An Analysis of New Zealand Rights

by

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I. Introduction

When John Milton[1] spoke of

> Men by nature free; born and created with a better title to their freedom than any King hath to his crown. . . .

he expressed a concern for the liberty and rights of man which in one way or another has occupied the minds of political philosophers and been at issue in western society for at least the last three centuries. And arguably, in this present era, New Zealanders are displaying more concern for their freedoms and rights than even before, in the face of an apparent incursion by central government into the lives of individuals. Indeed the tradition and language of "rights" is in vogue. What then are the rights that are being asserted in New Zealand? How are they reflected in the law? And what relationship do they bear to prominent past and present moral and political philosophies? It is the aim of this paper to answer these three questions. To provide, in short, an analysis of New Zealand civil rights.

II. What Rights Are Asserted To Exist In New Zealand?

In 1951 the Police Offences Amendment Act was passed.[2] The Act drew a tirade of criticism, complaints originating from such diverse bodies as the Methodist and Presbyterian Churches, the Peace Council and the Business and Professional Women's National Organisation.[3] It "was obnoxious to those raised on the tradition of the Magna

[1] Foot, *Liberty and the Liberal Heritage* (1948).
[2] Major provisions were: extension of definition of sedition; sweeping powers of arrest given to constables; and presumption of guilt re sedition.
[3] Described in Sutch, *The Quest for Security in New Zealand 1840-1966* (1966), 399-402.

Carta, the Bill of Rights and British Common Law".[4] The point is, the protest stemmed from a united belief that the Act was an attack on fundamental freedoms, and evidenced that there was a consensus amongst New Zealanders as to the nature of their civil liberties. The consensus still exists today. For instance, the National Party in their 1978 Election Manifesto[5] spoke of there being "traditional rights and privileges" and the Labour Party[6] promised to uphold the "rights" all New Zealanders hold dear.

What then, specifically, are these "rights" that are asserted to exist? The Values Party stated[7] the most fundamental to be: the right to life, liberty and security of the person, the right to equality before the law, and the right to protection before the law. Recently these were said to be "the cornerstones of our democracy".[8] There would be little disagreement. The Universal Declaration of Human Rights, which is asserted as a standard summary of "rights" enlarges on this last concept of "protection of the law" to include freedom from arbitrary arrest, search and seizure, the right to a fair hearing, and a presumption of innocence. The declaration mentions the right not to be held in slavery or punished in a degrading manner. Also the right to privacy at home and correspondence and the right to property. That watchdog of New Zealand "rights", the National Civil Liberties Council, also asserts[9] that rights to fundamental freedoms of speech, conscience, the press, religion, assembly and protest exist, as well as freedom from discrimination. To this list, (not an exclusive one) could be added the right of a minority group and right to partake in government affairs.

There is little doubt that these represent the fundamental rights assented to by New Zealanders (and others in the common law tradition) and are the basis for rights which are asserted to exist in specific spheres of life—such as the rights of employees.

This list, however, includes "civil rights" defined in the strict sense as "legal-political" rights. Within New Zealand and other developed Western nations there is a discernible trend towards using "civil rights" in a socio-economic context. This is particularly obvious in the rhetoric of political manifestos. The National Party asserts as basic, "freedom from want"[10] and it is asserted that everyone has a right to a basic standard of living, adequate for the health and well being of himself and his family, including food, clothing, housing, medical

[4] *Ibid.*, 402.
[5] 1978 National Party *Election Policy Guide.*
[6] *1978 Labour Manifesto.*
[7] 1978 Values Election Manifesto, *Critical Issues.*
[8] "Tarred with the same brush", a statement by the National Party, 19.
[9] McBride, *N.Z. Civil Liberties Handbook*(1973).
[10] 1969 National Party Election Policy Statement.

care and necessary social services.

This is stated in specific areas by the political parties. National claims[11]:

> the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without discrimination of race, religion, political belief, economic or social condition . . . .

In similar vein from the Labour Party[12]:

> Medical care should be available as of right to those who need it . . . .

Also[13]:

> Labour believes that the ideal of life-long education is . . . the right of individuals . . . .

