RELIGIOUS LIBERTY IN A TEMPERATE ZONE: A REPORT FROM NEW ZEALAND

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INTRODUCTION

If a typical rugby-loving, suburban-dwelling New Zealander was asked by a pushy social scientist or pollster to take an annoying word association test, his or her response to the word “religion” might be a muffled yawn accompanied by an answer such as “irrelevant,” “boring,” or “outdated.” Public interest, debate, or, for that matter, consternation over matters religious is rare—religion, church, and “all that God stuff” are not pressing concerns in the lives of most New Zealand citizens. In one sense, the widespread cultural disinterest in organized religion that typifies much of our history may be viewed as a positive thing. It can hardly be a cause for regret that, by and large, New Zealand has not witnessed the large-scale, bitter religious turmoil that has beset many nations. As John Stenhouse notes: “[W]hat is striking about New Zealand’s past is not that religious bigotry existed but that it so seldom erupted into violence. By world standards, New Zealanders have handled their religious differences remarkably well.” The unrelated series of religious freedom and church-state controversies that erupted in 2006 was thus unusual and caught ordinary New Zealanders, as well as the media, social commentators, and politicians, rather unprepared.

1 This is, of course, a broad generalization and it would be remiss to ignore, for example, the spasms of fierce sectarian feuding between the transplanted Protestant and Catholic communities in the late nineteenth and early twentieth centuries that punctuated this seemingly serene religious landscape. See generally, e.g., Rory Sweetman, Bishop in the Dock: The Sedition Trial of James Liston (1997) (detailing the unsuccessful prosecution of a Roman Catholic bishop for sedition in 1922); G. A. Wood, Church and State in the Furthest Reach of Western Christianity, in Christianity, Modernity and Culture: New Perspectives on New Zealand History 207, 229–332 (John Stenhouse ed., 2005).

New Zealand earned the wrath of some Islamic countries when two of its major city newspapers reprinted the Danish cartoons depicting the Prophet Mohammed.\(^3\) That incident was followed by an outcry over the screening of an episode of South Park, a U.S. satirical television cartoon show, which showed a statue of the Virgin Mary menstruating.\(^4\) Prime Minister Helen Clark denounced the screening of the episode as “quite revolting.”\(^5\) She insisted: “I think the critical thing is we show respect for other people’s beliefs.”\(^6\)

By far the greatest controversy, however, has been the shadowy role that the Exclusive Brethren played in the indirect funding and support of the National Party, the principal opposition political party in the general election of 2005. The Exclusive Brethren allegedly spent $1.2 million—in the form of producing and distributing pamphlets, brochures, and other advertising material that was severely critical of the Labor-led coalition government—to help the National Party’s campaign to win the election.\(^7\) The National Party did not win, and when the fierce government attack and consequent media furor over the Exclusive Brethren’s support erupted, the party sought to distance itself from this unpopular minority religious sect. Ultimately, Dr. Don Brash, the leader of the National Party, resigned,\(^8\) stepping down on the eve of the publication of a book by an independent investigative journalist, which detailed the extent of the connection between the party and the sect.\(^9\)

In this Article, I first wish to traverse briefly the political and constitutional foundations of church-state relations in Part I, before turning to the current legal protections for religious liberty in New Zealand. In Part II, I explore some contemporary religious freedom challenges as well as the emergent political controversies over the proper state response to religiousists. The recognition of Maori spiritual concerns—as part of a broader government program to respect historic obligations owed to the Maori people—has proved


\(^{5}\) Audrey Young, South Park’s ‘Mary’ Episode Revolting, Says PM, N.Z. HERALD, Feb. 21, 2006.

\(^{6}\) Id.


a particularly fertile source of friction. The challenges created by the recent growth in religious pluralism—prompted by increased immigration from Asia and Africa—also pose some urgent and difficult questions for policy makers, human rights agencies, and courts. In Part III, I consider aspects of New Zealand's modern religious freedom record in light of the requirements of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief ("1981 U.N. Declaration"). I finish with some concluding comments.

I. THE FOUNDATIONS OF THE RIGHT OF RELIGIOUS FREEDOM IN NEW ZEALAND

A. Non-Establishment and the Acknowledgement of Religious Liberty and Equality

New Zealand has never had an established church. As the Supreme Court clarified at the turn of the twentieth century, "There is no State Church here. The Anglican Church in New Zealand is in no sense a State Church . . . and, although no doubt it has a very large membership, it stands legally on no higher ground than any of the other religious denominations in New Zealand." Initially, there was a modest preference for the Anglican Church, leading some to describe that Church as having a quasi-establishment role in the colony. But, as Antony Wood observed, "The Anglican Church's pre-eminence was a shadowy affair in comparison with its position in the home country or in older established colonies of settlement." New Zealand was settled as a British colony at the time when the principle of non-establishment was gaining favor in Britain and the disestablishment of the Church of England was being seriously debated.

13 See generally G. Antony Wood, Church and State in New Zealand in the 1850s, 8 J. RELIG. HIST. 255 (1975).
14 Id. at 267.
Concomitant with the early colonial government’s policy of non-establishment was its distinct commitment to, and recognition of, the principles of religious equality and freedom. In the Imperial Instructions to Captain William Hobson, the Governor and Commander-in-Chief of the Colony of New Zealand, dated December 5, 1840, there was a requirement that the Governor not propose or give his assent to any ordinances impeding persons in the free exercise of their religion.\textsuperscript{16}

The signing on February 6, 1840 of the Treaty of Waitangi—a founding document whereby the leaders of the Maori people ceded sovereignty to the British Crown in return for becoming British subjects and securing the continued protection of their lands\textsuperscript{17}—witnessed the unexpected inclusion of an oral assurance concerning religious liberty and equality.\textsuperscript{18} This assurance came about due to the initiative of the Roman Catholic Bishop Jean Baptiste François Pompallier.\textsuperscript{19} In response to Bishop Pompallier’s request for the protection of the Catholic Church by the British government, Governor Hobson, “with much blandness of gesture and expression, replied, ‘Most certainly,’ and proceeded to express his regret that the Bishop had not made known his wishes earlier, as in that event the provision ‘would have been embodied in the treaty.’”\textsuperscript{20} The Reverend Henry Williams, the person charged with translating the agreement into the Maori language, wrote: “The Governor wishes you to understand that all the Maoris who shall join the Church of England, who shall join the Wesleyans, who shall join the Pikopo or Church of

