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THE RIGHT TO BE SECURE AGAINST UNREASONABLE SEIZURE OF THE PERSON: SECTION 21 NEW ZEALAND BILL OF RIGHTS ACT 1990.

AN ANALYSIS OF IT'S SCOPE, FUNCTION AND DEFINITION WITH REGARD TO THE OVERLAP WITH SECTION 22.

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1. INTRODUCTION.

This paper is an analysis of the right to be secure against unreasonable seizure of the person, under section 21 of the New Zealand Bill of Rights Act 1990.[1] The central issue of the paper turns on whether there is a place for the practical application of the right taking into account the application of section 22. Both section 21 and section 22 deal with what may be called "security of the person", we must examine therefore whether there is a difference between the sections and whether there are practical situations that are more appropriately remedied under section 21 than under section 22.
The sections provide:

> section 21: Everyone has the right to be secure against unreasonable search and seizure, whether of the person, property, or correspondence, or otherwise.
>
> section 22: Everyone has the right not to be arbitrarily arrested or detained.

While there has been considerable research and judicial comment on the seizure of property in such historic cases as *Wilkes*[2] and *Entick* v *Carrington*[3], seizure of the person has been the subject of only brief and undeveloped judicial comment.[4] When this paper was substantially completed G Huscroft and P Rishworth edited a

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[1] Hereafter called "NZBORA".

[2] From F Thompson *Magna Carta; It's role in the Making of the English Constitution, 1300 - 1629* (University of Minnesota Press, Minneapolis, 1948).

[3] (1765) 19 St Tr 1030.

[4] Seizure was defined in *R* v *A* [1994] 1 NZLR 429 by Richardson J as the "taking of what is discovered" from a search. Clearly this definition only applies to seizure of property.

book[5] with a useful chapter on search and seizure written by S Optican. The purpose of the Chapter is "to explore the significance of s 21 for the control of police search and seizure in New Zealand today."[6]

It does not address the issue at the centre of this paper, but it provides a useful exposition on search, seizure, and reasonableness.

Adams[7] provides the only direct academic comment on seizure of the person. It outlines the authorities and concludes that "[t]he point is unlikely to be significant in practice. An unreasonable seizure will certainly be an arbitrary arrest or detention."[8]

I respectfully disagree with this conclusion. This paper argues that section 21 and section 22 are of different scope and function. Moreover a rights-oriented approach requires that the section 21 right to be secure from unreasonable seizure of the person, be given practical effect.

Section 22 has been interpreted broadly and consequently judicial comment has been that seizure of the person under section 21 and section 22 overlap in practice and that recourse via section 22 is preferable.[9]

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[5] *Rights and Freedoms; The New Zealand Bill of Rights Act 1990 and The Human Rights Act 1993* (Brooker's Ltd, Wellington, 1995) Ch 8.

[6] above n 5, 299.

[7] J B Robertson (ed) *Adams on Criminal Law* (Brooker & Friend Ltd, Wellington, 1992) Vol 2, 10.8.04 (b).

[8] above n 7, 10.8.04 (b)

[9] per Richardson J *R* v *Jefferies* (1993) 10 CRNZ 202, 214; [1994] 1 NZLR 290, 305.

Fisher J in *R* v *Taylor*[10] commented that:

> s 21 is concerned with the seizure of property rather than the arrest of persons. That would accord with the usual meaning given to the word "seizure" in a legal context and also with the statutory context that arrests are separately dealt with in s 22. Probably nothing turns upon the choice of the section because if the seizure of the person were possible and "unreasonable" in terms of s 21 it would presumably mean that the same person was "arbitrarily arrested or detained" in terms of s 22. However I prefer the view that where wrongful arrest is at issue the relevant provision is s 22 rather than s 21.

Cooke P in *R* v *Jefferies*[11] said:

> Section 8 of the Canadian Charter of Rights and Freedoms provides simply "Everyone has the right to be secure against unreasonable search or seizure" the New Zealand s 21 copies this but goes on to add emphatically and comprehensively " whether of the person, property, correspondence or otherwise". In extending to seizure of the person s 21 thus overlaps s 22 (liberty of the person) and s 23 (rights of a person arrested or detained). The width of s 21 was chosen with the consideration in mind that the provision would be closer to the Fourth Amendment in the American Bill of Rights.

The judiciary have taken the first step of recognising section 21 but, I respectfully submit that, they have taken the easy way out by preferring section 22 without addressing the scope and function of section 21. I will argue that preferring section 22 to the exclusion of section 21 does not conform with the rights-oriented approach to the NZBORA interpretation, which the judiciary have adopted.

The scope and function of section 21 will be addressed in this paper by first examining the differences between section 21 and section 22, both practically and linguistically, and then by

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[10] Unreported, 24 Feb 1992, High Court, Hamilton Registry, T66/91, 7.

[11] above n 9, 208.

defining "seizure of the person". To achieve this some preliminary questions need answering. First, whether there are any practical differences between the application of the rights. Secondly, in order to identify any linguistic distinctions we need to ask whether "arrest/detention" and "seizure" are the same actions and whether "arbitrary" and "unreasonable" are the same qualifications of those two standards. My analysis identifies both linguistic and practical differences between the terms and therefore the rights.

Once a distinction between the rights is established the issue then becomes how to define and apply "seizure of the person" so as not to create the redundancy of one of the rights. It is important to recognise the scope and function of the rights from their differences and to transport those differences into the practical application of the rights. Neither right must be ousted in favour of the other.

My analysis and definition of "seizure of the person" draws on New Zealand and international authority to indicate possible solutions. Further, two solutions will then be analyzed on the basis of their ability to avoid redundancy. Finally I express my view on the more appropriate definition of "seizure of the person".

1.1 The Importance of Avoiding Redundancy.

Redundancy is the main cause of the overlap debate because the NZBORA is premised on a rights-oriented approach to it's interpretation. A rights-oriented approach is seen by Richardson J as the primary focus of the NZBORA.[12] Richardson J described the focus as:[13]

> where there is a right there is a corresponding duty to respect that right, but the primary thrust of the statute is on the positive assurance of the rights rather than on the deterrence of official misconduct.

Both section 21 and 22 rights must be assured by the judiciary. Redundancy is inherently contrary to the rights being assured and so must be avoided.

A clear analysis of the distinction between the rights and an adherence to the distinction in the practical application of the rights will avoid redundancy.

