New York, 2005) at 2-3.
[2] Kostas Vlassopoulos *Antiquity and its Legacy* (Oxford University Press, Oxford, 2009) at 33.
[3] Constitution Act 1986, s 15.
[4] HLA Hart *Law, Liberty, and Morality* (Oxford University Press, Oxford, 1968) at 47.

plays a major role in law-making, particularly when controversial human rights issues are raised.

While there are fundamental benefits of having a democratic system, there are also some problems with the heavy reliance placed on majoritarian public opinion. In particular, it can be difficult for Parliament to legislate in certain areas, because it can be hard to gain broad support for particular laws. This problem is especially cogent when Parliament makes decisions about minority rights.[5] Law-makers want to reflect the wishes of the majority, which means majority groups can effectively decide what rights are afforded to various minority groups. John Stuart Mill argued that this is a problem inherent in any democratic system, saying that minority groups are often subjected to the tyranny of the majority.[6] There are many examples of this issue arising in the New Zealand context. From the fight for women's suffrage in the nineteenth century to modern-day Treaty settlements, public opinion has long been the deciding factor in controversial human rights adjudication.[7] This problem arose more recently, when Parliament decided to extend the right to marry to same-sex couples.[8] This change only occurred after public opinion shifted in favour of reform.[9] These examples show the main problem with a system of pure legislative supremacy: there is no effective alternative way to secure passage of positive human rights legislation without relying on support from the public.

While Parliament creates laws in New Zealand, the role of the judiciary is to apply these laws to individual cases.[10] Therefore, the judiciary does not usually take public opinion into account.[11] In this paper, consideration is given to the various ways the role of the judiciary could be altered to give the courts more power to make substantive decisions about controversial issues. Following this, focus shifts to whether it would be democratically legitimate for the courts to continue to ignore public opinion if they started adjudicating on policy issues. If we assume that judges should have more law-making power, then it may not be democratically legitimate for them to continue to act without deference to public opinion. It is ultimately concluded that if the judiciary had broader powers, they should consider public opinion when making decisions that have a wide societal impact. Public opinion should be one

[5] HLA Hart, above n 4, at 1-5.
[6] John Stuart Mill *On Liberty* (Longman, Roberts, and Green, London, 1869) at 7.
[7] "A Brief History of Women's Suffrage in New Zealand" (20 December 2012) Ministry for Culture and Heritage <www.nzhistory.net.nz>.
[8] Marriage (Definition of Marriage) Amendment Act 2013, s 4.
[9] (29 August 2012) 683 NZPD 4913.
[10] Geoffrey Palmer and Matthew Palmer *Bridled Power* (4th ed, Oxford University Press, Oxford, 2004) at 288-289.
[11] "Guidelines for Judicial Conduct" (March 2013) Courts of New Zealand <courtsofnz.govt.nz> at [9]-[11].

of many relevant factors for judicial consideration. However, when adjudicating for private matters or matters that affect only a portion of the population, the courts should continue to ignore public opinion. This narrow outcome is beneficial because it preserves the fundamental role of the judiciary as a protector of human rights and a safeguard against the unrestrained power of the legislature.

Part II takes an in-depth look at our current constitutional arrangements and considers options for reform. The concept of legislative supremacy is described and critiqued. One specific problem with the current system is that majoritarian public opinion usually prevails. This can lead to the passage of legislation which undermines human rights or erodes the function of the judiciary. Consideration then shifts to the possible options for judicial intervention to uphold human rights. Instead of the present approach, the New Zealand legal system could use more aggressive forms of judicial review to protect minority rights. This judicial intervention could come in a number of forms. These options are merely described and critiqued for background information; no final recommendation is made. I discuss four different hypothetical options, which are addressed in order from "weakest" to "strongest". First, the courts could make a declaration of inconsistency. Second, the courts can take a more liberal approach to judicial interpretation. Third, the courts could refuse to apply any legislation that purported to supersede fundamental rights.[12] Fourth, New Zealand could adopt a system of complete judicial supremacy.[13] Any of these options could reduce the problem of majoritarian control and protect human rights.

Part III focuses on the implications of increased judicial law-making. In particular, it is arguable that judicial law-makers should consider public opinion (especially when adjudicating in controversial human rights cases). This is because without reference to public opinion, judges may act without regard to what the ordinary people of New Zealand want. This would erode the democratic nature of the New Zealand legal system.[14] Just as Parliament must consider public opinion, it would make sense for the judiciary to consider this as well.[15] It is arguable that if the judiciary takes on a law-making function, then they should also be expected to listen to the people. However, if the judiciary does start to consider public opinion, they could lose some of their independence and the same issues with majoritarian control of the legislature could begin to arise. There are three key arguments in favour of judges continuing

[12] *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398.
[13] See Constitution of the United States of America, art 6(2).
[14] Michael Sandel "Why Democracy?" (Podcast, 14 March 2015) BBC <bbc.co.uk>.
[15] Michael Sandel, above n 14.

to act without reference to public opinion: (a) the judiciary can continue to protect minority rights in the face of adverse public opinion, (b) refusal to consider public opinion ensures the judiciary remains apolitical so judicial independence is upheld, and (c) public opinion has no legal weight and judges may have difficulty ascertaining public opinion. These propositions are discussed in turn and presented along with important counter-arguments.

Part IV makes an ultimate recommendation about what the judicial position should be if one of the four hypothetical options were implemented. If the judiciary has increased law-making powers, then they should consider public opinion in certain cases. Consideration of public opinion should be confined to cases where judges are (1) effectively creating a new law and (2) this new law will affect a substantial part of society. In addition, public opinion should only be one relevant factor. It should not be conclusive nor should it be determinative. This position allows the judiciary to continue to fairly and impartially adjudicate on contentious issues, but goes some way towards remedying the democratic deficit inherent in judicial law-making.

II Possibility of Increased Judicial Law-Making

This part first outlines the constitutional position in New Zealand and discusses the main problem with its practical application: laws that reflect popular public opinion usually prevail and these laws can be inconsistent with human rights. New Zealand has a system of pure legislative supremacy, which means Parliament has "full power to make laws".[16] AV Dicey wrote that under such a system, Parliament has the ultimate power to make or unmake any law whatsoever. No other entity has the right to override or set aside the legislation of Parliament.[17] In addition, New Zealand has a unicameral legislature. There is only one law-making body: the House of Representatives. Geoffrey Palmer argues that this makes the Parliament of New Zealand especially powerful.[18] On the other hand, the task of the judiciary is merely to apply the law to individual cases.[19] Therefore, the judiciary cannot refuse to apply any law made by Parliament, even if it directly and unjustifiably contravenes the Bill of Rights Act 1990.[20] This part focuses on two main issues: (1) Parliament can legislate in opposition to human rights and (2) Parliament can legislate the powers of the judiciary away. To remedy these issues, it is

[16] Constitution Act, s 15.
[17] AV Dicey "The Nature of Parliamentary Sovereignty" in *An Introduction to the Study of the Law of the Constitution* (Liberty Classics, 1982 [1885]) at 3-4.
[18] Geoffrey Palmer "The Bill of Rights after Twenty-One Years: the New Zealand Constitutional Caravan Moves on?" (2013) 11 NZJPIL 257 at 263.
[19] Andrew Stockley "An Independent Judiciary" in Raymond Miller (ed) *New Zealand Government and Politics* (5th ed, Oxford University Press, Oxford, 2010) at 114.
[20] Bill of Rights Act 1990, s 4.

ultimately argued that some consideration should be given to four alternatives to our system of pure legislative supremacy.

The theoretically unlimited power given to Parliament has led to some major human rights violations in recent years. Parliament has focused on appeasing majority groups at the expense of minority rights. This is perhaps best shown by the number of Acts that have been passed which unjustifiably conflict with the rights in the Bill of Rights Act. When a bill is first introduced to Parliament, the Attorney-General is required to issue a section 7 report if the bill unjustifiably violates any rights.[21] From 1990 to 2014, the Attorney-General issued a section 7 report for 62 different bills. Of these, 36 bills went on to be enacted as law (and four bills are still before Parliament).[22] Paul Rishworth argues that the enactment of even a single bill which had a section 7 report would be objectionable.[23] The enactment of 36 pieces of legislation which unjustifiably conflict with human rights is alarming and shows that Parliament has a general indifference towards positive human rights adjudication. Paul Rishworth also noted that in many areas it is seen as "acceptable [for Parliament] to override the Bill of Rights".[24] Andrew Geddis concludes that Parliament largely ignores section 7 reports once a bill has entered the House.[25]

The insignificance that Parliament regularly ascribes to human rights is a serious issue. This problem is exacerbated given the broad power that Parliament enjoys. In order to appease the public, the legislature can override any judicial decision made in favour of human rights and can even remove the right of appeal to an independent tribunal.[26] Under the current constitutional arrangements, Parliament has immense power to override decisions made by the judiciary. It is arguable that power should be shared more evenly between these two branches of government. Two fairly recent cases show this problem in practice.

First, there is an example of Parliament legislating to reverse the effect of a judicial decision. In *Attorney-General v Ngati Apa*, the High Court decided that the Maori Land Court had jurisdiction to conduct an investigation into native title in the foreshore and seabed.[27] The

[21] Bill of Rights Act, s 7.
[22] Christopher Finlayson, Attorney-General "Section 7 of the Bill of Rights: an Attorney-General's perspective" (Remarks to New Zealand Centre for Human Rights Law, Policy and Practice, University of Auckland, Auckland, 2014) at 2.
[23] Paul Rishworth "Human Rights" [2005] NZ L Rev 87 at 103.
[24] At 104.
[25] Andrew Geddis "Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed" [2011] NZ L Rev 443 at 444.
[26] AV Dicey, above n 17, at 4.
[27] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 at 643-645.

decision was met with public outcry.[28] In response, Parliament soon passed the Foreshore and Seabed Act 2004, which reversed the decision and guaranteed that the foreshore and seabed were publicly owned.[29] The outcome of the court case did not reflect public opinion and as a consequence, legislation changed the outcome. This case shows that even if courts do make changes to protect minority rights, Parliament, who is presumably reflecting public opinion, can simply change the outcome. Therefore, on a practical level, courts have very little power to make meaningful decisions that promote human rights.

Second, there is an example of Parliament removing the right of appeal to an independent tribunal (namely the Human Rights Commission). The enactment of section 70E(2) of the New Zealand Public Health and Disability Amendment Act 2013 means that no one can bring a claim for judicial review relating to a decision made under the Act. By disallowing appeals, Parliament can reduce the amount of public money spent on paying private caregivers. This would appease the majority of the public, as many taxpayers do not want to see government money spent paying caregiving costs.[30] Andrew Geddis took particular issue with this part of the Act, saying that "the judiciary's primary function - to declare the meaning of law and its application in particular cases - has been nullified".[31] He continued by adding that "the judiciary's role as protector of individual citizens in terms of ensuring that they are being treated in accordance with the laws of the land has been removed".[32] The Attorney-General had issued a section 7 report prior to the enactment of the bill, saying it breached section 27(2) of the Bill of Rights Act.[33] This report was once again ignored by Parliament.[34]

These examples show that when Parliament enacts legislation that conforms to popular public opinion, this can often result in flagrant rights violations and confiscations of judicial power. Given the problems inherent in a system of pure legislative supremacy, there is an argument to be made that the judiciary should have broader power to make and/or unmake law. With enhanced power, the judicial branch of government could offer a more effective check on the power of the legislature. Dean Knight notes that "if the present trend continues and Parliament

[28] (6 May 2004) 617 NZPD 12718).
[29] Section 13.
[30] (16 May 2013) 690 NZPD 10116.
[31] Andrew Geddis "I think National just broke our constitution" (17 May 2013) Pundit <www.pundit.co.nz>.
[32] Andrew Geddis "I think National just broke our constitution", above n 31.
[33] Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the New Zealand Public Health and Disability Amendment Bill (No 2)* (16 May 2013).
[34] Note that section 27 covers the right to justice. Section 27(2) reads "Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination".

continues to treat rights with summary disdain … [the] courts will feel obliged to exercise greater vigilance about rights".[35] As noted, Parliament has increasingly shown disregard for important human rights. Therefore, it may be time for the courts to intervene. The justification for this is based on two important elements of the judiciary: judicial independence and judicial expertise. Both of these factors support the proposition that the judiciary should have more power.

