

ANTOINETTE BESIER

**CITIZENSHIP ON THE AGENDA:  
A RIGHTS-BASED ASSESSMENT OF THE  
MEANING CITIZENSHIP**

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CONTENTS

*I INTRODUCTION*.....3

*II CITIZENSHIP AND TRADITIONAL ASSUMPTIONS*.....4

*A Definition of Citizenship* .....4

*B Nationality* .....5

*C State Sovereignty* .....6

*III CURRENT MEANINGS* .....7

*A Legal Construct* .....7

*B Constitutional Status* .....10

*IV CITIZENSHIP AS A HUMAN RIGHT*.....14

*A Rights-Based Approach* .....14

*B Right and Benefits in Law* .....17

        1 *Recent changes* .....21

        2 *Importance of residual citizenship rights* .....23

*C Other Key Interests*.....25

*D International Law*.....27

*E Overall Assessment*.....31

*V CITIZENSHIP ON THE AGENDA*.....35

*A Acquisition of Citizenship Status*.....35

        1 *Identity (Citizenship and Travel Documents) Bill*.....37

        2 *Overseas comparisons* .....40

        3 *Value of Birthright Citizenship*.....42

*B Deprivation of Citizenship* .....45

        1 *Identity (Citizenship and Travel Documents) Bill*.....45

        2 *Overseas comparisons* .....47

        3 *Future changes*.....49

*C Constitutional Reform*.....52

*VI CONCLUSION*.....53

*BIBLIOGRAPHY*.....55



## **ABSTRACT**

This paper addresses the meaning and value of citizenship in response to the proposed reforms contained in the Identity (Citizenship and Travel Documents) Bill. In order to evaluate the issues raised by the proposed reform, this paper assesses the meaning and value of citizenship to the individual.

The argument is made that citizenship is deserving of human rights status given the importance of the rights that flow from citizenship and as well as other fundamental values and interests that citizenship status facilitates and protects. This argument is supported by developments in international law which point towards the recognition of the right to an effective nationality.

This paper also argues that in order for citizenship to be treated as a human right, it is necessary to address the question of who the right applies to. This involves an evaluation of how the law should provide for the acquisition and deprivation of citizenship status. Comparisons are made to the jurisdictions of a range of countries including the United Kingdom, the United States, Israel and Australia.

At the time of completion of this paper, the Bill was before the Government Administration Select Committee and it was unclear as to the final content of the Bill. Nevertheless, it is evident that the intention of the Government is to introduce law changes that are exclusionary in nature and that this does not bode well for the future of New Zealand. This paper suggests that constitutional reform should be undertaken in order to treat citizenship as a human right.

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## I INTRODUCTION

Early this year, the media announced that the Government had circulated among Cabinet members draft legislation that would give governments the power to deprive a person of his or her New Zealand citizenship on the basis of national security concerns.<sup>1</sup> This announcement provided the impetus to this paper: should such a change be allowed?

The objective of this paper is to answer this question by undertaking a rights-based assessment of the value and meaning of citizenship to the individual. This assessment involves a determination of whether citizenship itself can be considered a human right and will form the necessary platform in order to critique the proposed law reform.

Throughout the course of researching and writing this paper, further information on the Government's proposed reform to citizenship law became available. Indeed, the most significant proposed change was issued by a Supplementary Order Paper three weeks from the date that this paper was due for completion. Given the uncertainty surrounding the actual content for the law reform, this paper has focussed on providing a basis to assess any proposed reform to citizenship law. It has done this by addressing the importance of citizenship to an individual and asking how this should be reflected in law. Nevertheless, this paper does make some observations about the desirability of the proposed reform.

This paper will first provide a definition of citizenship and explain traditional assumptions that apply to it. It will then address the current treatment of citizenship in law and attempt to explain the lack of attention it receives in New Zealand. The next part of the paper will examine whether citizenship can be treated as a human right; this forms the rights-based assessment of citizenship. The final part of this paper will consider how citizenship *should* be treated in

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<sup>1</sup> "PM defends citizenship review" (29 March 2004) *New Zealand Herald* Auckland.



New Zealand law. The proposed law reform will be assessed against this benchmark and suggestions will be made for constitutional reform.

This paper will employ a comparative approach by utilising the experience of overseas jurisdictions to point to alternative models and highlight trends in the treatment of citizenship in law. The selection of jurisdictions has been made in order to make useful comparisons, rather than decide which jurisdiction's approach is the most appropriate.

## **II CITIZENSHIP AND TRADITIONAL ASSUMPTIONS**

### **A Definition of Citizenship**

Citizenship has a wide variety of meanings. It can be viewed as a legal status, a State of mind, a civic obligation, an immigration benefit, an international legal marking and a personal virtue. A good starting point is to define citizenship as the strongest bond between an individual and his or her State.<sup>2</sup> This bond has a legal status which some individuals enjoy and which some people aspire.<sup>3</sup> Citizenship is a legal relationship, which as Bradley explains:<sup>4</sup>

is founded on the current law of the State, including a constitutional text where this exists. Subject to the provisions of any constitution, the legislation in force will determine (a) the rules as to who are citizens, and (b) the legal rights, privileges and duties of those citizens. Questions as to what citizenship entails are questions about the rules of public law in the State concerned.

The legal status aspect of citizenship can be viewed as one level of the meaning of citizenship. Karantani has usefully divided citizenship into three levels of meaning:

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<sup>2</sup> Yaffa Zilbershats *The Human Right to Citizenship* (Transnational Publishers, Ardsley (New York), 2002) xiii.

<sup>3</sup> Peter Schuck "The Re-Evaluation of American Citizenship" (1997) 12 *Geo Immigr LJ* 1, 2.

<sup>4</sup> Anthony Bradley "'British Subjects' and 'Commonwealth Citizens' – an Imperial Experience of Trans-national Citizenship?" 6<sup>th</sup> World Congress of the International Association of



- i. The nominal aspect of “citizenship-as-status”: a formal membership of a political unit.
- ii. The substantive aspect of “citizenship-as-rights and “citizenship-as-desirable-activity”: a bundle of rights and obligations assigned to the holders of citizenship.
- iii. The functional aspect “citizenship-as-social-enclosure”: where citizenship is the means to include and exclude people.<sup>5</sup>

This paper will discuss citizenship in relation to all three levels of meaning.

### **B Nationality**

As a status, citizenship denotes formal membership of a State, but it also can imply an individual’s national membership of a group of shared identity loyal to a State, commonly called nationality. The terms citizenship and nationality are interchanged with one another but their shared meanings do not completely overlap.<sup>6</sup> There are different meanings of nationality need to be explained.

Nationality is a legal concept most commonly used in international law to describe membership in a State. Nationality denotes a specific legal relationship between an individual and international law. It provides his or her State of nationality with the *locus standi* to protect his or her interest in the international arena.<sup>7</sup> Therefore, the term nationality can be taken to mean the external effects of the State-citizen relationship.<sup>8</sup> This paper will generally use the term citizenship in relation to the issues that relate to a State’s domestic jurisdiction.

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Constitutional Law <<http://iaclworldcongress.org/english/program.shtml>> (last accessed 14 July 2004) p1.

<sup>5</sup> Rieko Karatani *Defining British Citizenship: Empire, Commonwealth, and Modern Britain* (Frank Cass Publishers, London, 2003) 197.

<sup>6</sup> See generally British Nationality Act 1981 which defines citizenship.

<sup>7</sup> Johannes M M Chan “The Right to a Nationality as a Human Right: The Current Trend Towards Recognition” (1991) 12 Hum Rts L J 1, 1.

<sup>8</sup> Bradley, above n 4, 1.



The term nationality will be used in relation to the discussion on international law.

The second meaning of nationality, is an ethnological term connoting a historical relationship with a specific ethnic, linguistic or racial group.<sup>9</sup> Often the conceptions of nationality and citizenship are indistinguishable in practice, particularly in ethnically homogenous States. But that is not always the case as exemplified in the United Kingdom. Scots, Welsh and English people comprise separate nations, in the sense of ethnic origins, but are within one State.

Regardless of whether a State is comprised of many nations or is homogeneous in its ethnic makeup, the State is able to exert control over who is included and excluded in the identity of the State. This point leads to a discussion on the principle of sovereignty and its application to citizenship.

### *C State Sovereignty*

The definition of citizenship provided by Bradley underlines the traditional assumption regarding citizenship, that is, the State has the prerogative to decide the identity of its citizens. This is because citizenship is viewed as being within the ambit of a State's sovereignty.<sup>10</sup>

The principle of sovereignty is based on the notion that the State has power over its own territory to determine the laws that govern those within it. This principle was one of the features of the rise of the Nation State and was fundamental in the early development of international law.<sup>11</sup> In its classical form, the principle of sovereignty describes a world in which "supreme power is exercised within a particular territorial unit".<sup>12</sup>

<sup>9</sup> Jeffrey Blackman "State Succession and Statelessness: the Emerging Right to an Effective Nationality under International Law" (1998) 19 Mich J Int'l L 1141, 1146.

<sup>10</sup> Zilbershats, above n 2, 8.

<sup>11</sup> Kim Rubenstein "Citizenship, Sovereignty and Migration: Australia's Exclusive Approach to Membership of the Community" (2002) 13 PLR 102, 104.

<sup>12</sup> Rubenstein, above n 11, 104.



The function of nationality under international law, that is the allocation of individuals to a specific State, is fundamentally an attribute of State sovereignty. The State has absolute control of its borders and its nationals. The orthodox view of international law holds that only the State can determine who comprises its nationals.<sup>13</sup>

This paper will address the movement away from this orthodox theory towards a recognition that international human rights law will affect how a State determines citizenship criteria. Before this discussion takes place, it is important to assess how citizenship status is at present acquired, and the level of attention it receives within New Zealand's legal system.

### **III CURRENT MEANINGS**

#### **A Legal Construct**

The law that sets out how citizenship may be acquired or lost may be regarded by some countries as being of a constitutional nature. Citizenship law may also be simply regarded as a creature of ordinary statute.

As a corollary to the belief that the conferment of citizenship rests on the will of the State, many believe that citizenship is simply a legal construct lacking in any constitutional meaning. Alexander Bickel declared that "citizenship is a legal construct, an abstraction, a theory. No matter what the safeguards, it is at best something given, and given to some and not to others, and it can be taken away."<sup>14</sup> Bickel's description of citizenship is apt for New Zealand.

In New Zealand, citizenship is defined and conferred by the Citizenship Act 1977. This Act sets out how New Zealand citizenship is acquired and lost. It is not clear as to whether the Citizenship Act has constitutional status given the lack of a written constitution in New Zealand. According to New Zealand constitutional law academic Philip Joseph, certain statutes are considered so

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<sup>13</sup> Blackman, above n 9, 1149.



important that they have constitutional status.<sup>15</sup> The Citizenship Act has not traditionally been part of this list.

There is limited judicial reflection on the meaning of citizenship to an individual by the New Zealand courts. From my research it appears only Hammond J in *Yan v Minister of Internal Affairs* has considered the value of citizenship. In an obiter comment, Hammond J declared that citizenship was “critically important human right”.<sup>16</sup> Earlier in the judgment, Hammond J observed that citizenship was once seen as a privilege granted by the State, but that the modern conception is that citizenship is a means to an end and “conceptually therefore, there has been a shift from a formalist, grant-of-rights theory, to a more functional conception of citizenship.”<sup>17</sup> This is a rare statement from the bench. In most cases the courts have limited their attention to the revocation of citizenship for people who have acquired the status through dishonest means.<sup>18</sup>

The status of citizenship is also neglected in other areas of law. The Bill of Rights Act 1990 (hereafter “the Bill of Rights”) provides cursory attention to citizenship. The language employed in the Bill of Rights to allocate rights generally has universal application: “everyone lawfully in New Zealand has the right of freedom of movement” or “every person has the right to manifest that person’s religions or belief”.<sup>19</sup> The entitlement to rights is based on a person being located in New Zealand, not on being a citizen. A couple of distinctions are made, however. Only citizens have a right to enter and remain in New Zealand and the right to vote.<sup>20</sup>

The authors of the White Paper on the Bill of Rights, a discussion paper that formed the debate on the purpose and content of the Bill of Rights, did not

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<sup>14</sup> Alexander Bickel *The Morality of Consent* cited in David Schwartz “Citizenship Without Consent: Illegal Aliens in the American Polity” (1986) 74 Calif L Rev 2143, 2170.