\begin{footnotes}
\item[16] HIGHT & BAMFORD, supra note 11, at 150–51; see also N.A. FODEN, THE CONSTITUTIONAL DEVELOPMENT OF NEW ZEALAND IN THE FIRST DECADE (1839–1849) 86 (1918). Foden’s account of this particular clause of the Instructions to Hobson reads: “Freedom of worship in any peaceable and orderly manner was to be permitted even if not according to the rites of the Church of England.” Id. Interestingly, the same Imperial Instructions to Hobson in 1840 that mandated the free exercise of religion also directed Hobson to exert his powers to promote the education and religion of the Maori, religion here meaning “conversion to the Christian faith.” See HIGHT & BAMFORD, supra note 11, at 154.
\item[17] The precise meaning and significance of the Treaty is a subject generating much controversy in contemporary New Zealand. The Maori understanding, buttressed by the official Maori language version of the Treaty, is that something less than full sovereignty (kawanatanga or “governorship”) was ceded to the British and thus full authority (rangatiratanga) remained with them. See, e.g., JAMES BELICH, MAKING PEOPLES: A HISTORY OF THE NEW ZEALANDERS 193–96 (1996); F. M. BROOKFIELD, WAITANGI AND INDIGENOUS RIGHTS: REVOLUTION, LAW AND LEGITIMATION 98–107 (1999); PHILIP A. JOSEPH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND 42–95 (2d ed. 2001).
\item[19] JEAN BAPTISTE FRANÇOIS POMPALLIER, EARLY HISTORY OF THE CATHOLIC CHURCH IN OCEANIA 63 (1888).
\item[20] BUICK, supra note 18, at 152; see also HUGH CARLETON, THE LIFE OF HENRY WILLIAMS 314 (rev. ed. 1948).
\end{footnotes}
Rome, and those who retain their Maori practices, shall have the protection of the British Government.” 21 The note was relayed to the Governor, who in turn passed it on to Bishop Pompallier, who read it and expressed approval. 22 Reverend Williams then read a carefully written statement to the assembly:

E mea ana te Kawana, ko nga whakapo katoa, o Ingarani, o nga Weteriana, o Roma, me te ritenga Maori hoki, e tiakina ngatahitia e ia. (“The Governor says the several faiths [beliefs] of England, of the Wesleyans, of Rome, and also the Maori custom, shall be alike protected by him.”).23

Despite some skepticism, this verbal assurance has taken on a renewed importance in the latter part of the twentieth century, sometimes being referred to, alongside the three written articles, as the “Fourth Article” of the Treaty.24 This elevated contemporary characterization of Hobson’s promise is misleading. In my opinion, the better view is that the guarantee was intended to have moral and not legal weight.25

The earliest Parliamentary debates also underscore this desire for religious equality. The opening session of the first sitting day of Parliament, May 26, 1854, witnessed an unexpected debate on the question of an opening prayer.26 James Macandrew, a Presbyterian from Dunedin, offered to fetch a nearby Anglican parish minister to ensure there should be “an acknowledgement of

21 Buick, supra note 18, at 153; Carleton, supra note 20, at 315.
22 Carleton, supra note 20, at 315.
23 William Colenso, The Authentic and Genuine History of the Signing of the Treaty of Waitangi 32 (1890). Dr. Claudia Orange argues that:

The official recognition seemingly given Maori custom should be seen for what it was—an inclusion arising from sectarian jealousy. It ran counter to nineteenth-century Christian sensitivities, and barely accorded with Normanby’s instructions to suppress, by force if necessary, the more extreme Maori usages. This promise to protect Maori custom—a verbal commitment given only by chance—amounted to very little.


26 See Allan Davidson, Chaplain to the Nation or Prophet at the Gate? The Role of the Church in New Zealand Society, in Christianity, Modernity and Culture: New Perspectives on New Zealand History, supra note 1, at 312–14.
dependence on the Divine Being." It was "clear to him that the House of Representatives, being the first embodiment of a New Zealand nationality, should be consecrated[,]" and so he proposed a motion to that effect. Dr. Walter Lee immediately offered a counter-motion that the House "be not converted into a conventicle, and that prayers be not offered up." A vigorous debate ensued. Some considered that such a prayer would seem "to involve the question of a State religion, the very appearance of which ought to be avoided by [the] House." Edward Gibbon Wakefield tried to assuage fears by pointing out that in America "where State religion was absolutely repudiated," the practice of opening the legislative houses by prayer was allowed. By then, some members became impatient and sought to short-circuit potentially "fruitlessly prolonged" discussion. In response, Frederic Weld suggested an amendment: "That this House, whilst fully recognizing the importance of religious observances, will not commit itself to any act which may tend to subvert that perfect religious equality that is recognized by our Constitution, and therefore cannot consistently open this House with public prayer."

Wakefield worried that "New Zealand should be singular in this respect among the Christian countries of the earth" if proceedings began without a prayer. Dr. Walter Lee responded with doubts as to how the Jew could join with the Christian in a prayer and added: "[A]s the Constitution had very properly rid them of State religion, the House should take care how they voluntarily submitted to it." Weld's amendment was rejected by twenty votes to ten. The House then returned to the original motion and passed it with no vote count recorded. The text follows:

That, in proceeding to carry out the resolution of the House to open its proceedings with prayer, the House distinctly asserts the privilege of a perfect political equality in all religious denominations, and that, whoever may be called upon to perform this duty for the House, it is

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27 I N.Z. PARL. DEB. (1854–1855) 4.
28 Id.
29 Id.
30 Id. (statement of James Edward Fitzgerald).
31 Id. at 5.
32 Id. (statement of Fredric Weld).
33 Id.
34 Id. at 6.
35 Id.
36 Id.
not thereby intended to confer or admit any pre-eminence to that Church or religious body to which he may belong.\textsuperscript{37} The house introduced Reverend F.J. Lloyd, who read prayers and never appeared again; thereafter, the Speaker of the House said the prayer.\textsuperscript{38}

B. Cultural Establishment and Disestablishment

While New Zealand may not have had a legally established church or an established religion, a solid case can be made that there was a \textit{de facto} or cultural establishment of a generic form of Christianity. Ivanica Vodanovich, for instance, has argued that “the New Zealand model . . . combine[d] separation of church and state, with recognition of the state as ‘Christian’”\textsuperscript{39} and acknowledgment that the state was committed to a “non-specific and non-sectarian” Christianity.\textsuperscript{39} Similarly, James Belich has discerned a “vague, shared Protestantism” as loosely binding the nation.\textsuperscript{40} The \textit{de facto} Christian establishment has been manifested in many ways. First, given the religious composition of the population, the laws and institutions in New Zealand naturally reflected Christian values.\textsuperscript{41} Moreover, the governing elite were also predominantly Christian.\textsuperscript{42}

Sir Ivor Richardson concluded his comprehensive 1962 survey of the religious dimension of New Zealand laws by rejecting the view that Christianity was part of New Zealand law or that New Zealand was a Christian State. In his words, “[i]f this means that the doctrines and principles of Christianity are legally binding on all citizens or that the political apparatus of government is subject to the mandates of the Christian religion, then the statement is incorrect.”\textsuperscript{43} However, he continued:

Nevertheless there is a certain amount of truth in the statement that Christianity is part of our law. In the first place, the Christian religion has played an important part in shaping our culture, our

