IN THE COURT OF APPEAL
AUCKLAND REGISTRY *CIV 2019-404*

In the matter Declaratory Judgments Act 1908

Between **The Kiwi Party Incorporated**
1285 Peak Road RD2
Helensville
Applicant

And **ATTORNEY-GENERAL**
Parliament House
Wellington
Respondent

SYNOPSIS OF SUBMISSIONS

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May it Please the Court

Chronology

1 April 2019, Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill 2019, 'the Bill' introduced to Parliament.

2 April 2018, first reading of the Bill.

3 April 2019 written submissions open.

Date currently unknown Select Committee delegated review of submissions to police.

4 April 2019 written submissions close. 12,953 submissions received.

4 April 2019 Select Committee heard selected and invited submitters only.

8 April 2019 Police review of submissions provided to Select Committee.

8 April 2019 Select Committee accepted the police review of submissions in its entirety, approved the Bill and referred it back to Parliament.

9 April 2019 second Reading of the Bill.

10 April 2019 third Reading of the Bill.

11 April 2019, Royal assent given to the Bill.

INTRODUCTION

1. It is respectfully submitted that Wylie J. struck out the causes of action at issue on the basis of either a lack of justiciablity or a lack of constitutional status, expressed by the learned Judge as the claim not expressing "higher law values". Further in response to the submission that the factual matrix gave rise to novelty the learned Judge held that this was an area of settled law.

2. This appeal raised three broad questions:
   (a) whether the process by which the Arms Act 1983 'the Act' was amended is justiciable and if so whether the amendments were unlawful;
   (b) whether the right to bear arms is a constitutional right and if so whether the Act is an unjustified limitation of that right, of no lawful effect;
   (c) whether the party machines have rendered Parliamentary sovereignty a fiction, as a matter of fact.

3. These submissions are organised around the categories set out in paragraph 1, above, with reference to the paragraphs of the learned Judge's Decision as follows:

lack of justiciablity: [25] - [30] [43] – [47];

lack of constitutional status: [32] - [37] (Treaty) {38] - [42];

Settled law: [50].

SUBMISSSIONS

Justiciablity

4. There are two broad justiciablity submissions:

   (a) That Parliament abdicated its role and acted at the direction of the Crown. The actions of the Crown are clearly justiciable.

   (b) That the process by which Parliament passed the Act was so flawed that it violated constitutional norms and so is justiciable.

5. In the UK Prorogation case[1], despite submissions by the UK PM that the issue was not justiciable, the UK Supreme Court reaffirmed the Court's inherent supervisory jurisdiction to enforce the rule of law, as follows:

> 69.This court is not, therefore, precluded by article 9 or by any wider Parliamentary privilege from considering the validity of the prorogation itself. The logical approach to that question is to start at the beginning, with the advice that led to it. That advice was unlawful. It was outside the powers of the Prime Minister to give it. This means that it was null and of no effect…

6. It is submitted that a core issue in this matter is whether the Crown determined the Legislature's actions and in fact it is a form of prerogative power that is in play here.

7. In regard to prerogative powers the UKSC also held:

> 49. …However, a prerogative power is only effective to the extent that it is recognised by the common law: as was said in the *Case of Proclamations*, "the King hath no prerogative, but that which the law of the land allows him". A prerogative power is therefore limited by statute and the common law, including, in the present context, the constitutional principles with which it would otherwise conflict.

8. It is submitted that the Crown has no prerogative power to suborn Parliament.

[1] R (on Application of Miller) v Prime Minister https://www.supremecourt.uk/cases/uksc-2019-0192.html

9. Also discussed in the Prorogation care was ministerial accountability, as follows:

> 46. The same question arises in relation to a second constitutional principle, that of Parliamentary accountability, described by Lord Carnwath in his judgment in the first *Miller* case as no less fundamental to our constitution than Parliamentary sovereignty (*R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, para 249). As Lord Bingham of Cornhill said in the case of *Bobb v Manning* [2006] UKPC 22, para 13, "the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy".

10. It is submitted that if in fact the party system has resulted in a situation where there is no real accountability, Parliament is not sovereign. As discussed in paragraph [47] of the prorogation case, Parliamentary accountability has been a primary "justification for judicial restraint as part of a constitutional separation of powers". It is submitted that if in fact such accountability is not operative, then the Court should make up the deficit.

Justiciablity – scope of Declaratory Judgments Act

11. The Declaratory Judgments Act 1908 provides:

> **S3 Declaratory orders on originating summons**
>
> Where any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute, or any regulation made by the Governor-General in Council under statutory authority,
>
> …
>
> such person may apply to the High Court by originating summons for a declaratory order determining any question as to the construction or validity of such statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or of any part thereof.

12. It is submitted that the plain meaning of this section is a party may seek declaratory orders pursuant to the Act and that the Court may determine any question as to the construction or **validity** of such statute". (emphasis added)

13. In reliance on *Shaw v Commissioner of Inland Revenue* Wylie J held that:

> [44] The scope of s 3 is limited. It is confined to ensuring that the statute was properly enacted – in other words, that Parliament has followed those laws that govern the manner in which the statute in question was created.