<sup>15</sup> Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 21.

<sup>16</sup> (15 August 1997) HC AK 187/97 21.

<sup>17</sup> *Yan v Minister of Internal Affairs*, above n 16, 10.

<sup>18</sup> See *Wang v Minister of Internal Affairs* [1998] 1 NZLR 309 (HC).

<sup>19</sup> Bill of Rights Act 1990, ss14, 15, and 18.

<sup>20</sup> Bill of Rights Act 1990, ss12 and 18(2).



consider citizenship.<sup>21</sup> Its meaning and importance was simply not addressed. The reason for the omission may lie in the reliance placed on the Canadian Charter of Rights<sup>22</sup> and Freedoms and International Covenant on Civil and Political Rights (ICCPR) for the content of the Bill of Rights.<sup>23</sup>

The Canadian Charter does not include a right of an individual to be a citizen. It contains similar distinctions to the Bill of Rights with an additional protection regarding education minority rights.<sup>24</sup> Article 24(3) of the ICCPR sets out a right for children to acquire a nationality but the White Paper did not address the inclusion on this Article in the Bill of Rights. The focus of the contributors to the White Paper was to ensure access to and protection of procedural rights, such as for example, the right of a fair trial, freedom of expression, freedom of association.<sup>25</sup> This reflects the theory of American legal philosopher, John Hart Ely who advocated a process theory of rights protection.<sup>26</sup> These factors explain the omission of citizenship in the Bill of Rights.

The matter of citizenship receives similar treatment in the United Kingdom. The British Nationality Act 1981 defines the entitlement to British citizenship. British citizenship has been described as “wholly a creature of statute”.<sup>27</sup> This Act was primarily designed as an immigration control measure and, apart from creating the right of abode, does not specify rights and benefits that flow from the status of citizenship.<sup>28</sup> Other statutes limit the rights of non-citizens where this is considered to be appropriate.

Unlike New Zealand and the United Kingdom, Australia has a written constitution. The word “citizenship” (or “citizen”) was deliberately excluded from the Australian Constitution given the perceived difficulties its inclusion

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<sup>21</sup> *A Bill of Rights for New Zealand: A White Paper* (Government Printer, Wellington, 1985).

<sup>22</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982 (Canada Act 1982 (UK), sch B).

<sup>23</sup> International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.

<sup>24</sup> Canadian Charter of Rights and Freedoms, above n 22, Art 23(1).

<sup>25</sup> *White Paper*, above n 21, 28.

<sup>26</sup> John Hart Ely *Democracy and Distrust. A Theory of Judicial Review* (Harvard University Press, Cambridge (Massachusetts), 1980).

<sup>27</sup> Karatani, above n 5, 185.

<sup>28</sup> Karatani, above n 5, 1.



would create.<sup>29</sup> It was generally felt by the participants in the constitutional convention debates of the late nineteenth century that not only was the term difficult to define, but that it introduced issues that the participants felt ill equipped to address. The complex questions of double citizenship (Federal/State) and the need to determine who should be excluded and included in the new Australian nation remained unresolved.<sup>30</sup> Later, in 1948, Australia enacted citizenship law, which set out qualifications for citizenship and naturalisation processes.<sup>31</sup>

The consensus among Australian academics is that citizenship is simply a legal construct lacking any constitutional status.<sup>32</sup> Rubenstein comments that “citizenship is a legal status which has had a slow, staggered and disconnected evolution which needs urgent review.”<sup>33</sup>

Like the situation in New Zealand, the Australian and British courts have not addressed the meaning of citizenship. Rubenstein is of the view that the lack of reference to the term “citizen” in the Australian Constitution has been a constraining factor in the Australian court’s approach to citizenship.<sup>34</sup> In these three countries, citizenship law is not regarded as possessing apparent constitutional status.

## **B      *Constitutional Status***

The approaches of New Zealand, Australia and the United Kingdom by no means represent the common approach to citizenship across the world. Two useful comparisons can be drawn with Israel and the United States.

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<sup>29</sup> Kim Rubenstein “Citizenship and the Constitutional Convention Debates: A Mere Legal Inference” (1997) 25 FL Rev 295, 297.

<sup>30</sup> “Citizenship and the Constitutional Convention Debates: A Mere Legal Inference”, above n 29, 296.

<sup>31</sup> Australian Citizenship Act 1948 (Cth).

<sup>32</sup> “Citizenship and the Constitutional Convention Debates: A Mere Legal Inference”, above n 29, 297; see also Greg Taylor “Citizenship Rights and the Australian Constitution” (2001) 12(3) PLR 205, 208-213.

<sup>33</sup> “Citizenship and the Constitutional Convention Debates: A Mere Legal Inference”, above n 29, 317.

<sup>34</sup> Kim Rubenstein, *Australian Citizenship Law in Context* (Law Books Co, Pyrmont (NSW) 2002) 257.



In Israel, the Nationality Law 1952 sets out the requirement for citizenship status. The main means of acquiring Israeli citizenship is through a connection to the Jewish faith and the Law of Return.<sup>35</sup> Citizenship status is regarded as a “basic right” by the courts despite the lack of a written constitution. This indicates that citizenship is regarded in Israeli law as possessing constitutional status.<sup>36</sup> Gross, an Israeli academic and ex-military Judge, explains that the Israeli High Court in *Hila Alroi v Minister for the Interior* accepted that “the right to citizenship is a basic right, inter alia, because it is the basis for the right to vote for the Knesset from which democracy flourishes.”<sup>37</sup> Despite citizenship being considered a basic right in Israel, Israeli law provides for the deprivation of citizenship, as this paper will discuss later.

In the United States, citizenship is defined and conferred by the Fourteenth Amendment to the Constitution:<sup>38</sup>

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

The Fourteenth Amendment’s citizenship clause served to reverse the Supreme Court decision in *Dred Scott*, which held that persons of African descent did not and could not possess citizenship.<sup>39</sup> According to Bosniak, most commentators read the Amendment as defining the criteria for citizenship in general terms as it “tells us who are citizens of the United States”.<sup>40</sup> The Amendment does not apply to the naturalisation process; immigration law and policy regulate the process of determining who can become a United States citizen.

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<sup>35</sup> Zilbershats, above n 2, 77.

<sup>36</sup> Emanuel Gross “Defensive Democracy: Is it Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against his Own State?” (2003) 72 UMKC L Rev 51, 64.

<sup>37</sup> Gross, above n 36, 63.

<sup>38</sup> United States Constitution, amendment XIV § 1.

<sup>39</sup> *Dred Scott v Sandford* (1857) 60 United States (19 How) 393 cited in Linda Bosniak “Constitutional Citizenship Through the Prism of Alienage” (2002) 62 Ohio St. LJ 1285, 1295.



The Supreme Court in *Afroyim v Rusk* interpreted the Fourteenth Amendment to mean that citizenship is a constitutional right.<sup>41</sup>

We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against congressional forcible destruction of his citizenship, whatever his creed, colour or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.

As the above discussion has illustrated, the approach of United States and Israel to citizenship is in stark contrast to that of New Zealand. The next section of this paper attempts to explain why citizenship has suffered from a lack of attention in New Zealand.

### **C The Attention Deficit**

The Australian experience has shown that the presence or lack of a written constitution is not the key factor that determines the constitutional status of citizenship law. History also plays a large role in explaining the lack of constitutional status of citizenship in New Zealand.

The United States fought a war of independence against the British and set about defining a new nation. Early debates took place over who should be considered citizens, for instance in the early 1800s a debate took place over whether or not native Indians should be accorded citizenship status.<sup>42</sup> The Fourteenth Amendment was a direct result of the American experience of slavery and the Amendment sought to ensure that African-Americans were afforded the same legal status as white Americans. Similarly, the State of Israel has fought many wars for its survival as a State. Citizenship laws have played a major role

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<sup>40</sup> Bosniak, above n X, 1296.

<sup>41</sup> (1967) 387 US 253, 268 (SC).

<sup>42</sup> Earl Maltz "Citizenship and the Constitution: a History and Critique of the Supreme Court's Jurisprudence" (1996) 28 Ariz St LJ 1135, 1142.



in allowing people of Jewish faith across the world to “return” to their ancient homeland.<sup>43</sup>

New Zealand was created under arguably less exigent circumstances. Our history has not required an examination of citizenship criteria and its meaning. From New Zealand’s inception as a colony, the acquisition of citizenship status was never an issue: Article 3 of the Treaty of Waitangi, the Crown guaranteed Maori the “same rights and duties of citizenship as the people of England”. This is an explicit statement of Maori being able to enjoy the same status of British subjects.<sup>44</sup> New Zealand has had the good fortune of being a stable democracy, an island State with no border disputes with its neighbours and having a population not torn apart by centuries-old ethnic feuds.

Perhaps as a result of history and the assumption that the State has the exclusive right to determine who are its citizens, citizenship (at least as far as my research has proven) has not featured as a topic of debate in New Zealand. There has also been very limited attention from New Zealand academics to the study of citizenship, particularly in terms of the meaning and value of citizenship and how this is articulated in law. Debates regularly take place regarding immigration but these are focussed on who are to be included as future New Zealand citizens and not the wider issues of citizenship.

The Government has recently introduced the Identity (Citizenship and Travel Documents) Bill, a major law reform of the law relating to citizenship law.<sup>45</sup> Based on my monitoring of the news media, the amount of debate generated by the proposed reform appears to be very limited. This is unfortunate. The following part of this paper will demonstrate that citizenship is of great importance to an individual and any changes to the attainment of citizenship status or the ability of the Government to deprive an individual of his or her citizenship should be carefully scrutinised.

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<sup>43</sup> Gross, above n 36, 63.

<sup>44</sup> Claudia Orange *Treaty of Waitangi* (Allen and Unwin, Wellington 1987) 42.

<sup>45</sup> Identity (Citizenship and Travel Documents) Bill, No 148-1.



#### IV CITIZENSHIP AS A HUMAN RIGHT

##### A Rights-Based Approach

A rights-based approach is an argument showing that an individual's interest is considered in itself to be sufficiently important from a moral point of view to justify holding people to be under a duty to promote it.<sup>46</sup> This approach is valuable to the consideration of the law reform proposals on citizenship. It provides a conceptual framework to analyse the proposed law reform as it directs an inquiry into the meaning and value of citizenship to an individual and how the law should reflect this. If citizenship is considered to be of such importance to an individual that it should be accorded a human rights status, this will directly lead to examination of how citizenship is treated in law: on what terms citizenship status is granted to an individual and when it can be revoked by the State? Does the State have any obligations, or is citizenship status simply bestowed out of the State's generosity?

Bickel would declare a rights-based approach to citizenship as dangerous:<sup>47</sup>

Emphasis on citizenship as the tie that binds the individual to government and as the source of his rights leads to metaphysical thinking about politics and law, and more particularly to symmetrical thinking, to a search for reciprocity and symmetry and clarity of uncompromised rights and obligations, rationally ranged from one next to the other. Such thinking bodes ill for the endurance of free, flexible, responsive, and stable institutions and of a balance between order and liberty. It is by such thinking, as in Rousseau's *The Social Contract*, that the claims of liberty may be readily translated into the postulates of oppression. I find it gratifying, therefore, that we live under a Constitution [the United States'] to which the concept of citizenship matters very little, that prescribes the decencies and wise modalities of government quite without regard to the concept of citizenship.

<sup>46</sup> Jeremy Waldron *The Right to Private Property* (Oxford University Press, Oxford, 1988) 3.

<sup>47</sup> Alexander Bickel *The Morality of Consent* cited in Schwartz, above n 14, 2170.