\textsuperscript{37} \textit{Id.} (emphasis added).
\textsuperscript{38} See Davidson, \textit{supra} note 26, at 313–14.
\textsuperscript{40} Belich, \textit{supra} note 17, at 439. Belich applied this characterization to the Pakeha (European) population, but I suggest that it might be extended to entire population, Maori included.
\textsuperscript{41} See Wood, \textit{supra} note 1, at 207–09, 209 n.4. For example, according to the 1896 Census figures, ninety-four percent of the population was Christian with Anglicans as the largest denomination (at forty percent). See id.
\textsuperscript{42} See id. at 226–27.
\textsuperscript{43} IVOR LLOYD MORGAN RICHARDSON,\textit{ RELIGION AND THE LAW} 61 (1962).
tradition, and our law. As Lord Sumner pointed out in *Bowman v. Secular Society Ltd.* [1917] AC 406, 464-465, the family is built on Christian ideals, and Christian ethics have made a tremendous impact on the development of our law, as is only natural considering that the majority of New Zealanders come from a Christian background.\

New Zealand has its own instances of what some American scholars dub "ceremonial deism." The symbolic or ceremonial examples of Christianity's special position in New Zealand society include: The opening prayer said by the Speaker of the House of Representatives; The swearing of oaths on the Bible (but affirmation is available also); Public holidays such as Christmas Day, Good Friday, and Easter Monday; The monarch, Elizabeth the Second, is "by the Grace of God," the Queen of New Zealand, and one of her titles is *Fidei Defensor*, or, the "Defender of the Faith." The national anthem is a hymn entitled "God defend New Zealand," and Blasphemous libel is listed in the statute book as a criminal offense.

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44 Id.
45 See, e.g., County of Allegheny v. ACLU, 492 U.S. 573, 596 n.46 (1989) (illustrating the U.S. Supreme Court's use of the term); see also Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083 (1996).
46 See generally Wood, supra note 1, at 210–12.
47 See David McGee, *Parliamentary Practice in New Zealand* 159 (3rd ed. 2005). Standing Orders require the prayer to be said. The wording of the current prayer was settled in 1962 but is not written into the Standing Orders nor is it regarded as binding on the Speaker. It reads as follows:

> Almighty God, humbly acknowledging our need for Thy guidance in all things, and laying aside all private and personal interests, we beseech Thee to grant that we may conduct the affairs of this House and of our country to the glory of Thy holy name, the maintenance of true religion and justice, the honour of the Queen, and the public welfare, peace, and tranquillity of New Zealand, through Jesus Christ our Lord. Amen.

Id.

48 See Oaths and Declarations Act 1957, 1957 S.N.Z. No. 88, §§ 3–4. The Oaths Modernisation Bill (264-1) is currently before the House of Representatives. Its principal aim is to modernize and standardize the texts of certain oaths; however, the Bill does not propose to abolish the Biblical oaths currently found in Section 3 of the Oaths and Declarations Act 1957. See Oaths Modernisation Bill, 2005, Bill [264-1] (N.Z.) available at http://www.parliament.nz/En-NZ/PB/Legislation/Bills/ (search “Keyword” for “264-1”; then follow link “Oath Modernisation Bill”).
51 See Allan Davidson, *Christianity and National Identity: The Role of the Churches in "the Construction of Nationhood,"* in *THE FUTURE OF CHRISTIANITY: HISTORICAL, SOCIOLOGICAL, POLITICAL AND THEOLOGICAL PERSPECTIVES FROM NEW ZEALAND* 27 (John Stenhouse et al. eds., 2004). "The word 'God' appears eleven times in the five verses of Thomas Bracken's composition." Id.
52 See Crimes Act 1961, 1961 S.N.Z. No. 43, § 123. To bring suit for an offense in this section, a prosecution needs the leave of the Attorney-General. Id. § 123(4). The only prosecution in New Zealand ever
The unquestioned reflection of the Christian ethic and a diffuse Christianity continued in New Zealand until about the 1960s. Many Christian commentators contend that this decade marked the beginning of the erosion of the cultural or de facto establishment of Christianity. The wresting of generic Christianity from its position of cultural ascendancy commenced during this period as New Zealand took its first fateful steps on the slippery slope to becoming a "post-Christian" society.

The various Christian observances and practices historically protected in New Zealand law are continually being challenged. Some have been overturned, while others face a precarious future. The Speaker's prayer in Parliament remains intact, but criticisms are regularly voiced, such as those of one Member of Parliament who in 2003 complained that the prayer "is no longer appropriate for the Parliament of a diverse and multicultural nation." Sunday observance by the commercial sector is a thing of the past, with shop trading on Sundays allowed for all retailers. Restrictions on the sale of liquor on Sundays took a little later to be repealed, but such sales are now also permitted. The Easter weekend shop trading ban still prevails, but defiant shop openings at Easter may test the remaining bans on trading on these Christian festival days as well. Bills to repeal these remaining restrictions continue to come before Parliament, although none have yet succeeded.

brought under this section was R v. Glover, [1922] 1 G.L.R. 185 (S.C.). The prosecution was unsuccessful; Geoffrey Troughton, The Maoriland Worker and Blasphemy in New Zealand, 91 Lab. Hist. 113, 113 (2006).

53 See Vodanovich, supra note 39, at 52.

54 Bishop Brian Carrell argued:

[The 1960s was] to be the decade in which the form of Christianity identified with European nations for over 1300 years, and with their former colonies such as New Zealand for more than a century, began to go into rapid decline. This decade would in fact witness the demise of Christendom, arguably a more obvious end in this country than in any other Western nation.


55 Davidson, supra note 26, at 314 (quoting Letter from Matt Robson, Progressive Party MP, to Jonathan Hunt, Speaker of the New Zealand House of Representatives (May 6, 2003)).


C. Modern Legislative Protections

The principal religious freedom guarantees today are found in the New Zealand Bill of Rights Act of 1990 (NZBORAs).\textsuperscript{60} This Act marks a significant new era in New Zealand constitutional history. It protects the usual civil and political rights such as the right to vote and the right to not be subjected to torture; it guarantees freedom of expression, religion, peaceful assembly, and association; and it upholds prohibitions on unreasonable search and seizure, as well as due process requirements such as the right to a fair trial.\textsuperscript{61} The Act applies only to the actions of the government and to persons exercising public functions.\textsuperscript{62}

Regarding religious freedom there are four NZBORA provisions of direct relevance.\textsuperscript{63} First, Section 13, “Freedom of thought, conscience, and religion,” provides that “[e]veryone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.”\textsuperscript{64} Section 15, “Manifestation of religion and belief,” next addresses the outward, social expression of such belief: “Every person has the right to manifest that person’s religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.”\textsuperscript{65} Section 19(1) titled “Freedom from discrimination,” states, “[e]veryone has the right to freedom from discrimination on the ground of . . . religious or ethical belief.”\textsuperscript{66} Similarly, Section 21(1) of the Human Rights Act of 1993 sets out thirteen prohibited grounds of discrimination, including: “[r]eligious belief [and] . . . [e]thical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions.”\textsuperscript{67}

Finally, Section 20 of NZBORA, “Rights of minorities,” provides protection for religious and other minorities:

\textsuperscript{60} New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109.
\textsuperscript{62} New Zealand Bill of Rights Act 1990, § 3.
\textsuperscript{64} New Zealand Bill of Rights Act 1990, § 13.
\textsuperscript{65} Id. § 15.
\textsuperscript{66} Id. § 19(1).
\textsuperscript{67} Human Rights Act 1993, 1993 S.N.Z. No. 82, § 21(1).
A person who belongs to an ethnic, religious, or linguistic minority in
New Zealand shall not be denied the right, in community with other
members of that minority, to enjoy the culture, to profess and practise
the religion, or use the language, of that minority.  