Others, such as W. B. Sutch for example, have asserted[14]:

> social services should be provided for all . . . as a normal right . . . .

It is also asserted by some (and is probably a tacit assumption common to many New Zealanders) that everyone, in the words of the Declaration of Human Rights[15],

> as a member of society has the right to Social Security and is entitled to the economic, social and cultural rights indispensable for his dignity and the free development of his personality . . . .

W. B. Sutch again, for instance, claims[16]:

> social security payments are a matter of right . . . .

Associated rights such as the "right to work" and the right to rest and leisure are also spoken of. These claims are based on moral grounds, and are the concomittant of the increased prosperity of the industrial state.

The extension of "rights" to include social and economic demands is not unreasonable. The strict (legal-political) definition of rights implies a belief in the freedom of the individual and at first sight this would seem to rule out increased government interference (necessary for the attainment of socio-economic rights). "But this whole argument rests on confusion"[17]; after all, to advocate individual freedom is to ask the government to interfere with the liberty of the criminal in order to protect the liberty of property accumulation in another. So government interference is necessary to maintain either a legal-political or a socio-economic right. It can also be argued though that such rights are better termed "human rights" and hence have little place in a discussion of civil rights, so called. In reality the former subsume the latter and the latter are an extension of the former.

"Rights" asserted by New Zealanders are then wide ranging. They

[11] National *1978 Election Manifesto,* 22.
[12] Labour, *1975 Election Manifesto.*
[13] *Ibid.*
[14] Sutch, *The Responsible Society in New Zealand* (1971), 123.
[15] Art. 22, Universal Declaration of Human Rights.
[16] Sutch, *The Responsible Society in New Zealand* (1971), 125.
[17] Mulgan, "The Theory of Human Rights", *Essays on Human Rights,* Ed. Keith (1968), 21.

are distinguishable as strict civil rights—and more broadly socio-economic rights, the latter asserted without the same unanimity and conviction as the former.

III. How Are These Rights Which Are Asserted To Exist In New Zealand Reflected In The Law?

A. *Civil Rights in the Legal-Political Sense*

To talk of civil "rights" in New Zealand in the strict legal-political definition of the term is generally to talk in the language of myth. The concept of "rights" is vaguely and idealistically used and bears little relation to legal reality. Primarily it must be noted that New Zealand has neither a written constitution nor a Bill of Rights. The Common Law is not in the habit of laying down lists and charters of rights.

Further, we must be specific in our understanding of rights. "Rights" exist only where there is a correlative "duty". Rights can be distinguished from Liberties (Privileges), Powers and Immunities. This is the Hohfeldian schema. If there is no duty in anyone to uphold the "right" of another there can be no legal right. And this is predominantly the situation in New Zealand. Few such duties exist. For instance, there is no duty to let another exercise his freedom to speak. He can be shouted down. A chain saw could be started next to him to drown him out. In short, an individual has no "right" of free speech.

It is more accurate to speak in terms of liberties. A liberty exists when an individual has no "duty not to do anything". In New Zealand, therefore, we have "civil liberties" not "civil rights". We use the term "right" when we in fact mean "liberty". It has been rightly said[18]:

> In New Zealand "rights" are based on the negative concept that anything is lawful unless expressly forbidden . . . .

And[19]:

> Such rights as the ordinary citizen has are not to be discovered by the perusal of some list set out by law, rather one has to study the whole of the law to see what it is forbidden to do and then deduce that the citizen is free to do what is not forbidden . . . .

These conclusions can be illustrated by reference to one particular so-called "right"—that of freedom of assembly and association. The New Zealand Civil Liberties Handbook states[20]:

> New Zealand does not recognise any general principle along the lines of Article 20 of the Universal Declaration of Human Rights. Everyone has the right of peaceful assembly and association. The rights [of every New Zealander in the context of

[18] McBride, *op.cit.*, xv.
[19] English, "Prisoners' Rights", *Fundamental Rights*, Ed. Bridge (1973), 202.
[20] McBride, *op.cit.*, 59.