Bickel makes an important point. By treating citizenship as a right, thereby promoting its importance and use to allocate rights and benefits, the universal trend of rights allocation is weakened. Thus citizenship could be used to effect discrimination. This point is addressed further below.<sup>48</sup>

According to Jeremy Waldron, rights are “individualistic considerations”.<sup>49</sup> The language of rights is reserved by rights-theorists for “interests and considerations that they take to have special importance, an importance which would warrant overriding other values and ideals whenever they conflict with the protection of rights.”<sup>50</sup>

Ronald Dworkin explained the special force of rights by drawing an analogy with a trump card:<sup>51</sup>

Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.

Thus, the “nerve of a claim of a right” is an individual’s entitlement to protection against the majority even at the cost of the general interest.<sup>52</sup>

Citizenship can be considered a legal right. It is articulated in law as an entitlement and it therefore comprises a valid claim.<sup>53</sup> Anyone who qualified for New Zealand citizenship but was denied this status could bring a claim under the Citizenship Act 1977 for a court to consider. However, a legal right can always be taken away by ordinary legal processes, such as the proposed citizenship law reform.

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<sup>48</sup> Part IV E.

<sup>49</sup> Jeremy Waldron (ed) *Theories of Rights* (Oxford University Press, Oxford, 1985), 15.

<sup>50</sup> *Theories of Rights*, above n 49, 15.

<sup>51</sup> Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge (Massachusetts) 1977) xi.

<sup>52</sup> Dworkin, above n 51, 156.

<sup>53</sup> Jeremy Waldron “A Rights-Based Critique of Constitutional Rights” (1993) 13(1) *Oxford Journal of Legal Studies* 18, 25.



A human right is an interest that each individual shares with every other.<sup>54</sup> It possesses a greater value than a legal right value given its universal character and the importance of the values that underlie it. It places duties upon a State to protect and uphold it through constitutional law.

The real question is, therefore, whether or not citizenship carries human rights status. Such a status would equate to a greater duty being placed on a State to recognise, uphold and protect an individual's entitlement to citizenship status.

This paper will adopt Waldron's approach of identifying the interests at stake for the individual who hold citizenship status. Interests that are important are those that form a vital aspect of an individual's well being.<sup>55</sup> An assessment of such interests and values is essential, according to Dworkin, in order to take rights seriously.<sup>56</sup> Through this understanding we can determine the character and strength of the right. As it is generally accepted that human rights are not absolute, the force of a right can only be understood by reference to these interests.<sup>57</sup>

The rights-based assessment of citizenship is undertaken in three parts. First, this paper examines what individual interests are served by the status of citizenship in law, as opposed to non-citizenship status such as a permanent resident or "alien" (non-naturalised migrants including refugees). Most of this assessment will be based on the New Zealand's legal system but recourse will be made to other jurisdictions such as the United States, Australia and the United Kingdom to provide helpful comparisons. In particular, recent changes to the use of citizenship as a tool to determine right and benefit allocations will be discussed. Secondly, other key interests of citizenship to an individual will be evaluated. These include the importance identity and international protection that are afforded by the citizenship. The values of dignity, liberty and equality, which are viewed traditionally as the source of a right and their connection to

<sup>54</sup> *Theories of Rights*, above n 49, 15.

<sup>55</sup> *Right to Private Property*, above n 46, 85.

<sup>56</sup> Dworkin, above n 51, 198.



citizenship, will also be addressed. The third part of this assessment is an evaluation of citizenship in international law.

### **B Right and Benefits in Law**

In 1958 Warren CJ of the United States Supreme Court in *Perez v Brownwell* described “[c]itizenship is a man’s basic right for it is nothing less than a right to have rights.”<sup>58</sup> This paper will assess whether or not this pronouncement is merely rhetorical or technically accurate in New Zealand.

In New Zealand, there appears to be very little basis to hold that citizenship is a super right. Law makes very little distinction between citizens and lawful permanent residents regarding rights entitlements. Moreover, it is difficult to differentiate between the rights of citizens and non-citizens in New Zealand because the rights are not clearly defined in one statute, rather they are contained in a number of statutes and regulations. The focus of Parliament has been to use specific legislation to restrict benefits or entitlements for non-citizens in certain areas. The following outlines the results of a survey of legislation to determine the distinctions made between citizen and non-citizens.

The key statute to begin any assessment of civil and political rights is the Bill of Rights. As discussed above, there are two key distinctions made between citizens and non-citizens in the Bill of Rights. Section 12 ensures that citizens have a right to vote, and section 18(2) provides citizens have a right to enter New Zealand.<sup>59</sup> The right to vote is not exclusive to citizens however. Permanent residents are also entitled to vote by the Electoral Act, but the articulation in the Bill of Rights can be seen as extra protection afforded to the class of people who have a specific right to participate politically in government.<sup>60</sup>

Unlike New Zealand citizens, non-citizens do not have the right of entry and the security of residence in New Zealand. Non-New Zealand citizens can

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<sup>57</sup> *Theories of Rights*, above n 49, 16.

<sup>58</sup> (1958) 356 US 44, 64-65 (SC).

<sup>59</sup> Bill of Rights Act 1990, s18(2).



only gain entry by permission.<sup>61</sup> The Immigration Act 1987 provides that every New Zealand citizen has the right to enter and remain in New Zealand at anytime and is not liable for removal or deportation in any circumstances.<sup>62</sup>

Immigration laws regulate how permission is granted by the State for persons to enter New Zealand and also provide the State with the means to deport non-citizens.<sup>63</sup> Immigration law is one of the areas of law that is perceived as a matter of the State's prerogative in external affairs.<sup>64</sup> The courts will be "slow to intervene" in such an area as Cooke J (as he then was) noted in *Ashby v Minister of Immigration*.<sup>65</sup> The Bill of Rights only protects a non-citizen from deportation by ensuring that the deportation order is made on grounds prescribed by law.<sup>66</sup> A non-citizen, therefore, is vulnerable to the vagaries of immigration law in terms of being able to stay in or return to New Zealand.

Nevertheless, once accepted for entry as a permanent resident, non-citizens such as immigrants and refugees, enjoy a range of substantive citizenship rights and benefits. These include:

- freedom of movement within New Zealand;<sup>67</sup>
- the right to vote;<sup>68</sup>
- the ability to own property including land and businesses<sup>69</sup> (subject to restrictions on people who do ordinarily reside in New Zealand and make substantial investments in property);<sup>70</sup>
- the ability to take up employment or to establish a business (subject to the recognition of some overseas qualifications);<sup>71</sup>

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<sup>60</sup> Electoral Act 1993, ss 60,73.

<sup>61</sup> Immigration Act ss3, 7(1), 7(3), 14E, 14C(6).

<sup>62</sup> Immigration Act 1987, ss3, 126.

<sup>63</sup> Immigration Act 1987, ss128, 148.

<sup>64</sup> Joseph, above n 15, 627.

<sup>65</sup> [1981] 1NZLR 222 (CA) 226.

<sup>66</sup> Bill of Rights Act 1990, s18(4).

<sup>67</sup> Bill of Rights Act 1990, s18(1).

<sup>68</sup> Electoral Act 1993, ss 60,73.

<sup>69</sup> Citizenship Act 1977, s23.

<sup>70</sup> Overseas Investment Act 1973.

<sup>71</sup> Restrictions are applied by the relevant trade and professional organisations that regulate the occupation such as for example the Master Plumbers Association.



- the right to access public medical services, social benefits and other social services;<sup>72</sup> and
- the right to education for children.<sup>73</sup>

All non-citizens, including temporary entrants (even illegal entrants) enjoy a range of civil and political rights.<sup>74</sup> Whether or not this extends to legal equality for aliens is another matter and it is outside the scope of this paper to discuss this.

There are some other distinctions found in other statutes. Only a citizen can hold political office either in Parliament or local government.<sup>75</sup> This is an important aspect of the right to participate in representative government.

In addition, non-citizens are excluded from being employed in the public service in positions that relate to national security such as Ministry of Foreign Affairs and Trade.<sup>76</sup> The Human Rights Act provides an exemption to the prohibition of discrimination in employment on the basis of ethnic or national origins in relation to work involving national security.<sup>77</sup> A non-citizen is able to serve on a Board of Trustees for a school provided that he or she is able to reside in New Zealand lawfully.<sup>78</sup> Similarly no distinction is made between non-citizens and citizens in jury service with voter registration being the key eligibility requirement.<sup>79</sup>

In summary, it would appear that Warren CJ's characterisation of citizenship as a right to have rights does not apply in New Zealand. Other western democracies, such as the United States and Australia, also determine rights entitlements on the basis of residence as opposed to citizenship status. However, there are some important differences to note with regard to the right to

<sup>72</sup> Social Security Act 1964.

<sup>73</sup> Education Act 1964, s3.

<sup>74</sup> Bill of Rights Act 1990.

<sup>75</sup> Electoral Act s47(3), Local Electoral Act 2001 s25.

<sup>76</sup> Ministry of Foreign Affairs and Trade web site <<http://www.mfat.govt.nz/about/careers/career.html>> (last accessed 27 September 2004).

<sup>77</sup> Human Rights Act 1993, ss25, 21.

<sup>78</sup> Education Act 1989, s103.



vote and also the movement of governments to exclude non-citizens from benefits.

In Australia, the right to vote in federal elections and most State elections is the preserve of citizens.<sup>80</sup> Some States allow non-citizens to vote in State elections and pre-1984 British immigrants are also permitted to vote. Voting is also a duty and those citizens who do not vote are liable to be fined.<sup>81</sup> In United States the right to vote is the sole preserve of citizens.<sup>82</sup>

The Constitutions of the United States and Australia do not provide guidance in terms of the allocations of rights and benefits. In the United States there is a great deal of jurisprudence and academic commentary on this matter.<sup>83</sup> Prominent American academics such as Bickel<sup>84</sup> and Aleinikoff<sup>85</sup> have declared that citizenship counts for nothing. Aleinikoff declares that "it is primarily residence in the United States, not citizenship, that affords rights to individuals."<sup>86</sup> He contends that Warren CJ's characterisation of citizenship as a super right is a "dramatic overstatement of the importance of citizenship in the United States today."<sup>87</sup>

Until recently, Bickel's and Aleinikoff's pronouncements would have been largely correct in terms of the distinction made in law between citizens and non-citizens in the United States. Most rights and benefits are determined on the basis of residence in the United States. At the State level, there are few distinctions between the substantive rights of citizens and permanent residents.<sup>88</sup> States are able to exclude resident aliens from "political functions", which include jury service, voting in State elections and certain public employment positions. Federal alienage distinctions were few prior to 1996 and "did not

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<sup>79</sup> Juries Act 1981, s6.

<sup>80</sup> Gianni Zappala and Stephen Castles "Citizenship and Immigration in Australia" (1999) 13 Geo Immig LJ 273, 304.

<sup>81</sup> Zappala, above n 80, 304.

<sup>82</sup> "The Functionality of Citizenship" (1997) 110 Harv L Rev 1814, 1820.

<sup>83</sup> Maltz, above n 42, 1135.

<sup>84</sup> Cited in Bosniak, above n 39, 1286.

<sup>85</sup> T Alexander Aleinikoff "Theories of Loss of Citizenship" (1986) 84 Mich L Rev 1471, 1486.

<sup>86</sup> Aleinikoff, above n 85, 1486.

<sup>87</sup> Aleinikoff, above n 85, 1486.



impose a major barrier to a meaningful and prosperous life in the United States".<sup>89</sup>

### *1 Recent changes*

With regard to welfare entitlements, both Australia and the United States have moved to restrict access by non-citizen residents. This is part of the trend of the governments of these countries to revitalize citizenship.<sup>90</sup>

The United States Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996<sup>91</sup> which excludes many aliens, including permanent residents from numerous social welfare programmes.<sup>92</sup> The 1996 Act has increased the value of citizenship by creating serious distinctions between citizen and non-citizen and is likely to pave the way for more"<sup>93</sup> Spiro notes that the "resurgent hostility" towards aliens as well as the 1996 Act has led to aliens naturalising in record numbers.<sup>94</sup>

This change is likely to be supported by the academics who have argued that citizenship should be more meaningful.<sup>95</sup> Maltz for instance, has argued that citizenship should be accorded greater respect in the United States constitutional framework. Based on a detailed analysis of the Constitution and Supreme Court decisions regarding the distinctions made between citizens and non-citizens, Maltz concluded that such distinctions are permissible:<sup>96</sup>

The case for judicial interventions against citizenship-based classifications is particularly weak. The text, structure, and history of the Constitution reflect a keen appreciation of the importance of the political relationships inherent in both State and national citizenship, as well as the

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<sup>88</sup> "The Functionality of Citizenship", above n 82, 1820.

