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CHAPTER 3

THE LEGAL PROTECTION OF HUMAN RIGHTS IN NEW ZEALAND: A SHORT HISTORY AND OVERVIEW OF THE CONTEMPORARY SCENE

3.1 INTRODUCTION

3.1.1 The purpose of this chapter is to examine three discrete, but interrelated, matters:

(1) The historical protection of what we would nowadays refer to as "human rights" by the common law and statute;

(2) A description of the ways in which the common law, statutes and other means apart from BORA currently protect human rights in New Zealand; and

(3) The development of international human rights protections and their impact on domestic New Zealand law, both through the enactment of legislation in order to incorporate relevant international norms and the judicial use of those norms in interpreting and applying New Zealand law.

3.1.2 In the course of discussing these matters, it will be necessary from time to time to consider some statutes and common law doctrines that would now be regarded as inconsistent with contemporary human rights law. It should be noted, however, that it is *not the* purpose of this chapter to provide a comprehensive list of the many statutes, policies and common law doctrines, which, from time to time, undoubtedly did amount to violations

of human rights. The particular history of BORA (and previous proposals for a bill of rights in New Zealand) is discussed in Chapter 2: Background to and History of the New Zealand Bill of Rights Act 1990. In the final chapter, Chapter 35: Reflections, we discuss the contemporary use of human rights norms, including BORA, in public discourse.

3.2 THE HISTORICAL PROTECTION OF HUMAN RIGHTS AT COMMON LAW: METHODOLOGIES FOR PROTECTING HUMAN RIGHTS

3.2.1 Historically, the common law has not developed a code of unwritten rights and freedoms that it regarded as fundamental and upon which Parliament could not

trespass. Rather, the common law employed a number of methods to secure the de facto and de jure enjoyment of certain rights and freedoms. The approach rested on the employment of a number of complementary methodologies.

3.2.2 First, it was a basic postulate of the common law that in general all individuals could do or say whatever they pleased, provided that they did not thereby offend statute or common law or trespass on the legal rights of others.[1] This is the concept of "residual liberty" (that is, liberty to do that which is not forbidden).

3.2.3 Secondly, the scope of operation of residual liberty has been quite broad, because the courts assume that fundamental principles governing civil liberties are to be taken for granted as informing parliamentary purpose and text;[2] conversely the courts will presume that general words in a statute are intended to be subject to the basic rights of the individual.[3] Thus, the courts have applied a rule of statutory interpretation to the effect that certain rights are so fundamental that the courts should not interpret a statute as encroaching on any of those rights except to the extent that the statute expressly says so in clear words or by necessary implication.[4] As regards the latter, it has been consistently emphasised that "[a] necessary implication is not the same as a reasonable implication".[5] A necessary implication is one that flows from the express provisions of the statute construed in their context; it is not sufficient to show that had Parliament thought about the matter it

is reasonable to suppose that it would have responded in the manner advanced by the party supporting the implication.[6]

[page 51]

Accordingly, "it is inappropriate to adopt an expansive construction of a statute which encroaches in a substantial way on fundamental personal rights".[7]

3.2.4 Thirdly, when interpreting statutes that authorise interferences with personal freedom, the courts have taken upon themselves the role of "preserv[ing] the balance which was the aim of the legislation so that personal freedom, privacy and dignity are not infringed beyond the extent prescribed in the greater public interest".[8]

3.2.5 Fourthly, statutes that conferred apparently untrammelled discretion on judicial or administrative officials have been interpreted as not conferring a discretion to act unreasonably, at least in so far as the discretion affects a right or freedom regarded as fundamental by the common law.[9] The level of scrutiny applied to the assessment of reasonableness could, on occasion, be quite searching.

3.2.6 Finally, and controversially, in New Zealand there have been suggestions by one judge — Lord Cooke of Thorndon — that some rights run so deep in the common law tradition that if Parliament should legislate them away, the courts would refuse to give effect to such legislation.[10] Fortunately, such a constitutional crisis scenario has not yet come to pass in New Zealand and Lord Cooke's suggestion has remained such. That said, there have been one or two cases, in particular *R v Poumako*[11] and *R v Pora*,[12] in which certain judges have espoused "constitutional" canons of interpretation that have an effect that is only a degree or so shy of the possibility advanced by Lord Cooke.