14. It is submitted that among "those laws that govern the manner in which the statute in question was created" is constitutional law. It is submitted that the passage of the amendments to the Arms Act failed to conform with constitutional law as discussed in these submissions.

15. It is submitted that the reasoning in the UKSC Prorogation case requires this Court to reconsider the bald assertions set out in *Shaw v Commissioner of Inland Revenue*. *Shaw* makes no attempt to reconcile the plain meaning of s3 of Declaratory Judgments Act with the Court's finding.

16. It is submitted that the relentless pressure of the Crown on the Court over Centuries, has so distorted constitutional law that it has become almost eclipsed. The statement of "clear and umambiguous" constitutional law in *Shaw* is nothing less than the Crown's triumph over constitutional fetters being uncritically sanctioned by the Court. It is submitted that this state of affairs has come about because:

    (a) The Court has become corrupted by the power that the Crown apportions it and has come to see itself as a part of the apparatus of government;
    (b) as the Crown holds the public purse and this enables it to out-muscle its opponents. In *Shaw* itself there was the unequal contest between a litigant in person and the future Eichlebaum J, as counsel for the IRD. The constitution has no such champion.

Justiciablity – abdication

17. In *Re Delhi Laws* the Supreme Court of India held:

> KANIA C.J.--Section 7 of the Delhi Laws Act, 1912, … ultra vires … respectively inasmuch as to that extent the Central Legislature has abdicated its functions and delegated them to the executive government.[2]

[2] RE: THE DELHI LAWS ACT, 1912, THE AJMER-MERWARA [1951] INSC 35; AI... Page 2 of 112

> MAHAJAN J.--The above said sections are ultra vires … inasmuch as they clothe the executive with co-extensive legislative authority in the matter of modification of laws made by legislative bodies in India.[3]

18. It is submitted that there are two related components to this issue;
    (a) Whether the party system, compounded by MMP and regulatory capture, have resulted in a situation where the Crown determined the Parliamentary outcome in regard to this Act;
    (b) Whether in this particular instance the Select Committee in fact abdicated its functions to the police, then simply signed off on the police review of submissions.

19. AV Dicey in his '*Introduction to the Study of the Law of the Constitution*'[4] published in 1914, wrote:

> Systematic party discipline violates the essential principles of Democracy, for it very much limits the control over their Government exercised by the people, and it sacrifices the public service to purely individual interests. The evil is very apparent in England and will become more so.[5]
> The rule of a party cannot be permanently identified with the authority of the nation or with the dictates of patriotism. This fact has in recent days become so patent that eminent thinkers are to be found who certainly use language which implies that the authority or the sovereignty of the nation, or even the conception of the national will, is a sort of political or metaphysical fiction which wise men will do well to discard. [6]

20. Breaking down the above quote, Dicey says that the overweening power of the party is corrosive of representative democracy. In referring to "purely individual interests" Dicey is referring to the influence of lobbyists, who provide the funds by which the party promotes itself. He who pays the piper calls the tune. In the media age this factor is more dominant than ever. He says this is "evil". He then refers to "eminent thinkers" who considered that this process has rendered the "sovereignty of the nation" a fiction.

21. It is submitted that sovereignty inheres in society at large. Parliament is only sovereign insofar as it represents society. This is why properly speaking the English Parliament

[3] Ibid.
[4] https://oll.libertyfund.org/titles/dicey-introduction-to-the-study-of-the-law-of-the-constitution-lf
[5] Ibid xv.
[6] Ibid lx.

comprises of the Crown together with the combined Houses of Parliament[7]. This division maps onto the broad classes which comprise English society, the Commoners, the Barons and the Crown, the latter being the representative of executive power, that is the military and the executive agencies. The party system has resulted in the bulk of society, the Commoners, not actually being represented in Parliament. As Parliament no longer represents society it is no longer sovereign.

22. It is submitted that over the last 100 years the "evil" which Dicey identified has become entrenched, particularly because 'safe seats' means that in most electorates, pre-selection rather than election, determines who will find a place in Parliament. Further, MMP provides a successful political party with absolute discretion as to a set of parliamentary places. This set of factors leads to practical disenfranchisement, as has been observed in the US as follows:

> When the preferences of economic elites and the stands of organized interest groups are controlled for, the preferences of the average American appear to have only a minuscule, near-zero, statistically non-significant impact upon public policy. [8]

23. It is submitted that the above process has resulted in a binary political system whereby the vast bulk of prospective parliamentarians are beholding to a small cabal, which decides who will be selected to stand for a particular electorate and who could expect a place by virtue of MMP. This completely unequal power dynamic is exacerbated by the concern of the cabal for replacement, which leads them to choose candidates whose primary and often sole talent, is one of loyalty to the cabal. The resulting dearth of ability in Parliament throws the great bulk of the workload onto the cabal, who may be persons of ability but they are few. This leads to divestment of decision-making to the executive agencies. This in turn leads to regulatory capture. The current Minister of Police is an ex-policeman and the National Party Shadow Minister of Police is an ex policeman. The two vie as to who can offer the most to their former colleagues. There is no longer a Minister of Police but rather a Minister **for** Police. In this, Cabinet structure more represents a set of fiefdoms than a representative government.