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[12] *R* v *Goodwin (No 1)* [1990-92] 3 NZBORR 214, 292; [1993] 2 NZLR 153.

[13] above n 12 , 293.

2. THE DISTINCTION BETWEEN THE RIGHTS.

2.1 The Practical Differences.

The practical situations that the courts usually meet in respect to the overlap of section 21 and section 22 are instances of police action where the suspects liberty is limited. Although these situations make up the majority of NZBORA actions there are clearer examples of the difference between arrest and detention, on one hand, and seizure, on the other, outside the ambit of police action. Since the NZBORA applies to actions of the executive, legislative, and judiciary plus the exercise of public powers[14], any "seizure of the person" by a non-police authority might be something other than arrest/detention. An example is where a teacher holds a pupil after school for disciplinary reasons.

The Commissioner for Children seemed uncomfortable with the terminology of section 22 when applying it to the strip-search of pupils of Hastings Boys High School.[15] He found:

> Young people in schools are accustomed to being held against their will and indeed the requirement that they attend school and the provision for their return if they are truants indicates the law's general position. It is a doubtful proposition that the ordering of the boys to accompany a teacher to the search area and requiring them to remain there constitutes arbitrary arrest or detention.

It is indeed artificial to apply, to a school situation, terms historically used to identify serious deprivations of liberty, specifically where police are holding suspects in custody for questioning about a criminal offence. The terms have developed

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[14] Section 3 NZBORA.

[15] *Re Strip Search at Hastings Boys High School* [1990-1992] 1 NZBORR 480, 497.

technical meanings designed for police questioning.[16] The holding of a pupil by a school teacher is practically different. Specific rights[17] are afforded to suspects who are arrested or detained under any enactment because, among other reasons, of the coercive nature of the situation, the disadvantage that the suspect is under as against the resources of the State, and the possibility of an untrue statement being elicited. The suspect is held in custody to be questioned about criminal charges which carry with them serious sanctions and social stigma. The peril is great. Thus the NZBORA affords specific rights to such people. By contrast, a pupil held after school by a teacher for disciplinary reasons would not ordinarily be in a perilous situation, so the protections flowing from arrest/detention are not normally necessary. However, where the pupil is strip searched the intrusion is far more serious and at least basic rights are necessary.[18] Even where a pupil is held for questioning on a school matter, the peril is not serious and specific rights would not be necessary and arrest or detention under any enactment would not be appropriate.[19]

Even where the situation is analogous to police questioning there has been some unease with the terminology of arrest/detention. In *Froggat* v *R*[20] a lance corporal in the army was asked to accompany a staff sergeant, some military police, and police

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[16] See 2.2 (A) i) "Arrest" and 2.2 (A) ii) "Detention" of this paper for an analysis of the terms.

[17] Section 23 includes rights such as the right to counsel, s 23(1)(b), and the right to be charged promptly or released, s 23(2).

[18] For example the right against unreasonable search and seizure, s 21, or the right to the inherent dignity of the person, s 23(5).

[19] See *Police v Smith and Herewini* discussed under the heading of 2.2(A)(ii) "Detention". The analysis of whether or not there was a detention seemed to be based on the need for counsel and the potential sanctions if the accused refused an evidential breath test.

[20] (1992) 9 CRNZ 181.

officers to the military police section. He was then questioned on suspicion of possession of military property and drugs. The Court rejected the submission that a soldier, ordered to accompany a superior officer, is effectively under arrest or detention under any enactment. When dealing with the detention question the Court said:[21]

> If Mr Atkins is correct then a soldier would be in an almost continual state of detention from the time of his attestation when he first becomes subject to military law. We are unable to accept that a soldier who is ordered to go from place A to place B and then to remain at place B until ordered to do otherwise is in a state of detention.

Further there was no express provision that created "detention" for failing to comply with an order. Also the right to give an order derives from the royal prerogative and not from statute. There was no detention under any enactment so as to trigger the s 23(1) rights.

On the concept of arrest, the Court said (obiter dicta):[22]

> We observe in passing that even if the appellant had been ordered to go to the MP section, that order per se would not in our view constitute a de facto arrest. Something more would be required.

The Court did suggest that if the military police and the staff sergeant by their conduct did reasonably induce the appellant to believe he was under arrest, then their conduct may have been held to be de facto arrest.[23]

However being held at the military police section and questioned in relation to possible criminal offences is closely aligned to normal police work. As such the situation could easily be

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[21] above n 20, 193.

[22] above n 20, 198.

[23] above n 20, 200.

categorised as arrest/detention and the section 23 rights should be afforded to the soldier. Nevertheless, the Court found the order to go to the Military Police section and remain there could not appropriately be classified as an arrest or detention. In discussing s 23 the Court said:[24]

> While as *Halsbury* says, "a person does not by enlisting in or entering the armed forces thereby cease to be a citizen, so as to deprive him of his rights...under the ordinary law of the land", we do not think that the Legislature intended that the Bill of Rights should inhibit or erode the power of command and obedience to orders which are fundamental to the control and operation of our armed forces.

The two cases seem to represent judicial unease with the concept of arrest/detention where individuals are accustomed to being ordered and held by those in authority in the institution.
I submit that these situations indicate a practical difference between the application of the rights.[25]

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[24] above n 20, 193.

[25] The courts have had little trouble in applying the term "detention" to mental patients (See *Re M* [1991] 1 NZBORR 217 and *Re S* [1991] 1 NZBORR 239). However the ease of application of the term may be attributed to the use of the word, in particular, in s 74 of the Mental Health Act 1969.

2.2 The Linguistic Differences.

The linguistic difference between the terms of section 21 and 22 also indicate a difference between the rights themselves.

2.2 (A) Arrest and Detention versus Seizure.

The judiciary's analysis of the terms "arrest" and "detention" indicate a conceptual dividing line between these terms and other less serious forms of deprivation of liberty.

i) Arrest.

The common law definition of arrest was formulated by P G Polyviou[26] as:

> the involuntary seizure of a person that not only involves deprivation of liberty but which represents an intentional exercise of an authority to arrest and has been attended by certain formalities, principally notification of reasons for the arrest.

By contrast, the New Zealand courts have made it plain that "arrest" has a very broad meaning, well beyond the formal arrest process. Thus, in *R* v *Goodwin (No 1)*[27] the Court of Appeal held that:

> arrest may be defined as the communication or manifestation by the police of an intention to apprehend and to hold the person concerned in the exercise of authority to do so; or, so long as the conduct of the arrester, seen to be acting or purporting to act under legal authority, made it plain that the subject had been deprived of the liberty to go where he or she pleased, then there was an arrest within the meaning of section 23(1) of the New Zealand Bill of Rights Act.