<sup>89</sup> "The Functionality of Citizenship", above n 82, 1820.

<sup>90</sup> Schuck, above n 3, 9; Zappala, above n 80, 304.

<sup>91</sup> Pub L No 104-193, § 402, 110 Stat 2105.

<sup>92</sup> "The Functionality of Citizenship", above n 82, 1814.

<sup>93</sup> "The Functionality of Citizenship", above n 82, 1820.

<sup>94</sup> Peter Spiro "Dual Nationality and the Meaning of Citizenship" (1997) 46 Emory LJ 1411, 1412.

<sup>95</sup> Bosniak, above n 39, 1285 for summary of these debates; also Schuck, above n 3, 3.

<sup>96</sup> Maltz, above n 42, 1190.



potential relevance of those relationships to the allocation of a wide variety of rights and benefits.

Australia appears to be following the lead of the United States in this regard. Zappala outlines the recent moves in Australia to differentiate more sharply between the rights of citizens and non-citizens, such as increasing the waiting period for welfare benefits for new entrants, and restrictions on the ability to reunify families.<sup>97</sup>

These changes form part of a trend to increase the use citizenship status to determine the allocation of rights and benefits.<sup>98</sup> Bosniak, an American academic, has observed that citizenship has “enjoyed a huge resurgence of interest in constitutional law scholarship in recent years” with many academics advocating a movement towards recasting the American constitutional rights framework in the language.<sup>99</sup>

The movement towards “constitutional citizenship” is seen by many to entail the loss of non-citizen rights.<sup>100</sup> Bosniak considered the arguments of theorists that the revitalization of citizenship need not lead to a loss of non-citizens rights and concluded that these arguments were “quite plausible, but only to a point.”<sup>101</sup> As distinctions increase between citizens and non-citizens, the non-citizen will become “increasingly marginalised.”<sup>102</sup>

In the context of recent world events, such as the September 11 terrorist attacks and the “War on Terror”, it is likely that the status of citizenship will become of increasing importance. As Mueller observes, in the post September 11 environment, the optimal point of rights allocation has shifted.<sup>103</sup> Worldwide refugee pressures has also added to the dynamics of this situation. Overall, there

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<sup>97</sup> Zappala, above n 80, 309.

<sup>98</sup> Schwartz, above n 14, 2143 citing Peter Schuck and Rogers Smith *Citizenship Without Consent: Illegal Aliens in the American Polity* (Yale University Press, New Haven, 1985).

<sup>99</sup> Bosniak, above n 39, 1286.

<sup>100</sup> Bosniak, above n 39, 1286.

<sup>101</sup> Bosniak, above n 39, 1293.

<sup>102</sup> Bosniak, above n 39, 1294.



is an increasing trend to define who is included and excluded from the protection of the State.<sup>104</sup> It seems increasingly likely that citizenship will be used a condition rights and benefits entitlements from the State.

In conclusion, there is little distinction between a citizen and non-citizen in law in New Zealand. New Zealand has not followed the United States and Australia to use citizenship as a tool of distinction in relation to rights and benefits entitlements. However, this paper has shown that non-citizens are vulnerable to limitations upon future rights entitlements. As recent changes in the United States and Australia have shown it is possible that citizenship status may become a tool of distinction in the future.

## 2 *Importance of residual citizenship rights*

The above discussion has shown that there are some important residual rights that are attached to the status of citizenship and the value of such rights should not be underestimated. These include citizenship as a means of participation and providing a place of residence.

A citizen has the right to full political participation in his or her State. While New Zealand grants this right to permanent residents, only citizens have this right recognised and protected in the Bill of Rights. In addition, non-citizens cannot stand for political office. Citizenship entitles people to the full rights of political participation. As such it increases the value of citizenship status. Citizenship, Rubenstein declares, is the “essence of a representative democracy”<sup>105</sup> Waldron observes that inherent in the concept of a citizen is that of a person who can “hold his head high and participate fully and with dignity in the life of his society.”<sup>106</sup>

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<sup>103</sup> Dennis Mueller “Rights and Citizenship in a World of Global Terrorism” 6<sup>th</sup> World Congress of the International Association of Constitutional Law <<http://iaclworldcongress.org/english/program.shtml>> (last accessed 14 July 2004), 12.

<sup>104</sup> Bosniak, above n 39, 1290.

<sup>105</sup> “Citizenship and the Constitutional Convention Debates” above n 29, 315.

<sup>106</sup> Jeremy Waldron *Liberal Rights. Collected Papers 1981-1991* (Cambridge University Press, Cambridge, 1993), 308.



The concept of citizenship marked our transition from being subjects of the sovereign to being people who had an active role in determining political decisions.<sup>107</sup> As Grosso, notes, “a citizen is a person who claims and obtains rights by somehow *participating* in political decisions.”<sup>108</sup>

Many people may be perfectly content not to exercise their right of participation as citizens. However, I consider it difficult to deny that this aspect of citizenship is of fundamental value to an individual. At least citizenship represents the ability to be able to participate fully in the political life of a State.

It is also important to recognise that the status of citizenship will generally provide security of residence in an individual's country. Citizens are also afforded the right of entry into New Zealand. Permanent residents have the right of re-entry, but as noted above this right is not protected and non-citizens are subject to the vagaries of immigration law. It is hard to imagine living without a sense of a homeland, without knowing that there was a place that you could live without fear of being removed; Edward Said's autobiography eloquently addressed the sense of dislocation that an individual feels in such situations.<sup>109</sup>

Kymlicka argues that a person has a right to live in his or her community in order to be able to exercise his or her liberty: “it is only through a rich and secure culture structure that people can become aware in a vivid way of the options available to them, and intelligently examine their values”.<sup>110</sup> Ideally, the location of this place should reflect an individual's cultural identity. However people often choose to establish themselves in other countries subject to different cultures.

This paper has shown that there are few rights and benefits that are linked to the status of citizenship but it has pointed to a trend to use citizenship status as

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<sup>107</sup> Gross, above n 36, 53.

<sup>108</sup> Enrico Grosso “Citizenship and Identity in the Crisis of the Nation State : A European Perspective” 6<sup>th</sup> World Congress of the International Association of Constitutional Law <<http://iaclworldcongress.org/english/program.shtml>> (last accessed 14 July 2004) 3.

<sup>109</sup> Edward W Said *Out of Place* (Granta Books, London , 1999).



a means of distinction. It has been argued, however, that the residual rights and benefits attached to citizenship, including political participation and providing security of residence are of great value to an individual.

### C Other Key Interests

Citizenship can be seen as an essential component of an individual's identity. People are the product of the community in which they are brought up, a place that shapes their character and conception of themselves. As Aleinikoff writes:<sup>111</sup>

Imagine that you awake one morning to find that your American citizenship has been taken away. What springs to mind? That travel to Europe may be difficult without an American passport? That no country will seek your release if you become a hostage overseas? That it will be impossible for you to vote in the next presidential election? I doubt that any of these issues are on the top of your concern list. More likely, you feel violated, naked. You ask, how can I be not an American? What am I then? A part of oneself is gone.

In a homogeneous State, an individual's cultural identity is reflected in his or her citizenship status. Gans argues that an individual's cultural identity is the "main focus of identification" because it provides a sense of belonging to a community.<sup>112</sup>

Citizenship is significant in that it provides a means to transcend ethnicity and provides a basis for membership of a community. Cicero in *De legibus* noted the ability of citizenship to unite people with different ethnic origins who are received into a political community (in other words the people of States defeated by Rome) into the membership and identity of a new State.<sup>113</sup> During the French Revolution, citizenship was perceived as the collective identity that defined the

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<sup>110</sup> Cited in Zilbershats, above n 2, 85.

<sup>111</sup> Aleinikoff, above n 85, 1596. Aleinikoff recognises the importance of citizenship to a individual's identity, but he does not see this as a ground for treating citizenship as a right

<sup>112</sup> Cited in Zilbershats, above n 2, 90.

<sup>113</sup> Grosso, above n 108, 11.



entire political community and alternative identities such as property, the family, place of origin or religion were opposed.<sup>114</sup>

Citizenship cannot be the sole factor that contributes to our sense of self. Nor can it completely override the importance of the membership to a cultural or ethnic group as world history in civil wars has shown. It is difficult therefore, to assess the weight or importance that citizenship plays in relation to an individual's identity and membership to a community. How can I determine how important it is to me to be a New Zealander? It is sufficient to conclude that citizenship, is at least one important factor in providing a sense of identity and membership to a community.

An individual who does not possess citizenship is stateless.<sup>115</sup> Since stateless individuals do not possess a nationality in international law terms, the principle link by which they could derive benefits from international law is missing.<sup>116</sup> A stateless individual would lack the possibility of diplomatic protection or of international claims being presented by one State in respect of harm suffered by them at the hands of another State. Without citizenship individuals are *persona non grata*, vulnerable to deportation and once deported, are ineligible for the "global protection racket" afforded by the concept of nationality in international law.<sup>117</sup>

This is another feature of citizenship that adds weight to the argument that it is valuable to an individual. Another argument can be made that citizenship is a derivative of the right to dignity, equality and liberty.

Rights theorists derive a human right from key values. These generally are based on the premise that individual dignity, equality and liberty are fundamental to an individual's wellbeing. For Dworkin, there are two key ideas

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<sup>114</sup> Grosso, above n 108, 6.

<sup>115</sup> Robert Jennings and Arthur Watts (eds) *Oppenheim's International Law* (9ed, Longman Group, Harlow, 1992) 886.

<sup>116</sup> Jennings, above n 115, 886.

<sup>117</sup> Blackman, above n 9, 1150.



underlying rights, the “powerful idea of human dignity” and “political equality”.<sup>118</sup>

Much has been written on the source of rights and their justification and it is not possible to summarise this field of discourse.<sup>119</sup> However, it is important to consider how the attainment of citizenship (or its denial) can affect these key values.

With regard to the matter of equality, citizenship by its nature marks the recognition by the State of an individual’s status. Limiting the ability of people to attain and retain this status will inevitably lead to inequality between people.

The liberty of an individual is also affected by citizenship status. As a non-citizen, a person does not have the same ability to participate in decisions affecting him or her, nor does he or she have the right to remain in a State. Arguably, a person’s dignity is also affected if he or she is denied the ability to fully participate politically.

These arguments lead, I believe, to the conclusion that citizenship is an important value and meaning to an individual. This augurs well for the treatment of citizenship as a human right. The following section of the paper forms the final part of the rights-based assessment by examining international law to determine whether or not any support can be found for citizenship as a human right.

#### **D International Law**

As outlined above, nationality is a term used to denote the effects of the individual-State relationship that operate beyond the State. It follows therefore, that if an instrument of international law imposed an obligation on a State to confer nationality upon an individual, this would be the equivalent of ensuring that that person has citizenship. There may be distinctions. A person may be

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<sup>118</sup> Dworkin, above n 51, 198-99.

<sup>119</sup> “A Rights-Based Critique of Constitutional Rights”, above n 53, 21.



considered a national of a State, but not a citizen, if he or she is a permanent resident, but this paper shall not address such subtleties.

The Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 is a good starting point in determining what is a human right.<sup>120</sup> The Universal Declaration is the main source of law on human rights but it is not a binding treaty.