It is important to note that the NZBORA is not a supreme-law type Bill of
Rights as are the United States Constitution and Canada’s Charter of Rights
and Freedoms 1982. It expressly denies the courts the power to invalidate
legislation that violates the NZBORA’s fundamental rights and freedoms.
Section 4 states:

No court shall, in relation to any enactment (whether passed or made
before or after the commencement of this Bill of Rights),—

(a) Hold any provision of the enactment to be impliedly repealed or
revoked, or to be in any way invalid or ineffective; or
(b) Decline to apply any provision of the enactment—
by reason only that the provision is inconsistent with any
provision of this Bill of Rights. 

Despite this limitation on judicial review, courts do have a duty under Section
6 to ensure that statutory provisions are to be given a meaning that is consistent
with the rights enumerated in the NZBORA. Section 5 titled “Justified
limitations,” sets out the litmus test for the restriction of rights generally:
“Subject to [S]ection 4 of this Bill of Rights, the rights and freedoms contained
in this Bill of Rights may be subject only to such reasonable limits prescribed
by law as can be demonstrably justified in a free and democratic society.”

II. A TRILOGY OF CONTEMPORARY CONTROVERSIES: RELIGION IN SCHOOLS,
TANIWHA, AND BURQA

New Zealand’s religious liberty jurisprudence is rather thin. There have
been few religious freedom conflicts to ever reach the courts—although in the
last decade the number has steadily grown. I have selected three current
instances, of which two were litigated, as illustrations.

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69 RISHWORTH ET AL., supra note 61, at 2.
70 Id.
72 Id. § 5.
A. Religious Exercises and Instruction in Public Schools

Globally, education appears as a major battlefield between government and religion, and New Zealand is no exception. The landmark legislation, the Education Act of 1877, established a national system of education that was to be free, secular, and compulsory. The famous “secular clause” read as follows: “The school shall be kept open five days in each week for at least four hours, two of which in the forenoon and two in the afternoon shall be consecutive, and teaching shall be entirely of a secular character.” Scholars emphasize that the secularity of the national education program was not due primarily to anti-religious sentiment or the advocacy of secularism, but rather was an attempt to defuse sectarian strife.

While public education was ostensibly secular, schools permitted religious, specifically Protestant, teaching on a limited basis under the “Nelson system.” This ingenious scheme was the brainchild of Nelson clergyman, Reverend J.H. McKenzie and commenced in 1897. Given that, in practice, schools were open for five hours a day, three in the morning and two in the afternoon, and the 1877 Act required a minimum of two consecutive hours in the morning and afternoon, a school might declare either the first or last hour of the morning as one designated for voluntary religious instruction. Moreover, the 1877 Education Act allowed school buildings to be used on days and at hours other than those used for public school purposes. Thus, supporters of religious education realized this Act enabled religious instruction, as well as the statutory minimum four hours of secular education, to take place within the customary school hours.

The legislation currently in effect, the Education Act of 1964, repeats the secular clause form the earlier Act, simply formalizing this long-standing arrangement. Section 78 authorizes the technical “closure” of a school for up to one hour per week to allow religious instructors to give instruction or for religious observances to be conducted during school hours in a manner approved by the board of that school. Such instruction has to be undertaken by voluntary instructors, not teachers, but may take place within school

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73 See, e.g., Ian Breward, Godless Schools? A Study of Protestant Reactions to Secular Education in New Zealand 21 (1967).
74 Education Act 1877, § 84(2) (emphasis added).
75 See, e.g., Breward, supra note 73, at 18; Allan K. Davidson, Christianity in Aotearoa: A History of Church and Society in New Zealand 65 (3d ed. 2004).
buildings. Section 78A allows "additional religious instruction" if the majority of parents of pupils at a school desire and if the instruction does not detract from the normal curriculum. Under Section 79, parents have the right to withdraw their children from any such religious instruction or observances if they so wish.

I have briefly traversed this history of public education and religion as necessary background to my first illustration. In 2005, a widely publicized debate erupted over a weekly luncheon religious club run at a Wellington state primary school. The board of trustees of Seatoun School banned the weekly "KidsKlub" meeting, a Christian club attended by around a third of the school's four hundred pupils and which had run since 2002. The board pointed to its obligation under the Education Act of 1964 to "deliver a secular education," and it had "chosen to maintain a level of consistency by operating in the same manner outside of teaching hours, while the school [was] open." The board's legal advisers, Chapman Tripp, a major New Zealand law firm, backed its position. KidsKlub is based on a Scripture Union program, and similar groups are held in eighteen other primary schools throughout the country. The club meetings—involving Bible stories, craft activities, dances, and songs—were voluntary, held during the school's lunch-break, and taught by trained volunteer parents and grandparents. Children who wanted to attend needed the permission of their parents to do so.

A group of parents, stung by the incoming board's ban, sought a legal opinion from Sir Geoffrey Palmer, a former Attorney General and Prime Minister and the principal architect of the NZBORA. In his written opinion, Palmer concluded that the ban breached the Act's religious freedom guarantee. Pupils who did not wish to participate in KidsKlub were free to decline: there was no evidence of any compulsion nor was there any suggestion of any peer pressure exerted on children who did not wish to go. However, as for the religious rights of those pupils who wished to attend, the ban presented a case of clear infringement. As noted earlier, Section 5 of the NZBORA provides that rights and freedoms may be subject "only to such reasonable limits

77 See id.
78 Id. § 78A.
79 Id. § 79(1).
prescribed by law and demonstrably justified in a free and democratic society. The Education Act did not prescribe voluntary religious programs at schools; just the opposite, voluntary religious programs were expressly permitted. KidsKlub was in accord with the statutory scheme. The reasonableness of the ban is what was suspect here. It was difficult to see how those who did not wish to attend had experienced any curtailment of their rights. Furthermore, children who wished to attend had to have parental consent. In other words, they had to positively “opt-in.” This, then, was a different situation from those situations in which religious instruction or observances were a built-in part of the school program and those not wishing to participate had to positively “opt-out.”

The Seatoun School fracas was raised in Parliament. The Minister of Education, Trevor Mallard, was reluctant to become embroiled in the debate, simply responding that school boards were autonomous bodies: “I do not back the decision, but I back the board’s rights to make it.” After reconsidering the matter, and perhaps dismayed by the adverse publicity, the board eventually resolved to reinstitute the KidsKlub meetings.