3.2.7 As noted, these methodologies represented general positions and there were, of course, many exceptions. It would be fair to comment that in the last number of years, the courts have been more forthright and consistent in their reliance on canons of rights-friendly statutory interpretation than has been the case in the past.

3.2.8 Moreover, common law provided the basis for numerous interferences with human rights. For example, the common law itself created a number of offences that restricted the exercise of what we would now regard as human rights. The common law of blasphemy interfered with freedom of expression and to the extent that it only protected Christian beliefs amounted to favouring one religious belief over others;[13] the common law prohibition on procuring miscarriages raised reproductive rights

issues; common law prohibitions on assemblies could hamper collective expression of opinion and/or freedom of association, and so on. Many rules of common law also affected the enjoyment of human rights. For example, many property, succession and family-related rules proceeded on the assumption that a married woman was the "property" of her husband and had no separate legal personality;[14] defamation law and the law of contempt impinge upon the exercise of free expression; and so on. In addition, the vigour with which the "rights-consistent" interpretation methodologies have been applied has varied from time to time, and from right to right.

3.3 RIGHTS AND FREEDOMS RECOGNISED BY THE COMMON LAW

3.3.1 Many of the rights and freedoms protected by BORA have long been recognised in the common law of the United Kingdom and New Zealand and, more recently, under statute. It is worthwhile considering a number of these.

Freedom of expression (s 14 of BORA)

3.3.2 Freedom of expression has had the benefit of much high rhetoric at common law. In *Attorney-General v Butler*[15] the then Supreme Court was asked to commit the defendant trade unionist to prison for contempt of the Arbitration Court. In upholding the charge of contempt (but only imposing a fine) the Court commenced its analysis by emphasising the centrality of free speech:[16]

> It has long been recognised that the Courts of Justice should be subject to the freedom of criticism which is a necessary accompaniment of the freedom of speech which is the right of all free men. The public interest requires that the right to free speech should not be restricted except where circumstances necessitate it.

3.3.3 In his speech in *Attorney-General v BBC*[17] Lord Salmon founded his conclusion that contempt of court was not available in respect of a land valuation tribunal by reference to the need to avoid unnecessarily expanding the scope of the contempt jurisdiction, because it would produce a concomitant contraction of free speech and freedom of the press.

3.3.4 In *Wheeler v Leicester City Council*[18] the House of Lords held that a local council acted

unlawfully in prohibiting a rugby club from using the council's recreation fields (which it had previously used for many years) because of the club's refusal to put pressure on three of the club's members not to take part in a rugby tour of apartheid South Africa. The House of Lords held that the decision was unreasonable and unfair,

[page 53]

as well as a misuse of power aimed at punishing the club when it had done no wrong. In his speech, Lord Templeman trenchantly observed:[19]

> The laws of this country are not like the laws of Nazi Germany. A private individual or a private organisation cannot be obliged to display zeal in pursuit of an object sought by a public authority and cannot be obliged to publish views dictated by a public authority.

3.3.5 More recently in *R v Secretary of State for the Home Department, ex parte Simms*,[20] Lord Steyn observed: "In a democracy [freedom of expression] is the primary right: without it an effective rule of law is not possible". In that case the House of Lords declared a blanket ban on journalists conducting oral interviews (even where the interviews were directed at investigating whether a miscarriage of justice had occurred in the inmate's case) with prison inmates to be unlawful. The House was of the view that where the restriction on free expression was substantial and affected a core aspect of that freedom then judicial deference would not be great and a high level of justification would be required.[21]

Freedom of assembly (s 16 of BORA)