> assembly] are what is left after a miscellaneous collection of prohibitions have been taken into account individually and collectively . . . .

Relevant legislation includes: local body legislation which makes public assembly and meetings an offence without notifying the police; provisions in the Crimes Act 1961, section 86 (Unlawful Assembly), sections 43-46 and sections 87-89 (reading the riot act); Summary Proceedings Act 1959, sections 186-188 (binding over orders; Police Offences Act 1927, section 3(eee) and section 4(1)(P), (obstruction of public places), section 77, (obstruction of a constable in course of duty, as interpreted judicially in *Burton* v. *Power*[21].

In public halls, again permission from the local body is important; particular members of the public can be prevented but police may come in under section 377 of the Crimes Act to prevent a breach of the peace or serious injury. For meetings on private property the situation is much the same. Under the rule in *Thomas* v. *Sawkins*[22] police can enter private property if they reasonably believe there will be a breach of the peace and once there can stop any meeting under the rationale of *Burton* v. *Power*.

Freedom of assembly is a representative area of New Zealand law and a reliable indication of the value placed on personal freedoms. Like most other areas, the so-called right is in fact a liberty to do what is not forbidden, and in this particular area (and perhaps in another, such as free speech) "it is not too much of an exaggeration to say 'that it is exercised' only with the licence of the police".[23]

This principle was summed up by Mr Justice Gresson in the case of the *Watch Tower Society* v. *Mt Roskill Borough*[24] where the Mt Roskill Borough was held to be unable to prevent the Watch Tower Society from using the local War Memorial Hall for a Bible reading. He said[25]:

> there is no specific right at Common Law to hold a public meeting on a common or in any public place . . .

And[26]:

> A right of lawful assembly for a lawful purpose provided no disorder or breach of the peace takes place is but in reality a corollary to individual liberty . . .

Thus individual liberty, W. H. Thompson reminds us[27]

> results from the principle that the subject may say or do what he pleases provided that he does not commit breaches of the substantive law or infringe the legal rights of others . . .

The general conclusion that New Zealanders have, in fact, few

[21] [1940] N.Z.L.R. 305.
[22] [1935] 2 K.B. 249.
[23] Northey, "Is a New Zealander's Home His Castle?" *New Zealand Society,* Collette & Webb (1973), 375.
[24] [1959] N.Z.L.R. 123.
[25] *Idem.*
[26] *Idem.*
[27] Thompson, *Civil Liberties* (1938), 9.

rights needs qualification. Some rights in the strict Hohfeldian "right-duty" sense can be identified, particularly in relation to person and property. Concerning property, the Trespass Act 1968, section (3) makes it an offence "to wilfully trespass and not to leave after being warned to do so". And certain provisions in the Crimes Act legislate against theft and burglary. Although these Acts create a negative duty in others not to do something, a positive right is still created. In relation to the person similar remarks can be made concerning Crimes Act provisions against assault and murder. New Zealanders have a legal right to security of the person and their life.

Other specific rights may be noted: the right to vote (there is some debate if it is a right at all); the rights of parents in the Children and Young Persons Act 1974; and the right of freedom from discrimination in the Human Rights Commission Act 1977 which broadly speaking creates a duty not to discriminate on "the grounds of colour, race, ethnic or natural origins, sex, marital status or religious or ethical belief". The general conclusion should remain, however, that if New Zealanders have "rights", they are defined by what one can not do—and they are, in strict legal terminology, liberties to do anything the law doesn't preclude.

Ostensibly the distinction between "rights", "liberties", "powers" and "immunities" may seem a semantic and academic one. What, it may be asked, is the point in discussing the precise forms in which "rights" so-called actually exist? For one thing, not to do so is to be imprecise. We use the word "right" in the sense of a legal entitlement. In fact the legal foundation on which the language of rights, enforceable by law, lies, is flimsy. Little is guaranteed. There is no legal recourse for someone who is shouted down while speaking in public. It is crucial that New Zealanders be aware of the lack of safeguards of their rights. Truly, "the price of liberty is eternal vigilance".[28]