The Seatoun School case did not involve the more traditional and prevalent form of religious instruction program run at state primary schools, namely, those run in school hours (not lunchtimes) where the presumption is that children will attend unless their parents take active steps to excuse them. The longstanding “Bible in Schools” program operates in about sixty percent of state primary schools with some four thousand volunteer instructors and about six percent of pupils opting out in their respective schools. It may well be that New Zealand courts will follow the Canadian courts and similarly rule such Bible in Schools programs as violations of the non-participating children’s religious freedom. The Nelson system of voluntary religious instruction in state primary schools preserved by the Education Act of 1964

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83 In some nations, courts have invalidated such opt-out programs on the basis that the requirement on non-participating pupils to withdraw meant the pupils incurred stigma and concomitant peer pressure to conform, and hence their religious freedom was impinged. See, e.g., Zylberberg v. Sudbury Board of Education, (1988) 52 D.L.R. 4th 577 (Can.); see also REX AHIDAR & IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE 240 (2005).
has not yet been directly challenged. But a climate sympathetic to its abolition exists.

In August 2006, the Ministry of Education issued draft guidelines on religious observances and instruction in state primary schools with the ostensible aim of clarifying the legal position and avoiding time-consuming complaints to bodies such as the Human Rights Commission.\(^8\) However, the clear practical effect of the guidelines would be to restrict religious activities at state schools. Under the guidelines, parents who desired voluntary religious instruction for their children would now have to positively “opt in” by giving written permission to the school prior to any such instruction. In the Ministry’s view, the present system requiring students to “opt out” places indirect pressure on pupils to participate and is potentially illegal under the NZBOR. “Whole of school” religious practices, such as hymns or prayers at school assemblies, ought to be avoided for they too subtly coerced children to conform.\(^9\) The hostile public response to these proposed guidelines\(^9\) led an embarrassed Ministry to hastily withdraw them and issue a rather disingenuous explanation that they were, after all, only “draft” guidelines.\(^9\) The issue will not go away and I predict spats between schools and parents, as well as attempts at reform, will continue.\(^9\)

**B. Official State Endorsement of Indigenous (Maori) Spirituality**

As the cultural disestablishment of Christianity accelerates, the appearance of a more genuine secular state has been belatedly thwarted by a recognition and adoption of a resurgent traditional Maori spirituality.\(^9\) This represents a stark volte-face, for, historically, successive governments were decidedly unsympathetic to Maori religion. The Tohunga Suppression Act of 1907 is a well-known example. With that Act, the government sought to curb the activities of Maori traditional healers, or tohunga, by making the practice of

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\(^9\) Fleming, supra note 88.


their medicinal arts a criminal offense. As Sir Geoffrey Palmer quite rightly observes, today "[s]uch a measure would clearly be contrary to the freedom of religion provisions of a Bill of Rights." 

Official government support for Maori and their spiritual concerns can be traced to the state’s belated desire to honor its obligations under the Treaty of Waitangi. Perhaps Maori culture and spirituality are a particularly suitable focus in a climate made up of such diverse ideological streams as post-modernism, anti-colonialism, post-colonial guilt feelings, and fascination with New Age values.

Examples of the official recognition of Maori spirituality are numerous. In 2002, construction on a major four-lane highway was halted, and the road was eventually redesigned, when the local Maori sub-tribe, Ngati Naho, expressed concern that the expressway would disturb the lair of Karu Tahi, a one-eyed taniwha (spiritual guardian or monster). When AgResearch, a Crown agricultural research facility, sought to develop a genetically modified class of Friesian cow that would produce milk containing the basic human myelin protein, local Maori, amongst others, vigorously objected. The sub-tribe, Ngati Wairere, claimed that alteration of whakapapa (genealogy) of humankind by mixing the genetic makeup of humans with other species would be deeply offensive and contrary to tikanga Maori (Maori custom). The Maori believed that both whakapapa (genealogy) and mauri (roughly, the life-force possessed by all things) were intangible taonga (treasures) deserving of active protection in terms of the relevant legislation and the Treaty of Waitangi.

Aside from these controversy-generating instances, the recognition of Maori spiritual concerns is becoming fairly commonplace. For example, the

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94 The Tohunga Suppression Act of 1907 made it a criminal offense for tohunga (an expert, priest, or healer) to practice on the “superstition and credulity” of Maoris or to profess to possess supernatural healing powers. Tohunga Suppression Act 1907, 1907 S.N.Z. No. 13, § 2(1); see generally Malcolm Voyage, Maori Healers in New Zealand: The Tohunga Suppression Act 1907, 60 OCEANIA 99 (1989).


99 Such recognition is now commonplace but was rare, if not positively eschewed, twenty years ago. See RISHWORTH ET AL., supra note 61, at 306-07; David Williams, Purely Metaphysical Concerns, in WHENUA: MANAGING OUR RESOURCES 289–321 (Merata Kawharu ed., 2002).
use of *karakia* (prayers) to commence court proceedings\(^{100}\) or public meetings\(^{101}\) is increasingly permitted, and sacred sites (*waahi tapu*) are acknowledged and protected under environmental legislation.\(^{102}\) One recent example is particularly interesting. There was an urgent need for a prison in Northland, and in 1999 the government selected Ngawha, a rural location, as the site.\(^{103}\) The Northland Regional Council, however, declined to grant the necessary resource consents.\(^{104}\) On April 3, 2001, the Minister of Corrections appealed to the Environment Court against the Council’s refusal, and various persons appealed the Minister’s original designation of the site as a prison. The Council’s refusal of the consents was solely due to the harmful effects the installation would have on the cultural, spiritual, and other interests of certain local Maori.\(^{105}\)

Following a lengthy twenty-one day hearing, the Environment Court delivered a 200-page decision upholding the original decision to designate the site for a prison and granting the resource consents needed by the government.\(^{106}\) Unlike the Council, the Court did not find that Maori cultural, spiritual, or health interests would be adversely affected, though not because those concerns were insignificant. Maori concerns are expressly mentioned in the purpose provisions of the Resource Management Act of 1991:\(^{107}\)

6. Matters of national importance:
In achieving the purpose of this Act, all persons exercising functions and powers under it . . . shall recognise and provide for the following matters of national importance:

. . . . .

(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, *waahi tapu* [sacred sites], and other *taonga* [treasures].

. . . . .

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\(^{101}\) The Complaints Review Tribunal (now the Human Rights Review Tribunal) dismissed an action by a member of the public objecting to a *karakia* delivered at a public meeting. See HUMAN RIGHTS COMM’N, TE RITO: HUMAN RIGHTS COMMISSION CASE NOTES 12–13 (2002) (discussing *Church v. Hawkes Bay Regional Council*); see also RISHWORTH ET AL., supra note 61, at 288.


\(^{104}\) Id. ¶ 7.

\(^{105}\) Id. ¶¶ 7–8.