[7] Ibid 322.
[8] doi:10.1017/S1537592714001595 American Political Science Association 2014 p 575.

24. It is submitted that the capture of the Legislature by the Crown has resulted in a collapse of the separation of powers. In reality the passage of the Act was accomplished by the Crown, utilising a power in the nature of the prerogative powers, of which the UK Supreme Court had this to say:

> 41.Two fundamental principles of our constitutional law are relevant to the present case. The first is the principle of Parliamentary sovereignty: that laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply. However, the effect which the courts have given to Parliamentary sovereignty is not confined to recognising the status of the legislation enacted by the Crown in Parliament as our highest form of law. Time and again, in a series of cases since the 17th century, the courts have protected Parliamentary sovereignty from threats posed to it by the use of prerogative powers, and in doing so have demonstrated that prerogative powers are limited by the principle of Parliamentary sovereignty.

25. Among the 17th Century cases referred to above, the UK Supreme Court specifically referred to *Entick v Carrington*[9]. As discussed in the US Supreme Court case of *US v Boyd*[10] at issue in the cases surrounding *Entick v Carrington* was the suppression of critics of the English Administration of the time, particularly John Wilkes and his associates. John Wilkes was writing about the Administration's use of taxation of the American colonies to bribe members of Parliament, with the result that Parliament was in the thrall of the Crown[11]. In 1769 the King asked the House to vote 513,000*l* to pay accumulated debts on the Civil List. Parliament was given no breakdown of the expenses, a situation which Edmund Burke characterised as a "downright mockery"[12]. According to one surviving Treasury Report, secret and special services "made up largely of political rewards",[13] cost 630,000*l* . There was a call by 135 MP's for an account of the deficit, "but on the side that had the money, 248 said No"[14]. One newspaper, *The Political Register*, published a mock King's speech, as follows: [15]

[9] (1765) 19 State Tr 1029; 95 ER 807: 809.
[10] 116 U.S. 616 (1886).
[11] Wardroper J, *Kings, Lords and Wicked Libellers (*1973) and *The Conservative Revolution of Edmond Burke* Mazlish p 25.
12 Wardroper ibid 56.
[13] Ibid.
[14] Ibid.
[15] Ibid 57.

> You know that last winter there was only half a million of which I could not give an account. You had it among you; and that is enough to satisfy any reasonable man.

26. In determining *Entick v Carrington* Pratt CJ looked to constitutional norms. Looking at the history of the office of Secretary of State, Pratt CJ noted that while by the time of the Petition of Right the King and council claimed the general power to commit, the Petition was silent on any such empowerment of the Secretary. Pratt CJ held that; "if the Secretary of State had claimed any such power, then certainly the Petition of Right would have taken notice of it".[16]

27. In considering the lawfulness of the general warrant under which the search at issue was purportedly authorised Pratt CJ explicitly referenced the "ancient constitution" as follows:

> …it is too modern to be law; the common law did not begin with the Revolution; the ancient constitution which had been almost overthrown and destroyed, was then repaired and revived; the Revolution added a new buttress to the ancient venerable edifice.[17]

28. Pratt CJ also held that constitutional rights could not be unmade by the Court:

> There is no authority but of the Judges of that time that a house may be searched for a libel, but the twelve Judges cannot make law.[18]

29. The history of the Administration of George III shows that Parliament can be corrupted. It is submitted a Parliament in the thrall of the Crown cannot be considered sovereign and that this is a question of fact and so was not amenable to strike out. It is accepted that facts alleged may be so fantastic that the Court will not entertain them it is submitted that this is not the case here, for the following reasons:

(a) Parliament is not a holy cow. The history of the franchise clearly shows it to have been the creature of the Barony for most of its existence.

[16] (1765) 19 State Tr 1029; 95 ER 807: 809
[17] Ibid.
[18] Ibid.

(b) Parliament was corrupted by King George III and so was not sovereign for that period;

(c) In his *Introduction to the Study of the Law of the Constitution* Dicey's tone is generally triumphalist but when he comes to the issue of the party machine he becomes a worried man. It is submitted that the concerns of one of the most eminent constitutional academics cannot lightly be dismissed. It is submitted that the Court can take judicial notice of progression of this tendency in NZ. For example Helen Clarke PM made her political ally Margaret Wilson the Attorney–General of NZ, the most critical post in insuring the separation of powers, despite the fact that Wilson had lost the Tauranga election by some 10,000 votes.

(d) The passage of this Bill bears all the hallmarks of being decided by the Labour Party cabal. This was not so much imposed on the parliamentary party but rather the parliamentary party is almost exclusively made up of persons for whom independence of thought is literally unthinkable.

Justiciability - process

30. At issue under this head is whether the process by which the Act came into being was so flawed that it violated constitutional norms. Wylie J referenced this issue at paragraph [39] of his Decision observing in relation to "higher law values":

> It has been said that Parliament "misfires" where legislation flouts such values in a wanton or indiscriminate manner.[19]

31. In the Prorogation case the UKSC held that following *R v Chaytor* [2010] UKSC 52; [2011] 1 AC 684:

> 66.That case clearly establishes: (1) that it is for the court and not for Parliament to determine the scope of Parliamentary privilege, whether under article 9 of the Bill of Rights or matters within the "exclusive cognisance of Parliament"; (2) that the principal matter to which article 9 is directed is "freedom of speech and debate in the Houses of Parliament and in parliamentary committees.

