The Kiwi Party Inc v Attorney-General: *A Reappraisal of Parliamentary Supremacy Following a Hopeless Case for the Right to Bear Arms in Aotearoa*

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I INTRODUCTION

On 15 March 2019, a right -wing terrorist entered the Al Noor Mosque and, soon thereafter, the Linwood Islamic Centre in Ōtautahi, Christchurch. Armed with various weapons, including two semi-automatic rifles, he shot and killed 51 Muslim worshippers and wounded a further 40.[1] He subsequently pleaded guilty to 51 charges of murder, 40 charges of attempted murder and one charge of engaging in a terrorist act. Mander J sentenced the terrorist to life imprisonment without the possibility of parole.[2]

In the wake of the mosque attacks, the Rt Hon Jacinda Ardern announced that New Zealand's gun laws would change.[3] Soon thereafter, the Government took swift action to address the accessibility, possession and use of semi-automatic weapons with the hope that such a tragedy would never again occur in Aotearoa. These changes were achieved via two mechanisms:

(1) an order in council made on 21 March 2019 pursuant to s 74A(c) of the Arms Act 1983 (the Order). The effect of this order was to identify certain semi-automatic weapons as "military style semi-automatic firearms", rendering them subject to additional licencing requirements under the Arms Act.[4] This order remained in force for 21 days; and
(2) the Arms (Prohibited Firearms, Magazines, and Parts) Amendment Act 2019 (the Amendment Act). This repealed the Order and made semi-automatic firearms prohibited weapons.

Both the Order and the Amendment Act generated vigorous public debate, with vociferous opposition to the effective prohibition on semi-automatic weapons. One of the parties that vehemently opposed the prohibition was the Kiwi Party Inc (the Kiwi Party) — a political party and subsequently an

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1 *The Kiwi Party Inc v Attorney-General* [2020] NZCA 80 [Kiwi Party (CA)] at [1].

2 *R v Tarrant* [2020] NZHC 2192 at [187] and [189].

3 Jacinda Ardern "Statement from Jacinda Ardern on Christchurch mass shooting" (press release, 16 March 2019).

4 "Arms (Military Style Semi-automatic Firearms) Order 2019" (21 March 2019) *New Zealand Gazette* No 2019-dl1272.

incorporated society formed for the purpose of challenging the lawfulness of the Order and the Amendment Act.[5]

In pursuance of its aim, the Kiwi Party brought proceedings in the High Court seeking various declarations relating to the validity of the Order, the process followed by Parliament in passing the Amendment Act and the validity of the Amendment Act. Central to the Kiwi Party's claim was the contention that citizens of Aotearoa possessed a right to bear arms. Wylie J, in the High Court, struck out 11 of the Kiwi Party's 12 causes of action.[6] His Honour noted that even if there were a right to bear arms, the right would not be absolute — rather, it would be capable of curtailment, which is exactly what the Amendment Act achieved.[7] The Kiwi Party, undeterred, appealed the decision to the Court of Appeal.

The Court of Appeal upheld the decision of Wylie J,[8] and an application for leave to appeal that decision was declined by the Supreme Court.[9] In determining the appeal, the Court decisively held there exists no constitutional right to bear arms in Aotearoa.[10] When addressing the existence of this proposed right, the Court noted Wylie J's observation in the lower court that fundamental common law rights may operate as a limitation on parliamentary power, but declined to comment on this concept any further.[11] The Court instead left this matter open, just as other courts in its position have done previously.[12] The Court also left open the potential for the High Court, in the right case, to assess whether it has jurisdiction to declare legislation inconsistent with the Treaty of Waitangi.[13]

Thus, this decision of the Court of Appeal is important for what it decides: that there is no constitutional right to bear arms in Aotearoa. It is also significant for what it expressly does not decide. The Court left the door open

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5 The Kiwi Party "Policies" <www.kiwiparty.co.nz> at [2].

6 *The Kiwi Party Inc v Attorney-General* [2019] NZHC 1163 [*Kiwi Party* (HC)]. The one cause of action his Honour did not strike out was the first cause of action, which sought a declaration that the Order was ultra vires s 74A of the Arms Act. The second through eighth causes of action, in chronological order, alleged the following: the Select Committee made a mistake of fact; the process followed by the Select Committee was inadequate because there was no proper consultation; the Select Committee predetermined the matters it was required to consider; the Select Committee failed in its duty to provide the checks and balances necessary to maintain a free and democratic society; the Select Committee took into account irrelevant considerations; the Select Committee failed to take into account relevant considerations; and the Select Committee abdicated its responsibility by endorsing de facto legislative powers upon the Executive to repeal legislation. The ninth cause of action alleged a breach of the Treaty of Waitangi and causes of action 10 through 12 alleged: the Amendment Act breaches the right to private property; the Amendment Act is in breach of the Bill of Rights Act 1688; and the Amendment Act is unconstitutional and in breach of the constitutional right to bear arms.