The first main argument for increasing judicial authority is the concept of judicial independence. Judges are sworn to be impartial and must be totally free from outside pressures.[36] Therefore, they make decisions in a very logical way and are not constrained by popular public opinion. This is in stark contrast to the ad hoc and emotive style of law-making which Parliament has adopted. Geoffrey Palmer writes that "the courts enjoy a high reputation for fairness and impartiality" and the judiciary is "likely to be the most reliable [branch of government] in [terms of] its adherence to principle, neutrality, and rationality".[37] In addition, courts generally consider important factors that Parliament may overlook, such as the principles of the Treaty of Waitangi, international human rights obligations, the rights contained in the Bill of Rights Act, and the principles of proportionality and consistency in judicial decision-making.[38] Courts can make decisions with positive implications for human rights and are not traditionally constrained by political affiliation and public opinion.

Judges can also make better decisions than those of Parliamentarians based on their expert legal knowledge. The minimum standard for judicial appointment is that candidates have at least seven years' prior experience as a lawyer.[39] In addition, Courts of New Zealand states that:[40]

> [Judges] must be of good character, have a sound knowledge of the law and of its practice, and have a real sense of what justice means and requires in present-day New Zealand. They must have the discipline, capacity and insight to act impartially, independently and fairly.

[35] Dean Knight "Parliament and the Bill of Rights — a blasé attitude?" (6 April 2009) LAWS179 Elephants and the Law <www.laws179.co.nz>.
[36] Oaths and Declarations Act 1957, s 18.
[37] Geoffrey Palmer and Matthew Palmer, above n 10, at 285.
[38] Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, Brooker's Ltd, Wellington, 2001) at 778.
[39] Judicature Act 1908, s 6.
[40] "Judicial Appointments" Courts of New Zealand <www.courtsofnz.govt.nz>.

None of these requirements are essential for legislators, because they are democratically elected.[41] Because of this, members of the judiciary have expert legal knowledge that many members of the legislature do not possess.

In addition, courts respond to practical, realistic situations in a way that the legislature does not.[42] Stephen Gardbaum noted that courts "indeed bring a more context specific or 'applied' dimension to rights deliberation that complements the necessarily greater generality of that undertaken by legislatures".[43] Courts can respond to potential law changes in a practical way, as opposed to the largely theoretical approach taken by the legislature. It is arguable that the legal system could make more use of the courts, as judges have the skills to contribute to the development of the law in a more substantive way.

A Options for Increased Judicial Law-Making

Based on this discussion, it is arguable that courts should intervene when Parliament fails to act. Currently, courts have no power to make law. Their function is to interpret the law as written by Parliament.[44] Instead of the present approach, the New Zealand legal system could use more aggressive forms of judicial review to protect minority rights. This judicial intervention could come in a number of forms. This subpart discusses four different hypothetical options, which are addressed in order from "weakest" to "strongest". First, there could be "weaker-form judicial review" as discussed by Stephen Gardbaum, where courts can issue a non-binding declaration of inconsistency.[45] Second, courts can take a more liberal approach to judicial interpretation. Third, courts could acknowledge an idea developed by Lord Cooke, who said that some rights are so fundamental that they cannot be overridden by legislation and the courts would not have to apply any legislation that purported to supersede these rights.[46] Fourth, New Zealand could adopt a system of complete judicial supremacy, where courts can declare any law to be unjustifiably inconsistent with the Bill of Rights Act and have it overturned.[47] Any of these options have the potential to reduce the problem of majoritarian control and protect human rights. These options are now described and evaluated

[41] Constitution Act, s 17.
[42] Richard Fallon Jr. "The Core of an Uneasy Case for Judicial Review" (2008) 121 Harv L Rev 1693 at 1709.
[43] Steven Gardbaum "The Case for the New Commonwealth Model of Constitutionalism" (2013) 14 German LJ 2230 at 2236.
[44] ATH Smith (ed) *Glanville Williams: Learning the Law* (12th ed, Sweet and Maxwell, London, 2002) at 23-24.
[45] Steven Gardbaum, above n 43, at 2241-2248.
[46] *Taylor v New Zealand Poultry Board*, above n 12, at 398.
[47] See Constitution of the United States of America, art 6(2).

in turn. The various approaches are canvassed simply as different options for judicial intervention and I make no conclusion as to which one (if any) is most appropriate.

1 Declaration of inconsistency

The first option for judicial intervention is the "weakest" and it is not incompatible with Parliamentary sovereignty. A declaration of inconsistency occurs when the court issues a formal statement that legislation is inconsistent with the Bill of Rights Act.[48] New Zealand courts have long considered the possibility of making a declaration of this type.[49] In 1998, Paul Rishworth wrote "[Section 4 of the Bill of Rights Act] precludes judges from doing numerous things in response to inconsistency [such as refusing to apply the legislation]". However, he goes on to add that "one thing it does not do is preclude comment and proclamation".[50] The courts refused to issue such a declaration until earlier this year, when the High Court made the first judicial declaration of inconsistency in *Taylor v Attorney-General*.[51] Geoffrey Palmer and Matthew Palmer argued that such a declaration would have an impressive political effect as it would inform the public of human rights violations and essentially force the hand of any legislators.[52] The theory was that a judicial message would encourage voluntary legislative change.

A declaration of inconsistency is comparable to the section 7 reports issued by the Attorney-General. They have no legal weight, but they do provide a public indication that legislation is inconsistent with human rights. Geoffrey Palmer notes one important advantage that a declaration of inconsistency has: it offers commentary on the final version of the legislation.[53] This is advantageous as offensive provisions can be added during the legislative process.[54] Therefore, a declaration of inconsistency can be conceptualised as a more reliable version of a section 7 report. It has no legal weight, but can be a useful way for the judiciary to provide commentary on the actions of Parliament and promote political change.

[48] Steven Gardbaum, above n 43, at 2245-2248.
[49] See for example the discussion in *Taylor v Attorney-General* [2014] NZHC 1630 at [83].
[50] Paul Rishworth "Reflections on the Bill of Rights after *Quilter v Attorney-General*" [1998] New Zealand Law Review 683 at 693.
[51] *Taylor v Attorney-General* [2015] NZHC 1706.
[52] Geoffrey Palmer and Matthew Palmer, above n 10, at 289.
[53] Geoffrey Palmer "The Bill of Rights after Twenty-One Years: the New Zealand Constitutional Caravan Moves on?", above n 18, at 261.
[54] Claudia Geiringer "Declarations of inconsistency dodged again" (2009) NZLJ 232 at 233.

2 Liberal approach to judicial interpretation

The next option for judicial intervention is for courts to adopt a more liberal approach to interpreting legislation that is potentially ambiguous. Unlike a declaration of inconsistency, this option does have some legal weight. Traditionally, the role of the judiciary is to apply the ordinary meaning of the statute as it was written by Parliament.[55] If the wording of a statute is unambiguous, then the courts must apply this, regardless of any potential rights violations.[56] However, many of the words in a statute can be uncertain (or can be construed as being uncertain). When this occurs, it is the task of the judiciary to resolve any ambiguities.[57] When the judiciary does this "a meaning that is consistent with the rights and freedoms contained [in the Bill of Rights] … shall be preferred to any other meaning".[58] Historically, the courts have taken a very cautious and prudent approach to interpreting legislation. Geoffrey Palmer writes that so far judges have been "careful and modest as to their role".[59] However, the courts do have substantial power in interpreting legislation. In another text, Geoffrey Palmer argued that "a statute [simply] means what the courts say it means".[60] Courts have the power to come up with creative interpretations when faced with potentially ambiguous legislative terms.[61]

Shimon Shetreet argues that in recent years, across jurisdictions, there has been an increasing demand on the judiciary to resolve political issues through liberal interpretation. Litigants have tried to avoid the arduous legal process by opting to bring a case to court for resolution.[62] Utilising the court process can promote efficiency of outcomes. Sir Owen Woodhouse noted that this trend has started to occur in the New Zealand context.[63] Minority groups are gradually starting to petition the courts to take action, because public opinion is constraining the actions of the legislature.

A prime example of this approach is the recent case of *Seales v Attorney-General*. The case concerned a terminally ill cancer patient, Lecretia Seales, who petitioned the court for her right

[55] Andrew Stockley, above n 19, at 114.
[56] Bill of Rights Act, s 4.
[57] Interpretation Act 1999, s 5.
[58] Bill of Right Act, s 6.
[59] Geoffrey Palmer "The Bill of Rights after Twenty-One Years: the New Zealand Constitutional Caravan Moves on?", above n 18, at 259.
[60] Geoffrey Palmer and Matthew Palmer, above n 10, at 289.
[61] See for example the discussion in *R v Poumako* [2000] 2 NZLR 695 and *R v Pora* [2001] 2 NZLR 37.
[62] Shimon Shetreet "Judicial independence and accountability: core values in liberal democracies" in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) at 13.
[63] Sir Owen Woodhouse "Government under the Law" (The Sixth J.C. Beaglehole Memorial Lecture, Price Milburn for the New Zealand Council for Civil Liberties, Wellington, 1979) at 7.

to die (although Parliament had not expressly passed euthanasia laws).[64] Ms Seales based her argument on two sections of the Crimes Act 1961: section 160(2)(a) (which prohibits the killing of any person by an unlawful act) and section 179(b) (which prohibits aiding or abetting the commission of suicide).[65] Ms Seales argued that if her doctor administered a fatal drug, the doctor would be "[administering] aid in dying" or "[facilitating] aid in dying".[66] These actions were submitted to be outside the scope of the two sections of the Crimes Act. The plaintiff based this argument on section 6 of the Bill of Rights Act, which holds that when two interpretations of an Act are available to the courts, the one most consistent with the Bill of Rights Act is to be preferred.[67] Prior to the hearing of the case, Andrew Geddis and Kathryn Tucker wrote that this was an exercise in statutory interpretation and accordingly, the plaintiff had a high chance of success.[68] However, the court rejected the plaintiff's case, saying that any change had to be left for Parliament to make.[69] Although the judiciary chose not to intervene and engage in a law-making function, this case shows there is an increasing demand on the judiciary to act when Parliament is unable or unwilling.

3 Refusal to apply some legislation

The previous two examples covered situations where the judiciary is still applying the law as written by Parliament. Consideration is now given to two situations where courts could refuse to apply legislation as written by Parliament. First, under the current system, the courts could refuse to apply legislation that eroded fundamental rights. Second, under a reformed system, the courts could refuse to apply legislation that unjustifiably conflicted with the Bill of Rights Act.

First, the courts could read in some form of restriction on Parliament's ability to enact law. There could be some laws, such as the abolition of the judiciary, which Parliament does not actually have the inherent power to pass. Lord Cooke of Thorndon wrote about this idea, saying: [70]

[64] *Seales v Attorney-General* [2015] NZHC 1239.
[65] At [7].
[66] At [5]-[6].
[67] At [209].
[68] Andrew Geddis and Kathryn Tucker "Litigating for a More Peaceful Death" [2015] NZLJ 172 at 174-176.
[69] *Seales v Attorney-General*, above n 64, at [211].
[70] *Taylor v New Zealand Poultry Board*, above n 12, at 398.