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[26] *Search and Seizure; Constitutional and Common Law* (Gerald Duckworth & Co Ltd, London, 1982), 263.

[27] above n 12, 161, 265.

Adams[28] concludes that the overall effect of the judgment in this area is that "arrest" requires a communication of an intent to deprive a person of his/her liberty to face charges, or questions about charges. The emphasis is laid on the communications by the police. There may, however, be an implicit manifestation of an intention to arrest that is a de facto arrest. Thus the judgment extends the concept beyond formal arrest to include de facto arrest and thus unlawful arrest. In *R* v *Wilson*[29] the Court applied *Goodwin (No 1)*[30] and held that, although the accused was given a caution under the Judge's Rules and the police had advised the accused of the right to a lawyer, that alone was not enough to manifest an intention to deprive the accused of his liberty and so was not sufficient to establish an arrest.

ii) Detention.

Detention overlaps with arrest in many circumstances and lies at the more serious end of deprivations of liberty

Cooke P in *Goodwin (No 1)*[31] regarded the practical difference between the concepts of arrest and detention as minimal. He concluded:

> the expressions are largely interchangeable. Lawful detention is wider than lawful arrest, but when the deprivation of liberty is unlawful the difference becomes meaningless. To adopt the language of Glanville Williams, when the words *arrest* and *detention* are used in invisible quotation marks a practical distinction can no longer be discerned.

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[28] above n 5, 10.9.05.

[29] Unreported, 13 September 1993, Court of Appeal, CA 77/93.

[30] above n 12.

[31] above n 12, 255.

The test for detention has recently been narrowed by the Court of Appeal under the Transport Act 1962 provisions in the decisions of *Temese* v *Police*[32] and *Police* v *Smith and Herewini*.[33]

In *Temese*[34] Cooke P held that "a mere transitory and proper questioning such as occurred here up to the point of admission of being disqualified is not arrest or detention."[35]
In the same vein, Casey J said:[36]

> in the context of the particular rights conferred "detention" would seem to comprehend a more substantial interference with the subject's liberty than that which occurred in this case between the time the constable's questions as to identity were answered.

In *Police* v *Smith and Herewini* Richardson J concluded that there was no detention.[37]

> A request for a blood sample pursuant to s 58D of the Transport Act, whether made by a registered medical practitioner of his or her own volition or at the request of an enforcement officer, necessarily involves a restraint of the liberty of the patient. However that restraint is of a temporary nature. Further, the demand will be made when the patient is already in the doctor's surgery or hospital and any restraint inherent in complying with the demand is of a minimal nature.

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[32] [1990-92] 3 NZBORR 203.

[33] [1994] 2 NZLR 306.

[34] The decision was made under s 68B(1)(a) of the Transport Act 1962 which gives the constable power to require a person on the roadside to give the name and address and particulars which may lead to identification of a driver of any vehicle.

It is clear that the taking of a blood specimen is a form of deprivation of liberty while the specimen is being taken, but, in the Court's analysis, it was not sufficient for a "detention". A detention is a more substantial deprivation of liberty. The powers of the police under the enactment are clearly applicable as early as the request for the blood specimen. Therefore, it must be that the concept of detention prohibits relief. It follows that the limited definition of detention under section 23 is a definition of general purpose and must be applicable to section 22.[38]

The finding of detention seemed to be based on whether or not the judiciary saw a need for counsel to be present and whether there were any sanctions if the accused refused the blood test. Therefore s 23 rights are provided where there are more serious consequences for the suspect. As a consequence a detention is a more serious form of deprivation of liberty.
J November[39] identified this distinction:

> the distinction has now been confirmed in *Smith and Herewini*. There is no detention within the meaning of s 23 where a person's movements are interrupted merely for the purposes of answering the questions relating to identity provided for in ss 66 and 68B and for no longer than necessary.

Thus, a circumstance outside the scope of arrest and detention is a less serious deprivation of liberty such as a transitory stop and preliminary questioning of a person up to the point of a substantial interference with personal liberty.

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[35] above n 32, 208.

iii) Seizure.

An unlawful or unreasonable seizure was historically remedied by tort law as an invasion of a property right, in particular, the seizure of one's books, goods, business records or personal effects. Seizure is therefore thought to refer to the physical taking of an object. In common parlance, however, a seizure of the person is a grasping and holding of the person; the act of stopping a person by a physical or authoritative movement.[40]

Seizure of the person has not yet been judicially defined in New Zealand. Terms in rights documents are usually assumed to carry their ordinary meanings.[41] Seizure of the person may therefore be interpreted as the grasping and holding of a person by bodily contact.

In the United States seizure has a more extended meaning, which clearly covers both objects and persons.[42] "For most purposes at common law, the word connoted not merely grasping or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control."[43]

Seizure of the person may occur either by the application of physical force or by a show of authority. There is a significant

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[36] above n 32, 211.

[37] above n 33, 317.

[38] McKay J in *R v Smith,* Unreported, 13 July 1993, Court of Appeal, CA 196/93 quoted with approval a statement of the Court of Appeal in *R v Nielsen*, Unreported, 15 June 1993, CA 53/93 that the definition of detention under section 23 must also apply to s 22.

difference between the two methods. The United States Supreme Court addressed the difference in *California* v *Hodari*.[44]

> The word "seizure" readily bears the meaning of a laying on of hands or the application of physical force to restrain movement, even when it is ultimately unsuccessful ("She seized the purse-snatcher, but he broke out of her grasp"). It does not remotely apply, however, to the prospect of a policeman yelling "Stop in the name of the law !" at a fleeing form that continues to flee. That is no seizure.

The difference between the two methods is that for a show of authority to be a seizure requires submission to that authority whereas the use of physical force does not. Further the test for the show of authority is objective:[45]

> whether taking into account all of the circumstances surrounding the encounter the police would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business".

The test determines whether the encounter was consensual or was in fact a seizure. "The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature."[46]

The result is that a seizure in the United States is an encounter between a police officer and an individual where a reasonable person in the shoes of the individual, taking into account all of the circumstances, would have believed he or she was not free to leave and did not leave, or was physically seized. An encounter that fits this definition will trigger Fourth Amendment protection. The concept of seizure is thus an umbrella concept in the United States that includes arrest/detention.