[19] P A Joseph, above n 10 at para 15.7.3(2), p 569, and see generally para 5.7, p 564 to 574.

32. It is submitted that Wylie J was in error in striking out the causes of action which alleged a flawed Parliamentary process, as this area of law is not settled, as the UKSC further held at paragraph [66]:

> … extensive inroads had been made into areas previously within exclusive cognisance.

33. It is submitted that the centrality of principle that "where there is a wrong there is a remedy" to the rule of law requires any abridgment of the principle to be strictly limited to the peril the abridgment addresses, as stated in *Jones v Kaney* [2011] 2 AC at 398G:

> Held, allowing the appeal (Lord Hope of Craighead DPSC and Baroness Hale of Richmond JSC dissenting), that any exception to the general rule that every wrong should have a remedy had to be justifed as being necessary in the public interest and should be kept under review;

34. Accordingly, it is submitted that the ambit of art. 9 and the exclusive cognizance is limited to the prevention or significant chilling of free speech within Parliament. It is submitted that an enquiry into whether Parliament conformed its practices to constitutional norms cannot be an unwarranted intrusion on Parliamentary process as Parliament is obliged to conduct itself within constitutional norms.

35. It is submitted that to the extent that the Parliamentary Privilege Act 2014 purports to exclude constitutional norms it is unconstitutional and of no lawful effect.

36. In *Kruse v Johnston*[20], where a by-law rather than an Act of Parliament was at issue, Lord Russell Killowen CJ was not prepared to completely forgo any degree of judicial supervision and set out indicia, which may warrant judicial intervention, such as when laws were: [21]

> .. partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they in involved oppressive or gratuitous interference with the rights of the subject to them as could find no justification in the minds of reasonable men.

[20] [1898] 2 QB 91.
[21] Ibid 99.

37. It is submitted that here Parliament acted in bad faith by predetermining the outcome of the Select Committee process. It is submitted that because of the significance of the right to bear arms in a free society the evisceration of that right was oppressive. It is submitted that the actions of Parliament were such "as could find no justification in the minds of reasonable men". This is because the Act was formulated by the NZ police in furtherance of their own interests, to have a monopoly of armed force in civil society. The rationale for the amendments to the Arms Act was to prevent mass shootings but the related passage of the **Arms (Prohibited Ammunition) Order 2019** . which banned armour-piecing rounds and the like, only has application in regard to the police. It is accepted that police concerns for their own private interests are as legitimate as the private interests of any other individual or group. However, to fail to see that this gives rise to a conflict of interests demonstrates that the NZ Parliament is simply an organ of the Crown.

38. Further, the trigger for the passage of the Act was arguably caused by police themselves relaxing the regime around licensing. This relaxation allowed Brenton Tarrant to obtain a license online and without the personal vetting process that the vast majority of licensed firearms holders had been subject to, treating the unlike alike.

39. In *Re Delhi Laws* it was held:

> Fazl Ali J.--(i) The legislature must formally discharge its primary legislative function itself and not through others. … (iii) It cannot, however abdicate its legislative functions and therefore, while entrusting power to an outside agency, it must see that such agency acts as a subordinate authority and does not become a parallel legislature. (iv) As the courts of India are not committed to the doctrine of separation of powers and the judicial interpretation it has received in America, there are only two main checks in this country on the power of the legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to (750) 'abdication and self-effacement.'[22]

40. The Parliamentary record shows that the Select Committee delegated consideration of the written submissions to it, to NZ police and then adopted the police review, without question, immediately upon receiving it. It is submitted that as the NZ police are conflicted on this issue, having long sought themselves to be armed at all times and the

[22] Re Delhi Laws p3.

population disarmed, this amounted to "abdication and self-effacement". Further it is submitted that the evidence of Mr Heckenberg, filed in support of these proceedings, suggests that the police review diminished the magnitude of dissent, as the review lumped those who objected to the rushed process into a secondary category and never engaged with the reasons put forth in opposing submissions. It was simply a head count, which inexplicably did not include about 10% of submissions. It is submitted that the Select Committee did not in fact consider written submissions opposing the Bill.

41. Parliament, at the direction of the Crown, cynically rushed this Act through immediately after the Christchurch shootings. It is submitted that the use of this tragedy to advance a political agenda was a disgusting example of political opportunism.

42. The process, from introduction of the Bill to its Royal assent was 10 days. The time given for written submissions was 48 hours. Oral submissions were restricted to those selected by the Select Committee.

43. The Chair of the Select Committee predetermined the outcome, stating publicly on 3 April 2019 that: "I think the public of New Zealand has demanded Parliament take action on this issue".

44. The Chairman of the Select Committee also made a mistake of fact in that he stated on 3 April 2019:[23]

> "Across the 250,000 or so licensed firearm owners the vast majority will not actually be impacted. The ban specifically deals with military-style assault weapons and that is a much smaller subset."