7. Other matters:
In achieving the purpose of this Act, all persons exercising functions and powers under it . . . shall have particular regard to—
(a) Kaitiakitanga.\(^{108}\)

8. Treaty of Waitangi
In achieving the purpose of this Act, all persons exercising functions and powers under it . . . shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).\(^{109}\)

Of the various concerns raised by the Maori opponents to the prison—and not all Maori were against the proposal—the most fascinating contention was that the prison would interfere with the relationship of the tangata whenua (people of the land) with a taniwha (metaphysical guardian or monster) named Takaue, the spiritual guardian of the area. It was claimed that Takaue’s domain encompassed the prison site at Ngawha and that the installation would interfere with his pathways to the surface and his mana (authority or prestige).\(^{110}\)

A large section of the decision was devoted to summarizing the evidence about this taniwha.\(^{111}\) Of the ten Maori who testified, three saw the development adversely affecting Takaue. He was not some sort of mere “mascot”\(^{112}\) in the Pakeha (European) sense, said Mr. Ron Wihongi, and the proposed construction would hinder his free movement and “literally throw mud in his eyes.”\(^{113}\) On the other hand, seven other witnesses denied that the installation would have any effect on the taniwha. Mr. Wallace Wihongi doubted its ana (lair) embraced Ngawha and, even if it did, the taniwha was adaptable and “would simply find other passageways and other places to reside. The prison and the taniwha can co-exist.”\(^{114}\) Another witness suggested that Takaue “was being misused to fight a prison” in a way that he found offensive.\(^{115}\) Anglican bishop, Bishop Waiohau (Ben) Te Haara, the senior spokesman for the Ngati Rangi hapu (sub-tribe) and one of the kaitiaki

\(^{108}\) Pursuant to Section 2(1) of the Resource Management Act 1991, Kaitiakitanga is “the exercise of guardianship by the tangata whenua [native or resident] of an area in accordance with tikanga [Maori custom] in relation to natural and physical resources and includes the ethic of stewardship. Id. § 2(1).

\(^{109}\) Id. §§ 6–8.

\(^{110}\) This claim was the submission of counsel for the Regional Council. Beadle v. Minister of Corr., Env’t Ct., No. A074/2002, Apr. 8, 2002, ¶ 413.

\(^{111}\) See id. ¶¶ 415–35.

\(^{112}\) Id. ¶ 416.

\(^{113}\) Id. ¶ 419.

\(^{114}\) Id. ¶ 432.

\(^{115}\) Id. ¶ 427 (evidence of Mr. Reuben Clarke).
(guardians) of the Tuwhakino block, which included the prison site, concurred that the protesting Maori’s concerns with Takauere were pretextual.\textsuperscript{116}

The Court accepted that there were those who sincerely believed in the existence of the \textit{taniwha}, Takauere, which it described for present purposes as “a mythical, spiritual, symbolic and metaphysical being.”\textsuperscript{117} The Court respected such sincere spiritual beliefs and noted Parliament enjoined it to do so by virtue of Sections 13 and 15 of the NZBORA.\textsuperscript{118} It emphasized that nothing in its ruling ought to be taken as “belittling” the believers in the taniwha nor “the importance that their belief in Takauere has for them.”\textsuperscript{119} But there were limits both in terms of policy and practical decision-making. The court observed:

Even so, the Act and the Court are creations of the Parliament of a secular State. The enabling purpose of the Resource Management Act is for the well-being of people and communities, and does not extend to protecting the domains of taniwha, or other mythical, spiritual, symbolic or metaphysical beings . . . . Neither the statutory purpose, nor the texts of [the Act] . . . indicates that those making decisions under the Act are to be influenced by claimed interference with pathways of mythical, spiritual, symbolic or metaphysical beings, or effects on their mythical, spiritual, symbolic or metaphysical qualities.\textsuperscript{120}

Practically speaking, the Court admitted to difficulties in evaluating questions about such metaphysical matters. In the wake of conflicting evidence about the \textit{taniwha}, it had no reliable or objective way to resolve the dispute.

For instance, “the taniwha’s pathways are not physical passages that can be measured, and (at least on some accounts) the dimensions of the taniwha vary from time to time.”\textsuperscript{121} Furthermore, the tribunal had to be persuaded on the

\textsuperscript{116} Bishop Te Haara’s testimony was recounted as follows:

The Bishop testified that his elders had never mentioned \textit{Takauere} to him, and that it is not one of their taonga. He gave the opinion that the concept was being used by people for their own purposes. Bishop Te Haara gave the opinion that using the site for caring for those who have needs and helping to heal them would not offend the taniwha if there is such a manifestation in one’s mind.

\textit{Id. ¶ 425}.

\textsuperscript{117} \textit{Id. ¶ 436}.

\textsuperscript{118} \textit{Id. ¶ 437}.

\textsuperscript{119} \textit{Id. ¶ 442}.

\textsuperscript{120} \textit{Id. ¶ 439}.

\textsuperscript{121} \textit{Id. ¶ 440}. 
facts that the being existed and would be impinged upon. In light of the
evidence presented, the tribunal concluded that:

None of us has been persuaded . . . that, to whatever extent Takauere
may exist as a mythical, spiritual, symbolic or metaphysical being, it
would be affected in pathways to the surface or in any way at all by
the proposed prison, or any earthworks, streamworks, or other works
or development for the prison.\textsuperscript{122}

In terms of Section 6(e), the Court found insufficient evidence that Ngawha
was a place of any great ancestral or spiritual significance. For example, there
were no waahi tapu (sacred sites) on the prison site and the building of a prison
would not offend the relationship of local Maori with the waters of
Tuwhakino.\textsuperscript{123} But, despite this holding, it is noteworthy for the purposes of
this discussion that the court did seriously evaluate the Maori’s argument.
Similar objections by non-Maori objectors would not have been accorded the
same careful treatment.

The prison case is a clear state acknowledgement of Maori religion, but
such a stance has its critics. Some have argued that it unfairly privileges one
religion over another, or worse still, that it simply enables some Maori to
cynically exploit traditional religious beliefs for pecuniary gain.\textsuperscript{124} For secular
liberals, rationalists, and skeptics in the Enlightenment tradition, it represents a
regrettable reintroduction of religion “through the back door.”\textsuperscript{125}

C. Accommodation of Islamic Tradition

Accommodating a person’s sincere religious beliefs in those circumstances in
which the general law unintentionally yet significantly burdens that
believer’s religious practice is a perennial church-state issue, at least for many
U.S. jurists. In New Zealand, it is seldom, if ever, contentious. A statutory
example is Section 28(3) of the Human Rights Act of 1993 under which an
employer must accommodate the religious or ethical belief practices of an
employee as long as any adjustment required “does not unreasonably disrupt
the employer’s activities.”\textsuperscript{126} The most interesting recent case testing the

\textsuperscript{122} Id. ¶ 443.

\textsuperscript{123} See id. ¶¶ 447–86.

\textsuperscript{124} See, e.g., David Round, Here Be Dragons, 11 Otago L. Rev. 31 (2005).

\textsuperscript{125} See Erich Kolig, Coming Through the Backdoor? Secularisation in New Zealand and Maori
Religiosity, in The Future of Christianity: Historical, Sociological, Political and Theological
Perspectives from New Zealand, supra note 51, at 183.

\textsuperscript{126} The Human Rights Act, 1993, 1993 S.N.Z. No. 82, § 28(3).
boundaries of the need to accommodate religious claimants also generated public controversy about the nation's commitment to multiculturalism.

