Submission on White Paper "A Bill of Rights for New Zealand"

Bishop P J Cullinane

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SUBMISSION ON THE WHITE PAPER ENTITLED
"A BILL OF RIGHTS FOR NEW ZEALAND"

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> ".....In the juridical organisation of states in our time, the first requisite is a..... Charter of Fundamental Human Rights...." (Pope John XXIII, Peace on Earth, (n.75)

INTRODUCTION

I am the Catholic Bishop of the Diocese of Palmerston north, and in my own name I offer the following submission because I believe the idea of a Bill of Rights gives our nation an historic opportunity, and that the present draft does not quite rise to the occasion.

In the past, and in our own day, NZ has given leadership in the community of nations. We could do so again by the kind of Bill of Rights we adopt, but only if we take seriously the fact that there has been, and continues to be, historical development in the way human rights are understood.

PART 1 - GENERAL COMMENTS

(A) Liberalism and legal positivism

The Liberal tradition (in the school of Locke, Mill, et al.) perceives rights mainly as the rights of the individual over against society, and has usefully defended these rights. The presupposition is that a right is what one is to be permitted. This is correct, of course, but it is also very incomplete. If we are not to be entrenched in an earlier chapter of human history, we shall have to have regard for an emerging consciousness of rights as "right relationships between people", so that what we are entitled to do as individuals, and what can be reasonably expected of us - even transcending our own preferences - are somehow both proclaimed. This is more than the simple correlation of rights and responsibilities which is already implied in the promulgation of individual rights.

The Liberal tradition was a child of its time, and most of us would not want to adopt some of the provisions of the French Declaration of Human and Civil Rights (1789) however enlightened and reformist they may have been in their day. E.g. "Every man is free to employ his arms, his industry and his capital as he deems fit and useful for himself; he can produce what pleases him as he likes".

It has even been said that the philosophy of "...Liberalism has spent itself because it has become irrelevant. Its sacred premises of individualism, unbridled competition, and unlimited growth are no longer compatible with our social experience...." (G.H. Brand, *Human Rights: Rhetoric or Reality,* pp 5-16).

The question before us is whether we want New Zealand's "supreme law" to be based on the assumptions of Liberal philosophy.

The practical difference it makes is apparent in the way the Liberal tradition perceives individual freedom - and in the context of a Bill of Rights, the basis of limitations. In that tradition, a person should not be restrained, even from doing wrong, unless what he does interferes significantly with the welfare or rights of others. This premise is useful; it has gone some way towards preventing undue interference with the private lives of citizens. Nevertheless, it involves an assumption that there is some sort of right to do wrong provided no one else is too greatly affected.

A different tradition maintains that there is no right to do wrong. This position is not the same as the assumption that if someone has no right to do wrong then someone else has the right to stop him. It is against this latter assumption that the liberal tradition has developed its very valuable theory of toleration. It remains, however, that Liberalism itself is based on an assumption that essentially freedom is permission to do anything whatever and that laws are necessary and reasonable restrictions on that freedom.

If, on the other hand, rights are perceived as right relationships between people, then freedom is seen to be the right freely to do what is just. This position presupposes the capacity for acting unjustly, but it does not have to assume that to do so is some kind of right. Equally, it avoids the assumption that justice and the individual's freedom are at least sometimes in inverse proportion to each other.

All this puts into relief the need to recognise a basis for rights (and justice) which goes deeper than the provisions of particular laws. It is the characteristic assumption of Legal Positivism (in the school of Bentham, Austin, et al.) that the validity of laws is a purely juridic question, based simply on the fact that some authority has so decided and commanded. In the end, this assumption must fail; the validity of laws needs to be tested against certain rights which are antecedent to "positive" (i.e. posited) laws. References to "natural justice" are an acknowledgement of this fact. Ultimately, this involves what another tradition calls the innate dignity of the human person. On this premise, freedom and justice both have their basis in what it means to be a person, and are not conceptually in opposition to each other. Laws and the promulgation of rights have to do with enabling human life to be human, i.e. enhancing both freedom and justice.

The difference between these two traditions is further revealed in how they understand sanctions for breaking the law. If the validity of a law depends ultimately on the human authority who gave it, the sanction can likewise be whatever that authority decides it should be. There is not necessarily any intrinsic connection between the breach and the punishment. If, on the other hand, keeping the law has to do with what it means to be truly human, then breaking it is a matter of being less fulfilled as a human being. (In this light, the distinction between private morality and public morality which the liberal tradition supposes, is likewise seen to fail; though this does not imply that law should extend into every area of human behaviour.)