45. Mr. Paul Clark, then President of the Council of Licensed Firearms Owners. "COLFO" in his affidavit filed in support of this application, estimated that about 30% of the 250,000 licensed firearm owners owned a firearm or firearm part caught by the prohibitions set out in the Bill. Mr. Clark also deposed that a further 100,000 to 150,000 people use firearms under the supervision of licensed firearms holders.

[23] https://www.radionz.co.nz/news/political/386192/gun-owners-shocked-at-short-submission-time-on-firearms-law-change

46. The Bill also provided that by OIC the Government may "declare any ammunition to be prohibited ammunition for the purposes of this Act". This means that all licensed firearms owners were impacted by the Bill.

47. As discussed above the Select Committee delegated the review of submissions to police, a conflicted party, then adopted that review, demonstrably without consideration as it did so within hours of its presentation. It is submitted that this amounted to abdication and effacement.

48. It is submitted that the process by which the Act was passed fell so far short of the process that controversial issues require, that it was unlawful.

Justiciability - comity

49. At paragraph [30] Wylie J adopted the Crown submission that comity forbade the Court from questioning the legislature. In the Prorogation case a similar submission was advanced on behalf of the UK PM, as follows;

> 28. … They conclude that the courts should not enter the political arena but should respect the separation of powers.

50. In response the UK Supreme Court held:

> 34. Fourthly, if the issue before the court is justiciable, deciding it will not offend against the separation of powers. As we have just indicated, the court will be performing its proper function under our constitution. Indeed, by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be giving effect to the separation of powers.

51. the UK Supreme Court also held:

> 66. … That case clearly establishes: (1) that it is for the court and not for Parliament to determine the scope of Parliamentary privilege, whether under article 9 of the Bill of Rights or matters within the "exclusive cognisance of Parliament"; (2) that the principal matter to which article 9 is directed is "freedom of speech and debate in the Houses of Parliament and in parliamentary committees.

52. It is submitted that the separation of powers requires the Court to consider whether the Crown is using 'prerogative powers' to suborn Parliament.

Error of fact

53. The learned Judge, at paragraph [50] of his decision held that "in my view the waters are relatively well chartered." It is submitted that the only evidence as to the novelty of the

situation was that of Rodney Hide, who in his affidavit filed in support of this proceeding stated of the passage of the Bill, "I have never seen anything like it".

54. As Mahatma Ghandi wrote in *Law and the Lawyers*[24], everything arises from the facts. It is submitted that the causes of action which alleged a failure of Parliamentary process should not have been struck out as factual issues arise. As set out at paragraph 31 above, the UKSC held that it is for the Court to ascertain whether Parliament is shielded by privilege. This enquiry in turn is based on the factual matrix. It is submitted that without the relevant facts being considered and established as evidence, questions as to law could not be resolved.

Constitutional rights

55. In the UK Prorogation case the UK Supreme Court Held:

> 39. Although the United Kingdom does not have a single document entitled "The Constitution", it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice. 40.The legal principles of the constitution are not confined to statutory rules, but include constitutional principles developed by the common law.

56. That this needs to be said demonstrates how far English constitutional law has been sidelined. As Blackstone said of the 'Ancient Constitution' "it has been gnawed at by rats". Blackstone was not referring to rodents and since his time the rats have been busy. Because English constitutional law is such an unknown it is necessary to give a potted history of its basis.

57. In its origins the Anglo-Saxons governed themselves by an assembly of the heads of households called the "Thing' in Germanic and later the "Folkmoot" in what was to become England[25],. These assemblies were controlled by a speaker, as is Parliament today. This is the origin of the right to assembly and is the origin of the jury trial as it

[24] https://www.mkgandhi.org/law_lawyers/law_lawyers.htm

[25] *Primitive Folk-Moots*, Gomme London 1880.

was here that justice was dispensed. The warrior chieftans did not have the right to punish[26]. This free society was founded on an equality of arms.

58. Over time and looking specifically at England, democratic governance by the Folkmoot devolved for three central reasons.
    (a) As the original 16 kingdoms of Anglo–Saxon Britain coalesed into one Kingdom and one nation, localised decision-making ceased to be a practical fit, given the difficulty and costs of travel. The Folkmoot devolved into the Witan and then the Witanmot, which were delegations.
    (b) The nature of the hetherto free society of the Anglo-Saxons fundamentally altered with the enserfment of the Celts. As the great majority of Celts come under the sway of the "Big Men" of the tribes, who become the Barony, tribal unity was lost and society became more hierarchial. What is often characterised as the class struggle in England is just as much a racial division.
    (c) Over time the self –interest of the Barony, first among whom is the Monarch, led to a widening gulf between those at the top and those at the bottom.

59. In this period of devolution English society maintained a balance based on a tripartite division where the Monarch held executive power, the Barony held judicial power and the Commoner held the "liberty of the subject" which is the province of rights. Within the 'liberty of the subject' came the ability to regulate the economy by customary law, such as in 'the Assize of Bread'. It was to end customary law and dispossess the Commoners of their ability to regulate the economy that the Baron's formed Parliament in 1215. The notion that the English Parliament is the foundation of democracy is a nonsense, clearly demonstrated by the progress of the franchise.