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[44] above n 43, 697.

[45] *Florida* v *Bostick* 501 US 429, 400.

[46] above n 45, 398.

Whichever form of seizure is used, the United States umbrella definition or the mere physical grasping, the term connotes a different form of deprivation of liberty than arrest/detention. If a security guard grasped a person who was lawfully at a function, the mere grasping of the person would not be sufficient for either arrest or detention but would surely be sufficient for a seizure. It is irrelevant for this purpose whether seizure of the person is defined as a mere physical grasping or other type of insubstantial interference or is in fact an umbrella concept including arrest and detention at the higher end of the scale. The terms are clearly distinct. This view is supported by a contextual analysis.

iv) Contextual Analysis.

A contextual analysis, both of the NZBORA and other international human rights documents, clearly supports a distinction between the concepts of arrest/detention and seizure. This may be construed as legislative recognition of "seizure of the person" as a type of deprivation of liberty, distinct from arrest or detention.

In New Zealand the right in section 23(5) NZBORA is not specific to arrest/detention.[47] It provides rights for those deprived of their liberty. The main body of section 23 extends rights to those arrested or detained under any enactment. If the drafters meant to provide the right only in situations of arrest/detention then those terms, it is assumed, would have been used. Therefore, the use of the term "deprivation of liberty" connotes a right that applies to other situations as well as arrest/detention, a possible situation for a seizure of the person.

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[47] It provides that "[e]veryone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person."

Internationally both the European Convention on Human Rights[48] and the International Covenant on Civil and Political Rights[49] provide for the same distinction.

The ECHR article 5(4) reads "[e]veryone who is deprived of his liberty by arrest or detention..."

This shows that the drafters identified a need to specify two forms of deprivation of liberty, arrest and detention. It follows that there would be no need to specify arrest and detention if there were no other forms of deprivation of liberty.

The ICCPR also distinguishes between arrest and detention, and deprivation of liberty in article 9(1).

Further support for the difference between the rights is gained in the linguistic analysis of the standards of the rights.

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[48] Hereafter called "ECHR".

[49] Hereafter called "ICCPR".

2.2 (B) Arbitrary versus Unreasonable.

These terms now need to be analyzed to further distinguish the rights.

The terms overlap in many situations. All situations of arbitrary conduct will also be unreasonable. The difference is evident when the reverse is posited. Are all situations of unreasonable conduct necessarily arbitrary? The answer is no. Unreasonableness is a broader concept with a lower threshold than arbitrariness thus unreasonable conduct may, but will not necessarily, be arbitrary.

The terms therefore overlap but may differ as to their application on the same facts. The difference should be recognised by the judiciary and understood as a factor indicating a difference in the scope between unreasonable seizure and arbitrary arrest and detention.

The difference in the standards of the two sections plays on their respective interpretations. "Unreasonableness" implies a situation where the grounds for the action were insufficient or the methods used exceeded what was necessary in the circumstances. "Arbitrariness" implies that the action was not based on true or proper grounds or the discretion was used improperly, unpredictably or was an abuse of power.

The actual determination of reasonableness in New Zealand involves balancing public interests and values.[50] Factors such as the nature and extent of the illegal act and the urgency and seriousness of the offence have been weighed against each other.[51] This approach mimics that of the United States as evident in *Terry* v *Ohio*[52] where Warren CJ focused on balancing

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[50] per Richardson J above n 4, 429.

[51] above n 9, 202.

[52] 392 US 1.

governmental interests against the interests of the individual. In New Zealand reasonableness is determined as a two stage test where the preliminary question is the legality of the action. A determination of an illegal action is weighty on the second question of reasonableness but it is not determinative.[53]

Reasonableness is a shifting concept and it is very fact-specific.[54] The current case-by-case approach means that reasonableness may not be accurately defined until guidelines are set. Fortunately, "arbitrary" is a more concrete term and may be defined using international and Canadian jurisprudence.

In New Zealand in *Re S*[55] the Court held that detention will be arbitrary if it is made without statutory authority, is unprincipled, or made for an ulterior motive. In *Re M* the concept was expanded upon so that "something is arbitrary when it is not in accordance with the law or which is not in accordance with the principles which the law regards as appropriate for a discretion to be operated within."[56]

In *R* v *Goodwin(No 2)*[57] the Court of Appeal found the term "arbitrary" elastic and authority to be divergent. The Court looked at international authority only to find that it was not necessary to rule on the word for the purposes of the case. The Court said (obiter dicta) that "[w]e leave open the possibility

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[53] Cooke P above n 9, 210 said that "[h]ighly exceptional circumstances aside, however, treating unlawful action as reasonable is a path down which a Court should surely be reluctant to go."

[54] This lack of clarity has instigated a call to the courts to create guidelines, in order to weigh interests, to determine reasonableness. See Huscroft and Rishworth above n 5, 324 - 325.

[55] above n 25, 256 per Barker J.

[56] above n 25, 234.

[57] [1990-92] 3 NZBORR 314, 321-322.

that there may be some limited exceptions to the principle that in general unlawful detention will be arbitrary detention."[58] And further the Court said that "to avoid arbitrariness a remand in custody must not only be lawful but reasonable and necessary in all the circumstances."[59]

However Morris J in *Messiter* v *Police*[60] said;

> On the basis of these authorities Mr Tennet submits in effect "arbitrarily' under the provisions of s 22 equates to "unreasonable" under s 21. I cannot accept this submission. The two sections deal with different topics and they are different words. "Arbitrarily" could, in my view, equate to "unjustified" by the existing law and/or brought about as a result of the whim of the person arresting.

Unfortunately Morris J did not offer a definition of reasonableness and interestingly he did not refer to *R* v *Goodwin(No 2)*[61] in his decision.

The conclusion must be that there is some divergence on the definition of "arbitrary" and that the issue needs to be revisited by the Court of Appeal.[62] A more definitive guide for the Court of Appeal is international and local authority on the definition of the term.

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[58] above n 57, 322.

[59] above n 57, 393.

[60] Unreported, 5 Dec 1994, High Court, Auckland Registry, AP 213/94, 5.

[61] above n 57.

[62] Hammond J in *Police* v *Dibble* (1994) 11 CRNZ 321 recognised that review of the term is a matter for the Court of Appeal.