> I do not think that literal compulsion, by torture for instance, would be within the [lawful] powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them.

This is perhaps the most famous pronouncement that some theoretical limits on Parliamentary sovereignty exist. However, this issue has also arisen in several other cases. A number of judges have argued that if extreme legislation is passed, the courts reserve the power to refuse to apply it.[71] This mechanism could be a useful way for the courts to protect fundamental rights, as they could simply refuse to apply legislation that purports to override the most fundamental of common law rights. There are no practical examples of this power being used in practice, and it is arguable whether it currently exists in New Zealand.

4 Judicial supremacy

Finally, New Zealand could adopt the "strongest" form of judicial review. Under a reformed system of complete judicial supremacy, courts could legally strike down legislation which is inconsistent with fundamental human rights, as is the case in the United States.[72] Under such a system, the courts would have the power to invalidate any legislation that was incapable of being read consistently with the rights contained in the Bill of Rights Act. This would ensure that human rights can be protected by the judiciary, even in the face of adverse public opinion. The courts can look at a provision impartially and determine whether it is consistent with rights legislation.[73] They are not constrained by political pressures or the desire to be re-elected every three years.[74] The judiciary would have the authority to provide an effective check on legislative power.

An example of this is the recent case of *Obergefell v Hodges*, where the United States Supreme Court ruled that access to same-sex marriage is a right protected by the equal protection clause in the United States Constitution.[75] The legislature had failed to take action over this issue. However, because state legislation providing that "marriage" was defined as the union of one man and one woman was incapable of being read consistently with the rights contained in the Constitution, the court could declare the legislation invalid.[76] Therefore, access to marriage is

[71] See for example *L v M* [1979] 2 NZLR 519 at 527; *Brader v Ministry of Transport* [1981] 1 NZLR 73 at 78; *New Zealand Drivers Association v New Zealand Road Carriers* [1982] 1 NZLR 374 at 390; *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121.
[72] Constitution of the United States of America, art 6(2).
[73] Lord Cooke of Thorndon "The Myth of Sovereignty" (2005) 3 NZJPIL 39 at 41.
[74] Constitution Act, s 23.
[75] *Obergefell v Hodges* 576 US ___ (2015); See also Constitution of the United States of America, art 14.
[76] At 1-2.

now guaranteed across the United States for both opposite-sex and same-sex couples. This example shows how the "strongest" form of judicial review can be used to protect minority rights.

III Should Judicial Law-Makers Consider Public Opinion?

Despite the benefits of judicial law-making, there is a fundamental problem with all four of these approaches. This problem is particularly apparent for the "stronger" forms of judicial review. The main criticism of expanded judicial law-making power is based on the fact that the judiciary is unelected and does not represent the diversity of New Zealand society. Therefore, it would be inconsistent with the principles of democracy to give the courts power to interfere with legislation made by a democratically elected legislature. The argument is that for any successful society to function, the will of the people must prevail.[77] Any law-making function provided by the judiciary would suffer from a democratic deficit in the sense that majoritarian public opinion would play no role. Judicial law-makers would legislate in a vacuum, devoid from any reference to the desires of ordinary New Zealanders.

One way to cure this democratic deficit is to encourage the courts to consider public opinion when making decisions. This would mean that even if the courts had more power to make law (based on any of the four hypothetical options) this power would still be consistent with democratic values because the will of the people would be reflected in judicial outcomes. Focus now shifts to remedying the democratic deficit inherent in judicial law-making by encouraging courts to consider public opinion when they are exercising a law-making function. On one hand, it is arguable that the courts should retain the status quo and not consider public opinion (even if they are effectively making new laws). On the other hand, it is arguable that the courts should consider public opinion because they have broader law-making powers. This would be more consistent with democracy. I ultimately assert that the courts should only consider public opinion when their decision will have broad ramifications for a substantial portion of society. In addition, even in those cases, public opinion should only be one of many relevant factors for judges to consider. Judges should not be constrained by public opinion; it should be left to the judiciary to consider the weight given to this factor. This outcome would help judges to retain a significant degree of independence to adjudicate on important human rights issues,[78] while ameliorating the issue of democratic deficit.

[77] Michael Sandel, above n 14.
[78] Geoffrey Palmer and Matthew Palmer, above n 10, at 296.

In this paper, I focus on the arguments against judicial consideration of public opinion. These arguments are based on the proposition that the ability of the judiciary to function properly would be undermined if they had to consider public opinion. There are three important reasons that judges should continue to act without deference to public opinion: (a) the judiciary can continue to protect minority rights in the face of adverse public opinion, (b) refusal to consider public opinion ensures the judiciary remains apolitical so judicial independence is upheld, and (c) public opinion has no legal weight and judges may have difficulty ascertaining public opinion. Each of these arguments is now analysed in turn.

Despite these arguments, it is difficult to reconcile judicial law-making with the concept of democracy. There may be some circumstances where reference to public opinion is vital. This is particularly so when a judicial decision will have a broader societal impact. Therefore, under each of these headings, some important counter-arguments are addressed, such as: (a) the argument that judges need a democratic mandate in order to essentially make new law, (b) consideration of public opinion can provide a check on broader judicial power, and (c) judges must justify their decisions with reference to all relevant authority (and part of this authority could include public opinion).

A Judges Should Focus on Upholding the Rights of Minority Groups

The first argument is that judges should not consider public opinion because the judiciary should be designed to protect fundamental human rights.[79] As discussed in Part II, Parliament legislates to protect the interests of majority groups, as they want to seek re-election. As an important check on this branch of government, the judiciary should aim to protect the interests of minority groups by applying an unbiased and impartial analysis to each case. Therefore, the judiciary can provide a check on the political nature of the legislature. Shimon Shetreet wrote that judges should not be restrained by public opinion, saying:[80]

> One should be aware of the dangers which lie in undue popular pressures on judges. Excessive popular pressure and irresponsible journalists, hungry for sensational pieces, may put judges in an unbearable position … when they very often have to act against popular wishes to protect dissenters and members of minority groups.

[79] Barry Albin "The independence of the judiciary" (2014) 66 Rutgers Law Review 455 at 457-458.
[80] Shimon Shetreet "Judicial independence and accountability: core values in liberal democracies", above n 61, at 9.

Historically, an important function of the judiciary has been the protection of minority rights. The United States Supreme Court noted that certain fundamental rights "may not be submitted to vote" and "they depend on the outcome of no elections".[81] If the judiciary had to consider public opinion, they would be seeking aims that are aligned with those of the legislature, and their ability to safeguard human rights would be undermined.

A prime example of a court upholding human rights in the face of adverse public opinion occurred in the South African Constitutional Court case of *S v Makwanyane and Another*. In this case, the supreme judiciary held that the imposition of the death penalty was inconsistent with both the right to life and the right to human dignity (contained in the Constitution of the Republic of South Africa).[82] Accordingly, they refused to allow the government to carry out any more executions.[83] The court focused on protecting the rights enshrined in the constitution, despite the fact that most South Africans supported the use of the death penalty. The majority accepted that public opinion was not in favour of their decision, but still said:[84]

> The question before us … is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence. Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour.

The judiciary can be seen as having a very different function from the legislature. They can focus more heavily on the rights of minority groups because they are not constrained by a need to please the majority groups.

This point can be exemplified in the New Zealand context by a case where the court was forced to rule against the promotion of human rights. In *Quilter v Attorney-General*, the court held that same-sex couples did not have the right to marry, because the legislation that prohibited this right was sufficiently unambiguous. [85] The court decided that any change had to be left to the supreme Parliament.[86] At the time, Parliament was highly unlikely to reform the law in this area, because public opinion in New Zealand was largely against marriage equality.[87] However, with increased judicial power, the court could have protected minority rights and would not

[81] *West Virginia State Board of Education v Barnette* 319 US 624 (1943) at 638.
[82] *S v Makwanyane and Another* [1995] ZACC 3 at [95].
[83] At [151].
[84] At [87]-[88].
[85] *Quilter v Attorney-General* [1998] 1 NZLR 523 at 572-573.
[86] At 575.
[87] "Civil Union Bill: What the readers say" *New Zealand Herald* (online ed, 4 October 2004).

have to defer to popular public opinion. If the courts had one of the four options for judicial intervention discussed in Part II, the outcome could have been different.

The court in *Quilter v Attorney-General* could have ruled in favour of minority rights, and they would not be bound by public opinion. First, the court could have issued a declaration that the Marriage Act 1955 was inconsistent with human rights, which could inform the public and could cause a shift in popular public opinion. This would put pressure on Parliament to change the law. Second, the court could have been more liberal in their interpretation of the potentially ambiguous statute,[88] and declared that marriage is the union of any two people (based on the provision against discrimination in section 19 of the Bill of Rights Act). Third, under the current system, the court could have simply refused to apply the Marriage Act, holding that Parliament does not have the right to extinguish the fundamental right to marriage for same-sex couples. Finally, under a reformed system of judicial supremacy, the judiciary could have overturned the Marriage Act, declaring it unjustifiably inconsistent with the Bill of Rights Act.

It is arguable that judicial law-making gives unelected judges too much power. However, it is clear from this example that none of the four forms of judicial intervention presented give the courts broad power to create any law. They can only act when legislation created by Parliament is unjustifiably inconsistent with human rights. Therefore, judges are not given unlimited power to strike down legislation. Geoffrey Palmer asserts that a system of increased judicial power would not be wholly incompatible with democratic values. He writes:[89]

> It does not seem to me to be transferring much power to the judiciary to allow them to judge whether Parliament's handiwork offends the basic democratic freedoms and rights articulated in the Bill of Rights Act. It is not giving them a carte blanche to roam all over the body politic, substituting judicial judgement for parliamentary judgement. It is a narrow and confined remit within an established body of jurisprudence that is neither frightening nor unexpected.

Therefore, it is arguable that the courts should be able to act without reference to public opinion, because they are not creating law in the traditional sense. Parliament retains the power to pass any law. Those laws must simply be consistent with fundamental human rights.

---

[88] The Marriage Act 1955 did not actually define the term "marriage". The Marriage (Amendment) Act later inserted a definition of "marriage" into section 2, saying "marriage means the union of 2 people, regardless of their sex, sexual orientation, or gender identity".

[89] Geoffrey Palmer "The Bill of Rights after Twenty-One Years: the New Zealand Constitutional Caravan Moves on?", above n 18, at 274.

When issuing the decision in *Taylor v Attorney-General*, Heath J asserted that his judgment was grounded "in the obligation of the court to declare the true legal position".[90] It is arguable that the judiciary and the legislature should work together in a more practical way. If the legislature defers to public opinion and the judiciary does not, then this should promote a more meaningful dialogue about what the true legal position should be. As a result, minority rights can be protected.

1 Judicial law-makers need a democratic mandate

While this outcome seems beneficial and it is arguably consistent with democracy, there is still one critical problem: judicial law-making lacks a democratic mandate because judges are not elected. The case against judicial consideration of public opinion focuses largely on the premise that judges only interpret the law and apply it to each individual case, so it would be inappropriate to take extensive external material (such as public opinion) into account. Thomas J described the court's "essential function" in *Electoral Commission v Tate*, saying "broadly speaking, that function is to interpret and apply the law to the facts of a particular case".[91] When the courts discharge this "essential function" they are giving effect to the will of Parliament, and essentially, the will of the people.[92] Therefore, it can be said that only under the current system is the existence of an unelected judiciary consistent with the concept of democracy. This problem is evident even if judges only have narrow power to challenge law as written by Parliament, because they are still substituting their will for the will of the people. The outcomes of cases where judges exercise their narrow law-making power can still have very wide ramifications.