7 At [41].

8 *Kiwi Party* (CA), above n 1, at [66].

9 *The Kiwi Party Inc v Attorney-General* [2020] NZSC 61 [*Kiwi Party* (SC)] at [12].

10 *Kiwi Party* (CA), above n 1, at [27(d)].

11 At [8(c)].

12 See *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398; *L v M* [1979] 2 NZLR 519 (CA) at 527; *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA) at 390; and *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 121.

13 *Kiwi Party* (CA), above n 1, at [50].

for legal development in two key areas, and these developments, or the possibility of these developments, are indicative of change in the relationship between Parliament and the judiciary. Furthermore, these developments, if viewed in the broader legal landscape in Aotearoa, may in fact suggest that orthodox understandings of parliamentary supremacy no longer adequately capture how this foundational principle operates in Aotearoa. Perhaps the relationship between Parliament and the judiciary can be better described as a dialogue or a collaborative enterprise.

II THE APPEAL

On appeal, Collins J, writing for the Court, distilled the Kiwi Party's "mercurial" submissions into the following propositions:[14]

(1) New Zealand citizens have a constitutional right to bear arms.
(2) The processes and decisions of the Select Committee were unlawful.
(3) The Amendment Act was unlawful.
(4) The Amendment Act was introduced and passed through Parliament through the exercise of prerogative powers by the Crown and is therefore amenable to review by the High Court.
(5) Section 3 of the Declaratory Judgments Act 1908 permitted the Kiwi Party to seek a declaration that the Amendment Act is invalid and that it also breaches Magna Carta, the Bill of Rights 1688 and the Treaty of Waitangi.

The Court of Appeal dismissed each of these propositions, the reasons for which are addressed in turn.

The Right to Bear Arms

A key plank of the Kiwi Party's case was the claim that citizens of Aotearoa have a constitutional right to bear arms.[15] The centrality of this claim led the Court to dedicate a significant portion of the judgment to addressing whether this right exists. The Kiwi Party identified the right to have been "derived from ancient custom, which evolved into a common law right … affirmed by Magna Carta, the Bill of Rights 1688 and the Treaty of Waitangi".[16] The Court

14 At [10].
15 The Order and the Amendment Act did not place a blanket ban on possessing or using firearms, and there does not appear to have been any challenge as to the reasonableness of any breach of the contended right. Therefore, it appears that the Kiwi Party envisioned the contended right would be absolute, prohibiting any curtailment by the Executive or Parliament.
16 *Kiwi Party* (CA), above n 1, at [14].

addressed each of the alleged bases for the contended right and systematically dismissed them. Neither art 29 or art 61 of Magna Carta were capable of forming a foundation for the right to bear arms,[17] and nor was the Bill of Rights 1688, as any right sourced in the Act would be subject to regulation by the laws enacted by Parliament.[18] The Treaty of Waitangi also could not provide any such foundation. The Kiwi Party had argued the proposed right could be sourced in art 3 of the Treaty, which provides Māori with the same rights as British subjects.[19] The Court was clear in stating this argument was founded on a fallacy, as any right to bear arms that British subjects may possess was now subject to regulation by Parliament. The Treaty of Waitangi could not, therefore, be the source of an unbridled right to bear arms.[20]

After dismissing each of the alleged foundations for the right, the Court highlighted the absurdity of the proposed right by pointing out:[21]

> (1) The so-called right to bear arms is not supported by any constitutional instruments that apply in New Zealand.
> (2) In this country, as in almost all countries, a citizen's ability to possess, own and use firearms is regulated by legislation.
> (3) There are only three countries which have some form of constitutional right to bear arms.