60. In this period the constitutional balance was also imperilled by the Crown's usurpations. Bad King John was countered by the alliance of the Barons and the Commoners imposition of the Magna Carta. By the time of psychopathic Henry VIII there was another construct in play and that was of absolute executive power, sanctioned by the ideology

[26] *The Germany and the Agricola of Tacitus* The Oxford Translation Revised, May 17, 2013 [EBook #7524]

of the "divine right of Kings". This doctrine is antithetical to English Liberty. It is King Henry VIII and the King Henry VIII Acts, so beloved by Crown lawyers, that set England on course to the civil war which erupted in the reign of the Stuarts.

61. The next critical juncture was the decapitation of Charles 1st, which fundamentally altered the stature of the Monarch and hence the tripartite balance. As foreseen by the levellers in the Putney Debates[27], with the King gone, the Commoners would be at the mercy of the Barony. To control the Parliamentary power of the Barons the levellers argued for manhood suffrage but they lost the debate. After the Interregnum the Baron's Parliament enacted the Enclosure Acts, the Game Acts and then the Black Acts, crushing the Commoners.

62. Previously the tripartite division of power gave rise to contests between the Crown and the Barony with the Commoners on one side or the other but after the French Revolution the English constitutional landscape fundamentally alters. EP Thompson wrote that "the revolution which did not happen in England was fully as devastating, and in some features more divisive, than that which did happen in France"[28].

63. Thereafter the Barony, and the Crown act as one in their suppression of the Commoners and their constitutional rights. This pitted all the organs of power, the Crown, Parliament and the Court against the Commoners. It is this collapse of the balance of power within English society which has led to the eclipse of constitutional law. The victors write the history.

64. In the present matter the learned Judge discussed "higher law values" but not equate these to the right to bear arms, the right which upholds all other rights. However, as Dicey wrote:

> No sensible man can refuse to admit that crises occasionally, though very rarely, arise when armed rebellion against unjust and oppressive laws may be morally justifiable[29].

[27] http://bcw-project.org/church-and-state/second-civil-war/putney-debates
[28] *Making of the Working Class* EP Thompson 1963 Gollancz London.
[29] Dicey N 119.

65. It is submitted that armed rebellion in the requisite circumstances is not merely "morally justifiable" but is a social duty. Rights are currently misconceived as private interests. For example following *Katz v US*[30] the basis of the US Fourth Amendment has largely been conceptualised as a private interest when the clear wording of the Right is that it is a right of the **public** to be **secure** against state actors. *Katz* has been followed in NZ where the proper authority, *Entick v Carrington* again explicitly states that right is a constitutional limitation of the prerogatives of the Crown. In *US v Boyd* the Supreme Court of America is of the view that the Fourth Amendment derives from the cases surrounding *Entick.* It submitted that the conceptualisation of rights as public interest, which are necessarily possessed by individuals, is the classical and correct conceptualisation, as set out by Lord Coleridge in *Bonnard v Perryman*:

> The right of free speech is one which it is in the public interest that individuals should possess.[31]

66. Properly understood the right to bear arms protects society from succumbing to absolutism, with the attendant social dysfunction that absolutism engenders. It not a private right but a public interest right.

67. It is submitted that public interest is not seen as a concern for the Court as it has taken the view that public interest is properly the province of the public, to be exercised by its elected representatives in Parliament. It is submitted that this is in error for two reasons:
    (a) In fact Parliament does not represent the public but rather special interests, as discussed above.
    (b) It is the function of the Court to declare the law and give guidance to society.

68. Abraham Lincoln famously said: "you can fool some of the people all of the time and all of the people some of the time but you cannot fool all of the people all of the time". This

[30] 389 U.S. 347 (1967).
[31] (1891) 2 Ch. 269; 283.

observation is so well-known that it can be rushed over but it is submitted that it bears consideration for it is a very dismal but accurate observation about democracy.

69. It is submitted that as you can fool some of the people all of the time and all of the people some of the time, rushed legislation is a cynical manipulation of the process. With its unicameral Parliament NZ is particularly prone to such abuse and it is only the Court which can prevent perversion of the law by this technique, especially where you have conformity across party lines..

70. It is submitted that properly 'Law' is that which is broadly consensual, and rationally based. Because what is consensual and rational has a 'higher law value' within our society the word has been hijacked to clothe statute, which may be simply dictate.

71. To return to Lincoln, as many do not have the facility to discern, they are reliant on authority to inform them but authority in our Society is largely exercised by the Media, which is controlled by the Barony. It is submitted that the primary function of the Court is to uphold constitutional law and so give impartial guidance to society.

Magna Carta

72. In *Shaw v Commissioner of Inland Revenue* the Court considered the submission that Magna Carta's constitutional status was affirmed by its inclusion in a list of Constitutional Enactments set out in the Imperial Laws Application Act 1988. The Court dismissed this submission at paragraph [14] of its Decision on the basis that in 1990 Parliament decided against "constitutionalising" the rights enacted by NZ Bill of Rights Act.