Whatever about the misconceptions of natural law which both its advocates and its opponents have been guilty of, the historical fact remains that consciousness of it arose precisely against the tyranny of positive law:

> Historically, the appeal to the natural law has arisen precisely from the resistance of personal conscience to the arbitriness of written laws; it appealed to an *unwritten law*, an inborn knowledge of what man ought to do and ought not to do in order to be and become authentically himself... hence, in its original meaning, the natural law is a dynamic existing reality, an ordering of man towards his self-perfection and his self-realisation, through all the concrete situations of his life and intersubjective dialogue with his fellow men and with God. (Monden, L*; Sin, Liberty and Law*, G. Chapman, 1966, p.89).

(B) **Natural law**

Clearly, much depends on what we understand by "what it means to be human".

The first thing to be said about this is that human nature, (i.e. what it means to be human) is simultaneously a given and a task. Its givenness is the basis for a certain universality - obviously it is predicated of all who are human. To say that it is also a task is to acknowledge that being truly human entails the capacity for self-realisation, through the exercise of freedom. This is the basis of the experience of moral obligation. The experience of "ought" is an aspect of what it "is" to be human, and the most basic expression of natural law is along these lines: "Be, by reason of the choices you make, true to your nature; true to yourself."

In determining "what it means to be human", there are certain "constants", which are the relationships in which human existence is lived out. They include the relationship of the person to human bodiliness, and to the whole ecological environment; the relationship to other persons both as individuals and through social institutions; and the relationship to other generations before and after. Such is what it means to be a human being; every human being is immersed in material reality and history, and capable (to the extent that they are not inhibited by de-humanising conditions) of living that condition freely.

Human life, in this perspective is a process of self-realisation, through these relationships, involving an ever-increasing range of planning and skills - e.g. education, technology, etc.

> "....It seems that in the near future man will have unsuspected possibilities - he will be able , e.g. not only to transplant a human heart, but also to make far-reaching changes in the biological reality of man - with all the consequences that must follow for the human personality. The question is posed again: Is it permitted to touch upon the reality of man? The answer must be, it is not only allowed, but it is even the duty of man constantly to make himself more human, i.e. always to develop himself further, and to bring into action the inner possibilities of the being that is called man. But here there is the difficulty of recognising what kind of manipulation of man makes him more human. It certainly would be false to say: because God has created man as he finds himself, therefore this is the best manner of existence for him. God has created man *complete with the possibility of his development*, and indeed of *self-*

development. (Fuchs, J; Human Values and Christian Morality, Gill and Macmillan, 1970, p 117).

My point has been that an approach to human rights based on an understanding of "what it means to be human" involves more than "having certain rights", which, after all, may mean no more than what is granted, and limited, by some public authority. Rather, it involves discovering "what is right", and this becomes the validating source even of those rights which the public authority proclaims. Political action (including legislative action) has to do with creating the conditions in which people can discern what is right and just.

(C) Theological perspectives

No doubt, this struggle to discern "what it means to be human" is as old as the human race. "Believers", broadly speaking, are those who believe that "what it means to be human" is necessarily related to the intentions of a Creator, and that this is what has been revealed in certain aspects of human history. It is claimed that this theological perspective throws light on our human condition. This claim, and its relevance to human rights, is well summarised in the following passage, in which the author speaks of an "ethos" which

> ....drives in the direction of a search for a 'more human life', for the fulfilment, within the conditions of history, of the best material and spiritual possibilities available for the human person and society. As we look at this history, it seems that we can discern three such insights which can be considered a permanent achievement.

1. The universality of human rights

> 'There is only one God and Father of all': this conviction is the basic ground on which the Christian faith rests. It is the basic confession of the Old Testament: (Deut.6:4). Far from retreating from it, the New Testament makes it even more explicit in terms of its trinitarian faith: (Eph.4:4-6). The consequence cannot be avoided: there is only one mankind. Within the New Testament this consequence is first drawn in relation to the new Christian community: all are one body, in which all members have equal dignity and value: social, ethnic, cultural, even sexual distinctions cannot justify any discrimination. But this universality overflows the limits of the community. Every human being bears the image of God; it is therefore absurd and sacrilegious 'to bless the Lord and Father...and to curse men, who are made in the likeness of God' (James 3:11). There is no doubt that it was the encounter with Platonic and Stoic philosophy which first gave to Christian theologians the possibility of articulating this conviction in conceptual theological terms. When Christians used this conceptual framework, though they were not merely borrowing a Greek idea: they were formulating something that was profoundly their own.