With these points in mind, the Court ultimately concluded "[t]here is no constitutional right to bear arms in New Zealand let alone the arms that are prohibited by the Amendment Act."[22]

The Processes and Decisions of the Select Committee

As noted by Wylie J in the High Court, the second to eighth causes of action each challenged the lawfulness of the processes and decisions made by the Select Committee leading up to the enactment of the Amendment Act. The Court of Appeal disposed of these causes of action swiftly and succinctly, as each fell within the bounds of the Parliamentary Privilege Act 2014; an Act preventing the Court from questioning the truth, motives, intentions and good faith of the Select Committee.[23]

The Exercise of Prerogative Power

To avoid the bar on questioning parliamentary proceedings, the Kiwi Party contended that since the Crown had determined how the legislative process

17 At [18]–[19].
18 At [21]–[22].
19 At [23].
20 At [23]–[24].
21 At [27].
22 At [27].
23 See [37]–[45].

would operate with regard to the Amendment Act, these causes of action could also be viewed as a challenge to the exercise of a prerogative power.[24] This argument failed, as a "minister's decision to introduce a Bill to Parliament and the way the House of Representatives decides to proceed with that Bill are proceedings of Parliament", not the exercise of a prerogative power.[25]

Lawfulness of the Amendment Act

The ninth cause of action sought a declaration that the Amendment Act breached art 3 of the Treaty of Waitangi. Wylie J had struck out this cause of action on the basis that the High Court did not have "jurisdiction to make a declaration that the Amendment Act is in breach of the Treaty of Waitangi".[26] His Honour's decision was based on authorities dating back to *Te Heuheu Tukino v Aotea District Māori Land Board*.[27] Diverging from the reasoning of Wylie J, the Court of Appeal referred to the recent recognition of the jurisdiction of the High Court to declare legislation inconsistent with the New Zealand Bill of Rights Act 1990 (NZBORA) in *Attorney-General v Taylor*.[28] The Court drew on this authority, stating:[29]

> In an appropriate case it may be possible to argue that there is a similar jurisdiction to that recognised in *Taylor* for the Courts to declare legislation inconsistent with the Treaty of Waitangi.

The Court was clear, however, that as there was no "tenable factual or legal basis upon which it [could] be said that the Amendment Act breache[d] the Treaty of Waitangi",[30] this was not the correct case to engage in the careful analysis and assessment that would be needed to address an issue of "major constitutional significance".[31]

The remaining three causes of action alleged a breach of the constitutional right to private property, a breach of the Bill of Rights 1688, and the contravention of the right to bear arms.[32] These causes were doomed from the outset as, put simply, there existed no right to bear arms in Aotearoa and no right to private property, nor any right sourced in the Bill of Rights 1688 that could override the supremacy of Parliament.[33] To the extent these rights existed, the Amendment Act lawfully and justifiably curtailed them.

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24 At [57].
25 At [58].
26 *Kiwi Party* (HC), above n 6, at [34].
27 *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308 (PC) at 324 as cited in *Kiwi Party* (HC), above n 6, at [34].
28 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213. For commentary on this case, see Amy Dresser "A Taylor-Made Declaration? *Attorney-General v Taylor* and Declarations of Inconsistency" (2019) 25 Auckland U L Rev 254.
29 *Kiwi Party* (CA), above n 1, at [50].
30 At [51].
31 At [50]–[51].
32 At [52], [54] and [56].
33 At [53], [55] and [56].

Declaration of Invalidity

The Kiwi Party also sought various declarations pursuant to the Declaratory Judgments Act 1908, on the basis that s 3 of that Act conferred jurisdiction on the High Court to declare statutes invalid.[34] This proposition was entirely inconsistent with the accepted doctrine that "the courts cannot declare an Act of Parliament to be invalid",[35] and no reasons advanced by the Kiwi Party could persuade the Court to undermine this accepted doctrine.[36]

Conclusion

In sum, the Court of Appeal upheld the decision of Wylie J striking out causes of action two through 12, and clearly established that in Aotearoa there is no constitutional right to bear arms. One may say this outcome should have been obvious from the outset, as Aotearoa does not have the same affinity for firearms as the United States. Nor was this a new question for the courts. A number of sentencing decisions of the High Court had previously traversed this matter summarily and adopted the view that no such right existed in Aotearoa.[37] More importantly, the *Kiwi Party* case was brought in response to what has been described as one of New Zealand's darkest days,[38] at a time when there was overwhelming support for the changes enacted by Parliament.[39] Although the Kiwi Party's claim was misconceived from the outset, the decision of the Court of Appeal is valuable both for its decisive rejection of the existence of a right to bear arms, and for the matters it left undecided.