3.3.6 Freedom of assembly is a right that has not historically enjoyed particularly high protection under either New Zealand or British common law.[22] For example, in *McGill v Garbutt* the then Supreme Court had to consider whether a Napier Borough Council bylaw, which prohibited street processions (subject to a limited number of exceptions, such as funerals) unless the council's permission had first been obtained, was reasonable.[23] Members of the Salvation Army, who had conducted a street procession involving the playing of band music, were prosecuted for breach of the bylaw as no permission had been sought. The Supreme Court (overturning the Resident Magistrate's decision below) held the bylaw to be reasonable. In reaching this conclusion, Richmond J made a number of observations that indicate the low value he attached to peaceful assembly:[24]

> Nor can the formation of a procession by private individuals ever be a matter of necessity, at all events of urgent necessity, save in the case of funerals.[25]

> The supposed right in any body of persons to pass in procession through the streets of a town is something entirely different from the separate and individual right of passage of the same persons as private citizens without preconcerted arrangement and mutual understanding. A procession implies more or less previous organisation, and a more

[page 54]

> or less regular array. It is the passage of an organised body of persons, who make in passing a display of their organisation. Now, it is plain that in many respects the practice of marching in procession through the streets may be reasonably expected to occasion several of the mischiefs which Borough Councils are authorised to prevent. A compact body of men moving along a thoroughfare, more especially if attended by the rabble which is frequently attracted, has an obvious tendency to obstruct traffic.
>
> I have not yet mentioned the strongest ground for asserting the right of the Municipal authority to control the practice of street processions. It is that such parades tend to occasion breaches of the peace. Where the peace is endangered thereby, a procession, whatever it may be, may, I apprehend, at common law, be stopped by the constabulary force. The common law is the vigilant guardian of individual liberty, but for this very reason shows itself jealous of assemblages not under the control of some authority recognised by the State … [I]t is undeniable that large and organised assemblages in the streets of a city for any particular purpose tend to excite to a violent opposition persons to whom the object of the assemblage is obnoxious or distasteful … It would be intolerable that any body of persons who might choose to associate themselves for the purpose should have the absolute right to parade the streets of a town in such numbers as to themselves might appear suitable by day or by night with flags flying, or torches flaring, drums beating and every kind of noisy accompaniment; and it is perfectly certain any such right is wholly unknown to the common law.

3.3.7 Indeed, when organised trade union activity took hold in the mid to late nineteenth century, the courts held such action to be unlawful and tortious. Trade unions were regarded by the common law as an illegal restraint on trade,[26] and depended on statutory protection in order to avoid suit at common law.[27] That is still the common law position in the United Kingdom.[28]

3.3.8 Collective action in the form of an industrial strike was regarded by common law as a breach of contract and participation in such an action was a tortious inducement of breach of contract. Again statutory intervention has been required to ameliorate this

common law view. In the United Kingdom[29] and New Zealand statute had to be enacted to clothe this form of collective expression with protection from legal liability and in New Zealand the ability to strike was often heavily circumscribed by statute.[30]

3.3.9 More recent decisions, however, indicate a more positive embracement of the right to assemble and protest (at least in some of its manifestations). In *Hubbard v Pitt*

[page 55]

Lord Denning MR acknowledged that the freedom to assemble and protest "is often the only means by which grievances can be brought to the knowledge of those in authority".[31] In *Verrall v Great Yarmouth Borough Council* the same judge referred to freedom of assembly as "another of our precious freedoms. Everyone is entitled to meet and assemble with his fellows to discuss their affairs and to promote their views".[32] In *Verrall*, the Court of Appeal ordered the local council to perform a contract formed with the National Front Party to allow the party to use a council hall for its annual conference. In the same case, however, the Court emphasised that it was lawful for persons to picket a place so long as it was done peacefully, designed to communicate information on views, and is not such as to submit others to any use of a constraint, or restriction of his or her personal freedom. In *DPP v Jones*[33] the House of Lords (by a majority) held that use of a highway to conduct a protest was a reasonable use thereof and not unlawful, so long as it did not unreasonably obstruct the ability of other road users to pass.