Often, however, this precise distinction ignores the wider concept of the term "right" for which "over and over we need a term".[29] The word is most often used thus: broadly as shorthand to include liberties and powers, etc. We must remember this usage does not equate with strict legal reality in New Zealand. This preoccupation with the distinction between rights and liberties —of how some "rights" are reflected in the law—may blind us to the fact that some are apparently not reflected in the law at all. That is, they subsist outside any legal basis as fundamental principles involving (probably) higher obligations than merely legal ones. This applies particularly to more basic

[28] Foote, *op. cit.*, 21.
[29] Pound, "Fifty Years of Jurisprudence" (1936-1937) 50 Harv. L.R. 557, 574.

rights, such as the right to participate in government affairs, the right not to be punished in any degrading manner and even the right to liberty.

B. *Rights in the Socio-Economic Sense*

Generally these "rights" (in the "right-duty" connotation) are reflected imperfectly in the law. Some are asserted as mere idealism and political rhetoric, devoid of any legal basis. The right to freedom from want is just that. Many more specific claims are reflected in the law. Education is by statute compulsory. The government has a duty to provide free primary education. The child has a right to it. Substantially the same is true of a right to medical services.

It is more difficult to establish the legal basis of a right to "social security payments". Are they more than *ex gratia* handouts? It would seem so. The Social Security Act 1957 lays down that various benefits, for example, the Family Benefit, "shall be granted upon application". Only in exceptional circumstances is the application not granted. The duty of the state is practically unqualified, and there are rights of appeal. Under section 10(7) an applicant or beneficiary aggrieved may, within three months of being notified, apply to the Commission which must review its decision. Representation can also be made to government ministers, the ombudsman, and parliament may be petitioned. However, Family Benefit, along with Miners' Benefit and Superannuation, is the only payment not means tested. So if a right exists to these payments, it is a very much qualified one in most cases.

In the case of Social Security the existence of any legal rights is a result of a balance of interest between the security of the individual and the level of taxation tolerated to support the payments. Within New Zealand different philosophies affecting this balance are discernible, most obviously between the National and Labour Parties. The "means test" is, in effect, a compromise.

The claim of a right to social security payments merges with the more basic claims to a right to a standard of living adequate for the well being of an individual. The latter may be an ideal but it is not a legal right in New Zealand today. Nor is the right to work. To assert these rights, therefore, is one thing. For them to be legally embodied in the law is quite another.

IV. What Relationship Do These Rights Bear To Dominant Past And Present Political And Moral Philosophies?

A. *Legal-Political "Rights"*

"It is worth remembering that the political tradition of civil rights is

local, both in time and place".[30] The notion of civil rights is not to be found in earlier parts of our Western tradition. It was not known to the Greeks or Romans or to theorists of the Middle Ages. This is not to say thinkers did not ever make similar demands as theorists today. They did, but not in terms "of claims due to all individual men as men".[31]

It was from the 17th century "that the notion of 'rights' emerged as a basis of political theories".[32] The most important of these theories were those of Hobbes, Locke and Rousseau, the social contract theorists. I will review also Hume's criticism of them, the views of the English liberals, Bentham and Mill, and lastly Marxism.

Hobbes and Locke both based their theories on the idea of natural law—traceable back to St Thomas Aquinas and St Augustine; that there was a universal body of natural law applying to all men equally. They posited that man entered into a contract with others to rule over him. According to Hobbes, this contract was formed because of an instinct for self-preservation. By entering into the contract the individual retained his natural (fundamental) rights which were enforced and protected by the State.

John Locke, probably more influential to this day, set out to justify the "Glorious Revolution" and opposed authoritarian and arbitrary governments. He claimed that government should exist to preserve the individual's rights which were absolute and inalienable. Man was born with them. These "rights" were self-evident—elements of natural law and discernible through the dictates of right reason.

Locke used property as an example of such rights and summed up other rights as "life, liberty and the pursuit of happiness". He never showed the origin of such rights and "that individuals are endowed with the right to life, liberty and estate is certainly not a proposition for which empirical proof can be given".[33] The community was a trustee of these rights and government a trustee for the community. Individuals entered into a contract with each other and consent was given to some to make laws and enforce rights[34]:

> The life, liberty and estate of one person could be limited only to make effective the equally valid claims of another person to the same rights . . . .