73. It is submitted that this interpretation does not take account of the political issues in play in the introduction of the NZ Bill of Rights. It is submitted that in its promotion of the NZ Bill of Rights, the Labour Party was driven by its internationalist ideology to incorporate international treaty, the International Convention on Civil and Political Rights into domestic law. It is submitted that it was opposition to this clumsy attempt to

incorporate Treaty into domestic law which resulted in the compromise that the Act be passed but that the provisions set out in the Act be subject to s4.

74. It is submitted that this has resulted in the absurdity that an Act which claims to "affirm, promote and protect" rights and freedoms has actually had the reverse result., as demonstrated by the reasoning in *Shaw*.

75. It is submitted that the NZ Bill of Rights has no place in NZ constitutional law, except to confuse and obscure.

76. It is submitted that Magna Carta sets out a number of constitutional conventions that are part of the Constitution of NZ. It is submitted that art. 61 explicitly incorporates within it a right to resist arbitrary power with armed force, which is the right to bear arms. In *US v Heller* Justice Scalia noted that the Second Amendment to the US Bill of Rights did not create the right to bear arms, but only stated that it shall not be infringed[32]. It is submitted that the rights set out in the US Bill of Rights directly devolved from the Rights of the English[33] as set out in the Ancient Constitution as Pratt CJ and Blackstone termed it.

Private property

77. In the High Court the plaintiff submitted that the right to private property operates as a fundamental English common law limitation of the prerogatives of the Executive and is a constitutional boundary mechanism which prevents absolutism. In the Prorogation case at paragraph [52] the UKSC used similar language to describe how the legal standard they applied, operated, as follows:

> That standard is not concerned with the mode of exercise of the prerogative power within its lawful limits. On the contrary, it is a standard which determines the limits of the power, marking the boundary between the prerogative on the one hand and the operation of the constitutional principles of the sovereignty of Parliament and responsible government on the other hand.

[32] *District of Columbia v. Heller*, 554 U.S. 570 (2008) [8] [9]
[33] *That Every Man Be Armed* Halbrook S. R. University of New Mexico Press 2013.

78. It is submitted that the concept of 'province' has utility in conceptualising the lawful scope of conflicting interests. Just as in the *Lord of the Rings* the Ring had no power within the homely realm of Tom Bombadil, who is Puck the British sprite, the ambit of the crown's power is delimited by rights. It is submitted that in this way property rights function as a constitutional boundary mechanism. In his Decision at paragraph [41] Wylie J relied upon the Public Works Act to reject the submission that property rights could be relied upon as a constitutional restraint. It is submitted that the sacrifice of an individual's private interest for the greater good is not the same as a mass confiscation of property. As Josef Stalin said: "quantity has its own quality". What is in issue is a power dynamic and if a power dynamic disempowers the people and empowers the Crown, the tendency is towards absolutism.

79. It is further submitted that while a confiscation under the Public Works Act is predicated on the public good out-weighting a private interest there was no proper consideration of the contending values in issue here. In the first instance there was no discussion as to the liability of the NZ police in regard to the Christchurch shootings, by relaxing the process by which Brenton Tarrant obtained a firearms license. Accordingly there was no consideration as to whether the previous licensing regime was sufficiently robust to reduce the possibility of such a tragedy. There was no consideration of whether shootings arising from the right to bear arms, as it previously existed in NZ were an acceptable cost in reducing the risks to a free society occasioned by the disparity of arms between the people and the police. It is submitted that without proper consideration of the contending values, public interest could not be lawfully invoked and so the Act unlawfully infringed on the right to private property.

Treaty of Waitangi

80. The learned Judge relied upon *Hoani Te Heuheu Tukino v Aotea District Maori Land Board*[34], at paragraph [34] of his decision, in holding that the Treaty does not on its "own confer enforceable legal rights". It is submitted that *Te Heuheu Tukino* was decided during a period when the separation of powers between the Crown and Court had largely

[34] 3 April 1941.

collapsed, the nadir of these times being exemplified by *Liversadge v Anderson*[35], by which time the Court had gone down the rabbit-hole, to paraphrase Lord Atkin. It is submitted that this process has reversed since *Anisminic*[36] and that constitutional cases during this period are not necessarily to be relied upon.

81. It is submitted that the Treaty is a part of the Constitution of NZ and as such cannot be altered by Acts of Parliament. It is submitted the Court may make declarations as to any inconsistencies between actions by the Crown and the terms of the Treaty.

82. The Treaty was a constitutional settlement by which Maori surrendered sovereignty in exchange for citizenship. This agreement guaranteed them all the "rights and privileges of an English subject". It is submitted that in this bargain Maori obtained such rights and privileges as pertained **at the time,** including the right to bear arms. It is submitted that the diminution of these rights by the Crown, as purported obtained by the Act in issue, is a unilateral variation of the Treaty and so is unlawful.

83. As discussed in *Ngati Apa*[37], in 1847 the law as to native title had been correctly set out in *R v Symonds*[38]. It took from *Wi Parata*,[39] decided in 1877, until *Ngati Apa*, decided in 2003, for this to be settled law in NZ. That's about 125 years. It is submitted that this is cause for reflection. It is submitted that the reason learned jurists got it so wrong, for so long, was because the collapse of the separation of powers had resulted in the Court seeing its function as one of rationalising the actions of the Crown.