2. 'Humanity as criterion

> The American theologian Paul Lehmann has coined a felicitous expression when he said that what God has been and is presumably doing in the world is 'what it takes *to make and to keep human life human'.*
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> It is a very modern formulation, but it expresses an insight which permeates the whole Biblical testimony. Only a full biblical theology developed in the perspective of 'life' as God's goal for his creation could do justice to this theme. But perhaps it is not superfluous to lift up briefly one of the very early and pregnant expressions of such insight: the priestly account of God's covenant with humankind in Noah (Gen. 9:1-

17). God voices and pledges his will concerning the 'fallen' human being, humanity 'as it is' - vitiated by wickedness, violence, sin. And he simply reiterates the promise and commandment of creation: "Be fruitful, and multiply, and fill the earth'. Human life is still the key to creation. But three new provisions are added: (1) Man has a right to put all existing life...at the service of his life; (2) Human life is sacred: God himself will avenge violence done against man; (3) Man himself is made responsible for respecting and enforcing this provision.

It is impossible to exaggerate the importance of this Biblical motif. God's 'covenant' with man has 'life', particularly 'human life', as its fundamental content. He is unconditionally and absolutely the God of life. And consequently, he entrusts man with a mission: the perpetuation, enriching and protection of life. This is God's most precious treasure, so much so that not even his just and necessary wrath against man's sin is cause enough to annul the alliance. When the decisive time comes, the God-made-man will protect the human race with his own life. He will take upon himself the just punishment and the senseless violence of the fallen world so that men may live. The new covenant 'in his blood' eternally seals and affirms the earlier covenant with mankind.

Once again, it took the Church a long time to explore the content of its affirmation of human life: the inviolability of the human conscience, the freedom to develop one's own intellectual and spiritual possibilities, the intransferable value of each human person, the unity of spiritual and physical life, the social character of human existence, emerge slowly in the encounter of the Christian faith with different historical circumstances and philosophical conceptions as the ever enlarging implications of this 'Covenant'. But each new insight operates on the Christian conscience because Christians are faithful only when and to the extent that they do in the world 'whatever it takes to make and keep human life human'.

2. The 'poor' as the test

Universality and 'partiality' seem contradictory terms. But it is one of the deepest insights of the Biblical picture of God that his universality finds concrete expression in his 'partiality' in favour of the poor, the oppressed, the disadvantaged, the powerless, the marginal. In the strong words of one of the most important theologians of our century; "God always takes his stand unconditionally and passionately on this side and on this side alone: against the lofty and on behalf of the lowly....'. At this point, the biblical concept of justice parts company with the classical tradition. It is not the 'blind' rendering 'to each his own' - which presupposes a stable and basically unchangeable order - but the liberation of those who have been deprived of the conditions for an authentic human life. Such a vision does not mean a rejection of universality, but there are always historical tests for universality. In biblical terms, this test is the condition of the poor. Here we have the basis for a deeper understanding of the struggle for human rights. When the Brazilian bishops, for instance, refer at length to the condition of the Indians, they are not arbitrarily selecting a special case: they are offering a witness which indicates the inhumanity of the whole society.

This relation between universal definition and a historical concrete focus is crucial for the understanding of human rights and participation in support of them. As the slogan of 'human rights' becomes one of the rallying points today in the world, it is of paramount importance for us to bear this historical-theological test in mind. For the vast majority of the population of the world today the basic 'human right' is 'the right to a human life'. The deeper meaning of the violation of formal human rights is the struggle to vindicate these large masses who claim their right to the means of life. The

> defence of formal human rights is meaningful as a pointer to that deeper level. In that sense, the drive towards universality implicit in our Christian faith, which found partial expression in the quest of the American and French revolutions, the aspirations expressed in the UN Declaration, finds its historical focus today for us in the struggle of the poor, the economically and socially oppressed, for their liberation. At this point the biblical teaching and the historical injunction coalesce to give the Christian churches a mission. (Bonino, J. *Religious Commitment and Human Rights: A Christian Perspective*, in Falconer, pp 29-32, cf bibliography.

PART II - THE PROPOSED BILL OF RIGHTS

It is against the above background of converging philosophical and theological considerations that I find the present draft of the proposed Bill of Rights rather weak. This is due in the first place to the lack of any explicit connection between the rights that are listed and their basis in the dignity of human personhood, or, as the scriptural tradition would have it, in the sacredness of human life. A selection of rights is listed, but their roots are not identified. Consequently, the document is vulnerable to the assumptions of legal positivism. Rights appear to be what Parliament grants in the first place, or at least does not take away. The very purpose of the Bill is to show that Parliament is cognizant of rights which it does not bestow, and this can be shown only be reference to the real source of human rights.