Logically Locke could be attacked, but the inward spirit remains.

Rousseau altered the formal contract notion and developed a theory of the "general will". The community is seen as coeval; members neither make it nor have rights against it. It has a moral and collective

[30] Mulgan, *loc. cit.*, 18.
[31] *Idem.*
[32] *Idem.*
[33] Sabine, *A History of Political Theory* (1927), 447.
[34] *Idem.*

personality[35]:

> Each of us puts ourselves under the supreme direction of the general will . . . .

The rights of individuals are really rights of citizens as a whole. These are "almost" inalienable, and rights of any sort require social definition "and can be defended only in terms of a common good". Collectively these theories, especially of Locke, reached their zenith with the French and American Revolutions and their language is evident in the American Bill of Rights and the French "Rights of Man and the Citizen".

Hume attacked the theory of social contract and logically swept aside the notion of self evident truths, and the whole rationalist philosophy of the natural right. The law of nature professed to show that there are rationally self evident principles of rights and justice which can be shown as inescapable. Hume stated that reason could never show whether such principles and rights were absolute. All reasoning can do is show the end result of acting a certain way, and not whether it is acceptable to human inclination or even right or wrong. Man decides that subjectively for himself. So he concluded that when inalienable rights were spoken of, their validity existed only because men thought them good and useful. Rights to life, liberty, security of the person, could not claim any absolute validity. They existed only in accord with men's estimate of their utility and from this point on, rights found their basis in utilitarian theory, especially in the theories of the English liberals.

Bentham asserted that the greatest happiness of the greatest number is the principle by which rights can exist. But it was in J. S. Mill that these ideas found their culmination. He stated their central doctrine in a classic defence of freedom—"On Liberty". Mill accepted the greatest happiness principle as the "standard of social good and the object of all moral action"[36] and asserted that the greatest happiness could be provided in the free development of an individual's personality. Freedom is desirable because it "produces and gives scope to a high type of moral character".[37] The rights of free speech, thought and conscience are ways in which fulfilled humans are produced. Mature man should be able to develop himself and have access to divergent and minority opinion. He concluded[38]

> the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even

[35] *Ibid.*, 496.
[36] *Ibid.*, 593.
[37] *Ibid.*, 595.
[38] *Idem.*

> right. . . . The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign . . . .

Beliefs such as Mill expresses here, are surely widely held here in 20th century New Zealand and influence our conception of rights . "We still have that sympathy with the human individual trying to define, assert, and make appreciated his uniqueness"[39] and exercise his liberty which is one of the traditions of the West. "We still dislike regimentation, paternalism, deference to authority".[40] Today, rights are justified because they contribute to moral good and to the development of the individual, and are only to be set aside in exceptional circumstances. Equally we accept an incursion on our liberty on utilitarian grounds because the general good to be secured is greater: for example, the S.I.S. legislation and the fact there are twenty ways a public servant can enter on the property of an individual without his permission.

On the other hand, we want security and "are tired of the fine, free Darwinian fight".[41] Perhaps this is another reason, associated with influence of Marxism, why state intrusion is tolerated. And, in addition, there still exists an idealistic (even if logically untenable) belief in certain absolute rights. Locke's clarion call still strikes receptive hearts. But the problem of definition (absolute rights cannot provide clear cut solutions for all possible legal, political and moral situations) and of reconciling them when there is a clash (freedom of speech can and does conflict with the right to individual security) remain.

However, it is only in a dominant moral philosophy, Christianity, that any basis for absolute standards and rights exist. The different political philosophies show first in the case of Locke, a belief in absolute rights without any Christian (and hence truly valid) justification, and then an abandonment of absolute rights in place of relativism which is the logical result when God as absolute is removed. Perhaps New Zealanders still seek some justification for absolute rights. Christianity can provide such absolute standards because God exists outside the natural system and is eternal. If it is accepted that God exists (and it requires a step of faith), then there is no particular difficulty in accepting that he has "spoken" and set standards.