This is exemplified by the cases of *Quilter v Attorney-General*, *Seales v Attorney-General*, and *Attorney-General v Ngati Apa*. These three cases show that judicial decisions can potentially have broad implications on public policy. If the court had ruled in favour of the plaintiffs in *Quilter v Attorney-General*, this would presumably have had the effect of legalising same-sex marriage nationwide. Marriage equality would have become law 15 years before Parliament made the change, at a time when public opinion was still largely against it. If the court had ruled in favour of the plaintiff in *Seales v Attorney-General*, this could have made euthanasia more accessible for seriously terminally ill patients (even after Parliament had already failed

[90] *Taylor v Attorney-General*, above n 51, at [70].
[91] *Electoral Commission v Tate* [1999] 3 NZLR 174 at [31].
[92] Peter Cane *An Introduction to Administrative Law* (Oxford, Clarendon Press, 1996) at 12.

to make the change).[93] The case of *Attorney-General v Ngati Apa* opened up the possibility of Maori groups seeking title to the foreshore and seabed,[94] something which Parliament later rejected.[95] These examples show the potentially broad implications of some important judicial decisions.

Therefore, if judges have more extensive power and make decisions relating to public policy, then there is a strong case they should at least consider the popular public opinion on certain issues. Judges should consider public opinion because there should be public discussion and involvement in human rights adjudication. It is important that all members of the public are informed and are able to give their views on a particular issue. This ensures any policy decision is made after consulting all the people it will affect and considering all of their diverse perspectives.[96] Just as Parliament must consider public opinion, it would make sense for the judiciary to consider this as well. Listening to the voices of the people is an essential part of democracy and it is arguable that a democratic system leads to the creation of the most effective laws.[97] People are more likely to respect a law if they know their views were considered when it was made.

Consideration of public opinion is also valuable because it promotes a utilitarian outcome. Utilitarianism is perhaps best described by Jeremy Bentham, who argued that "it is the greatest happiness of the greatest number that is the measure of right and wrong".[98] Based on this approach, a good law is one that has net benefit for the general population. Citizens presumably vote for the outcome that gives them the most happiness, which means a democratic process achieves a utilitarian outcome. It is arguable that minority rights are not critically important provided the majority of people are satisfied with a given outcome.

Law-makers also need to have a democratic mandate to ensure power is distributed equally. No group should have more authority on the basis of socio-economic status or position in society.[99] In the interests of fairness, the views of all people should be considered when an entity is exercising a law-making function. Otherwise, the elite entity that holds power can make decisions that favour them, as opposed to decisions that are beneficial for society as a

[93] Death with Dignity Bill 1995 (00-1); Death with Dignity Bill 2003 (37-1).
[94] *Attorney-General v Ngati Apa*, above n 27, at 643-645.
[95] Foreshore and Seabed Act, s 13.
[96] Michael Sandel "Why Democracy?", above n 14.
[97] Michael Sandel "Why Democracy?", above n 14.
[98] JH Burns "Happiness and Utility: Jeremy Bentham's Equation" (2005) 17 Utilitas 46 at 46.
[99] Joshua Cohen "Deliberation and Democratic Legitimacy" in James Bohman and William Rehg (eds) *Deliberative Democracy: Essays on Reason and Politics* (MIT Press, Cambridge, Massachusetts, 1997) at 74.

whole. Throughout history, various forms of undemocratic government have been rejected in favour of majority rule by ordinary people. A prime example of this is the wave of revolution that has swept across the world over the last 300 years, as citizens have rejected bureaucratic systems of government. Zhand Shakibi argues that the challenges of making and maintaining "the bureaucracy of a supposedly absolute monarchy function" led to the downfall of three monarchs: Louis XVI of France, Nicholas II of Russia, and Mohammad Reza Shah of Iran.[100]

It is arguable that just like bureaucracy, a system of increased judicial power amounts to another form of undemocratic government. Ran Hirschl coined the term "juristocracy" which describes a system where power is held by elite judges.[101] John Smillie criticised such a system, saying it is:[102]

> [I]nherently undemocratic to permit a small group of non-elected, mostly male, former lawyers to substitute their views on highly contestable moral and social issues for those of the democratically elected parliament.

Judges can make decisions that benefit them and they do not represent ordinary New Zealanders. It is important that judges seek a democratic mandate because they are not generally representative of the diversity in New Zealand society. While Parliament has become more diverse following the introduction of a mixed member propositional representation electoral system,[103] the judiciary is still primarily made up of Pakeha men. Catriona MacLennan noted that in 2013, 72 percent of judges were male.[104] In addition, the judiciary is not sufficiently ethnically diverse. In 2015, 93.1 percent of judges identified as New Zealand European,[105] compared to 74 percent of the general population.[106] The lack of gender and ethnic diversity on the judiciary is concerning.

---

[100] Zhand Shakibi *Revolutions and the Collapse of the Monarchy: Human Agency and the Making of Revolution in France, Russia and Iran* (IB Tauris, London, 2007) at 29-33.
[101] Ran Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, Cambridge, Massachusetts, 2004).
[102] John Smillie "Law, Social Policy, and the Courts: Who Wants Juristocracy?" (2006) 11 Otago LR 183 at 184.
[103] Derek Cheng "Dumping MMP huge setback for ethnic diversity, expert warns" *New Zealand Herald* (online ed, 25 June 2010).
[104] Catriona MacLennan "Greater diversity needed in judiciary" *New Zealand Herald* (online ed, 17 April 2013).
[105] New Zealand Law Society "Snapshot of the Profession" (2015) 859 LawTalk 7 at 18.
[106] "2013 Census – Major ethnic groups in New Zealand" (29 January 2015) Statistics New Zealand <www.stats.govt.nz>.

Judges can also lack diversity in other aspects. Ben Keith argues that judges have limited experience and a "limited outlook on the world".[107] Many judges are unaware of the wider societal impact their decisions will have. Stephen Gardbaum writes that:[108]

> [E]lectorally-accountable representatives are able to bring a greater diversity of views and perspectives to bear on rights deliberations compared to the numerically smaller, cloistered and elite world of the higher judiciary.

Therefore, it is arguable that judges do not have adequate resources to make decisions that have a broad impact on society. Harriet Farquhar argues that a representative bench is important because the benefit of the different perspectives brought by diversity improve the judicial product.[109] Therefore, if the judiciary is to effectively create law, then they should have regard to public opinion and the diverse views of all New Zealanders. This is an important criticism and it is vital that policy makers focus on a way to increase diversity within the judiciary. However, it is also arguable that the judiciary does not need to be substantially diverse in order to make the best decisions. Members of the judiciary could still have the skill and expertise to make important decisions about human rights.

Finally, there is a precedent of foreign judges seeking a democratic mandate through consideration of public opinion. It seems as though foreign courts who have law-making power already generally consider the views of the public. This precedent is one that New Zealand should arguably follow. In particular, the outcomes of many United States Supreme Court cases appear to simply be reflecting majoritarian public opinion. For example, in *Korematsu v United States* the Supreme Court upheld the constitutionality of Executive Order 9066.[110] This meant the federal government could order anyone of Japanese descent into an internment camp, regardless of citizenship. The original order was largely made in response to widespread xenophobia against Japanese Americans. When Assistant Secretary of War John McCloy was asked about the removal decision, he acknowledged that "public sentiment was a determining factor".[111] The Supreme Court refused to strike down the order, saying that while racial antagonism can never justify placing legal restrictions on an ethnic group, "pressing public

[107] Ben Keith "Seeing the World Whole: Understanding the Citation of External Sources in Judicial Reasoning" (2008) 6 NZJPIL 95 at 110-111.
[108] Steven Gardbaum, above n 43, at 2234.
[109] Harriet Farquhar "New Zealand's Diversity Deficit: Towards a More Representative Judiciary" (LLB (Hons) Dissertation, Victoria University of Wellington, 2015) at 5-7.
[110] *Korematsu v United States* 323 US 214 (1944).
[111] Brian Masaru Hayashi *Democratizing the Enemy: The Japanese American Internment* (Princeton University Press, Princeton, 2004) at 78-79.

necessity may sometimes justify the existence of such restrictions".[112] However, with no evidence that Japanese Americans posed any threat to public safety,[113] it seems likely that the Supreme Court was acting in accordance with popular public opinion. *Korematsu v United States* is an example of the United States Supreme Court ruling against minority rights in favour of majoritarian public opinion. One of the dissenting judges, Justice Murphy, described the decision as falling "into the ugly abyss of racism".[114]

Despite this, there are also examples of the United States Supreme Court choosing to promote human rights once popular public opinion shifts in favour of the change. In this way, the court has acted to speed up the legislative process, as Congress can take a long time to pass legislation. A recent example of this is the case of *Obergefell v Hodges* 576 US ___ (2015), where the Supreme Court ruled that same-sex marriage was a constitutional right nationwide.[115] Prior to this, public opinion polling had indicated broad support for the change.[116] When discussing the ruling, Supreme Court justice Ruth Bader Ginsburg noted that "… the court is not in a popularity contest, and it should never be influenced by today's headlines, but inevitably it will be affected by the climate of the era".[117] She provided a clear statement that the court does not take public opinion into account. However, this is then qualified by an explanation that it is hard for the court to completely disregard public opinion. It seems as though public opinion is already an important consideration for the supreme judiciary in the United States, and this can sometimes come at the expense of minority rights.

Even in New Zealand, judicial consideration of public opinion is not a new concept. Judges have previously asked interested groups to give evidence. A primary example of this occurred in a dispute about relationship property. In the case of *Z v Z (No 2)* the court asked interested groups to give evidence.[118] Part of the reason for this was that the case, concerning division of matrimonial property, would set a precedent and have broader implications for future parties.[119] This case shows that even in a legal system based on pure legislative supremacy, there is a

[112] *Korematsu v United States*, above n 110, at 217.
[113] Commission on Wartime Relocation and Internment of Civilians *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians* (Washington, D.C., December 1982) at 185-186.
[114] At 223.
[115] *Obergefell v. Hodges*, above n 75.
[116] Jeffrey Lax and Justin Phillips "Gay Rights in the States: Public Opinion and Policy Responsiveness" (2009) 103 American Political Science Review 367 at 367-368.
[117] Interview with Ruth Bader Ginsburg, United States Supreme Court Justice (Goodwin Liu, 2015 American Constitution Society National Convention, 13 June 2015) transcript provided by American Constitution Society (Washington, DC).
[118] *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 273.
[119] Ben Keith, above n 107, at 105.

precedent of judges seeking external aid in order to make the most appropriate decisions. In other jurisdictions where judicial power is broader, judges more frequently seek external guidance.[120] This is because judges need to be very well informed before making a policy decision. I argue that the correct approach was taken in this case, only because the outcome of the case would have broader legal consequences. In addition, the opinions given by relevant interested groups were only one of many considerations for the court to take into account. The judiciary used a cautious and limited approach when considering public opinion in order to preserve their independence.