III MATTERS LEFT FOR ANOTHER COURT AT ANOTHER TIME

The Court of Appeal left open two key matters. The first of these concerns the notion that Parliament may "misfire" where it flouts "higher law" in a wanton or indiscriminate manner. The notion that Parliament may "misfire" is not new. Rather, there is a history of judicial notation to this effect, which Lord Woolf aptly summarised in the following manner:[40]

34 At [62].

35 David Feldman (ed) *Oxford Principles of English Law: English Public Law* (2nd ed, Oxford University Press, Oxford, 2009) at [18.27] as cited in *Kiwi Party* (CA), above n 1, at [63].

36 At [63] and [65].

37 See *Police v Goodwin* (1993) 10 CRNZ 681 (HC).

38 Jacinda Ardern "PM House Statement on Christchurch mosques terror attack" (press release, 19 March 2019).

39 A poll conducted by Colmar Brunton found that 61 per cent of New Zealanders polled following the mosque attacks were satisfied that the law changes were "about right" and 19 per cent did not think they went far enough. See Brittney Deguara "Majority of Kiwis support new gun laws following Christchurch attacks, poll finds" (16 April 2019) Stuff <www.stuff.co.nz>.

40 Lord Woolf "Droit Public—English Style" (1995) PL 57 at 69.

> … if Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which would be without precedent. … I myself would consider there were advantages in making it clear that ultimately there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold.

Cooke J echoed this sentiment in *Taylor v New Zealand Poultry Board*, where his Honour stated:[41]

> 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.

Wylie J, drawing on this history, described the concept as follows:[42]

> Traditionally it has been held that, when an enactment is passed there is finality unless and until it is amended or [repealed] by Parliament. It is the function of the Courts to give effect to the intention of the legislature and there can of course be extensive debate as to the correct interpretation of an enactment. The Courts cannot however be called on to decide whether an act should be on the statute book at all. The constitutional position in New Zealand until recent times has been clear and unambiguous. Parliament is supreme, and the Courts do not have a power to consider the validity of properly enacted laws. In more recent years, it has been suggested, both extrajudicially and in some cases, that the supremacy of Parliament is a common law construct, and that there are common law limitations on Parliamentary power. It has been suggested that there may be "higher law" values that are antecedent to the law itself, that these values inform legislation and common law principles and that they provide a rationale for legal development. It has been said that Parliament "misfires" where legislation flouts such values in a wanton or indiscriminate manner.

The Kiwi Party made no effort to identify what "higher value" may underlie any right to bear arms. This was, therefore, never going to be the case that spurred this legal development into being. On appeal, the Court of Appeal did no more than note Wylie J's finding that "[w]hilst there may be a common law limitation on parliamentary powers, the complaints pursued by the Kiwi Party did not engage that jurisdiction."[43] As a result, the possibility the courts may find Parliament to have "misfired" remains just that — a possibility — that may be determined by another court, at another time, and no doubt in a worthier case.

The second matter the Court of Appeal left undecided was whether the High Court had jurisdiction to declare legislation inconsistent with the Treaty of Waitangi. Wylie J noted that the traditional position in Aotearoa has been to identify the Treaty as being of "transcendent importance" but incapable of conferring enforceable rights without incorporation into

41 *Taylor v New Zealand Poultry Board*, above n 12, at 398.
42 *Kiwi Party* (HC), above n 6, at [39] (footnotes omitted).
43 *Kiwi Party* (CA), above n 1, at [8].

legislation.[44] In other words, the Treaty of Waitangi has not been viewed as a source of legal rights. Nevertheless, the Court of Appeal drew an analogy to the recently established jurisdiction of the High Court to declare statutes inconsistent with NZBORA[45] and identified the possibility of a similar jurisdiction existing in respect of the Treaty of Waitangi.[46] The facts of the case, once again, did not require the Court to examine this potential jurisdiction in any detail. The Court simply planted the seed for what could grow into a significant legal development in the future.

IV WHAT WOULD THESE DEVELOPMENTS MEAN FOR PARLIAMENTARY SUPREMACY?

In a future where the right case comes along, and the judiciary is bold enough to bring the discussed developments to fruition, there will be a need to assess what this means for the foundational principle of parliamentary supremacy in Aotearoa.

The principle of parliamentary supremacy, as originally described by Dicey and applied in Aotearoa, espouses that Parliament is supreme and, consequentially, the courts are to obey enactments passed by Parliament. If parliamentary supremacy is understood in its most orthodox or Diceyan sense, it encapsulates the principle that Parliament has:[47]

> … the right to make or unmake any law whatever; and … no person or body is recognized by the law … as having a right to override or set aside the legislation of Parliament.

The Diceyan view sees the courts as subordinate to Parliament. Pursuant to this principle, no court may declare any law invalid on account of its content. This principle ensures certainty in the law and reflects that in a democratic society it is the people, through their elected representatives, who have the power to bring about change to the law.