International authority under the ICCPR is authoritative. "Arbitrary" has been given a special meaning under article 31(4) of the Vienna Convention.[63] Shaw and Butler[64] submit that under the ICCPR the word "arbitrary" means:

> First, an action will be considered "arbitrary" if it is illegal. An action will be illegal if the action is contrary to an existing rule of positive law or if the authorities are unable to point to a rule of positive law authorising the action. Second, an action (or the "law" upon which the authorities rely to support the legality of their action) is "arbitrary" if it does not meet objective standards of procedural and substantive justness.

Van Alphen v *The Netherlands* enlarged on the definition by requiring the Court to interpret the term broadly "to include elements of inappropriateness, injustice, and lack of predictability. This means that remand in custody must not only be lawful but reasonable in all the circumstances."[65]

This supports Shaw's and Butler's[66] thesis that arbitrariness is a dual concept comprising illegality and injustice. Jurisprudence of the European Court on ECHR shows they have adopted a similar approach.[67]

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[63] See P Hassan, "The International Covenant on Civil and Political Rights: Background and Perspective on Article 9(3)" (1973) 3 Den J Int'l L & Pol'y 153; A Shaw & A S Butler "Arbitrary Arrest and Detention under the New Zealand Bill of Rights - The New Zealand Courts Stumble in Applying the International Covenant" [1993] NZLJ 139, 140.

[64] above n 63.

[65] [1990-92] 3 NZBORR 327, 337.

[66] above n 64, 140.

[67] See *van der Leer* v *The Netherlands* (12/1988/156/210), 21 February 1990.

The Canadian case of *R* v *Hufsky*[68] involved the selection of drivers for a random stop and check procedure. It was authorised by statute but the selection was in the absolute discretion of the police officer. Le Dain J stated that "[a] discretion is arbitrary if there are no criteria, express or implied, which govern its exercise."[69]

The leading case in Canada, *R* v *Duguay*[70], elaborated on *R* v *Hufsky*[71] and L'Heureux-Dube J noted that "[a] detention is arbitrary if it is the product of an untrammelled discretion."[72]

The majority concluded;[73]

> In my view, on the facts as found by the trial judge, the arrest or detention was arbitrary, being for quite an improper purpose - namely, to assist in the investigation. The conclusion does not minimise the significance or importance of an experienced detective's "hunch" or intuition. Such "hunch" must, however, have some reasonable basis. It cannot be used as a defence and explanation, without examination, for irrational and high-handed actions.

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[68] (1988), 63 CR (3d) 14, 40 CCC (3d) 398, [1988] 1 SCR 621, 4 MVR (2d) 170, 32 CRR 193, 84 NR 365, 27 OAC 103.

[69] above n 68, (NR) 377, (CR) 23, (CCC) 407.

[70] (1985), 45 CR (3d) 140, 18 CCC (3d) 289, 50 OR (2d) 375, 17 CRR 203, 18 DLR (4th) 32, 8 OAC 31(CA).

[71] above n 68.

[72] above n 70, (CCC) 22.

[73] above n 70, (OAC) 37, (CR) 148, (OR) 383.

In *R* v *Cayer*[74] the Canadian Court applied *Duguay*[75] and concluded that arbitrary detention is a detention that is "capricious, despotic or unjustifiable."[76]

It is clear from these authorities that the Canadian definition includes unjust action as well and so equates with international jurisprudence.

As noted later in the History section[77] of this paper section 22 of NZBORA is taken from the Canadian Charter provision. New Zealand courts have used Canadian authority to interpret section 22. If there is any discrepancy between definitions of "arbitrary" the Canadian jurisprudence should be preferred as long as it does not deviate so as to be inconsistent with the ICCPR or New Zealand social conditions.

"Arbitrary" may be summarised as meaning an abuse of power by an official acting outside his/her authority or using his/her discretion in a manner incompatible with justice. It imports notions of illegality, inappropriateness, unreasonableness, and improper purpose. Although "arbitrary" draws on reasonableness in some instances the terms are different.

My submission is that the difference between reasonableness and arbitrariness is similar to the difference between arrest and detention. In *R* v *Goodwin (No 1)*[78] both Casey and Hardie Boys JJ recognise that while every arrest involves a detention the converse is not true. Similarly, while every arbitrary action will be unreasonable, it does not hold true that every unreasonable action will be arbitrary.

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[74] (1988), 6 MVR (2d) 1, 28 OAC 105 (CA).

[75] above n 70.

[76] above n 74, (MVR) 17, (OAC) 116.

[77] 3.1.

[78] above n 12, 48 and 53.

For example if a woman was stopped in her car under the Transport Act 1962 for investigative purposes but the actual reason for stopping that her was that the Officer knew and disliked her, and would not have stopped the vehicle otherwise, that action would clearly be arbitrary and unreasonable. But if the Officer stopped the vehicle on proper grounds and the length of time she was held for was longer than necessary for an investigatory stop, the Officer's actions would be unreasonable but not arbitrary.

Another example of the conceptual difference between arbitrariness and unreasonableness is the sentencing policy in some states of the United States of "three strikes and you're out".[79] In California the three strikes provision provides that those individuals convicted previously of two or more serious and/or violent felonies are sentenced to an indeterminate term of life imprisonment. However the statutory definition of "strike" treats many property crimes as violent crimes. If person A has two previous aggravated burglary convictions and is subsequently convicted of murder a life sentence seems reasonable. However, if person B has two petty theft convictions and is subsequently convicted of a third, the life sentence imposed is unreasonable in the circumstances. The policy seems irrational and unjust. It does not distinguish between property crimes and violent crimes in sentencing. Thus the sentence is not proportionate to the crime, the sentence is groundless and hence arbitrary. Whilst the policy remains arbitrary at all times the policy's reasonableness varies with the circumstances.

Therefore the concepts are different in scope and function.

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[79] For example the Californian three strikes provision codified at CAL PENAL CODE s 667(e)(2)(A).

2.3 The Differences in Scope and Function Between Section 21 and Section 22 Rights.

Both a practical and linguistic analysis illustrate that there is a difference between the sections. Their application does not appear to be coextensive in all situations. Which section should be applied should depend on the seriousness of the deprivation of liberty, the reasons for the deprivation, the methods used to restrain the individual, the length of the deprivation, and the circumstances of the individual. In any action it is likely that both section 21 and 22 will be pleaded. It will be up to the judiciary which section is used, depending on the fact situation.

I submit that as section 22 is used for more serious deprivations of liberty it should be applied where there is restraint by the police for questioning on a criminal matter or by a similar body where the consequences will be analogous.