B Considering Public Opinion Undermines Judicial Independence

This leads to the second important reason for disallowing consideration of public opinion: it can undermine judicial independence. Judges should not consider the views of the general public, because judicial independence requires them to be objective and impartial.[121] Members of the judiciary need to make decisions free from influence by other branches of government or the public.[122] It is important that judges have both personal and substantive independence. Personal independence means that judges enjoy "security of office, life tenure and adequate remuneration and pensions".[123] These safeguards protect judges from being unduly influenced by any other public figures. In addition, judges require substantive independence. Shimon Shetreet notes substantive independence means that "in the discharge of his function a judge is subject to nothing but the law and the commands of his conscience". He continues by adding that the judge must be "totally free from irrelevant pressures".[124]

It is vital that judicial independence is protected in order to uphold the rule of law and enhance public confidence in the judicial system. Historically, judicial independence has been crucial to ensuring disputes are resolved using "logical, analytical methods".[125] Judges must determine the outcome of the case by applying the relevant law. Any external interference with their

[120] At 104-105.
[121] "Guidelines for Judicial Conduct", above n 11, at [9].
[122] At [11].
[123] Shimon Shetreet "Judicial independence and accountability: core values in liberal democracies", above n 62, at 15.
[124] Shimon Shetreet and Jules Deschenes *Judicial Independence: The Contemporary Debate* (Martinus Nijhoff Publishers, Dordrecht, Netherlands, 1985) at 630.
[125] Shimon Shetreet "Judicial independence and accountability: core values in liberal democracies", above n 62, at 7.

judgment can lessen the quality of judicial outcomes. When judicial independence is protected, public confidence in the judiciary is upheld.[126]

Judicial independence is a critical aspect of New Zealand's legal system. Other jurisdictions, such as the United States and Switzerland, have judiciaries which are not politically neutral.[127] This has the potential to generate court decisions that are politically motivated and erodes the ability of the judiciary to effectively oversee the legislature and adjudicate fairly on rights issues. The concept of judicial independence would be undermined in New Zealand if judges were required to consider public opinion, because then an external source could unduly guide their decision-making. JA Jolowicz wrote that there are many different definitions and conceptions of judicial independence. However, several key aspects are present in every definition. One of these is that "[a judge] must also be free of interference or influence outside the proceedings from the parties or others".[128] Therefore, in order to uphold the principle of judicial independence, judges should not consider public opinion.

Judicial independence also requires that a judge be free from any conflict of interest, particularly one that shows bias in regards "to differences arising from culture, race, religious beliefs, or gender".[129] If judges consider public opinion, then they also need to consider the general public bias that exists towards these groups. Therefore, consideration of public opinion is incompatible with judicial independence in this aspect as well. In addition, judicial guidelines state that judges should not publicly express any political views.[130] If judges considered public opinion, they would be forced to consider the political views held by members of the public. This would unduly guide their reasoning and be inconsistent with Shimon Shetreet's argument that judicial independence requires total neutrality.[131]

1 Consideration of public opinion can provide a check on judicial power

The primary counter-argument to this is that judicial independence is not of paramount importance. Instead, judges' power should be controlled and they should be held accountable

[126] *R v Valente* (1983) 2 CCC (3d) 417 at 423.
[127] Mark Tushnet "Judicial selection, removal and discipline in the United States" in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) at 135-136; Benjamin Suter "Appointment, discipline and removal of judges: A comparison of the Swiss and New Zealand judiciaries" (LLM Research Paper, Victoria University of Wellington, 2015) at 23.
[128] JA Jolowicz "Angleterre" in M Cappelletti and D Tallon (eds) *Fundamental Guarantees of the Parties in Civil Litigation* (Giuffre, Milan, 1973) at 121.
[129] "Guidelines for Judicial Conduct", above n 11, at [23].
[130] At [60].
[131] Shimon Shetreet and Jules Deschenes, above n 124, at 630.

for the decisions that are made. Consideration of public opinion can provide an important check on judicial power. If judges have the ability to essentially make laws, then there should be some controls in place to limit this power. There are several reasons for this. First, judges may not make decisions which are beneficial for all New Zealanders. It is an assumption to say that a powerful judiciary always rules in favour of protecting minority rights when given the opportunity. Not all judges may be objective and impartial in practice. If they have their own political motivations they may aggressively rule against popular public opinion (even if public opinion is in favour of expanding human rights legislation). To demonstrate this point, there are several cases where the United States Supreme Court failed to uphold basic human rights. Notable examples include: *Scott v Sandford*, which held that a black person could not be a citizen of the United States,[132] and *Plessy v Ferguson*, which upheld the constitutionality of segregation laws.[133] Therefore, it is difficult to say that judges always uphold human rights in the face of contrary public opinion. There need to be checks on the power of the judiciary, just like there are electoral checks on Parliament.

It is arguable that the principle of judicial independence is not as important as it is often made out to be. Judicial independence cannot be prioritised over judicial accountability. The judiciary must be held publicly accountable for the decisions that are made.[134] This is especially so when a judicial decision amounts to effectively making a new law. Therefore, there is tension between accountability and independence.[135] These principles need to be balanced rather than overly emphasising independence.

Shimon Shetreet argues that judicial accountability is important and must be finely balanced with judicial independence, because the public expects the judiciary to be held accountable for "failures, errors, or misconduct".[136] Without judicial accountability, public confidence in the judiciary can be compromised, because the public expects the judiciary to be answerable to society.[137] Riddell JA of the Court of Appeal for Ontario wrote that "judges are the servants, not the masters of the people".[138] Therefore, it is arguable that judges should have to consider public opinion and reflect the views of the people. The judiciary is a public institution and as

[132] *Scott v Sandford* 60 US 393 (1856) at 394.
[133] *Plessy v Ferguson* 163 US 537 (1896) at 538-539.
[134] Lord Hailsham "The Independence of the Judicial Process" (1978) 13 Israel Law Review 1 at 8–9.
[135] Andrew Le Sueur "Parliamentary Accountability and the Judicial System" in Bamforth and Leyland *Accountability in the Contemporary Constitution* (Oxford University Press, Oxford, 2013) at 201-202.
[136] Shimon Shetreet "The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986" (1987) 10 UNSW Law Journal 4 at 7.
[137] At 6.
[138] *David Actylene Gas Co v Morrison* (1915) 34 OLR 155 at 158.

such, cannot make decisions in a vacuum without regard to the commonly held views of the people. By making public opinion a mandatory factor for judges to consider, judicial accountability is protected. Judges are responsible to the public and their decisions should reflect the wishes of the public.

C Public Opinion Has No Authority in Judicial Law-Making

A final important reason to disregard public opinion is that it actually holds no legal weight. When making decisions, judges should be guided by relevant sources such as legislation, case law, and appropriate external sources (such as expert evidence).[139] It is arguable that public opinion cannot be classed as an appropriate external source. Ben Keith argues that use of external material could potentially give some sort of "inherent legal authority to that material".[140] Roger Alford describes use of external material as a way of outsourcing authority from legislation and case law.[141] Therefore, public opinion is simply irrelevant when judges are deciding the outcome of a case. It introduces "a utilitarian analysis that runs counter to [the] legal basis" of judicial decision-making.[142] In addition, deference to public opinion has the potential to impede the court's ability to consider other relevant factors such as international legal obligations and the Treaty of Waitangi.[143] This is because adding more factors for judges to consider inevitably means less weight must be given to each new competing factor.

A particular problem with judicial focus on public opinion is that this focus could come at the expense of considering expert opinion. This is particularly problematic given the fact that sometimes public opinion is in direct opposition to expert evidence.[144] A prime example of this issue arose in the case of *Seales v Attorney-General*. In that case, the plaintiff (Ms Seales) was joined by three additional parties: the Human Rights Commission, Care Alliance, and the Voluntary Euthanasia Society of New Zealand. These three parties gave expert evidence about the inconsistency of the current law with both the Bill of Rights Act and human rights generally.[145] Therefore, there was expert evidence in favour of the plaintiff's argument. However, the judiciary decided it could not act and any change had to be left to Parliament.[146]

[139] Ben Keith, above n 107, at 95-97.
[140] At 95.
[141] Roger Alford "Four Mistakes in the Debate on 'Outsourcing Authority'" (2006) 69 Albany LR 653 at 658.
[142] Ben Keith, above n 107, at 114.
[143] Ben Keith, above n 107, at 102; See also Bill of Rights Act 1990, s 6.
[144] Sharon Casey and Phillip Mohr "Law-and-Order Politics, Public-Opinion Polls and the Media" (2005) 12 Psychiatry, Psychology and Law 141 at 142-143.
[145] See generally *Seales v Attorney-General*, above n 64.
[146] *Seales v Attorney-General*, above n 64, at [210]-[211].

Following the decision, a petition was presented to Parliament asking them to "investigate fully public attitudes towards the introduction of legislation which would permit medically-assisted dying in the event of a terminal illness or an irreversible condition which makes life unbearable".[147] Following this, an inquiry is to be carried out by the Health Select Committee who may or may not recommend legislative change. This is problematic, because now the general public opinion has a great amount of weight in determining an issue that arguably should be left to the relevant experts.

Another example of this issue in the New Zealand context is the increasing focus on punitive measures in sentencing. Successive governments, driven by popular public opinion, have adopted a "tough on crime" rhetoric when legislating judicial guidelines for judges.[148] Lobby groups, such as the Sensible Sentencing Trust, have added to the general public hysteria.[149] However, there is a body of criminological research which suggests a punitive approach is ineffective at reducing rates of recidivism and reintegrating offenders back into society.[150] Despite this research, a harsh approach has been favoured in recent legislation, and has been applied by the judiciary.[151] Sharon Casey and Phillip Mohr argue that a reliance on public opinion could cause problems with informed discussion as members of the public can be uninformed and very emotive.[152] People do not always reason in a rational way, and many do not consider long-term implications.[153]

In addition, it is arguable that many members of the New Zealand public are uninformed because they are generally apathetic to any important changes. In *Taylor v Attorney-General*, the High Court issued the first judicial declaration of inconsistency, declaring that the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (which disenfranchised prisoners) was an unjustified limitation on the right to vote contained in section 12 of the Bill of Rights Act.[154] However, the decision generated relatively little publicity and the government

[147] Alastair Hercus and others "The right to die in New Zealand – Seales v Attorney-General" (21 August 2015) Buddle Findlay <www.buddlefindlay.com>.
[148] John Pratt and Marie Clark "Penal populism in New Zealand" (2005) 7 Punishm Soc 303 at 304-305.
[149] Deborah Coddington "Blinded justice" *New Zealand Herald* (online ed, 8 November 2009).
[150] Hennessey Hayes "Assessing Reoffending in Restorative Justice Conferences" (2005) 38 Australian and New Zealand Journal of Criminology 77 at 79-80.
[151] See generally Sentencing Act 2002; Nessa Lynch "'Contrasts in Tolerance' in a Single Jurisdiction: The Case of New Zealand" (2013) 23(3) Int'l Crim Just Rev 217 at 227-228.
[152] Sharon Casey and Phillip Mohr, above n 144, at 148.
[153] Alana Cornforth "Behaviour Change: Insights for Environmental Policy Making from Social Psychology and Behavioural Economics" (2009) 5 Policy Quarterly 21 at 22-23.
[154] *Taylor v Attorney-General*, above n 51.

has yet to formally respond.[155] Andrew Geddis noted that "because New Zealand has an unwritten, largely informal constitution, it can change in quite major ways without generating much fanfare".[156] This case shows that New Zealanders can be largely disinterested and uninformed when it comes to constitutional developments, which supports the proposition that courts should rely on important empirical evidence as opposed to public opinion. These examples show that in some cases, when the judiciary makes decisions based on public opinion they can achieve less effective outcomes.

The benefits of relying on empirical evidence and largely ignoring public opinion are perhaps best exemplified by the United States case of *Brown v Board of Education*. In this case, the Supreme Court ruled that racial segregation in schools was unconstitutional.[157] Part of the basis for this decision was expert evidence given that racial segregation caused psychological harm to black children.[158] Philippa Strum noted the advantages of using an approach based on empirical evidence, saying lawyers should focus on explaining the "facts that make a law reasonable".[159] By avoiding consideration of potentially ill-informed and emotive public opinion, the court can make more logical decisions.