Freedom of movement (s 18 of B●RA)

3.3.10 In a case concerning a challenge to an exclusion order issued under terrorist legislation, Sedley J stated that, "freedom of movement, subject only to the general law, is a fundamental value of the common law".[34]

Freedom from discrimination (s 19 of B●RA)

3.3.11 In the field of discrimination, the common law has been described as reluctant.[35] That is certainly true of United Kingdom common law.[36] Thus in *Commissioner of Local Lands and Settlement v Kaderbhai*, the Privy Council held that it was not unlawful for the Kenyan Commissioner of Lands to limit the sale of town plots in Mombasa to Europeans only.[37] In disposing of its property, the Crown had the same right as a private landowner to

sell it to whomever it wished and on whatever basis (including racial discrimination) it wished. Similarly in *Re Lysaght*, it was held that it was not contrary to public policy to exclude Jews and Roman Catholics from a charity established to give medical studentships.[38]

3.3.12 In contrast, in New Zealand judges have been more prepared to recognise and give some effect to the non-discrimination principle. Thus, in *Lemprière v Burgles* Stout CJ held that it would be unreasonable for a lessor to refuse to consent to an assignment of the lease only because the proposed lessee was Chinese.[39] In *Watch*

[page 56]

Tower Bible & Tract Society v Hunty Borough[40] the then Supreme Court held that it was unreasonable for a municipal borough to decline permission to the Jehovah's Witnesses to use a (public) war memorial hall for the purpose of a public lecture as to do so would be discriminatory. In *Van Gorkom v Attorney-General*[41] the then Supreme Court struck down regulations that discriminated against married women teachers in the calculation of removal expenses that they could claim from the Department of Education when shifting from one school to another. In that case, Cooke J stated:[42]

> [I]n modern times discrimination on the ground of sex alone is so controversial, and so widely regarded as wrong, that I would not be prepared to infer authority to introduce it from such general language as was found in [the particular regulation], especially in the light of [the section authorising the making of regulations].

Privacy protection (s 21 of B●RA)

3.3.13 Protection of privacy, at least in so far as security of the home and personal property and privacy of the person are involved (s 21 of B●RA), has long been a special concern of the common law.[43]

3.3.14 Turning to security of private premises first, as far back as *Entick v Carrington* Lord Camden CJ stated:[44]

> By the laws of England, every invasion of private property be it ever so minute, is a trespass … Papers are the owner's goods and chattels; they are his dearest property; and though the eye cannot by the laws of England be guilty of trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect.

3.3.15 In *Morris v Beardmore* the House of Lords affirmed this basic approach in refusing to imply a right of police officers to remain on private property after they had been requested to leave. In so holding their Lordships emphasised that privacy of the home "has for centuries been recognised by the common law".[45]

3.3.16 The basic attitude of the New Zealand common law in the field can be seen in the Court of Appeal's judgment in *Transport Ministry v Payn*.[46] There the Crown had submitted that traffic officers who suspected a motorist of having driven while drunk had an implied power to enter the suspect's property in order to require him to accompany them to a testing station, notwithstanding the suspect's express desire that they not enter the property. The Court of Appeal (by majority) rejected the Crown's

[page 57]

submission. Richmond P (who ultimately dissented) noted that "the starting point … is that in New Zealand, as in the United Kingdom, neither the police nor traffic officers enjoy by virtue of their office any general right of entry onto private land".[47] In his judgment, Woodhouse J stated:[48]

> [S]omething much more basic than private property rights are concerned [in this case]. Rights of property in this context have the special significance that they enable individuals to maintain their right to privacy and their civil liberties in general and they underline the value attached to personal independence and freedom from official harassment.

3.3.17 Moreover, from the middle of the eighteenth century the common law firmly insisted that a warrant to search and seize evidence of offending had to be focused on a particular offence or offences believed to have occurred; general warrants (that is, warrants to enter and see whether the authorities could locate evidence of any crimes) were unacceptable.[49] This approach received the imprimatur of the Westminster Parliament by resolution in 1766.