Section 21 should be applied where the deprivation is less serious, the consequences are less serious or the situation usually requires some deprivation of liberty, for example schools and the army. This may include police action that is less serious in any of the above ways or more serious action that fails to meet the arbitrary test.

Further, I submit that the two sections should be remedied differently based on the seriousness of the deprivation. Where damages are appropriate,[80] the awards should be higher in section 22 situations because the standard of arbitrary conduct is more serious than that of unreasonable conduct and the deprivation of liberty will usually be more serious than that under section 21.

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[80] *Simpson* v *A-G [Baigent's case]* [1994] 1 NZLR 290.

Having established that there is a difference between the rights, the placement of the dividing line between the rights must be addressed. Its placement relies on the definition of seizure of the person to indicate the parameters of the rights.

3. DEFINING SEIZURE OF THE PERSON.

In my thesis, seizure of the person involves a less serious intrusion on the person's liberty. It is triggered by the lower standard of unreasonable conduct by the relevant authority. Arbitrary arrest/detention gives rise to a more specific right. It involves a more serious intrusion on a person's liberty by a law enforcement officer or a similar body and is triggered by the higher standard of action - arbitrary conduct.

As such there are two possibilities for the definition of seizure of the person:

> i) an umbrella definition, such as used in the United States, which includes the concepts of arrest and detention at the more serious end of the scale. All deprivations of liberty are seizures of the person but a more serious deprivation is labelled arrest/detention. Or
>
> ii) a limited definition that only applies to less serious deprivations of liberty up to but not including arrest and detention. The concepts of arrest/detention and seizure are distinct. Any deprivation of liberty that is not an arrest/detention will be a seizure.

The history of the right in section 21 and the principles of interpretation are useful in determining the appropriate scope of the definition of seizure of the person.

3.1 History of Section 21.

The history of the section 21 right illustrates that New Zealand adopted the broad United States interpretation of seizure of the person. At the same time the Legislature expressly rejected Canada's solution to the overlap, to exclude seizure of the person from their equivalent right.

The United States introduced their Constitution and Bill of Rights after the Civil War. When independence was declared in the United States the American people turned to English models for a statement of rights.[81] The Magna Carta was essential in the history of the American constitutional development. "It came to be regarded by the colonists as a generic term for all documents of a constitutional significance."[82]

Chapters 28, 29, 30, and 31 of Magna Carta protect against the arbitrary seizure of a citizen's property without the payment of compensation. This theme, together with the English common law approach to warrants, was used as a basis for the Fourth Amendment to the United States Constitution. However, the Fourth Amendment went beyond a pure property right to extend protection expressly to personal liberty infringements as a result of searches and seizures. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Historically and interpreted literally, a search or seizure had to be justified by a warrant that met the Fourth Amendment requirements and the search or seizure had to be reasonable. In recent decades the United States Supreme Court has developed the "Special Needs Doctrine" which has led to the division of the

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[81] See H D Hazeltine "The Influence of Magna Carta on American Constitutional Development" in H E Malden (ed) *Magna Carta Commemoration Essays* (Royal Historical Society, 1971); M Jensen *The Making of the American Constitution* (D. Van Nostrand Co Inc, New Jersey, 1964) p 11 ff; C E Stevens *Sources of the Constitution of the United States* (MacMillan & Co, New York, 1894).

[82] R L Perry (ed) *Sources of Our Liberties; Documentary Origins of Individual Liberties in the United States Constitution and the Bill of Rights* (American Bar Foundation, Illinois, 1959), 9.

Fourth Amendment into two separate clauses; the reasonableness clause and the warrant clause.[83] The Doctrine provides that where it is not practicable to obtain a warrant and the circumstances require immediate action for the safety of the Officer or the public the courts may justify the search or seizure on the basis of reasonableness alone. This allowed, in appropriate circumstances and for the first time, seizure to be tested by reasonableness alone.

In Canada in 1968 the then Minister of Justice suggested the possible inclusion of the guarantee against unreasonable search and seizure in the proposed Canadian Charter of Human Rights.[84] It was later enacted in the Charter as article 8.[85] The provision is clearly based on the United States Supreme Court's interpretation of the Fourth Amendment reasonableness clause although it is extended beyond the 'Special Needs Doctrine' to be an all encompassing right against unreasonable search and seizure regardless of warrants.

Interestingly in *R* v *Parton*[86] the Supreme Court of Canada rejected seizure of a person from the scope of article 8 on the basis of the inclusion of the article 9 provision for arbitrary arrest and detention. The Canadian Bill of Rights 1960 also provides rights for an arrested or detained person[87]

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[83] D J Bodenhamer and J W Ely, Jr (eds) *The Bill of Rights on Modern America; After 200 Years* (Indiana University Press, Indianapolis), 126.

[84] Now enacted as The Canadian Charter of Rights and Freedoms.

[85] P E Trudeau *A Canadian Charter of Human Rights* (Queens Printer, Ottawa, 1968).

[86] 9 CCC (3d) 295.

[87] Section 2(c).

The NZBORA imported the Canadian Charter's provision of arbitrary arrest and detention as well as a search and seizure right. However the New Zealand legislature expressly rejected the Canadian Supreme Court's interpretation of article 8 by adding the words "whether of the person, property, or correspondence or otherwise".[88] Therefore in New Zealand, following the approach of the United States, seizure of the person was expressly included in the search and seizure right.[89] Section 21 is also derived from article 17 of the ICCPR.[90]

Unfortunately the mixing of the Canadian and United States search and seizure provisions has led to New Zealand's search and seizure right and arbitrary arrest and detention right overlapping in scope.[91]

3.2 General interpretation.

The starting point in any interpretation of legislation must be that Parliament intended what the legislation expressly provides. Unless there is an ambiguity a court may look no further than the words of the provision. As Cooke P recognises the wording of section 21 is absolute and comprehensive.[92] Section 21 must be given legal effect. To overlook section 21 in favour of section 22 would be effectively re-legislating the Act by excluding seizure of the person.

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[88] See Huscroft and Rishworth above n 5, 303 ff for a discussion of the impact of s 21 on the law of search and seizure in New Zealand.

[89] However the s 21 right does not require judicial authorization by warrant, probable cause or require the specification of the place to be searched or the things or persons to be seized.

[90] above n 9, 301.

[91] See Richardson J above n 9, 214.

[92] above n 9, 208.

i) International Law Perspectives.