A Christian concept of rights comes in knowing, first, God as creator of humans in his image, hence in the dignity of the individual. From this follows the right to life, liberty, equality before the law, freedom from discrimination and individual freedom and more

[39] Brinton, *The Shaping of Modern Thought*(1963),168.
[40] *Idem.*
[41] *Idem.*

specific freedoms such as thought and speech. Secondly, it comes in loving one another as God loved us. From this follows ultimately the willingness to sacrifice rights when they conflict or harm others. Clearly this philosophy still influences our conception of our rights even if the basis for belief has been abandoned and society secularised.

B. *Socio-Economic Rights*

Civil rights in a socio-economic sense bear a relationship to more recent political and moral philosophies, particularly since the time of the English Liberals. There has never been a consensus concerning such rights and it is argued that they would have been violently opposed by 16th and 17th century theorists and by many, though not all, 19th and 20th century philosophers.

That Locke's theory and other similar theories ruled out socio-economic rights is not clear. Admittedly such rights are demands for increased government action in the sphere of education, social welfare and economic control and Locke was concerned to limit any government interference in individuals's lives. But it is worth noting,[42]

> that some of the classical theorists did, in fact, demand such increased state action to provide for social and economic rights. Paine, for instance, in the second part of his Rights of Man, applies the principles of the Declaration of 1789 in a plan of what we should now call social security. It includes a state system of education, children's allowances, and a scheme of publicly endowed employment for the poor of London.

Paine, though, may have been an exception. Even so, the preservation and enforcement of legal-political civil rights necessitates some government interference.

However, in the 19th century there was no doubt about philosophical opposition to socio-economic rights. There were those, notably Herbert Spencer, who argued that social security was an[43]

> intolerable incursion on individual rights since taxation for welfare took away from some to guarantee to others what they have not gained by their own efforts . . . .

This opposition was strengthened by Social Darwinism. At the same time it was claimed that the market place was the best guide for welfare[44]:

> The maximum good of society is attained by the pursuit of enlightened self-interest . . . .

It was writers such as Mill and Green who provided intellectual and ethical frameworks upon which socio-economic claims could be asserted as rights[45]:

> Mill showed in *On Liberty* (1895) that freedom does not necessarily mean leaving the individual to pursue his own interests. He talked of the greatest happiness for the greatest number as something that could well involve the law-makers. The

[42] Mulgan, *loc. cit.*, 19.
[43] Sutch, *The Responsible Society in New Zealand* (1971), 19.
[44] *Idem.*
[45] *Idem.*

> legislature acted most responsibly when it provided means for fulfilling a certain end, leaving individuals free to avail themselves of different means.

He accepted the need for the creation of socio-economic rights on humanitarian grounds. Green in *Liberal Legislation and Freedom of Contract* wrote[46]:

> When we measure the progress of society by its growth of freedom, we measure it by the increasing development and exercise on the whole of these powers of contributing to social good with which we believe the members of the society to be endowed; in short, by the greatest power on the part of the citizens as a body to make the most and best of themselves . . . . It is the business of the state, not indeed directly to provide moral goodness, for that, from the very nature of moral goodness, it cannot do, but to maintain the conditions without which a free exercise of the human faculties is impossible.

This philosophy was strengthened by the Marxist tenet: "from each according to his ability—to each according to his need": a redistribution of income and an implied creation of a right to a sufficient standard of living. Christian and humanitarian principles of social justice provide a moral basis for such rights.

Today there is divergent thinking as to the existence of these rights which clearly bear a relationship to past philosophies. It is still possible to find, in New Zealand, the view expressed by A. Young in 1771, that there should be no socio-economic rights and[47]

> that everyone but an idiot knew that the poor must be kept poor, or they would not work.

It can be said with some assurance that the justification for our civil rights is found in the political philosophies, particularly of the last century, and that our notion of rights is inseparable from the whole tradition of Western ethics and philosophy.

[46] *Ibid.*, 20.
[47] *Ibid.*, 18.