3.3.18 Contemporary New Zealand common law has cleaved to this approach. In *Auckland Medical Aid Trust v Taylor*[50] a warrant had been issued to the police to enter an abortion clinic in order to locate "any thing" that would be "evidence as to the commission of an offence of abortion". No particular incidence of that offence was specified and the constable executing the warrant seized almost all of the medical and counselling files held at the clinic. He acknowledged that his purpose was not to find evidence in support of a particular suspected illegal abortion, but rather to see how many illegal abortions had taken place at

the clinic. In the Court of Appeal McCarthy P declared the warrant unlawful for failing to specify the particular illegal abortion that was under investigation. In so doing he stated, "Whilst it is important that the police be not frustrated in their attempts to bring offenders to justice, the law exists to protect the rights of individuals as well and we must struggle to hold a fair balance".[51] He said:[52]

> [I]t would be contrary to the role which the Courts of our tradition have always adopted of protecting the integrity of a man's premises and of viewing in a conservative way the extension of statutory powers to interfere with privacy, if we were to uphold the warrant in this case.

[page 58]

3.3.19 McMullin J held the warrant unlawful for the same reason.[53] In his judgment Richmond J held the warrant unlawful for its failure to particularise what items of evidence could be looked for and seized (if found): a warrant authorising the taking of "any thing" that would be evidence of illegal abortions failed to inform the occupant of the clinic what items the police were entitled to seize; worse, it had been understood by both the clinic's administrative director and the police as allowing for the wholesale removal of the clinic's records.[54]

3.3.20 Turning then to personal searches, the common law requires that prior to requesting a person to submit to such a search a police officer must identify himself or herself (if not in uniform) and inform the searcher in a general way of the reason for the search and the authority for it (unless there are exceptional circumstances in which it is not reasonably possible to do so).[55] This common law obligation applies to supplement a statute that is silent as to such matters.[56]

3.3.21 As for informational privacy, the Court of Appeal's judgments in *Duffield v Police (No 2)*[57] and *Moulton v Police*[58] are instructive. In both cases, the Court had to consider the extent of the information that the police can compulsorily acquire from an arrestee in order to establish that person's identity as permitted by s 57(1) of the Police Act 1958. In the form as it was in *Duffield*, the s 57(1) power was to obtain "all such particulars as may be deemed necessary for the identification of [the arrestee]". The Court held that, since issues of privacy were involved, s 57(1) could not be interpreted to permit the taking of particulars for purposes unrelated to the charge, such as strengthening police records for use in detecting those responsible for other offences or for use in building up a useful collection of personal details for tracing those involved in future offences. Subsequent to *Duffield*, s

57(1) was amended so as to remove the connection between the charge and the request for identification. Nonetheless, in *Moulton* the Court held that even as amended it could not contemplate that s 57(1) was intended to empower the police to delve into a person's past so as to compile a dossier on his or her schooling, employment record, successive addresses, family background, friendships, medical history, financial position, and so on. The Court held that to allow the collection of information of that kind under pain of legal penalty for non-disclosure would constitute a substantial intrusion on personal privacy.[59] The Court held that the power in s 57(1) should be confined to the purposes of recording details of the arrestee as a means of *identifying* him or her, rather than building a personal history.

[page 59]

Obtaining confessions/statements from suspects (ss 22 and 23 of BORA)

3.3.22 At common law, no statement by an accused is admissible against him or her unless the Crown shows that it is voluntary, in the sense that it has not been obtained from him or her either by fear of prejudice or hope of advantage exercised or held out by a person in authority.[60] That common law position has been modified by statute in New Zealand. Section 29 of the Evidence Act 2006 provides that a statement must not be adduced at trial if (1) the accused provides an evidential foundation that raises the question of whether the statement was influenced by oppression; and (2) the judge is not satisfied beyond reasonable doubt that the statement was not so influenced. "Oppression" means oppressive, violent, inhuman or degrading conduct towards, or treatment of, the accused or another person, or a threat of conduct or treatment of that kind.[61] It is irrelevant that the statement may be true.[62]