Article 15 of the Universal Declaration set out for the first time the individual's right to a nationality: "1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." However, the vagueness of the Article has robbed it of any immediate force.<sup>121</sup> As Blackman explains, the Article does not carry a specific corresponding obligation on States to confer nationality. In other words, the Article fails to indicate precisely which nationality one has the right to, and under what circumstances that right applies.

The International Covenant on Civil and Political Rights (ICCPR) failed to take the right of nationality forward as a binding treaty obligation.<sup>122</sup> Article 24(3) limits the right to children only, it declares that "[e]very child has the right to acquire a nationality". Article 24(3) protects the right of every child to acquire a nationality, but it does not necessarily make it an obligation for States to grant nationality to every child born in their territory. Moreover, it does not contain a general right to nationality. According to Chan this is one of the "glaring omissions of the transposition of the Universal Declaration".<sup>123</sup>

The omission of a general right to nationality is explicable in two ways. First a special convention was adopted in 1961 dealing with the Reduction of Statelessness.<sup>124</sup> According to Zilbershats, the 1961 Convention made it

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<sup>120</sup> UNGA Resolution 217 (III) (10 November 1948).

<sup>121</sup> Blackman, above n 9, 1172.

<sup>122</sup> Chan, above n 7, 5.

<sup>123</sup> Chan, above n 7, 5.

<sup>124</sup> Convention on the Reduction of Statelessness (30 August 1961) UNTS 989 175.



unnecessary to restate the right to nationality in the ICCPR.<sup>125</sup> Chan, based on his assessment of the *travaux préparatoires* of the ICCPR, concluded that the Convention was used as an excuse for not including a general right to a nationality.

The second reason for the omission is that the right to nationality was seen to violate State sovereignty.<sup>126</sup> Many States argued that naturalisation could not be a right of an individual but was accorded by the State at its discretion.<sup>127</sup> In the end, the parties to the ICCPR were unable to agree upon a formulation of the right to nationality which meet such concerns and the 1961 Convention provided a sufficient excuse to avoid this complex area.

The 1961 Convention focuses on the reduction and elimination of statelessness by imposing duties upon contracting States.<sup>128</sup> Its objective is to encourage States to create a domestic regime to confer nationality on people lawfully within their borders who would otherwise be stateless. It also seeks to prevent the loss or deprivation of citizenship if as a result, the person would become stateless. The Convention came into force in 1975 and has been ratified by 28 States.<sup>129</sup> New Zealand has yet to ratify the Convention but Ministry of Foreign Affairs has notified an intention to accede to it following the amendment of the Citizenship Act 1977.<sup>130</sup>

Support for the recognition of nationality as a human right is found in the Inter-American Convention on Human Rights. Article 20 of the Convention protects the right to have, to retain and change an individual's nationality and goes further than the Universal Declaration by imposing an obligation on the Contracting State to grant its nationality to any stateless person born in its territory.<sup>131</sup>

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<sup>125</sup> Zilbershats, above n 2, 10.

<sup>126</sup> Zilbershats, above n 2, 11.

<sup>127</sup> Chan, above n 7, 5.

<sup>128</sup> Convention on the Reduction of Statelessness, above n 124, art1,4,5,9.

<sup>129</sup> United Nations Treaty Collection < [www.unhchr.ch/html/menu3/b/treaty4\\_.htm](http://www.unhchr.ch/html/menu3/b/treaty4_.htm) > (date last accessed 22 September 2004).

<sup>130</sup> Ministry of Foreign Affairs and Trade <<http://www.mfat.govt.nz/support/legal/inttreaties3.html>> (date last accessed 22 September 2004).

<sup>131</sup> Chan, above n 7, 5.



The Inter-American Convention came into effect in 1978 and is the only internationally binding instrument that contains a general right to a nationality.<sup>132</sup> As of August 1997, 25 countries, not including the United States, had ratified the Convention.<sup>133</sup> The American Court of Human Rights, a body established by the Inter-American Convention, held in an important advisory opinion that nationality is an inherent human right:<sup>134</sup>

It is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity.

Support for the argument of citizenship as a human right is also found in the language of the Oppenheim's famous Treatise on International law. In 1905, the first edition of the text, Oppenheim declared "it is not for International but for Municipal Law to determine who is and who is not to be considered a subject".<sup>135</sup> In the ninth edition the language has changed:<sup>136</sup>

[I]n principle, and *subject to any particular international law obligation which might apply*, it is not for international law but for the internal law of each State to determine who is, and who is not to be considered its national.

The view of commentators on international law appears to be clearly behind citizenship, or nationality, emerging as a human right. Based on a survey of developments in international law undertaken in 1982, Chan concluded that "recognition of an individual's right to nationality as a fundamental human right is an inevitable and logical consequence of the current development."<sup>137</sup>

<sup>132</sup> Chan, above n 7, 5.

<sup>133</sup> Inter-American Commission on Human Rights web site < <http://www.cidh.oas.org/what.htm> > (date last accessed: 22 September 2004).

<sup>134</sup> *Re Amendments to the Naturalization Provisions of the Constitution of Costa Rica* (Advisory Opinion OC /84) (1984) 5 HRLJ 161 para 32.

<sup>135</sup> Zilbershats, above n 2, 8.

<sup>136</sup> Jennings, above n 115, 852 (emphasis added).

<sup>137</sup> Chan, above n 7, 1.



International law expert, Jeffrey Blackman, reached the same conclusion in 1998 from his survey of international law.<sup>138</sup> Blackman is convinced that international law is evolving to assign positive obligations on States to confer nationality to persons which accords with their genuine link to a State. This development, he believes, is formed largely in response to human rights principles which have developed over the past fifty years which stress individual rights and positive obligations on States in their treatment of people. The right to a nationality, the duty to avoid statelessness, and the norm of non-discrimination have emerged to present affirmative obligations, or at least presumptions, on States in their granting and withdrawal of nationality.

Henkin is in agreement and urges the recognition of the human right to a nationality “[I]t is time for international law to insist on the rationality and equity of States laws of citizenship and nationality and provide international protection of the human right to a nationality on rational terms.”<sup>139</sup>

Overall, however, there is no clear statement from international human rights law that citizenship is a human right. Important regional conventions such as the European Convention on Human Rights 1950 do not provide a general right to a nationality.<sup>140</sup> The Convention for the Reduction of Statelessness has only be ratified by a small number of States, the Universal Declaration does not have binding force and the scope of the right to a nationality under the ICCPR is very limited. Nevertheless, there are strong indications that international law could come to recognise citizenship, or nationality, as a human right.

### *E Overall Assessment*

This paper has shown, that the status of citizenship, at least in the jurisdictions referenced in this paper, does generally not form the basis of right and benefit entitlements. One should not conclude, however, that this is a world-wide practice.

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<sup>138</sup> Blackman, above n 9, 1191.

<sup>139</sup> Zilbershats, above n 2, 67.



Although there is little support for concluding that citizenship is a right to have rights, there are some fundamental residual rights that are attached to the status of citizenship, which are not shared with non-citizens. The ability for an individual to participate fully in the political life of his or her country and to be able to return and remain in his or her country represents significant values.

The rights-based assessment has also shown that citizenship has an important value to an individual based identity, membership to a community and protection of international law. The acquisition of citizenship arguably affects the dignity, liberty and equal treatment of an individual. These are the traditional values from which rights are derived. The task of identifying the morally crucial interests that require citizenship to be accorded is a conceptually difficult task. Many of the statements linking the value of citizenship to the individual have the quality of suppositions. My argument is that citizenship is deserving of human rights status as it contains important elements relating to the security and well being of individuals.

There is limited scholarship regarding citizenship as a human right other than the writings of international law scholars discussed above. Of the academics that have considered this subject, opinion is divided as to whether or not citizenship has human rights status.

Gross declares that citizenship is a "basic right" because it is the basis for the right to vote in Israel.<sup>141</sup> On the other hand, Bickel, as noted earlier in this paper, has rejected a rights-based approach to citizenship. Aleinikoff, in agreement with Bickel, has contested the Supreme Court's interpretation of citizenship as a right in *Afroyim v Rusk*.<sup>142</sup> He has argued that it is "inappropriate to conceive of citizenship in rights terms" as the Fourteenth Amendment "does not speak in right terms" and citizenship is simply a relationship between an

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<sup>140</sup> (4 November 1950) UNTS 213.

<sup>141</sup> Gross, above n 36, 63.

<sup>142</sup> *Afroyim v Rusk*, above n 41, 268.



individual and the State. The basis of his argument is that all people residing in the United States are afforded the protection of the Constitution.<sup>143</sup>

In my opinion, Aleinikoff has underestimated the value of the residual rights that flow from citizenship status. He has also ignored the underlying concept of citizenship; that citizenship reflects the strongest bond between an individual and the State. There is a good argument that citizenship is more than simply a relationship between an individual and the State. Citizenship, inherently, conveys a stronger claim to constitutional protections.

Perhaps Bickel and Aleinikoff, writing from the United States where the attainment of citizenship status is protected by the Constitution, could have been influenced by their own "comfort zones". Bickel and Aleinikoff work from the basis that the criteria determining citizenship attainment and retention are protected and they may not have contemplated what it would mean to have citizenship treated as a mere legal construct. Where rights are defined and protected by a Constitution, the concept of citizenship does not seem to add value. Therefore it is easy to dismiss citizenship as a "relationship" lacking in any rights value. There is no such luxury in New Zealand, Australia and the United Kingdom.

Bickel and Aleinikoff were writing in the United States prior to the movement towards attaching greater meaning to citizenship status and the 1996 legislation. Schuck, another American writer, agreed with Bickel in 1989 but in 1997 he wrote that he had changed his opinion. "Today, however, Bickel's (and my) confident assurances seem embarrassingly premature. In a radically altered political environment, the question of citizenship is now both salient and divisive."<sup>144</sup>

Adding weight to the argument that citizenship should be viewed as a human right is the trend in international law to view nationality as a human right. It will be interesting to see how this trend is affected by the other trend to

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<sup>143</sup> Aleinikoff, above n 85, 1487.



increase the meaning of citizenship. States may resile from any obligation to ensure that certain people have a nationality as they seek to restrict citizenship criteria to those people who have “meaningful and ongoing links” with the State.<sup>145</sup> The rise of terrorism, the effects of the “War on Terror” and refugee pressures experienced by many western democracies will increase the momentum and strength of the movement to revitalise the meaning of citizenship.

The start of this section of the paper recorded Bickel’s concern regarding a rights-based approach to citizenship. Bickel argues that citizenship should, and indeed does, have little constitutional meaning in the United States. I share Bickel’s concern regarding the potential effects of greater constitutional meaning of citizenship. The more meaning we attach to citizenship as a means of distinction in rights and benefits allocations, the more likely will be the loss of the same for non-citizens. Maximum distinction could equate to minimum inclusion. This represents a significant risk in making citizenship status more meaningful.

Essentially there are two paths that can be undertaken. The first is to eschew any notion of citizenship being important in order to avoid any discrimination or movement away from the universalist model of right allocations. The second path involves a commitment to citizenship as a human right. The second path is the most desirable in the light of the conclusion that citizenship is important to an individual. Furthermore, the treatment of citizenship as a human right serves as an important safety device to avoid a loss of individual rights at a time when rights allocations are being redefined. At the very minimum, citizenship as a legal status should require greater protection in constitutional frameworks. Much can be learned from the United States Constitution in this regard.

If the second path is followed, it need not lead to the loss of rights and benefits for non-citizens provided the focus is on the how citizenship as a human

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<sup>144</sup> Shuck, above n 3, 10.



right is acquired and retained. It is not necessary to examine the rights that flow from the status of citizenship. Rather the inquiry should be: citizenship, a right for whom? This inquiry will direct attention away from the allocation of rights and benefits according to citizenship status and instead focus on how citizenship status is acquired. There is of course the danger that criteria for citizenship status are narrowed as a result of this inquiry. Indeed, this is the approach of the proposed law reform as the next section of this paper will address.