The idea that the courts may find Parliament to have "misfired" flies in the face of the Diceyan view of parliamentary supremacy. Each of the varying iterations of this concept are premised on a view that fundamental rights may operate as a limitation on the power of Parliament. Similarly, issuing a declaration of inconsistency, either in the Treaty context or the human rights context, also undermines an orthodox understanding of

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44 *Kiwi Party* (HC), above n 6, at [34].

45 The Supreme Court in *Attorney-General v Taylor*, above n 28, at [50], held that "the text and purpose of the Bill of Rights overall supports the court exercising its usual range of remedies of which a declaration is a part".

46 *Kiwi Party* (CA), above n 1, at [50].

47 Albert Venn Dicey *An Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan, 1996) at 38 as cited in Mark Elliot "United Kingdom: Parliamentary sovereignty under pressure" (2004) 2 ICON 545 at 545.

parliamentary supremacy. Although a declaration does not go so far as to declare legislation invalid, it is a remedy that formally brings an inconsistency to the attention of the political branches and "triggers a reasonable constitutional expectation that those branches will respond by 'reappraising the legislation and making any changes that are thought appropriate'".[48] In short, neither the ability to grant a declaration of inconsistency nor the notion that Parliament may "misfire" can sit comfortably with an orthodox understanding of parliamentary supremacy, as both represent a limitation on Parliament's supreme power; a power that is meant to be absolute.

V A FRESH PERSPECTIVE

Parliamentary supremacy is a fundamental pillar of the constitutional arrangements of Aotearoa.[49] Hence, developments like those the Court of Appeal alluded to when dismissing the Kiwi Party's appeal are a direct challenge to those arrangements, invoking discussions of constitutional change. These discussions tend to hastily digress to an either/or scenario.[50] A liberal democracy either adopts arrangements like those Dicey envisioned, where Parliament is truly supreme in all respects, or it upholds arrangements where the judiciary is, in a sense, supreme and able to strike down law as being inconsistent with fundamental human rights or higher principles of law. Adopting this dichotomy, however, is rather unhelpful because it suggests that any change to these arrangements will result in a drastic shift from one end of the spectrum to the other. When this binary view is rejected and parliamentary supremacy is closely inspected, it becomes clear that orthodox understandings of parliamentary supremacy no longer adequately capture how this foundational principle operates in Aotearoa, yet notions of judicial supremacy seem equally inadequate. Instead, upon inspection, it is evident that the relationship between Parliament and the judiciary can be better described in terms of collaboration or dialogue, whereby power is shared by each of the branches.

The main proponent of this interpretation of Aotearoa's constitutional arrangements, Philip Joseph, has described the power-sharing model as a "collaborative enterprise".[51] Others, including Claudia Geiringer, have referred to it as a dialogue.[52] The idea is that the legislature and the judiciary, with mutual respect for one another, exercise distinct but complementary

48 Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor*" (2017) 48 VUWLR 547 at 563 citing *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [151].

49 Bruce Harris *New Zealand Constitution: An Analysis in Terms of Principles* (Thomson Reuters, Wellington, 2018) at [5.1].

50 Philip A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321 at 323.

51 At 323.

52 See generally Geiringer, above n 48.

powers to promote a just society under the rule of law.[53] In the realm of rights, including those that may be identified in the Treaty of Waitangi, the legislature and the judiciary have a joint responsibility to protect said rights. Where the legislature goes astray and violates rights unjustifiably, there is value in the judiciary declaring an error has been made. The open dialogue between the branches allows them to work collaboratively to preserve and protect fundamental rights.

The notion of a "collaborative enterprise" is useful in explaining current realities in Aotearoa. For example, the functioning of a collaborative enterprise can be clearly observed in the task of statutory interpretation. Here, the legislature provides general language that the judiciary is to apply to specific scenarios. The judiciary, when interpreting that language, makes meaning of it and fills in any gaps that may be uncovered.[54] Inter-branch dialogue is what unfolds between the enacted words and the judicial construction of those words.[55] Philip Joseph described the inter-branch dialogue that may take place following judicial interpretation of a statute as follows:[56]

> Parliament may legislate for new or existing causes, or it may legislate to override or modify the law in response to judicial rulings. Where this occurs, the Courts adapt their rulings to accommodate Parliament's legislation within the context of the legal system as a whole. The Courts rule on the meaning of statutes, develop and apply principles of common law, and declare the rights, duties and liabilities of persons or bodies according to law.