Bill of Rights 1688

84. While the UK Supreme Court in the Prorogation case characterised the Bill of Rights as an Act of Parliament, there was no discussion on this point. It is submitted that the Bill of Rights is not called an Act as it was not an Act of Parliament but rather was a constitutional settlement concomitant on the Glorious Revolution. As set out above at paragraph 18, in *Entick v Carrington* Pratt CJ is clearly referencing the Bill of Rights as a restatement of the "ancient constitution".

[35] [1941]UKHL 1.
[36] [1969] 2 AC 147.
[37] [2003] NZCA 117.
[38] NZPCC 387.
[39] (1877) 3 NZ Jur (NS) SC 72.

85. The Parliamentary franchise in 1688 represented little more than the Barony. It is estimated that in 1780 only 3% of the people of England and Wales had the vote. In its preamble the Bill of Rights says: "Whereas the Lords Spiritual and Temporal, and Commons, assembled at Westminster, lawfully, fully, and freely representing all the estates of the people of this realm…". The terminology of the preamble invokes concensus across society, rather than the authority of Parliament. It must not be forgotten that in its origins English society was governed by a direct democracy of the heads of households assembled at the Folkmoot[40]. The Folkmoot assembled in large open spaces, such as Runnymede, which had a similar function to the Maori Marae, in that it held a multitude. Parliament, in its origin and thereafter to varying degrees, was the vehicle by which the Barony supplanted the democratic governance of society, to further their own interests.

86. The exclusion of Catholics, only about 1% of the population, from the right to bear arms, was an exclusion of the partisans of absolutism, in a time of civil war where English liberty was ranged against the divine right of kings. The proviso that such arms be "as allowed by law" related to the extant prohibitions, such as on highwaymen[41]. Where there were conflicts, such as with the Games Act, this was promptly bought in line with the Bill of Rights.

Conclusion

87. Broadly the learned Judge held that the cause of actions were not justiciable as Parliament was "supreme"[42]. It is noted that Dicey characterised Parliament's power as "sovereign", as did the UKSC in the Prorogation case. Dicey balanced the sovereignty of Parliament with the supremacy of the law of the land. It is submitted that sovereignty is not dogma but is a matter of fact and that as Parliament is in the thrall of the Crown it is not sovereign.

[40] *Primitive Folk-Moots* Gomme London 1880.
[41] Statute of Northampton (1328).
[42] [39}

88. It is submitted that the rationale of judicial deference is that the Court should not overrule the will of the people. However, the will of the people is not in issue where the Crown utilises the appearance of democracy to grasp at absolute power. It is submitted that the current political process, dominated as it is by the party machine, lobbyists and regulatory capture, is a fraud on the people. No differently than the multitude of other frauds the Court is called upon to unwind, this fraud vitiates all that it obtains.

89. Constitutional law does not rely on good intentions but sets interest against interest. To prevent the Crown from using state power to become absolutist the armed force of the state is fettered by the people's right to bear arms, as provided by the common law, Magna Carta and the Bill of Rights.

90. There is truth in the quip that, "God made man but Samuel Colt made men equal". The effective disarmament of the people purportedly accomplished by the amendments in question and the fact that the NZ police now look more like a standing army than a police force is all part of the same process. The right to bear arms holds in check the armed retainers of the Crown and is the practical ability to resist absolutism. Equality of arms is the prime and primal right which protects all other rights as it asserts equality. This is evident in the fact that worldwide the extent of the right to free speech has a direct correlation with the extent of the right to bear arms. Shortly after the passage of the Act in question the Labour Party indicated that next it would suppress free speech.

91. It is not a co-incidence that the state is becoming all-powerful while constitutional rights are being denied. These are two sides of the same coin. Rights limit power. The Act now bans firearms which are capable of counter-balancing those held by state actors and provides that by Order in Council any and all ammunition may be banned. This limitation of the right in fact extinguishes the right, as it removes any practical means of resistance to absolutism. What is being sought by the Crown is unfettered power but the wisdom of our Constitutional Law tells us that "power corrupts and absolute power corrupts absolutely" as Lord Atkin put it. At Waco, Texas, police murdered 76 men, women and children. At Bundy's Ranch a similar group of heroes were met by a body of men armed with semi-automatic firearms. Nobody died.

92. Justice Thomas of the US Supreme Court has observed that the right to bear arms is the right least loved by the Court. It is submitted that this is because the Court is generally composed of cerebral types whose forte is not violent action. Armed violence is anathema to such personalities. However, it is submitted that the ugly truth is that at bottom, power dynamics underlie societies. It is further respectfully acknowledged that the basis of these submissions, that the state is tending towards absolutism, will not sit well with the august members of the Supreme Court, as this submission is as far from your reality as are the sands of Mars. However, absolutism does not first impact on the most privileged members of society but rather first afflicts those at the other end of the social spectrum, the members of the "torturable class", to use Graham Greene's expression. But then it eats its way up.