## V *CITIZENSHIP ON THE AGENDA*

If citizenship is to be regarded as a human right, then it is important to examine the content of citizenship law. The right to *acquire* citizenship status, and *retain* this status, comprises two distinct aspects of the human right to citizenship. Chan would include a third aspect to the right of citizenship, that is the ability to change an individual's citizenship.<sup>146</sup> Only the first two aspects of citizenship will be addressed in this section as the third relates to the process of naturalisation.

This part of the paper will address how law should address the acquisition and the attainment of citizenship status. This will involve an assessment of the present law and the implications of the Government's Identity (Citizenship and Travel Documents) Bill (the Bill).<sup>147</sup> This Bill contains a comprehensive reform package that will amend the Citizenship Act 1977 and the Passports Act 1992. The proposed reforms contained in the Bill will be placed in the context of overseas citizenship law. Finally, this paper will suggest strategies to recognise the importance of citizenship and protect an individual's right to citizenship.

### F *Acquisition of Citizenship Status*

Citizenship has a role as "an important exclusionary status category."<sup>148</sup> Up until recent times, the history of citizenship reflected a progressive

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<sup>145</sup> Hon G Hawkins (29 July 2004) 62 NZPD 14496.

<sup>146</sup> Chan, above n 7, 13.

<sup>147</sup> Identity (Citizenship and Travel Documents) Bill, No 148-1.

<sup>148</sup> Linda Bosniak "Universal Citizenship and the Problem of Alienage" (2000) 94 Nw UL Rev 963, 976.



incorporation of previously excluded groups.<sup>149</sup> The tide has turned, however, and citizenship status is becoming more difficult to acquire.

According to Price, great empires and humble nations alike have made similar choices in determining the criteria for citizenship.<sup>150</sup> There are two main methods. The first method is to assign citizenship by place of birth that is within the territorial boundaries of a State. This is referred to as the principle *jus soli* or birthright citizenship. The second method is according to the citizen status of at least one of the child's parents, in other words, by descent. This is referred to as the principle *jus sanguinis*. Citizenship may also be acquired by grant of the State through the naturalisation process and by adoption.

The Anglo-American tradition is to assign citizenship by *jus soli*. The reason for this lies deep in England's medieval history. In 1608, the case of *Calvin v Smith* (commonly referred to as "Calvin's case") decided the future of citizenship law.<sup>151</sup> Lord Coke held that Robert Calvin, born in Scotland after the English throne had passed to James IV of Scotland, was not an alien and could be considered a subject of England.<sup>152</sup> Therefore, Calvin's case determined that a child born within a sovereign's territory is a sovereign's subject, or in modern parlance, a "citizen."<sup>153</sup>

In New Zealand, the Citizenship Act 1977 confers citizenship through *jus soli* and *jus sanguinis*. Section 6 confers citizenship by birth on New Zealand territory and section 7 by descent from a parent who has New Zealand citizenship by birthright.

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<sup>149</sup> "Universal Citizenship and the Problem of Alienage", above n 148, 980

<sup>150</sup> Polly Price "Natural Law and Birthright Citizenship in Calvin's Case (1608)" (1997) 9 Yale JL & Human 73, 73.

<sup>151</sup> *Calvin v Smith* 77 Eng Rep 377 (KB) Coke LJ cited in Price, above n 150, 73.

<sup>152</sup> Michael Houston "Birthright Citizenship in the United Kingdom and the United States" (2000) 33 Vand J Transnat'l L 693, 698.

<sup>153</sup> Houston, above n 152, 699; Only a few exceptions, such as children of diplomats and enemy aliens in the Crown's enemy occupied territory, apply to birthright citizenship.



*1 Identity (Citizenship and Travel Documents) Bill*

The law change proposed by the Government will limit significantly the application of the *jus soli* principle. Unfortunately, the Bill itself only contains a limited number of provisions that address this matter, as the Minister for Internal Affairs, the Hon G Hawkins announced his intention to:<sup>154</sup>

introduce a Supplementary Order Paper to the Bill to *restrict citizenship by birth to children of New Zealand citizens and residents*. Currently, with few exceptions, people born in New Zealand are New Zealand citizens. Some people may come to New Zealand on temporary permits solely to give birth, so that their New Zealand-born children are citizens. Under current law, those children are entitled to access publicly funded services such as health care and education. Restricting citizenship by birth will ensure that citizenship and its benefits are limited to those people with a *genuine and ongoing link to New Zealand*.

However, there is one positive change regarding citizenship eligibility in the Bill. Clause 7 of the Bill will amend section 7 of the Citizenship Act 1977 to allow a person born outside of New Zealand to be a citizen by descent if the person's mother or father was a New Zealand citizen by *descent* at the time of the person's birth and if the person would otherwise be stateless. At present, citizenship by descent is not granted if the parents are not citizens by *birth* in New Zealand.<sup>155</sup>

The Supplementary Order Paper (SOP) to the Bill referred to by the Minister was later introduced to the House on the 8 September 2004.<sup>156</sup> This paper is unable to undertake a full assessment of the content of the SOP given its timing but some observations can be made.

The general effect of the SOP is to introduce the proposed changes as described by the Minister above. My initial concern that the Bill's removal of automatic citizenship for children born in New Zealand would leave many

<sup>154</sup> NZPD, above n 145, 14496 (emphasis added).

<sup>155</sup> Citizenship Act 1977, s7.

<sup>156</sup> Supplementary Order Paper, No 258 (8 September 2004).



children stateless has been addressed in the SOP. Both sections 6 and 7 of the Citizenship Act 1977 will be amended to ensure that the New Zealand citizenship will be conferred to persons who would otherwise be stateless by virtue of these sections.<sup>157</sup> Indeed the Bill will allow New Zealand to fulfill its commitments under the Convention of the Reduction of Statelessness.<sup>158</sup>

Nevertheless there are some major concerns with this Bill and the manner in which it has been introduced. Firstly, amendments to the Bill as contained in the SOP, represent a major law change that has not been subject to full public scrutiny and debate in the House. It is not desirable that a SOP introduces such significant change as this undermines the democratic process of lawmaking. There also appears to have been limited consultation undertaken by the Government on the proposed reforms. Hon M Robson MP, a member of the Progressive Party which forms part of Government and an opponent of the Bill, has criticised the Government for lack of consultation with the public.<sup>159</sup>

There has been some criticism of the Bill. The Office of the Commission for Children has made a submissions against the Bill.<sup>160</sup> Groups such as the New Zealand Federation of Ethnic Councils, and Catholic agency Caritas Aotearoa New Zealand, have also made submission against the Bill.<sup>161</sup> But the Bill has failed to generate a great deal of interest from the media, academics and public generally.

The Bill has passed its first reading in the House and has been referred to Government Administration Committee for consideration.<sup>162</sup> The report of that Committee is due back on 8 November 2004.

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<sup>157</sup> SOP, above n 156, cl 6(2)(a).

<sup>158</sup> Ministry of Foreign Affairs and Trade, above n 130.

<sup>159</sup> NZPD, above n 145, 14506.

<sup>160</sup> The Children's Commissioner "Submission from the Children's Commissioner to the Government Administration Committee on the Identity" 13 September 2004.

<sup>161</sup> "Refugees call for status to be considered Citizenship Bill submissions heard", Otago Daily Times website. <<http://www.odt.co.nz>> (last accessed 22 September 2004).

<sup>162</sup> NZPD, above n 145, 14511.



It appears that the amendments to the Citizenship Act as introduced by the SOP will avoid the occurrence of statelessness, but they will not provide for the consideration of an individual's effective nationality. This is another major area of concern with the Bill.

A child born in New Zealand from parents who are not New Zealand citizens or permanent residents will acquire the nationality of his or her parents.<sup>163</sup> This will occur and regardless of the strength of their ties to that country and whether the parents plan to stay in New Zealand or not. The effect of this change is to create multiple generations of foreigners living in New Zealand. This undermines the integration of this group of people in New Zealand society. The Commissioner for Children has criticised this change for the uncertainty and sense of dislocation it is likely to create among children.<sup>164</sup> The Commissioner has argued that aspects of the Bill are inconsistent with the United Nations Convention of the Rights of the Child.<sup>165</sup>

Another area of concern is the lack of justification and explanation of such a significant area of law. The Minister has described the need for the Bill in general terms such as national security concerns and the need to ensure that people who receive the benefits of New Zealand "genuine and ongoing link to New Zealand"<sup>166</sup>

The amendment of section 6 of the Citizenship Act 1977 to restrict the application of the *jus soli* principle appears to be a reaction to the incidence of citizenship tourists.<sup>167</sup> Citizenship tourists are pregnant, foreign women who come to New Zealand to give birth in order for their children to gain New Zealand citizenship.<sup>168</sup> But the Minister was unable to provide any information to demonstrate that there is a problem to be addressed.<sup>169</sup> The explanation for the

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<sup>163</sup> SOP, above n 156, cl 6.

<sup>164</sup> The Children's Commissioner, above n 160, para 4.5.

<sup>165</sup> The Children's Commissioner, above n 160, para 5.1.

<sup>166</sup> NZPD, above n 145, 14496.

<sup>167</sup> "Citizenship law change bowing to Australia" (1 September 2004) *The Dominion Post*, Wellington, A6.

<sup>168</sup> Citizenship Act 1977, s6.

<sup>169</sup> Interview with Hon G Hawkins, Minister of Internal Affairs (Geoff Robertson, Morning Report, 31 August 2004).



proposed change to birthright citizenship has been insufficient as S Kedgley MP argued in the House:<sup>170</sup>

This automatic right of citizenship is a longstanding right ... we should only take away that right if we have good reason, and none has been provided yet. Some women are coming here, we are told, to exploit free maternity services, but that avenue has been blocked off. One or two other women have visited here to give birth, with them paying the cost, in order to give their babies New Zealand citizenship, but that does not amount to a problem that would cause us to change our law.

Perhaps there is another explanation for the change that the Government is less willing to provide. Some have accused the Government of bowing to the pressure of the Australian Government to follow its lead in pushing through law with an exclusionary focus.<sup>171</sup> Whatever the reason, this Bill has made a radical change to how citizenship status is acquired in New Zealand. The need for this change has not been fully justified and its likely effects do not bode well for New Zealand's society.

## 2 Overseas comparisons

The American method of conferring citizenship is built on the foundation of English common law. The United States Constitution bestows citizenship upon anyone born within the territory of United States: "1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."<sup>172</sup> Naturalisation and the application of the *jus sanguinis* principle to recognise children of citizens born abroad, are also important means of acquiring citizenship status.<sup>173</sup>

It has been presumed that the Constitution requires that all persons born within the territorial boundaries of the United States, including children of illegal

<sup>170</sup> (NZPD), above n 145, 14503.

<sup>171</sup> "Citizenship law change bowing to Australia", above n 167.

<sup>172</sup> United States Constitution, amendment XIV § 1.

<sup>173</sup> Price, above n 150, 73.



aliens, be granted citizenship. Houston has assessed this presumption in light of the calls by many to reinterpret the Constitution to exclude children of illegal aliens from citizenship birthright entitlement.<sup>174</sup> The arguments for a reinterpretation include the bare fact that the framers of the Fourteenth Amendment did not contemplate the phenomenon of illegal immigrants and that the Supreme Court has not clearly stated that such a move would be unconstitutional.<sup>175</sup> Houston's assessment is that these arguments are weak. While the case law is not conclusive, it leans towards recognising children born to illegal immigrants as citizens. He concludes that recent "Congressional attempts to abandon the Fourteenth Amendment territorial birthright citizenship are unconstitutional."<sup>176</sup> This conclusion appears to be the stance of most academics.<sup>177</sup>

The United Kingdom however, has abandoned the principle of *jus soli* in favour of parentage based citizenship. This change was brought about by the British Nationality Act of 1981 in response to the perceived problem of increased social service costs due to immigration.<sup>178</sup>

Australia has followed suit to restrict birthright citizenship. Prior to 1986, Australia's 1948 Citizenship Act assigned citizenship on the basis of birth in Australia or through descent.<sup>179</sup> Restrictions were made to the territorial birthright citizenship so that a person born in Australia will be an Australian citizen only if one of his or her parents was at the time of his or her birth an Australian citizen or a permanent resident. Children failing to meet that category are provided citizenship status if they have been ordinarily resident in Australia for a ten year period from the time of their birth.<sup>180</sup> According to Zappala, the decision to limit the *jus soli* principle was based on the desire of Government to

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<sup>174</sup> Houston, above n 152, 696.