In Police v. Razamjoo,\(^{127}\) the question was whether two female Muslim witnesses would be permitted to wear their *burqas*—full-length, loose-fitting garments that cover the body and head save for a narrow slit for the eyes—while giving their testimony in court.\(^{128}\) Fouzya Salim and Feraiba Razamjoo were Crown witnesses in a case against the latter’s brother.\(^{129}\) Abdul Razamjoo was charged with making a false statement to police as part of an insurance fraud.\(^{130}\) He reported that his car had been stolen, lodged a claim with his insurance company, and was paid out by the company.\(^{131}\) Meanwhile, he had deposited the vehicle at the address of a Mr. Salim, another member of the local Afghani community in Auckland, where the two would supposedly remove identifying features and sell the car.\(^{132}\) Later, the vehicle was located and when questioned, Mr. Razamjoo denied he had made a false insurance claim.\(^{133}\) He alleged that Mr. Salim had stolen the vehicle from him.\(^{134}\) Mr. Salim's wife Fouzya and the defendant's sister, Feraiba Razamjoo (who was living with the Salims at the relevant time) were called by the Crown to confirm aspects of Mr. Salim's account of the events.\(^{135}\)

As the District Court noted, “there could be a considerable significance attaching to the credibility and reliability of the two witnesses who wished to give evidence whilst wearing their *burqas*.\(^{136}\) Defense counsel protested vigorously that to permit these two witnesses to testify veiled would seriously compromise the defendant's right to a fair trial under Section 25(a) of the NZBORA.\(^{137}\) The ability to observe the demeanor of the witnesses would be impaired, as would the opportunity to undertake an effective cross-examination.\(^{138}\) On the other hand, the two women were adamant that to

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\(^{129}\) Id. ¶ 11.

\(^{130}\) Id. ¶ 10.

\(^{131}\) Id.

\(^{132}\) Id.

\(^{133}\) Id.

\(^{134}\) Id.

\(^{135}\) Id.

\(^{136}\) See id. ¶ 12.

\(^{137}\) Id. ¶ 42.

\(^{138}\) Id. ¶ 80.
unveil themselves in public would be a grave infringement of their religious beliefs.\textsuperscript{139}

The Court heard extensive evidence on whether the wearing of the burqa (and other veils) was a religious requirement or simply a cultural one. Judge Lindsay Moore commented wistfully that the court "may well have been considerably assisted by evidence from a cleric or elder"\textsuperscript{140} on Islamic attire (and any adjustments that might conform with the faith), but such expertise was not provided. On behalf of the prosecution, Professor Paul Morris, a Jewish professor of religious studies at Victoria University, gave detailed testimony of the Islamic teaching on the topic. He explained that "[i]n Afghanistan, the practice of wearing the burqa is near universal and understood to be authorized by the traditions and texts above [namely the Qur’an and the Hadith]."\textsuperscript{141} The defense countered that the practice was simply a benighted cultural imposition.\textsuperscript{142} Judge Moore refused to be drawn into this thorny question. He explained:

The interrelationship between religious beliefs and cultural practices is inevitably complex . . . . What started as cultural practices may become matters of religious belief, conversely religious beliefs can result in the generation of new cultural practices or substantial changes to existing ones . . . . The original justifications for, and "validity" of, particular beliefs and customs . . . are subjects for disputation—scholarly and otherwise—but they are generally not amenable to judicial determination.\textsuperscript{143}

The relevant question for Judge Moore was not whether wearing the burqa was essential or a religious requirement but whether the claimant herself sincerely believed the practice to be required by her faith.\textsuperscript{144} Here, Mrs. Salim had told the court that she would rather kill herself than reveal her face while giving evidence.\textsuperscript{145} Her unveiling on an earlier occasion for the purpose of

\textsuperscript{139} See id. ¶ 13.
\textsuperscript{140} Id. ¶ 20.
\textsuperscript{141} Id. ¶ 16.
\textsuperscript{142} Id. ¶ 57.
\textsuperscript{143} Id. ¶ 65.
\textsuperscript{144} On the question of not weighing the validity of religious beliefs but only the sincerity with which they are held, the District Court quoted from a Maryland Court of Appeals judgment, McMillan v. Maryland, 258 Md. 147 (1970).
\textsuperscript{145} This statement was repeated in two newspaper reports: Court Says Women Must Lift Veil When Giving Evidence, N.Z. Herald, Jan. 17, 2005 and I'd Rather Kill Myself Than Remove Veil, Woman Tells Court, N.Z. Herald, Oct. 27, 2004. Curiously, the statement was not recorded in the written court judgment. See generally Razamjoo, [2005] D.C.R. 408.
being photographed for her driving license was noted but did not undercut the sincerity of her claim in the present situation. Judge Moore concluded:

This Court cannot be drawn into attempting to determine the theological or other “validity” of the practice of wearing the burqa. The evidence of Professor Morris establishes that, in the culture from which Mrs Salim comes, the practice of wearing the burqa is widespread. It is seen as a public declaration of faith. This Court... accepts that to require her to remove her burqa in public (dire emergencies or other very compelling reasons excepted) would be to shame and disgrace her both in her own eyes and in those of the community of like believers whose customs and beliefs she is proud to uphold.\textsuperscript{147}

Judge Moore noted that the present case was one of first impression in New Zealand.\textsuperscript{148} Overseas jurisprudence was considered, such as a U.S. decision in which a Florida state court held there was a compelling state interest in requiring a Muslim female to remove her burqa for a driver’s license photograph.\textsuperscript{149}

The Court emphasized that more than just the rights of the witnesses and the defendant were at issue here. Besides Mr. Razamjoo’s legitimate expectation of a fair trial and two Muslim witnesses’ right to manifest their religious beliefs, the public had rights and expectations to an open and public criminal justice system.\textsuperscript{150}

The Judge had earlier remarked that neither side had explored the possibility of an intermediate solution between the giving of evidence whilst veiled and testimony in open Court in the ordinary way with the face uncovered.\textsuperscript{151} The Court concluded that both alternatives were untenable and that it would be “contrary to the interests of justice” to require the witnesses to have their faces exposed in court.\textsuperscript{152} It similarly concluded that to allow testimony to be given “from beneath what is effectively a hood or mask” represented “such a major departure from accepted process and the values of a free and democratic society as to seriously risk bringing the Court into

\textsuperscript{147} Id. ¶ 67.
\textsuperscript{148} Id. ¶ 86.
\textsuperscript{149} See id. ¶ 89 (discussing Freeman v. State, No. 2002-CA-2828, 2003 WL 21338619 (Fla. Cir. Ct. June 6, 2003)).
\textsuperscript{150} Id. ¶107.
\textsuperscript{151} Id. ¶ 20.
\textsuperscript{152} Id. ¶ 108.
disrepute.” Judge Moore, however, devised an elegant compromise. The two witnesses would be allowed to give their evidence from behind screens so that only the judge, counsel, and female court staff would be able to see the witnesses’ faces. In addition, provided the witness’s face was fully exposed to view, the witness could wear a hat or scarf to cover her hair. The trial duly proceeded, and Mr. Razamjoo was later convicted.