The collaborative enterprise, therefore, functions on account of interdependence, reciprocity and mutual respect.

There are also instances where orthodox notions of parliamentary supremacy have been flouted in notable decisions of the higher courts. For example, the Court of Appeal, in *R v Poumako*[57] and *R v Pora*,[58] undertook what could be described as interpretive gymnastics in order to find a rights-consistent interpretation of a statute, even though that interpretation was contrary to Parliament's legislative intention.[59] A further example can be seen in the recent Supreme Court decision that found the High Court has jurisdiction to declare legislation inconsistent with NZBORA.[60] These cases may represent an erosion of orthodox parliamentary supremacy, or they may indicate that realistically, orthodox parliamentary supremacy has been replaced with a power-sharing arrangement between the legislature and the

53 Joseph, above n 50, at 334–335.
54 At 337–338.
55 At 342.
56 At 330.
57 *R v Poumako* [2000] 2 NZLR 695 (CA).
58 *R v Pora* [2001] 2 NZLR 37 (CA).
59 Anita Killeen, Richard Ekins and John Ip "Undermining the grundnorm?" [2001] NZLJ 299.
60 *Attorney-General v Taylor,* above n 28.

judiciary. If recourse is had to the notion of dialogue, the interpretive exercise undertaken in *Pora* and *Poumako* and the declaration granted in *Taylor* are simply the judiciary shouting in disappointment at the political branches on account of their infringement of fundamental rights. The subsequent amendment of the law to reduce said infringement reflects Parliament listening to the judiciary's expression of disdain.[61]

The legal developments discussed throughout the case (namely, the notion that Parliament may "misfire" when legislating in breach of fundamental rights and the possibility that legislation may be declared inconsistent with the Treaty of Waitangi) are also consistent with Parliament and the judiciary working as a collaborative enterprise. The collaborative enterprise prescribes that the courts, by virtue of their judicial function, are the final authority on the law.[62] They are, however, to carry out this function in the context of collaboration and ongoing dialogue. There will always be potential for disagreement, but this disagreement is part of the functional relationship.[63] The idea that Parliament may "misfire" represents an inter-branch disagreement, and the courts, as the final authority on the law, may appropriately signal to Parliament that it has enacted a law "unworthy of judicial respect", initiating inter-branch dialogue.[64] Similarly, a declaration of inconsistency in the context of the Treaty of Waitangi would be a signal that informs the legislature of its misstep. The branches would then be engaged in a dialogue, whereby they could work in tandem to protect any rights founded in the Treaty. Thus, if the developments alluded to do eventuate, they will signify that the days of Diceyan dictate in Aotearoa are long gone, and in its place will be a power sharing arrangement best described as a collaborative enterprise.

Although the notion of a collaborative enterprise signals a change to a founding principle underlying Aotearoa's constitutional arrangements, this does not mean that analysis of the relationship between Parliament and the judiciary should shy away from this concept. Nor should the courts avoid legal developments that would bolster their ability to engage in dialogue with the legislature, including the developments raised by the High Court and the Court of Appeal in this saga of the *Kiwi Party* litigation. Any concerns these developments may raise ought to be allayed by the fact that there are many instances where Parliament and the judiciary already conduct themselves as if taking part in collaborative enterprise. More importantly, legal developments that foster inter-branch dialogue, like those in *Pora*, *Poumako* and *Taylor*, tend to arise out of the desire to protect fundamental rights. If Aotearoa is truly a nation that prides itself on protecting the fundamental rights of its citizens, and the Treaty of Waitangi truly is "part of the fabric of New Zealand

61 See the Electoral (Registration of Sentenced Prisoners) Amendment Act (No 2) 2020.
62 Joseph, above n 50, at 330.
63 At 336.
64 Lord Irvine "Judges and Decision-makers: The Theory and Practice of Wednesbury Review" [1996] PL 59 at 77 as cited in Joseph, above n 50, at 325.

Society",[65] embracing a collaborative relationship between the legislature and the judiciary will put meaning to words that paint pretty pictures. Constitutional dialogue "is a sign of equality, mutual respect and reciprocity".[66] A dialogical approach is exactly what Aotearoa needs to embrace if it is to place fundamental rights — particularly indigenous rights — and Te Tiriti o Waitangi at the core of its constitutional arrangements.

65 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210.

66 Conrado Hübner Mendes "Not the Last Word, but Dialogue: Deliberative Separation of Powers II" [2009] 3 Legisprudence 191 at 191.