<sup>175</sup> Houston, above n 152, 722.

<sup>176</sup> Houston, above n 152, 738.

<sup>177</sup> See generally John W Guendelsberger "Access to Citizenship for Children Born within the State to Foreign Parents" (1992) 40 Am J Comp Law 379, 380.

<sup>178</sup> Houston, above n 152, 696

<sup>179</sup> "Citizenship and the Constitutional Convention Debates", above n 29, 308.

<sup>180</sup> Zappala, above n 80, 284.



limit any protection from deportation available to the children of illegal immigrants.<sup>181</sup>

This year, Irish voters overwhelmingly backed a proposal to tighten their citizenship laws. Almost 80 per cent of voters in a referendum were in favour of ending the automatic citizenship right for all children born in Ireland.<sup>182</sup>

Price makes an interesting observation that points to the main reason for these changes:<sup>183</sup>

In 1608, the rule of obedience and allegiance required of a subject at birth was a self-serving policy for a monarchy at a time when few other compulsions existed. The cost of a rule determining that all persons born within the King's territories were subjects was low because few benefits were tied to that allegiance. Today, by contrast, most nations, including particularly the United States, have radically expanded the benefits tied to the status of citizen.

This comment leads us to consider what the policy justifications are for the retention of the *jus soli* principle.

### 3 Value of Birthright Citizenship

Debate on citizenship criteria focuses on the question of how inclusive or exclusive the criteria should be. Exclusive criteria will restrict the application of the birthright citizenship, *jus soli*, by placing a greater emphasis on citizenship by descent, *jus sanguinis*. The balance between these principles, in combination with the immigration and nationalisation laws of a State, forms the basis of citizenship criteria.

There are two main views regarding *jus soli*. One is that it is a "rule of convenience whose moral relevance is limited to a paternalistic past".<sup>184</sup> It is viewed as a constraint on the freedom of governments and individuals. The other

<sup>181</sup> Zappala, above n 80, 284.

<sup>182</sup> Angelique Chrisafis "Has Ireland Lost its Soul?" (2 July 2004) *Guardian Weekly*, Sydney, 17.

<sup>183</sup> Price, above n 150, 146.



view is that it is a “powerful notion”,<sup>185</sup> that there is “something basic about the right to be a citizen in the country of an individual’s birth”<sup>186</sup> Walzer has even gone so far as to say that *jus soli* is the only protection an individual has against State tyranny.<sup>187</sup>

Schuck and Smith’s text, *Citizenship Without Consent*, proposed to replace territorial birthright citizenship with “American-born conditional citizenship”.<sup>188</sup> This proposal involves replacing the customary division of citizenship laws into *jus soli* or *jus sanguinis* with the principle of consent. Under their proposal, citizenship would be conditional until the age of majority, and then citizenship would be acquired through passive acceptance, but that one could voluntarily renounce by expatriation.<sup>189</sup> Schuck and Smith argue that this proposal is necessary for the community to protect its interests, maintain harmony and achieve a unifying sense of shared values.<sup>190</sup>

Schuck and Smith’s proposal has received a great deal of criticism from many scholars. Many have attacked it as against the intention of the framers of the Fourteenth Amendment to create “a hereditary class of voteless denizens, vulnerable to expulsion and exploitation”<sup>191</sup> Others have argued that it would lead to a return of pre *Dred Scott* days and would undermine the values of acceptance and tolerance in American society.<sup>192</sup>

The above discussion serves to make the point that an individual’s view of citizenship criteria is determined by what values of society are considered important. Guendelsberger in his assessment of American and French citizenship laws describes United States birthright citizenship as reflecting American

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<sup>184</sup> Peter H Schuck and Rogers M Smith *Citizenship Without Consent: Illegal Aliens in the American Polity* cited in Schwartz, above n 14, 2170.

<sup>185</sup> Schwartz, above n 14, 2144.

<sup>186</sup> Schwartz, above n 14, 2152

<sup>187</sup> Schwartz, above n 14, 2170.

<sup>188</sup> Neil Gotanda “Citizenship and its Discontents: Centering the Immigrant in the International Imagination (Part 1)” (1997) 76 *Or L Rev* 233, 235.

<sup>189</sup> Gotanda, above n 188, 241.

<sup>190</sup> Schwartz, above n 14, 2158.

<sup>191</sup> Mark Tushnet “United States Citizenship Policy and Liberal Universalism” (1998) *Geo Immigr LJ* 311, 317.

<sup>192</sup> Schwartz, above n 14, 2162; Gotanda, above n 188, 241.



society's acceptance of cultural pluralism.<sup>193</sup> In France, birthright citizenship is only acquired if there is a link to at least one other connecting factor (descent) in addition to mere birth in order to ensure cultural attachment to France. According to Guendelsberger, this reflects the importance placed on cultural assimilation and filiation in France.<sup>194</sup>

Immigration policy is inextricably linked to this debate and it is worth noting that the Bill provides for the tightening of naturalisation requirements for immigrants.<sup>195</sup> It increases the required period of residence in New Zealand before a migrant can apply for New Zealand citizenship. The "good character" requirements that immigrants must satisfy have been stated more explicitly and are more strenuous.<sup>196</sup> These changes in combination with the proposed tightening of citizenship criteria mark the transition to a more exclusionary focus of who may become New Zealand citizens.

It is important that New Zealanders take a hard look at the direction of citizenship policy. New Zealanders need to decide whether they want to promote an inclusive model of citizenship criteria that reflects our acceptance of a pluralistic society and encourages the tolerance of other cultures, or whether the French model of cultural assimilation is preferred.

There are strong justifications for the continued application of the *jus soli* principle in conferring citizenship status in New Zealand. The application of this principle avoids the situation whereby a person born in New Zealand acquires the citizenship of a country that they have no effective link to or no intention to reside in. If a person born in New Zealand has no tie to New Zealand, it is unlikely that the conferral of citizenship will impose any great burden on the State, as that person is likely to leave New Zealand in any case. But to deny citizenship to people who intend to make New Zealand their home on the basis of the immigration status of his or her parents' undermines that person's right to citizenship. The use of the principle of *jus soli* in the conferral of citizenship

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<sup>193</sup> Guendelsberger, above n 177, 428.

<sup>194</sup> Guendelsberger, above n 177, 428.

<sup>195</sup> Identity (Citizenship and Travel Documents) Bill No 148-1, cl 8.



recognises the importance of citizenship to an individual, and accords with the treatment of citizenship as a human right.

### **G Deprivation of Citizenship**

In New Zealand, citizenship status can be deprived by the Minister in the case of fraud during the naturalisation process or on the acquisition of other citizenship combined with an action that is “contrary to the interests of New Zealand.”<sup>197</sup> In addition, an individual is able to voluntarily renounce his or her citizenship.<sup>198</sup>

There is very limited case law in New Zealand on the use of the Minister’s power to deprive a person of his or her citizenship (or “denationalise” a person). Those cases that address this matter only relate to the deprivation of New Zealand citizenship on the basis of fraud during the naturalisation process.<sup>199</sup> Section 16, which allows the Minister to deprive a person of New Zealand citizenship if he or she has acquired the nationality of another country and has acted “contrary to the interests” of New Zealand, has not been applied by the Courts.

#### **1 Identity (Citizenship and Travel Documents) Bill**

One of the conditions for deprivation under section 16 is that the person must have acquired the citizenship of another country by a formal act “other than marriage”. Clause 11 of the Bill amends section 16 remove the words “other than marriage”. The effect of this change is to remove a restriction and provide broader application of the section. No explanation in the Bill has been provided for the amendment.

It is difficult to determine the effect of such a change when the courts have not applied this provision.. At face value, it would appear to provide the

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<sup>196</sup> Identity (Citizenship and Travel Documents) Bill No 148-1, cl 9.

<sup>197</sup> Citizenship Act 1977, ss16 and 17.

<sup>198</sup> Citizenship Act 1977, ss 15.

<sup>199</sup> See generally *Wang v Minister of Internal Affairs*, above n 18.



Minister greater scope to deprive a person of his or her citizenship by removing a group of people who previously did not come within the ambit of section 16. It is unclear as to whether a person can be deprived of his or her citizenship if he or she was a national of another country, had later become a naturalised New Zealand citizen and had then acted in a manner “contrary to the interests of New Zealand.” This result would seem to strain the interpretation of section 16. Therefore, the effect of the change introduced by the Bill does not appear to be significant.

Despite media reports that the Government was ready to introduce new provisions to allow the Minister of Internal Affairs to deprive a person of their New Zealand citizenship on national security concerns, this has not formed part of the Bill or the SOP. Requests under the Official Information Act 1982 to obtain information on this matter were unsuccessful.<sup>200</sup> Perhaps as an alternative to depriving a person of his or her citizenship, the Government has focussed on amending the Passports Act 1992 to provide additional control mechanisms for the issuing and use of passports.<sup>201</sup>

It is unclear if the Government plans future reform in this area. Nevertheless, if citizenship is to be treated as a human right, it is important to consider under what circumstances, if any, an individual could be deprived of his or her citizenship (or “denationalised”). The matter of fraud in the naturalisation process will not be addressed as it is considered justified action on the part of the State to revoke citizenship that has been obtained by acts of dishonesty.

By treating citizenship as a human right, it does not necessarily mean that citizenship cannot be revoked; it just ensures that revocation is carried out in a certain way, placing the onus on the government to justify the need for deprivation and ensure appropriate checks and balances.

It is not contrary to international law to deprive a person of his or her nationality provided that they will not be made stateless in the process and that it

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<sup>200</sup> Hon G Hawkins, Minister of Internal Affairs, (29 May 2004) letter.



is not undertaken in an arbitrary manner.<sup>202</sup> The emerging norm against statelessness means that only people who possess citizenship status elsewhere can be denationalised. Article 8 of the Convention of the Reduction of Statelessness provides that a contracting State “shall not deprive a person of his nationality if such deprivation would render him stateless.” Moreover, before deporting a person who has been denationalised the State is required to find a State that will accept that person.<sup>203</sup>

## 2 Overseas comparisons

The laws of various States recognise numerous grounds for depriving a person of his or her nationality. These grounds generally include acts of treason, acquisition of another nationality, prolonged residence abroad and service in another State’s armed forces without permission.<sup>204</sup> There are two extremes in approaches employed: the United States which generally does not permit deprivation of citizenship even when that individual would *not* be rendered stateless, and the United Kingdom and Israel which allow the government to revoke the citizenship for acts of disloyalty provided they have citizenship in another country.

In the United States, there is a “virtual prohibition on government power to terminate citizenship unilaterally.”<sup>205</sup> Citizenship can only be terminated when a person has voluntarily demonstrated his or her intent to relinquish American citizenship. The Supreme Court decisions since 1960s have “severely restricted the Government’s power to denationalise for reasons of disloyalty or divided allegiance.”<sup>206</sup>

In order for the Federal Government to deprive an individual of American citizenship it must prove that the individual intended to renounce his or her citizenship. This “standard is difficult to satisfy and “few “denationalisations”

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<sup>201</sup> Identity (Citizenship and Travel Documents) Bill No 148-1, cl 23.

<sup>202</sup> Jennings, above n 115, 880.

<sup>203</sup> Gross, above n 36, 90.

<sup>204</sup> Jennings, above n 115, 878.

<sup>205</sup> Aleinikoff, above n 85, 1483.