3.3.23 The Judges' Rules (1912) are a set of guidelines approved by English judges in 1912[63] (and subsequently approved and adopted in New Zealand) to guide police officers as to how they should interact with people whom they wish to question in relation to the commission of offences.[64] The detail of the Rules cannot be set out here, suffice it to say that the Rules: (1) encourage the giving of cautions prior to the questioning of those whom the police are about to charge with an offence; (2) discourage the cross-examination of those questioned; and (3) set out procedures for the recording of statements made to the police.[65] The Judges' Rules were, in effect, given statutory recognition through the Practice Note on Police Questioning (2007) issued by the Chief Justice under s 30(6) of the

Evidence Act 2006. That Practice Note specifically provides that it "restates" those rules, and is "not intended to change existing case law on application of the Judges' Rules in New Zealand". Non-compliance with the Judges' Rules may lead a court to the conclusion that a confession (or other evidence) has been unfairly obtained and should, as a result, be excluded from evidence.[66]

Right to be informed of offence for which arrested (s 23(1)(a) of BORA)

3.3.24 It is a basic principle of the common law that where a constable arrests a person without a warrant, he or she must in ordinary circumstances inform the

person arrested of the true ground of arrest.[67] The purpose of this general rule was to give an arrestee the opportunity of giving an explanation of any misunderstanding, with the result that further inquiries may save him or her from the consequences of false accusation.[68] The common law did, however, accept that where the reason for arrest was obvious, or where exigent circumstances required, there was no need for immediate advice as to the reason for arrest.[69]

Right to be brought before a court without delay (s 23(3) of BORA)

3.3.25 The classic common law position is that "it is the duty of a person arresting any one on suspicion of [an offence] to take him before a justice as soon as he reasonably can".[70] The common law case law emphasised that it was quite improper to arrest a person and delay bringing him or her before a court in order to facilitate the bolstering of the case against him or her (by, for example, allowing for the gathering of witnesses,[71] or holding the arrestee pending making of inquiries,[72] or the conduct of an interview).[73] The essential common law position was summarised by Richardson J in *R v Te Kira* as being that "no one who is arrested and charged with an offence can be detained any longer following arrest than is necessary to bring that person before a court on that charge".[74] While the rigour of the common law approach has been diminished somewhat in England in recent years,[75] it still represents New Zealand law.[76]

Right to silence (s 23(4) of BORA)

3.3.26 In *Elder v Evans*, the then Supreme Court held that at common law every person enjoys the right to silence, in the sense that neither a private person nor a constable has any power to demand answers to questions put to another person in the belief that he has committed an offence or is under some other form of liability,[77] a statement that has been repeatedly endorsed over the years.[78] Section 32 of the Evidence Act 2006 reinforces this basic tenet of the common law by prohibiting a prosecutor from inviting the fact-finder at trial inferring guilt due to an accused's pre-trial silence.

[page 61]

Right to natural justice (s 27(1) of BORA)

3.3.27 Traditionally the common law recognised that bodies and tribunals dealing with certain rights, interests and obligations of the citizen were required to act in a judicial or quasi-judicial manner in making their determinations. The fundamental procedural protection was that such bodies would act in accordance with "natural justice". While this phrase was, from time to time, the subject of sometimes trenchant criticism in the case law,[79] the phrase has stood the test of time. As understood at common law "natural justice" required that the body or tribunal must conduct a fair and full hearing in an impartial manner.[80] In the latter third of the last century, the courts moved away from the largely unhelpful question of determining whether a body or tribunal was acting judicially or quasi-judicially, and expanded the reach of the natural justice concept into a wider field, although emphasising repeatedly that the precise content of natural justice obligations on a decision maker would vary depending on the subject-matter.

Other rights and freedoms

3.3.28 In addition to the BORA-equivalent rights outlined above, the common law did, and continues to, recognise other human rights not found in BORA. Among others, the common law has traditionally protected the following in whole or in part:[81]

- Property rights[82] (including Māori customary rights);[83]
- The principle against retrospective law (other than criminal law);
- The right to a livelihood/trade;[84]
- The right to subsistence;[85]

[page 62]

- The right of access to court[86] and legal advice;[87]
- Family rights; and
- The right to personal reputation.[88]