The value of international material is identified in the preamble to the NZBORA. There are various international treaties such as the ICCPR and ECHR and also interpretations of a state's own rights documents may give guidance for the interpretation of the NZBORA although none will be decisive.[93] Primarily New Zealand courts have used Canadian[94] and United States[95] jurisprudence to develop core principles and define terms. However as New Zealand has ratified certain international human rights treaties[96], New Zealand is bound by international legal pressure to enforce them. The judiciary have recognised this obligation, most recently in *Simpson* v *A-G [Baigent's case]*.[97]

There are four main principles of interpretation of international treaties that Merrills[98] identifies in relation to the ECHR. These principles may be applied by New Zealand courts in interpreting international treaties and the NZBORA itself.

First, the textuality principle provides that the articles of the Vienna Convention of 23 May 1969 on the Law of Treaties are relevant. Specifically articles 31 to 33 which provide the starting point for the European Court, that is the Court must respect the text of the document[99] and the ordinary meaning of the words. Therefore the Court must resist using a technical

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[93] above n 9, 300.

[94] *Noort* v *MOT* ; *Curran* v *Police* [1990-1992] 1 NZBORR 132, 136.

[95] Above n 9, 303.

[96] The ICCPR was ratified by New Zealand on 28 Dec 1978 and entered into force for New Zealand on 28 March 1979.

[97] above n 80, 667, 676, 699, 703.

[98] J G Merrills *The Development of International Law by the European Court of Human Rights* (Manchester University Press, Manchester, 1988) Ch 4.

[99] Article 31.

meaning that is divorced from the common use or meaning of the word.[100] However article 31(4) gives the Court an out where the parties to the treaty intended to give the term a technical meaning to provide for an autonomous concept.[101] The inherent risk is that the Court will interpret the term in a way that detaches the treaty from the domestic law. This is an outcome the courts must be careful to avoid so that neither the domestic law nor the treaty is undermined.

Secondly, the words must be considered in context and against the background of the object and purpose of the treaty. Importantly for this paper, this principle has been used by the European Court to interpret provisions where there is an overlap.

Thirdly, article 31(1) of the Vienna Convention and the judgment of *Wemhoff*[102] provide that the terms should be interpreted in light of its object and purpose or to realise the aim and achieve the object of the treaty. This principle involves attaining an effective interpretation of terms in accordance with the protection of individual rights for human rights documents.[103]

Finally, the treaty should be interpreted as a living instrument and therefore be assessed with current views and social conditions in mind.

There are many examples of these principles being used by New Zealand courts to interpret the NZBORA.

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[100] Merrills above n 98 uses the example of the right to marry in article 12 of ECHR in the *Johnston* case. The Court held that the right to marry included the formation but not the dissolution of the marriage.

[101] above n 98, 65.

[102] Series A, No 7, 23 from Merrills above n 98, 70.

[103] See Merrills above n 98, Ch 5 for a further development of the concept of effective interpretation of rights.

Specifically, the purposive approach, effectiveness, and the living instrument doctrine have been prevalent.[104]

ii) Scope of section 21.

The scope of the section is broad. It has the potential to include seizure of speech, thoughts, actions, movements and more. The right could extend to seizure of a person's image by photography or removal of a person's body parts by unnecessary surgery. The potential is as vast as the imagination. The scope is as vast as the judiciary's tolerance. The width of the section may indicate a Parliamentary intention to have the terms within the section defined broadly to maximise the protection the right affords.

The section is also notable because it provides a positive right to be *secure*. This makes an interesting comparison with the section 22 right which provides a negative right: "Everyone has the right not to be arbitrarily arrested or detained."

This supports the thesis that the section 21 is a more broad-spectrum right, with section 22 being a more specific ancillary right. And, it is also relevant that section 21 is the more general provision and that it precedes section 22. This suggests that section 22 is a corollary to section 21.[105] The analysis of section 21 therefore points towards the umbrella definition of seizure of the person.

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[104] See *Noort* v *MOT* ; *Curran* v *Police* above n 94, 151 and *R* v *Jefferies* above n 9, 299.

[105] For a further discussion of the effect of a corollary right see 3.2 i) "International Law Perspectives".

3.3 Conclusion: The theme from the interpretation.

The general principles of interpretation and the specific analysis of the section suggest that where there are two possible definitions of terms or the scope of rights; one narrow and one broad, prima facie the broad interpretation is to be favoured. The broader umbrella interpretation equates with the purposive approach, the rights oriented approach, and the effectiveness principle by creating an all-purpose section 21 right to protect an individual's liberty and privacy.

There are instances, however, that may require the narrower definition to take precedence. The overlap issue must be analyzed to determine whether it requires that the broad interpretation should be departed from.

3.4 The Problem of Overlap.

My analysis of the overlap issue is that it does not require any departure from the prima facie position on interpretation.

Where provisions overlap in scope there are two views that may be taken of the problem. This was illustrated in *Guzzardi*[106] where article 5(1) of ECHR which guarantees the right to liberty and article 2(1) of Protocol No 4 which guarantees freedom of movement were found to overlap. The majority of the European Court found that deprivation of liberty must be something over and above a mere restriction on liberty of movement and so adopted a broad interpretation. The majority did not address the overlap problem because the State in question had not adopted Protocol 4.

However Sir G Fitzmaurice in dissent suggested that where there are two provisions that overlap, a broad interpretation of either provision must be avoided to limit any unnecessary overlap. The

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[106] Series A, 43 from Merrills above n 98, 67.

majority were prepared to treat the two provisions as coextensive and enhancing of an individual's protection under the treaty. Sir Fitzmaurice preferred a restrained interpretation to prevent as much overlap as possible.

Despite the dissent, Merrills[107] identified two principles of contextual interpretation relevant to overlap problems:

> i) The Court will not permit one article of the Convention to be used in a way that undermines or neutralises the effect of another.[108]
>
> > When a matter is covered by one provision, the Court may be prepared to recognise that another has a bearing on the matter but not if such an interpretation would render nugatory the main provision.[109]
>
> ii) where a matter is in effect governed exclusively by one article but it is a corollary to the first, the principle is that the Court cannot read rights into the sections which were deliberately omitted from another section. For example, in the case of *Johnston*[110] it was argued that, although there is no right of divorce in article 12, it could be read into article 8 (the right to marry). The Court rejected the argument because the Convention must be read as a whole. The Court also observed that although article 12 was, in effect, corollary to article 8, article 8 is a provision of more general purpose and scope and so if the right to divorce was to be included it would have rightly been included in article 12 not article 8.