<sup>206</sup> Schuck, above n 3, 12.



have occurred in the United States.<sup>207</sup> In the case of John Walker Lindh, the so-called "American Taliban," the Government did not pursue the option of revoking his citizenship despite the fact he was alleged to have supported an enemy of the United States.<sup>208</sup>

In Israel, citizenship of an individual can be revoked at the discretion of the Minister for the Interior following an act of disloyalty.<sup>209</sup> This provision in the Nationality Law has been used twice: to revoke citizenship of a person who was involved in the planning of suicide attacks and another person living in Lebanon who was linked to the Hizbullah.<sup>210</sup> Denationalisation was considered in relation to the assassin of Prime Minister Itzhak Rabin but the Minister refused on the ground that there were no public order issues at stake.<sup>211</sup> The exercise of the Minister's discretion is subject to judicial review but so far no review has been undertaken.<sup>212</sup>

In the United Kingdom, the Secretary of State recently used the Nationality, Immigration and Asylum Act 2002 to revoke the citizenship of Abu Hamza.<sup>213</sup> Hamza, a Muslim cleric, was a naturalised British citizen for 20 years. His citizenship was deprived under section 40(2) of the Act, which states:

[t]he Secretary of State may by order deprive a person of that citizenship status if the Secretary of State is satisfied that the person has done anything seriously prejudicial to the vital interests of (a) the United Kingdom or (b) a British overseas territory.

Hamza has appealed against the order and presently awaits trial.<sup>214</sup>

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<sup>207</sup> Schuck, above n 3, 12.

<sup>208</sup> JM Spectar "To Ban or not to Ban an American Taliban? Revocation of Citizenship in a Statecentric System" (2003) 39 Cal WL Rev 263, 266.

<sup>209</sup> Gross, above n 36 64.

<sup>210</sup> Gross, above n 36, 64.

<sup>211</sup> Gross, above n 36, 66.

<sup>212</sup> Personal communication with Professor Gross, Faculty of Law, Haifa University (5 July 2004).

<sup>213</sup> Nationality, Immigration and Asylum Act 2002 (UK); "Cleric Stripped of Citizenship" <<http://newsvote.bbc.co.uk>> (last accessed 28 June 2004); "Arrest Casts Doubts on British Justice" (29 May 2004) *The Dominion Post*, Wellington, B1.

<sup>214</sup> "Cleric Stripped of Citizenship", above n 213.



### 3 *Future changes*

In the case of *Yan v Minister of Internal Affairs*, Hammond J in considering the test under section 17 for deprivation of citizenship, held that the Minister must prove the ultimate burden for his or her decision as this is “consistent with the view taken under international law today: the loss of citizenship, as the right to have rights, is not to be supported, save in very clear cases.”<sup>215</sup> I agree with Hammond J but would go further and suggest that the approach of the United States Supreme Court should be adopted to avoid the discrimination that will apply to people with dual citizenship as this paper will explain.

The main reasons given for denationalisation include divided or transferred allegiance to the State (lack of loyalty), punishment, public order and safety.<sup>216</sup> Academics generally appear to support in theory the ability of the State to revoke an individual’s citizenship. Gross finds theoretical justification in communitarian and social contract theory for the ability of the State to deprive a person who has committed an act of extreme disloyalty, such as terrorism. His view is that loyalty circumscribes the right to citizenship; once a person has broken the bond of loyalty, the State is entitled to “disown” that person.<sup>217</sup>

Other academics such as Spectar and Aleinikoff are in agreement with Gross.<sup>218</sup> Aleinikoff argues that the language of the Fourteenth Amendment does not establish irrevocable right to citizenship and the lack of importance of the interests does not militate for such a right.<sup>219</sup> While Aleinikoff recognises that denationalisation threatens the security of an individual’s place of residence, he makes light of this matter by arguing that the effect on the individual is limited: denationalisation on the basis of disloyalty cannot impair an individual’s sense of identity because they have already transferred their allegiance away from the State. Deported aliens (denationalised persons) are entitled to the rights that the

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<sup>215</sup> *Yan v Minister of Internal Affairs*, above n 16, 22

<sup>216</sup> Aleinikoff, above n 85, 1473.

<sup>217</sup> Gross, above n 36, 57.

<sup>218</sup> Spectar, above n 208, 280.

<sup>219</sup> Aleinikoff, above n 85, 1478.



receiving country extends to them, and statelessness will not occur as denationalisation grounds require acquisition or existence of citizenship elsewhere.

However, Aleinikoff urges the need for caution in the denationalisation process. An overt act of disloyalty is required before the Courts revoke an individual's citizenship.<sup>220</sup> Gross also urges the need for caution. While he does not place a strong requirement on the need for an overt act of disloyalty (Gross appears to suggest that membership to a terrorist organisation is sufficient), he argues that denationalisation is a criminal sanction, and as such, it should only be undertaken by the courts.<sup>221</sup> Gross is very critical of the current approach in Israel whereby denationalisation is undertaken at the Minister's discretion.

The reasoning of the United States Supreme Court in *Trop v Dulles* provides a strong counter argument.<sup>222</sup> The majority of the Court held that there were no grounds to deprive the petitioner who has deserted the army in war time of his American citizenship.<sup>223</sup> The main reasons given by the Court was that American citizenship too precious (the right to have rights argument) and that citizenship was "not a licence that expires on misbehaviour."<sup>224</sup> The Court also held that denationalisation constitutes "cruel and unusual punishment" and was barred by the Eight Amendment of the Constitution.<sup>225</sup> The factors highlighted by the Court were that denationalisation was severe and excessive in that it destroyed a person's status nationally and internationally and it is likely to have a severe impact on third parties.<sup>226</sup> As a punishment, it infringed on human dignity and liberty and that it did not achieve the objective of penal laws to promote rehabilitation and deterrence.<sup>227</sup> Lastly, the Court considered that denationalisation may be counterproductive as it would not actually protect

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<sup>220</sup> Aleinikoff, above n 85, 1500.

<sup>221</sup> Gross, above n 36, 121.

<sup>222</sup> (1958) 356 US 86 (SC).

<sup>223</sup> *Trop v Dulles*, above n 222, 92 Warren CJ Judgment for the majority.

<sup>224</sup> *Trop v Dulles*, above n 222, 92 Warren CJ.

<sup>225</sup> *Trop v Dulles*, above n 222, 102 Warren CJ.

<sup>226</sup> *Trop v Dulles*, above n 222, 110 Brennan J concurring.

<sup>227</sup> *Trop v Dulles*, above n 222, 100 Warren CJ.



public safety as the person concerned could continue their actions against the State from abroad.<sup>228</sup>

Although there is some justification to permit the deprivation of citizenship for someone who has demonstrated extreme disloyalty to the State, denationalisation would appear to create more problems than it solves. Surely if a person's actions were so heinous to warrant banishment they would have infringed the criminal code of the State and they can be dealt with through the criminal law process?

In Israel and the United Kingdom a person may be deprived of his or her citizenship for activities that would not be considered crimes. Hamza for instance has not been convicted of any crime, but he is considered a threat because of his extreme stance against the British Government's position on the war in Iraq.<sup>229</sup> Indeed, Aleinikoff notes the chilling effect that denationalisation based on government investigations into the loyalty of its citizens could have on speech and conduct. He is only prepared to permit denationalisation based on an actual act of extreme disloyalty.<sup>230</sup>

Also, it is important to remember that denationalisation is permitted in international law only for persons who have another nationality.<sup>231</sup> Will this mean that naturalised citizens will have a lesser right of freedoms of expression and association? Any move in this direction is likely to create a class of people who are less able to exercise their freedoms and rights. Surely once a person has become a citizen, his or her citizenship status is equal to that of everyone else?

A State may not always act on sound information regarding the nationality status of the disloyal citizen, or it may simply disregard international law. For example, Hamza has argued that he is no longer a citizen of Egypt but this has not stopped the Secretary of State issuing an order under to deprive him

<sup>228</sup> *Trop v Dulles*, above n 222, 111 Brennan J concurring.

<sup>229</sup> "Cleric Stripped of Citizenship", above n 213.

<sup>230</sup> Aleinikoff, above n 85, 1500.

<sup>231</sup> Zilbershats, above n 2, 25.



of his British citizenship.<sup>232</sup> This matter has yet to be addressed by the British courts.

Denationalisation achieves little except for the short-lived satisfaction of the Government in banning a disobedient citizen. It is better to use criminal law to address activities that are considered disloyal or affect public order and safety. If a person were subjected to these processes it would be difficult to justify the deprivation of their citizenship over and above the punishment they have received by criminal law. Any move to increase the scope of the Government's power to deprive a person of his or her citizenship should be rejected. Such a move would not be in accordance with citizenship status as a human right.

The United States Supreme Court's approach to denationalisation in *Trop* arguably reflects the status of citizenship as a human right as it explains the asymmetrical bond between the citizen and the State: citizenship must be granted by the State if the person is eligible through territorial birthright or descent, and that this status can only be voluntarily revoked by the individual.

In New Zealand, the constitutional framework does not provide for such an asymmetrical relationship between State and the individual. This leads to the question of what changes should be made to New Zealand law. In my view, citizenship is so important to an individual that New Zealand law should not provide for the deprivation of citizenship except in cases of dishonesty during the naturalisation process.

## **H Constitutional Reform**

Acquisition of citizenship status protects and facilitates some important individual rights. This paper has identified that the ability to acquire and retain citizenship status comprise essential components of the right to citizenship. These components of citizenship should be protected within New Zealand's constitutional framework if citizenship is to be accorded human rights status. However, as the Bill has demonstrated, the Government is able to make radical

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<sup>232</sup> "Cleric Stripped of Citizenship", above n 229.



changes to citizenship law through ordinary statutory amendment processes. Governments should not be able to change these criteria without significant consultation and support in the community.

An option for the protection of citizenship could involve amending the Bill of Rights. For example, the Bill of Rights could contain the right to acquire and retain citizenship. Another option is that the Government be left the power to determine the eligibility for citizenship but the right to retain citizenship status could be protected.

Another option is the entrenchment of the relevant sections in the Citizenship Act 1977. These sections provide for the acquisition of New Zealand citizenship and the limited circumstances, under the present law, when the Government can deprive an individual of their citizenship.

These options cannot be properly addressed within the scope of this paper as it forms another topic in itself. There is a great deal of scholarly debate regarding whether or not human rights should be constitutionally protected. These arguments need to be addressed.<sup>233</sup>

A salient feature underlying this whole discussion has been the difference the United States Constitution has made in terms of ensuring that the Government cannot change citizenship eligibility and deprive a person of their citizenship. Other countries, including New Zealand, have much to learn from the United States in this regard.

## **VI CONCLUSION**

Up until recently, the question of citizenship has been uneventful in New Zealand. The Identity (Citizenship and Travel Documents) Bill has the potential to change this situation because it introduced some far reaching changes to citizenship law. This paper has argued that the changes introduced by the Bill,

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<sup>233</sup> "A Rights-Based Critique of Constitutional Rights", above n 53, 50.



particularly in terms of the removal of the *jus soli* principle for determining eligibility for New Zealand citizenship, are not welcome.

The introduction of radical changes through a SOP and the failure of the Government to provide a credible explanation for these changes is undesirable. Seen in combination with other proposed changes in the Bill which relate to the tightening of the naturalisation process, the reform has a clear exclusionary flavour. This does not bode well for the wellbeing of New Zealand society. Moreover, the Bill does not treat citizenship in a manner that recognises it as something that is of great value to an individual.

This paper has argued that citizenship is a human right. It may not be accurate to characterise citizenship as a right to have rights given the limited rights and benefits which flow from this status, but citizenship does, however, contain some important residual rights for an individual such as political participation and security of residence. Citizenship also facilitates and protects some other key interests for an individual including identity and membership to a community and status in international law. Without citizenship status a person's right to equality, dignity and liberty is precarious.

It is important that attention is directed to an inquiry of how the components of the right of citizenship, that is the ability to acquire and retain citizenship status, are treated in law. At present, citizenship law provides for inclusive notions of citizenship based on the principle of *jus soli*. The proposal contained in the Bill will restrict who can become a New Zealand citizen. Thankfully, the Bill did not introduce any significant changes to allow a government to deprive an individual of his or her citizenship despite statements early this year to the contrary. This paper has argued that any such change would be a retrogressive step.



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