A further reason to not consider public opinion is that judges may have trouble actually determining the predominant public view. Without recourse to reliable and secure public voting on an issue, judges will inevitably struggle to determine the general public opinion at any given time. Judges would have to resort to crude mechanisms like opinion polling in order to determine what the majority of the public wanted. Sharon Casey and Phillip Mohr argue that data relating to public opinion is "subject to both random and systematic errors".[160] Polls can focus on skewered sample groups and sampling is inherently unreliable.[161] In the interests of accuracy and efficiency, judges should disregard the consideration of public opinion entirely. However, there is a counter argument that judges could instead invite interested groups to make submissions, similarly to the way the Select Committee asks for public submissions.[162] This

[155] Claire Trevett "Prisoners should be allowed to vote: High Court" *New Zealand Herald* (online ed, 24 July 2015).
[156] Andrew Geddis "Andrew Geddis: Message on prisoner voting rights 'unequivocal'" *New Zealand Herald* (online ed, 28 July 2015).
[157] *Brown v Board of Education* 347 US 483 (1954) at 495-496.
[158] At 494-495.
[159] Philippa Strum "Brandeis and the Living Constitution" in Nelson Dawson (ed) *Brandeis and America* (University Press of Kentucky, Lexington, 1989).
[160] Sharon Casey and Phillip Mohr, above n 144, at 147.
[161] At 145-146.
[162] Ben Keith, above n 107, at 105.

could ameliorate the problem of using potentially inaccurate polling data, but it would still result in only a small portion of people being heard by the judiciary.

This raises the issue of consistency. If courts were to take public opinion into account, it would be difficult to determine how consistently this could be done in practice. The judiciary may choose to see public opinion as a relevant factor, but this leaves open the issue of how much weight this factor should have. Various judges could ascribe different weight to public opinion. Some may see it as paramount while others could be more prepared to derogate from the popular public viewpoint. Public opinion that is overwhelmingly in favour of one position (such as the outcry that lead to the enactment of the Foreshore and Seabed Act) may be seen as a more substantial factor than public opinion that is more closely in favour of one position (such as the vote that lead to the retention of the mixed member proportional representation system).[163] Conversely, it may not be regarded as a more important factor. It is arguable that there are too many variables and the introduction of public opinion as a relevant factor could produce inconsistent outcomes, which would erode public confidence in the judiciary.[164] However, it is also arguable that the development of comprehensive judicial guidelines could ameliorate this issue and achieve more consistent results.

1 Judges must justify their decisions with regard to all relevant factors

There is an important counter-argument to the proposition that public opinion is irrelevant. Judges must justify their decisions with regard to all significant factors, and this should include public opinion. It is important that judges provide logical and comprehensive justifications for the decisions they make. John Bell writes that judges often refer to vague concepts such as "common sense" and that judges must validate their decisions in a more appropriate way, particularly when the decision in question affects future policy.[165] John Burrows argues that the judiciary needs to understand the broader implications of their decisions,[166] and apply these when writing their final judgments. Even members of the judiciary have themselves supported this idea. Sir Ivor Richardson argued that:[167]

[163] Amelia Romanos "Final poll shows MMP holding its strong lead" *New Zealand Herald* (online ed, 25 November 2011).
[164] Claire Baylis "Justice Done and Justice Seen to be Done – The Public Administration of Justice" (1991) 21 VUWLR 177 at 184-185.
[165] John Bell *Policy Arguments in Judicial Decisions* (Clarendon Press, Oxford, 1983) at 35-36.
[166] John Burrows "Interpretation of Legislation: The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR 561 at 565.
[167] *Williams v Attorney-General* [1990] 1 NZLR 646 at 681.

> [T]he court should be furnished with arguments and available analytical material so that proposed policy alternatives are considered in an informed way rather than resting on instinctive responses supported by generalised reasons.

It follows from this that the judiciary should consider all available material, in order to make a justified decision. Part of this material must be popular public opinion. Judges should consider how the majority of ordinary New Zealanders feel about the changes they want to make, especially if these changes have wide-ranging effects. This is consistent with the democratic nature of our legal system.

In addition, if the judiciary properly justifies the decisions that are made and refers to popular public opinion, this should increase public confidence in the judiciary. It is extremely important that the public has confidence in the ability of the judiciary to make the correct decisions. Justice must be done and must be seen to be done.[168] However, there is a counter-argument here that because the judiciary is losing some of its independence, this will also have the effect of reducing public confidence. There is a tension between considering all available material and being fully independent. These values must be balanced.

These counter-arguments raise valid points. However, I argue that these points cannot generally trump the importance of protecting minority rights and upholding judicial independence. It is important that judges are free from any irrelevant pressures.[169] This ensures they make decisions that are consistent with human rights. However, in the specific situation that judges are effectively creating new law, public opinion should be one of many factors to be considered. Public opinion should not be determinative nor should it be conclusive. However, the views of ordinary New Zealanders should at least be a relevant factor in judicial law-making.

IV Recommendation

Given the competing arguments, it is difficult to determine the most appropriate way for judges to reduce the democratic deficit when effectively making new law. On one hand, considering public opinion is consistent with democratic values. On the other hand, considering public opinion can lead to outcomes which conflict with important human rights. I argue that the correct approach is for judges to consider public opinion in certain cases, but even in those

[168] Shimon Shetreet "Judicial independence and accountability: core values in liberal democracies", above n 62, at 10-11; See also Claire Baylis, above n 164.
[169] Shimon Shetreet "Judicial independence and accountability: core values in liberal democracies", above n 62, at 9.

cases, it should only be one of many factors to be taken into account. The use of public opinion should be restricted in order to preserve judicial independence and ensure other relevant considerations are given due weight. In addition, it is vital that judges limit use of majoritarian public opinion so they can protect minority rights. In this way, the role of the judiciary can complement the role of the legislature. Legislators can focus on reflecting the views of the majority while judges focus on protecting minority groups from the "tyranny of the majority".[170] Largely ignoring public opinion avoids the problem of over-politicising the judiciary. Judicial agents are free to consider issues that Parliament has failed to take into account, such as human rights legislation, international legal obligations, and the Treaty of Waitangi.[171]

Given this starting point, it must be determined in which situations courts should have some reference to public opinion. Public opinion should only be relevant where the decision has broader societal implications. In other words, it should only be considered where judges are (1) effectively creating a new law and (2) this new law will affect a substantial part of society. In cases concerning either private disputes between individuals or disputes that could have broader legal implications but only for minority groups, public opinion should remain irrelevant.

This means there are three categories of cases, and public opinion should only be relevant in one. To demonstrate this point, three examples are discussed. First, there is a situation where the dispute is essentially private in nature and does not have any broader ramifications. An example of this is criminal sentencing. In sentencing cases, the court should not consider public opinion. Judges should determine which outcome is best for the parties involved (with reference to the guidelines in the Sentencing Act 2002).[172] This is important because public opinion can be inconsistent with specialist evidence about how best to achieve sentencing aims.[173] Second, there is a situation where a court decision could amount to making new law, but this law affects only a small portion of society, so judges should focus on upholding minority rights as opposed to reflecting public opinion. In *Taylor v Attorney-General*, the court was asked to consider whether disenfranchising prisoners was inconsistent with human rights legislation. They held that the Electoral (Disqualification of Sentenced Prisoners) Amendment Act amounted to an unjustified limitation on the right to vote contained in section 12 of the Bill

[170] John Stuart Mill, above n 6, at 7.
[171] Ben Keith, above n 107, at 102.
[172] Sentencing Act 2002, ss 7, 8, 9 and 10.
[173] John Pratt and Marie Clark, above n 148, at 307.

of Rights Act. In this case, the court was right not to defer to public opinion, because the decision would only affect the rights of a minority group. The rights of any non-prisoners were not at issue. Therefore, their views should not be considered.

Conversely, there are some cases where public opinion should be a judicial concern, because the judiciary is essentially making a law that affects the general population. For example, in *JT International SA v Commonwealth of Australia*, the High Court of Australia held that plain packaging regulations for tobacco products did not constitute "acquisition of property" and as such, these regulations were legal.[174] Tobacco companies are now required to use plain packaging when selling their products in Australia.[175] The decision made no reference to public opinion (which presumably had driven the original legislative change). However, the court agreed with both the legislature and the prevailing public opinion. Studies have shown that the majority of people support new measures to control the availability and use of tobacco products.[176] It is important that the courts have some regard to public opinion in similar cases, because their decision has broader legal implications for a large portion of society. In this case, there were serious restrictions placed on the use of intellectual property for tobacco companies.[177]

The final issue to resolve here is how to determine whether a decision will have broader ramifications for a substantial part of society. It could be hard for the court to categorise cases in the way discussed on a consistent basis. I propose that if the legislature were to allow reform and give the judiciary more power, then they should also develop a comprehensive set of judicial guidelines. These guidelines will assist judges in this categorisation exercise. The guidelines should be based on the provisions of the Supreme Court Act 2003 which relate to criteria for leave to appeal. The Act states that one of the reasons "for the Supreme Court to hear and determine a proposed appeal [is] if … the appeal involves a matter of general or public importance".[178] Once the test "a matter of general or public importance" is met, the court should consider public opinion as a relevant factor.

In practice, the court itself would have to decide whether this test is met, just as the Supreme Court determines whether an appellant's claim falls within the scope of section 13 of the

[174] *JT International SA v Commonwealth of Australia* [2012] HCA 43 at [297]-[298].
[175] Tobacco Plain Packaging Act 2011 (Australia).
[176] Raoul Walsh and others "Is Government Action Out-of-Step with Public Opinion on Tobacco Control? Results of a New South Wales Population Survey" 32 Australian and New Zealand Journal of Public Health 482 at 485-487.
[177] *JT International SA v Commonwealth of Australia*, above n 174, at [298].
[178] Supreme Court Act 2003, s 13(2)(a).

Supreme Court Act.[179] The judiciary should have regard to the body of case law on whether an appeal is "a matter of general or public importance" to determine whether a case requires consideration of public opinion. However, many cases are confined to their particular facts, which makes it difficult for the courts to develop a logical and comprehensive test. For example, the court in *Zaoui v Attorney-General* held that the issue of whether the defendant should be granted bail was sufficiently important to grant leave.[180] The case was very fact-specific and is arguably unlikely to come before the Supreme Court again. It is important that guidelines are in place in order for the judiciary to make consistent decisions. However, given the fact-specific nature of judicial decision-making (and consequently judicial law-making), it might be best to set the broad guideline that a case must concern "a matter of general or public importance" and allow judges the discretion to apply that test to each individual case. For this approach to work, it is imperative that judges give comprehensive reasons for why a case does or does not meet this test.

The authors of *McGechan on Procedure* set out a concise summary of the case law in this area. They agree that the phrase "a matter of general or public importance" will "obviously depend on the circumstances, and it is not possible to provide a concise definition of when those criteria will be met".[181] However, the text also provides a list of the important cases where the criteria has been satisfied:[182]

(1) Where the issue is whether "barristerial immunity" should continue to apply.[183]

(2) Where the issue is whether a person can act as an employee or independent contractor under the Employment Relations Act 2000.[184]

(3) Where the case concerns important questions of electoral law, such as the proportionality of Parliament.[185]

(4) Where the case involves the determination of the meaning of s 44C Property (Relationships) Act 1976.[186]

[179] Andrew Beck "The Court of Final Appeal" [2006] NZLJ 17 at 17.
[180] *Zaoui v Attorney-General* (Supreme Court of New Zealand, CIV SC 13/04, 14 October 2004).
[181] *McGechan on Procedure* (Brooker's Ltd, Wellington, 1988) at [6 – 199].
[182] At [6 – 199].
[183] See *Chamberlains v Lai* [2005] NZSC 32.
[184] See *Bryson v Three Foot Six Ltd* [2005] NZSC 6, [2005] ERNZ 311.
[185] See *Prebble v Huata* 25/8/04, SCCIV9/2004.
[186] See *Nation v Nation* (2005) 17 PRNZ 568; 24 FRNZ 336 (SC).