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[107] above n 98

[108] Refer *Leander* Series A, 18 from Merrills above n 98, 69.

[109] above n 98, 69.

[110] Series A, No. 112, para 51 from Merrills above n 98, 64.

These two principles may be applied to the NZBORA and the overlap problem of sections 21 and 22.

The creation of redundancy in section 21 would breach the first of Merrills' principles for overlap by undermining the provision against its express terms. It is clear that section 21 includes seizure of the person so any interpretation of section 22 that completely overlaps with section 21 combined with the current judicial opinion to prefer section 22 would neutralise any potential effect of section 21 and must be avoided.
The second of Merrills' principles is more difficult to apply. The preliminary question that arises from that principle is which section, if any, is corollary to the other section. From my analysis above, the word secure and the broad nature of section 21 would seem to suggest that section 22 is a corollary to section 21. This supports the umbrella interpretation of seizure of the person as a general provision. Also note Polyviou's[111] common law definition of arrest[112] which describes arrest as a type of seizure of the person. The definition suggests that, where the rights exist, the arrest/detention right will be a corollary of the seizure of the person right as it is, in effect, a subset of section 21. Moreover, the *Guzzardi*[113] case illustrates the European Court's preference for coextensive rights. Allowing for such rights is a portrayal of the rights-oriented approach to interpretation because coextensive rights provide the individual with maximum protection. It follows that since New Zealand courts have adopted the rights-oriented approach coextensive rights are preferable.

My conclusion is that section 21 should be interpreted broadly to take into account its more general scope and purpose, a rights-oriented approach, and to avoid undermining its effect.

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[111] above n 26.

[112] See 2.2(A)(i) "Arrest".

[113] above n 106.

Thus the umbrella interpretation is preferrable. This gives rise to a practical problem.

3.5 The Dilemma of An Expansive Section 21 Right.

Once it is established that on general principles the umbrella interpretation is preferable, the practicality of it must be examined.

The problem is whether the broad interpretation of section 21 applied so as to undermine the application of section 22. For the reasons this paper has already argued in relation to section 21, redundancy is unsustainable with a rights-oriented approach.

On the other hand the limited interpretation requires strict definitions of seizures and arrest/detention. Unless these strict definitions are adhered to there is a risk that they will be refined so that some deprivations of liberty fall through the gap between section 21 and section 22 rights.

The practical dilemma is whether to favour the broad interpretation and risk redundancy or whether to prefer the limited definition and risk a breach of a right going unremedied.[114]

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[114] The NZBORA is unique because it introduced s 5 which provides:

> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits as prescribed by law as can be demonstrably justified in a free and democratic society.

I submit it is possible to limit s 21 and s 22 rights on the basis that each right is a reasonable limit prescribed by law on the other. This limitation may be justified by avoiding undermining either right.

4. CONCLUSION.

Although the judiciary will decide which interpretation is more appropriate when it addresses the significance of section 21, on the basis of my research and analysis of the issue my view is that the more appropriate approach is the umbrella interpretation.

The width of the section, the fact that it is modelled on the Fourth Amendment, and the judiciary's use of the rights-oriented approach indicate that the umbrella interpretation is preferable. The practical dilemma does arguably detract from the broad interpretation but if the judiciary recognise and give effect to the practical and linguistic differences between the rights, as they illustrate differences in scope and function, there will be no redundancy.

The umbrella interpretation of the right also has the advantage of allowing the judiciary the opportunity assess problems in defining "seizure of the person" on the basis of the United States experience.

Select Bibliography.

Auckland District Law Society, Public Issues Committee *Schools and Searching for Drugs* (Auckland District Law Society, Auckland, 1991).

Department of Justice *A Bill of Rights for New Zealand; A White Paper* (Government Printer, Wellington, 1985).

T J Devetski "Fourth Amendment - Protection Against Unreasonable Seizure of the Person: The New(?) Common Law Arrest Test for Seizure" (1992) 82 J Crim L & Criminology 747.

M Eastwood "Constitutional Law: Investigatory Stops and the "Reasonable Person"" (1992) 44 Fl L R 131.

J B Elklind & A Shaw *A Standard for Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand* (Oxford University Press, Auckland, 1986).

R Harrison "Police Powers of Search: Sowing Dangerous Seeds" [1993] NZLJ 362.

G Huscroft & P Rishworth (eds) *Rights and Freedoms; The New Zealand Bill of Rights Act 1990 and The Human Rights Act 1993* (Brooker's Ltd, Wellington, 1995) Ch 8.

W R LaFave *Search and Seizure: A Treatise on the Fourth Amendment* (2ed) (Wests Publishing Co, Minnesota, 1987).

Law Commission *Police Questioning: Report No 31* (Law Commission, Wellington, 1994).

Legal Research Foundation *The New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Wellington, 1992).

S V Lewis "Fourth Amendment - The Presumption of Reasonableness of a Subpoena Duces Tecum Issued by a Grand Jury" (1992) 82 J Crim L & Criminology 797.

D Mathias "From Goodwin to Good Law" [1993] NZLJ 10.

J November "Detention and the Right to Counsel: Canadian and New Zealand Jurisprudence: When is a Detention not a Detention?" [1994] NZLJ 227.

J November "R v Goodwin: The Meaning of Arrest, Unlawful Arrest, and Arbitrary Detention" [1993] NZLJ 54.

P G Polyviou *Search and Seizure: Constitutional and Common Law* (Gerald Duckworth & Co Ltd, London, 1982).

W E Ringel *Searches and Seizures, Arrests and Confessions* (2ed) (Clark Boardman Callaghan, New York, Updated to 1995).

J B Robertson (ed) *Adams on Criminal Law* (Brooker & Friend, Wellington, 1992) Vol 2, Ch 10.

J Sellers "Constitutional Law - Fourth Amendment - A Foot Chase by police was not a Seizure Under the Fourth Amendment Because the Police Conduct was not such a Show of Authority that a Reasonable Person Would Believe that he was not Free to Leave" (1991) 68 U Det Law Rev 441.

A Shaw & A S Butler "Arbitrary Arrest and Detention under the New Zealand Bill of Rights - The New Zealand Courts Stumble in Applying the International Covenant" [1993] NZLJ 139.

A Shaw & A S Butler "New Zealand Bill of Rights Comes Alive (I)" [1991] NZLJ 400.

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