I suggest there is also some ambiguity created by listing some of the most fundamental human rights under the rubric of "democratic and civil rights". I am sure it was not the drafters' intention to give the impression that these rights have their origin in some democratic decision or civil convention. The ambiguity could be removed by a presentation of human rights which shows their relationship to the dignity of personhood and what it means to be human. (Perhaps it is also this expectation on my part that accounts for my surprise to find that what is described under the exalted title of "Liberty of the Person" only turns out to be an aspect of what is elsewhere called "Freedom of Movement".)

In its present form, the Bill fails to show clearly that the rights it proclaims have a basis greater than the decision of Parliament. For the same reason, the symbolic value of the Bill is also lost; I refer to the hope that has been articulated by Sir Robin Cooke, who suggests that "In New Zealand we badly need something that can grip the imagination", and that the right kind of constitution could play "a major part in building up a sense of national identity".

In a word, unless the rights proclaimed in the Bill can be seen to have an authority greater than that of Parliament, the Bill fails to give visibility to its own intended status, and to its potential as a formative influence on the people of our country.

The second reason why I think the Bill is weak is because it fails to avoid those assumptions of liberal philosophy which have already begun to lose their credibility. The liberal tradition is right to insist on the rights of the individual, but tends to see those rights as being

diminished by the rights of others. It fails to allow for the fact that human existence is essentially relational, and that there are no rights outside of right relationships. That tradition's heavy emphasis on the rights of individuals to pursue their own choices with as little restriction as possible will surely give the Bill diminishing relevance in a world of increasing inter-dependence. Individuals need to be challenged to the positive acceptance of differences between people and of values which transcend individual preference, and even national boundaries. Have we really said enough (e.g. under the headings of Non-discrimination and Minority Rights) when we speak of other individuals' rights to be who they are and belong where they belong?

"Justified limitations"

Under the heading of "Limitations" it is probably too fine a point to argue whether it is rights and freedoms that are subject to certain "limitations" (clause 3), or whether it is the exercise of those rights that is limited, the rights themselves remaining intact.

Of greater concern to me is the implication that, once again, Parliament and democratic decision are supreme after all. I am not objecting to the need for "limitations", nor to the role of Parliament; I am objecting to the failure to identify the real basis for the necessary limitations. Fundamental human rights can only be "limited" by other rights which are equally fundamental. Such rights have their source in the dignity of personhood and in what constitutes right relationships between people. They are not granted by public authority, even though public authority will be involved in discerning those relationships.

Therefore, I submit that the basis for "justified limitations" as given in clause 3 should be strengthened by the inclusion of some reference to natural justice - or, as clause 14 would have it: "the principles of fundamental justice."

(This would also obviate the need to build additional limitations into some of the particular freedoms (e.g. 10/2) and rights (e.g. 14). If the purpose of the Bill is to identify those fundamental rights and freedoms against which all positive laws should be able to stand the test, it should not be necessary to hedge any of them, let alone some of them and not others. All fundamental rights should be able to be tested against the same criteria for "limitations", and those criteria should be equally fundamental, i.e. rooted in human dignity - and recognised by law. To require of limitations only that they be "prescribed by law as can be demonstrably justified in a free and democratic society is to make the greater reality (fundamental human rights) subject to the lesser reality (positive law), unless it is made clear that even these provisions of positive law must themselves be consistent with "the principles of fundamental justice."

Continuing growth of a jurisprudence of human rights

The inclusion of the Treaty of Waitangi in the Bill of Rights seems to me to be totally commendable. The provision that the Treaty "shall be regarded as always speaking...." seems to me to be a provision which should apply to the whole Bill. The whole of this submission is based on the historical fact that our understanding of human rights is itself dynamic, not static. This, in turn, is rooted in the fact that what constitutes "right relationships between people" can change. Hopefully, provision for the continuing growth of a jurisprudence of human rights is implied in the title of the Bill as "an Act to institute as the supreme law of NZ a Bill of Rights in order to affirm, protect and promote....";

presumably, an on-going process is what is intended. This process has resulted in the Courts in the Republic of Ireland finding a number of implied rights which are to be protected by the Constitution even though they are not explicitly named in it, including some very basic rights.

Continuing growth in our understanding of human rights has already found expression in several modern constitutions and covenants which are frankly based on the conviction that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". (*International Covenant on Civil and Political Rights***,** preamble, para 1)

Such an undergirding reference point is also what makes it possible to articulate newly discovered human rights with an inner consistency.

If NZ's Bill of Rights is not to be anachronistic, it needs to acknowledge more explicitly that human rights have an origin beyond merely human convention.

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