The authors of *McGechan on Procedure* also provide a list of cases where the criteria has not been met.[187] Their analysis shows that even though the term "a matter of general or public importance" is somewhat vague, a body of case law can develop in this area which allows judges to determine whether the test is met in later cases.

Though this seems like a useful starting point, using these decisions for guidance is also problematic, because the court often fails to give reasons for allowing or denying leave.[188] Guidance has to be found from individual cases in a specific context. For example, in *Bahramitash v Kumar*, Blanchard J asserted that if a case related to an important clause in a standard form contract, then the case would contain "a matter of general or public importance".[189] This pronouncement is useful for any case relating to a standard form contract, because it is clear when these cases will fall within the ambit of the test.

It is important to note that there is a problem with simply importing the case law regarding section 13 of the Supreme Court Act, as many of the decisions concerning leave have been decided on factual grounds. Andrew Beck writes that when deciding whether to grant leave "[the Supreme Court] has focused narrowly on the factual issues of individual cases, declining to engage on broader questions of law".[190] Andrew Beck goes on to assert that because of this, the Supreme Court seemed quite restrictive in refusing leave in three notable cases: *Calan Healthcare Properties Ltd v Ord*,[191] *Hester v Commissioner of Inland Revenue*,[192] and *Pharmacy Care Systems Ltd v Attorney-General*.[193] Part of the reason for this must be the Supreme Court's desire to preserve limited judicial resources. This is a concern that would not apply to a judicial test about whether public opinion is relevant. Because of this, the tests from case law in this area need to be regarded with caution. Only decisions that focus on whether the case raises an important question of law should be used. Decisions on whether to grant leave to the Supreme Court are a useful starting point, but the judiciary needs to take time to develop their own case law regarding whether public opinion is a relevant factor.

The proposed outcome is the best option because it adequately balances the interests of both majority groups and minority groups in society. To ameliorate the problem of democratic deficit in judicial law-making, judges should consider public opinion. However, their

[187] *McGechan on Procedure*, above n 179, at [6 – 199] – [6 – 120(a)].
[188] Andrew Beck, above n 179, at 20.
[189] *Bahramitash v Kumar* [2005] NZSC 8 at 8.
[190] Andrew Beck, above n 181, at 19.
[191] *Calan Healthcare Properties Ltd v Ord* [2006] 1 NZLR 174.
[192] *Hester v Commissioner of Inland Revenue* (2005) 17 PRNZ 572 (SC).
[193] *Pharmacy Care Systems Ltd v Attorney-General* (2004) 17 PRNZ 308 (SC).

consideration of public opinion should be limited to cases where the outcome has a wide-ranging legal effect for the general public. This outcome ensures the judiciary can focus on their primary objective: the objective and logical resolution of human rights cases. It is arguable that this approach would not be effective, because it relies on judges exercising their own discretion to (1) determine whether public opinion should be a relevant factor and (2) actually take public opinion into account in a meaningful way. However, I argue that because judges in New Zealand have been consistently cautious and prudent in their approach to law-making,[194] they will use this attentiveness in any reformed system. Judges can be trusted to consider public opinion, rather than be constrained by it.

V Conclusion

Sir Kenneth Keith wrote in the introduction to the Cabinet Manual that "a balance has to be struck between majority power and minority right" and that it is vital to consider the importance of both "the sovereignty of the people exercised through Parliament and the rule of the law".[195] In this paper, I have argued that the fundamental principles espoused by Sir Kenneth Keith are important in modern New Zealand. Democratic legitimacy and positive human rights adjudication are equally vital to a functioning society and it is important that the legal system gives equal weight to both.

This paper first outlined the main problem with our current constitutional arrangements: too much weight is given to democratic legitimacy at the expense of positive human rights adjudication. Based on this, it is arguable that the judiciary should have more power to intervene in law-making. Four hypothetical options of judicial intervention were presented. Regardless of which option should be ultimately adopted, a system of increased judicial intervention could leave a democratic deficit.

The main part of the paper considered how to ameliorate this deficit. We could expand the role of public opinion in judicial law-making. This could correct the democratic deficit in judicial law-making, but it also has several inherent problems. I argued that there are three key reasons why judges should continue to disregard public opinion, even if they are essentially creating new law: (a) the judiciary can continue to protect minority rights in the face of adverse public opinion, (b) refusal to consider public opinion ensures the judiciary remains apolitical so

[194] Geoffrey Palmer "The Bill of Rights after Twenty-One Years: the New Zealand Constitutional Caravan Moves on?", above n 18, at 259.
[195] Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" in *Cabinet Manual 2008.*

judicial independence is upheld, and (c) public opinion has no legal weight and judges may have difficulty ascertaining public opinion. Despite these arguments, it was ultimately conceded that there are some important counter-arguments to these points. Judges cannot make law without regard to the context of the society they are in. It is concluded that under a reformed system, the courts should generally continue to decline to consider public opinion, as this would preserve their impartiality and independence. However, public opinion should play a role in some limited situations. Public opinion should only be relevant where a court decision could have broad implications for a substantial part of society, and even then, it would only be one of many factors for the courts to consider.

Lord Cooke of Thorndon wrote that "democracy does not mean simple majority rule; an objective and unbiased assessment of minority interests must also be attempted".[196] In this paper, I have asserted that a system of pure legislative supremacy could focus too heavily on simple majority rule. There is potential for the judiciary to intervene to protect minority interests. However, judicial intervention lacks democratic legitimacy and it may be necessary for the courts to correct this deficit by taking public opinion into account. To preserve their traditional role as a protector of human rights and a safeguard against the supreme power of Parliament, the judiciary should only do this in a limited way.

[196] Lord Cooke of Thorndon, above n 73, at 41.

VI Bibliography

A Case Law

1 New Zealand

Attorney-General v Ngati Apa [2003] 3 NZLR 643.

Bahramitash v Kumar [2005] NZSC 8.

Brader v Ministry of Transport [1981] 1 NZLR 73.

Bryson v Three Foot Six Ltd [2005] NZSC 6, [2005] ERNZ 311.

Boscawen v Attorney-General (No 2) [2009] 2 NZLR 229.

Calan Healthcare Properties Ltd v Ord [2006] 1 NZLR 174.

Chamberlains v Lai [2005] NZSC 32.

Electoral Commission v Tate [1999] 3 NZLR 174.

Fitzgerald v Muldoon [1976] 2 NZLR 615.

Fraser v State Services Commission [1984] 1 NZLR 116.

Hester v Commissioner of Inland Revenue (2005) 17 PRNZ 572 (SC).

L v M [1979] 2 NZLR 519.

Ministry of Health v Atkinson [2012] 3 NZLR 456.

Nation v Nation (2005) 17 PRNZ 568; 24 FRNZ 336 (SC).

New Zealand Drivers Association v New Zealand Road Carriers [1982] 1 NZLR 374.

Pharmacy Care Systems Ltd v Attorney-General (2004) 17 PRNZ 308 (SC).

Prebble v Huata 25/8/04, SCCIV9/2004.

Quilter v Attorney-General [1998] 1 NZLR 523.

R v Pora [2001] 2 NZLR 37.

R v Poumako [2000] 2 NZLR 695.

Re Application by AMM and KJO to Adopt a Child [2010] NZFLR 629.

Seales v Attorney-General [2015] NZHC 1239.

Taylor v Attorney-General [2014] NZHC 1630.

Taylor v Attorney-General [2015] NZHC 1706.

Taylor v New Zealand Poultry Board [1984] 1 NZLR 394.

Williams v Attorney-General [1990] 1 NZLR 646.

Z v Z (No 2) [1997] 2 NZLR 258.

Zaoui v Attorney-General (Supreme Court of New Zealand, CIV SC 13/04, 14 October 2004).

2 Australia

JT International SA v Commonwealth of Australia [2012] HCA 43.

3 Canada

R v Valente (1983) 2 CCC (3d) 417.
David Actylene Gas Co v Morrison (1915) 34 OLR 155.

4 England and Wales

English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409 (CA).
Entick v Carrington [1765] EWHC KB J98.

5 South Africa

S v Makwanyane and Another [1995] ZACC 3.

6 United States

Brown v Board of Education 347 US 483 (1954).
Hirabayashi v United States 320 US 81 (1943).
Korematsu v United States 323 US 214 (1944).
Loving v Virginia 388 US 1 (1967).
Obergefell v Hodges 576 US ___ (2015).
Pace v Alabama 106 US 583 (1883).
Plessy v Ferguson 163 US 537 (1896).
Roper v Simmons 543 US 551 (2005).
Scott v Sandford 60 US 393 (1856).
United States v Windsor 570 US ___ (2013).
West Virginia State Board of Education v Barnette 319 US 624 (1943).

B Legislation

Adoption Act 1955.
Bill of Rights Act 1990.
Constitution Act 1986.
Crimes Act 1961.
Death with Dignity Bill 1995 (00-1).
Death with Dignity Bill 2003 (37-1).

Electoral Act 1993.
Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010.
Foreshore and Seabed Act 2004.
Human Rights Act 1993.
Human Rights Act 1998 (United Kingdom).
Interpretation Act 1999.
Judicature Act 1908.
Judicature Modernisation Bill (178-2).
Marriage Act 1955.
Marriage (Definition of Marriage) Amendment Act 2013.
New Zealand Public Health and Disability Amendment Act 2013.
Oaths and Declarations Act 1957.
Sentencing Act 2002.
Supreme Court Act 2003.
Tobacco Plain Packaging Act 2011 (Australia).

C Books and Chapters in Books

Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis, Wellington, 2005).
Andrew Le Sueur "Parliamentary Accountability and the Judicial System" in Bamforth and Leyland *Accountability in the Contemporary Constitution* (Oxford University Press, Oxford, 2013).
Andrew Stockley "An Independent Judiciary" in Raymond Miller (ed) *New Zealand Government and Politics* (5th ed, Oxford University Press, Oxford, 2010).
Anthony Blackshield and George Williams *Australian Constitutional Law and Theory* (Federation Press, Sydney, 2010).
ATH Smith (ed) *Glanville Williams: Learning the Law* (12th ed, Sweet and Maxwell, London, 2002).
AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan, London, 1959).
AV Dicey "The Nature of Parliamentary Sovereignty" in *An Introduction to the Study of the Law of the Constitution* (Liberty Classics, 1982 [1885]).
Brian Masaru Hayashi *Democratizing the Enemy: The Japanese American Internment* (Princeton University Press, Princeton, 2004).

Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry? Urgency in the New Zealand Legislative Process 1987-2010* (Victoria University Press, Wellington, 2011).
Garfield Barwick *A Radical Tory* (Federation Press, Sydney, 1995).
Geoffrey Palmer *Unbridled Power* (2nd ed, Oxford University Press, Oxford, 1987).
Geoffrey Palmer and Matthew Palmer *Bridled Power* (4th ed, Oxford University Press, Oxford, 2004).
HLA Hart *Law, Liberty, and Morality* (Oxford University Press, Oxford, 1968).
JAG Griffith *The Politics of the Judiciary* (4th ed, Fontana Press, London, 1991).
Jeffrey Goldsworthy *The Sovereignty of Parliament* (Clarendon Press, Oxford, 1999).
Jeremy Waldron *The Dignity of Legislation* (Cambridge University Press, Cambridge, 1999).
John Bell *Policy Arguments in Judicial Decisions* (Clarendon Press, Oxford, 1983).
John Stuart Mill *On Liberty* (Longman, Roberts, and Green, London, 1869).
John Thorley *Athenian Democracy* (Routledge, New York, 2005).
Joshua Cohen "Deliberation and Democratic Legitimacy" in James Bohman and William Rehg (eds) *Deliberative Democracy: Essays on Reason and Politics* (MIT Press, Cambridge, Massachusetts, 1997).
KJ Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962).
Kostas Vlassopoulos *Antiquity and its Legacy* (Oxford University Press, Oxford, 2009).
Lord Denning *Landmarks in the Law* (Butterworths, London, 1984).
M Cappelletti and D Tallon (eds) *Fundamental Guarantees of the Parties in Civil Litigation* (Giuffre, Milan, 1973).
McGechan on Procedure (Brooker's Ltd, Wellington, 1988).
Morag McDowell and Duncan Webb *The New Zealand Legal System: Structures and Processes* (4th ed, LexisNexis NZ Ltd., Wellington, 2006).
Mark Tushnet "Judicial selection, removal and discipline in the United States" in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011).
Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003).
Peter Cane *An Introduction to Administrative Law* (Oxford, Clarendon Press, 1996).
Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, Brooker's Ltd, Wellington, 2001).
Philippa Strum "Brandeis and the Living Constitution" in Nelson Dawson (ed) *Brandeis and America* (University Press of Kentucky, Lexington, 1989).
Ran Hirschl *Towards Juristocracy: The Origins and Consequences of the New*

Constitutionalism (Harvard University Press, Cambridge, Massachusetts, 2004).
Robert Stevens *The English Judges: Their Role in the Changing Constitution* (Hart Publishing, Portland, 2002).
Shimon Shetreet and Jules Deschenes *Judicial Independence: The Contemporary Debate* (Martinus Nijhoff Publishers, Dordrecht, Netherlands, 1985).
Shimon Shetreet "Judicial independence and accountability: core values in liberal democracies" in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011).
Zhand Shakibi *Revolutions and the Collapse of the Monarchy: Human Agency and the Making of Revolution in France, Russia and Iran* (IB Tauris, London, 2007).

D Journal Articles

Alana Cornforth "Behaviour Change: Insights for Environmental Policy Making from Social Psychology and Behavioural Economics" (2009) 5 Policy Quarterly 21.
Andrew Beck "The Court of Final Appeal" [2006] NZLJ 17.
Andrew Geddis "Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed" [2011] NZ L Rev 443.
Andrew Geddis "The Comparative Irrelevance of the New Zealand Bill of Rights Act to Legislative Practice" (2009) 23 NZULR 465.
Andrew Geddis and Kathryn Tucker "Litigating for a More Peaceful Death" [2015] NZLJ 172.
Barry Albin "The Independence of the Judiciary" (2014) 66 Rutgers Law Review 455.
Ben Keith "Seeing the World Whole: Understanding the Citation of External Sources in Judicial Reasoning" (2008) 6 NZJPIL 95.
Claire Baylis "Justice Done and Justice Seen to be Done – The Public Administration of Justice" (1991) 21 VUWLR 177.
Claire Charters and Andrew Erueti "Report from the Inside: The CERD Committee's Review of the Foreshore and Seabed Act 2004" (2005) 36 VUWLR 257.
Claudia Geiringer "Declarations of Inconsistency Dodged Again" (2009) NZLJ 232.
Geoffrey Palmer "The Bill of Rights after Twenty-One Years: the New Zealand Constitutional Caravan Moves on?" (2013) 11 NZJPIL 257.
Geoffrey Palmer "What is Parliament for?" [2011] NZLJ 378.
Hennessey Hayes "Assessing Reoffending in Restorative Justice Conferences" (2005) 38 Australian and New Zealand Journal of Criminology 77.

Ian Haney Lopez “A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness” (2007) 59 Stanford Law Review 985.
JA Jolowicz “A Duty to Give Reasons” (2000) 59 Cambridge Law Journal 263.
Janet McLean “The Political, the Historical and the Universal in New Zealand’s Constitution” (2014) 12 NZJPIL 321.
Jeffrey Lax and Justin Phillips “Gay Rights in the States: Public Opinion and Policy Responsiveness” (2009) 103 American Political Science Review 367.
JH Burns “Happiness and Utility: Jeremy Bentham’s Equation” (2005) 17 Utilitas 46 at 46.
John Burrows “Interpretation of Legislation: The Changing Approach to the Interpretation of Statutes” (2002) 33 VUWLR 561.
John Pratt and Marie Clark “Penal Populism in New Zealand” (2005) 7 Punishm Soc 303.
John Smillie “Law, Social Policy, and the Courts: Who Wants Juristocracy?” (2006) 11 Otago LR 183.
Kenneth Keith “The New Zealand Bill of Rights Act 1990: An Account of its Preparation” (2013) 11 NZJPIL 1.
Lord Hailsham “The Independence of the Judicial Process” (1978) 13 Israel Law Review 1.
Lord Cooke of Thorndon “The Myth of Sovereignty” (2005) 3 NZJPIL 39.
M Cappelletti “Who Watches the Watchmen? A Comparative Study on Judicial Responsibility” (1983) 31 American Journal of Comparative Law 1.
Nessa Lynch “’Contrasts in Tolerance’ in a Single Jurisdiction: The Case of New Zealand” (2013) 23(3) Int’l Crim Just Rev 217.
Paul Rishworth “Human Rights” [2005] NZ L Rev 87.
Paul Rishworth “Reflections on the Bill of Rights after *Quilter v Attorney-General*” [1998] NZ L Rev 683.
Petra Butler “Human Rights and Parliamentary Sovereignty in New Zealand” (2004) 35 VUWLR 341.
Phillip A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 King's College Law Journal 321.
Richard Fallon Jr. “The Core of an Uneasy Case for Judicial Review” (2008) 121 Harv L Rev 1693.
Roger Alford “Four Mistakes in the Debate on ‘Outsourcing Authority’” (2006) 69 Albany LR 653.
Sharon Casey and Phillip Mohr “Law-and-Order Politics, Public-Opinion Polls and the Media” (2005) 12 Psychiatry, Psychology and Law 141.

Shimon Shetreet "The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986" (1987) 10 UNSW Law Journal 4.
Steven Gardbaum "The Case for the New Commonwealth Model of Constitutionalism" (2013) 14 German LJ 2230.
Stephen Levine and Nigel S Robert "MMP and the Future: Political Challenges and Proposed Reforms" (2009) 7 NZJPIL 135.

E Parliamentary Materials and Government Publications

(6 May 2004) 617 NZPD 12718.
(29 August 2012) 683 NZPD 4913.
(13 March 2013) 688 NZPD 8523.
(17 April 2013) 689 NZPD 9482.
(16 May 2013) 690 NZPD 10116.
Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill* (17 March 2010).
Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the New Zealand Public Health and Disability Amendment Bill (No 2)* (16 May 2013).
Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" in *Cabinet Manual 2008*.

F Reports and Dissertations

Benjamin Suter "Appointment, discipline and removal of judges: A comparison of the Swiss and New Zealand judiciaries" (LLM Research Paper, Victoria University of Wellington, 2015).
Matthew Stephenson "Court of Public Opinion: Government Accountability and Judicial Independence" (Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series, Paper 423, June 2003).
The 2014 New Zealand General Election: Final Results and Voting Statistics (Parliamentary Service, Parliamentary Library Research Paper 2015/01, February 2015).

G International Materials

Commission on Wartime Relocation and Internment of Civilians *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians* (Washington, D.C., December 1982).
Constitution of the Commonwealth of Australia.
Constitution of the Republic of South Africa.
Constitution of the United States of America.
The Bangalore Principles of Judicial Conduct ECOSOC 2006/23.
United Nations Basic Principles on the Independence of the Judiciary and the Role of Lawyers GA Res 40/32, GA Res 40/146.

H Other Sources

"2013 Census – Major ethnic groups in New Zealand" (29 January 2015) Statistics New Zealand <www.stats.govt.nz>.
"A Brief History of Women's Suffrage in New Zealand" (20 December 2012) Ministry for Culture and Heritage <www.nzhistory.net.nz>.
Alastair Hercus and others "The right to die in New Zealand – Seales v Attorney-General" (21 August 2015) Buddle Findlay <www.buddlefindlay.com>.
Allan Cooke "The Law Society's perspective" (15 March 2015) New Zealand Law Society <www.lawsociety.org.nz>.
Amelia Romanos "Final poll shows MMP holding its strong lead" *New Zealand Herald* (online ed, 25 November 2011).
Andrew Geddis "Andrew Geddis: Message on prisoner voting rights 'unequivocal'" *New Zealand Herald* (online ed, 28 July 2015).
Andrew Geddis "I think National just broke our constitution" (17 May 2013) Pundit <www.pundit.co.nz>.
Catriona MacLennan "Greater diversity needed in judiciary" *New Zealand Herald* (online ed, 17 April 2013).
Christopher Finlayson, Attorney-General "Section 7 of the Bill of Rights: an Attorney-General's perspective" (Remarks to New Zealand Centre for Human Rights Law, Policy and Practice, University of Auckland, Auckland, 2014).
"Civil Union Bill: What the readers say" *New Zealand Herald* (online ed, 4 October 2004).
Claire Trevett "Prisoners should be allowed to vote: High Court" *New Zealand Herald* (online ed, 24 July 2015).
Dean Knight "Parliament and the Bill of Rights — a blasé attitude?" (6 April 2009)

LAWS179 Elephants and the Law <www.laws179.co.nz>.
Deborah Coddington "Blinded justice" *New Zealand Herald* (online ed, 8 November 2009).
Derek Cheng "Dumping MMP huge setback for ethnic diversity, expert warns" *New Zealand Herald* (online ed, 25 June 2010).
"Guidelines for Judicial Conduct" (March 2013) Courts of New Zealand <courtsofnz.govt.nz>.
Harriet Farquhar "New Zealand's Diversity Deficit: Towards a More Representative Judiciary" (LLB (Hons) Dissertation, Victoria University of Wellington, 2015).
Interview with Ruth Bader Ginsburg, United States Supreme Court Justice (Goodwin Liu, 2015 American Constitution Society National Convention, 13 June 2015) transcript provided by American Constitution Society (Washington, DC).
Isaac Davison "Government slammed over censored caregiver legislation" *New Zealand Herald* (online ed, 20 May 2013).
J M Priestley, Judge of the High Court "Chipping Away at the Judicial Arm?" (Harkness Henry Lecture 2009, University of Waikato Law School, Hamilton, October 2009).
John Weekes "Right to die: Lecretia Seales dies hours after judgment" *New Zealand Herald* (online ed, 5 June 2015).
"Judicial Appointments" Courts of New Zealand <www.courtsofnz.govt.nz>.
Michael Sandel "Why Democracy?" (Podcast, 14 March 2015) BBC <bbc.co.uk>.
New Zealand Law Society "Snapshot of the Profession" (2015) 859 LawTalk 7.
Owen Woodhouse "Government under the Law" (The Sixth J.C. Beaglehole Memorial Lecture, Price Milburn for the New Zealand Council for Civil Liberties, Wellington, 1979).

The word count of this paper is exactly 12,395 words (excluding table of contents, abstract, footnotes, and bibliography).