The Razamjoo case fueled some heated public debate. The response from local Muslim leaders was mixed, with some denying that the wearing of the burqa in the court setting was a religious duty and others urging for a compromise to be struck. The most forthright criticism came from non-Muslims. The Otago Daily Times believed the judge had gone too far in the name of “cultural sensitivity.” The leader of the New Zealand First Party, Winston Peters, railed: “People who come here from countries with extreme religious views and customs should seriously think about resettling where practices of covering up faces are the norm.”

Indeed, the scene had been set in the trial itself. Defense counsel submitted copious material—almost entirely printed off the Internet—on the evils of Islamic fundamentalism. To permit the wearing of the burqa in New Zealand courts, counsel urged, “must be seen in the context of the political expression of the Muslim religion or Islamism which aims to relegate the Western world back to the dark ages through bombings of innocent people, televised executions and general dehumanization of women.” The Court castigated this material as “political rather than legal in nature” and dependent “upon factual assertions for which there was no evidential foundation.” The defense submissions were “extravagant and often needlessly offensive in both

153 Id. § 109.
156 Id. § 112.
157 Man at Centre of Burqa Court Case Convicted, N.Z. HERALD, Mar. 24, 2005.
162 Id. § 55.
scope and expression. There were numerous appeals to ignorance and prejudice.\footnote{Id. ¶ 73.}

A recurring concern in the public controversy was the very idea of special allowances or exceptions for other religions and cultures. "When in Rome, do as the Romans do" was the popular sentiment. At trial, defense counsel had urged that any ruling accommodating the witnesses should be viewed as a most dangerous precedent with "the potential to infiltrate New Zealand's legal system by creating a separate justice system for Muslims in what is essentially a secular society."\footnote{Id. ¶ 54.} By coming to New Zealand, the two Islamic witnesses had tacitly agreed to obey New Zealand laws and so they ought not "now demand special laws for themselves."\footnote{Id. ¶ 56.} One recalls here the similar U.S. concern expressed in a nineteenth-century polygamy decision in which the Supreme Court rejected a religious-based exemption from the general law lest this in effect "permit every citizen to become a law unto himself."\footnote{Reynolds v. United States, 98 U.S. 145, 167 (1879). This fear of "courting anarchy" was reiterated by the majority of the Supreme Court in Employment Div. v. Smith, 494 U.S. 872, 888 (1990).}

The New Zealand courts have not, however, adopted this sanguine, unbending view. Indeed, the aftermath of the Razanjoo case has by no means been negative. Policy-makers, well aware of the issues raised by the case, responded in the form of a statutory accommodation. The Evidence Act of 2006 provides that a judge may restrict the cross-examination of a witness on the grounds of "the linguistic or cultural background or religious beliefs of the witness."\footnote{Evidence Act 2006, 2006 S.N.Z. No. 69, § 95 (3)(c).}

III. THE 1981 UNITED NATIONS DECLARATION ON RELIGIOUS DISCRIMINATION

The 1981 U.N. Declaration has received only sporadic and passing mention in New Zealand in the twenty-five years since its adoption by the General Assembly on November 25, 1981.\footnote{1981 U.N. Declaration, supra note 10.} Part of this phenomenon is no doubt attributable to its status as a mere declaration and not a convention.

New Zealand has always been an enthusiastic supporter of the United Nations and has traditionally been at the forefront of those nations who sign
(and later ratify) U.N. treaties and conventions on the protection and advancement of human rights.\textsuperscript{169} The Human Rights Commission studied a draft version of the 1981 U.N. Declaration at its August 19, 1981 meeting\textsuperscript{170} and, in a letter to the Prime Minister, recommended that “New Zealand should accept the Draft Declaration . . . by voting for it in the United Nations General Assembly.”\textsuperscript{171} I will not evaluate New Zealand’s compliance with the 1981 U.N. Declaration on an article-by-article basis, but instead, I will focus on several issues of particular relevance to the New Zealand situation.

The free exercise provision in Article 1 is essentially replicated in Sections 13 and 15 of the NZBORA.\textsuperscript{172} However, there is no direct equivalent in the NZBORA of Article 1(2)’s prohibition on “coercion” in matters religious. The ban on religious discrimination in the Human Rights Act of 1993 implements the thrust of Article 2’s proscription upon discrimination based on religion or belief.\textsuperscript{173}

Article 4 of the 1981 U.N. Declaration exhorts states to take effective measures to ensure that discrimination on the grounds of religion or belief is prevented throughout society, such measures to include the enactment of appropriate legislation and mechanisms to combat religious intolerance.\textsuperscript{174} This Article was invoked in argument in the first of only two reported New Zealand cases to ever cite the 1981 U.N. Declaration.

The 1987 High Court decision \textit{Huakina Development Trust v. Waikato Valley Authority}\textsuperscript{175} is an important case marking the birth of the modern era of serious state recognition of Maori social and political claims. The case concerned a rather bland, everyday regulatory matter. A dairy farm sought a water right under the Water and Soil Conservation Act of 1967 to permit it to discharge treated dairy shed effluent into the Kopuera Stream, a tributary of the Waikato River. The Waikato Valley Authority and, on appeal, the Planning Tribunal granted consent but the Huakina Development Trust, a body

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item 1981 U.N. Declaration, supra note 10, art. 4.
\item [1987] 2 N.Z.L.R. 188 (H.C.).
\end{enumerate}
\end{footnotesize}
representing the Tainui, the local Maori tribe, was upset.\textsuperscript{176} The Trust objected to the water right on the ground it infringed the Tainui's religious beliefs.\textsuperscript{177} The discharge of this wastewater would, it said, pollute a treasured, near sacred, tribal resource, namely, the Waikato River.\textsuperscript{178} This river is of great cultural and spiritual significance and the release of effluent, even though processed to the stage of eliminating any toxic elements, offended the religious beliefs of the tribe. The Planning Tribunal ruled that, according to the relevant statutory provision, it was not able to take such "purely metaphysical concerns" into account in adjudicating upon water rights.\textsuperscript{179} The Trust appealed to the High Court invoking Article 4 of the 1981 U.N. Declaration. It argued that, "if the Tainui people cannot express their concern in hearings affecting the object of their beliefs then the legislation must be viewed as intolerant of their beliefs."\textsuperscript{180}

The High Court held that the Planning Tribunal had erred in excluding from consideration "evidence [which] establish[ed] the existence of spiritual, cultural and traditional relationships with natural water held by a particular and significant group of Maori people."\textsuperscript{181} The case was remitted to the Tribunal for rehearing, with the Tribunal now being obliged to take due account of these metaphysical concerns. Of present interest to this Article is the Court's ruling that international instruments, including declarations, are available as aids in the interpretation of statutes.\textsuperscript{182} New Zealand was, the Court noted, a signatory to conventions and declarations guaranteeing the right to practice one's religion and to develop one's culture and the "most obvious" was the 1981 U.N. Declaration.\textsuperscript{183} Given that the relevant section of the Water Act lacked defined criteria by which to evaluate objections to the granting of water rights, it was acceptable to interpret that Act in light of New Zealand's international obligations. These obligations protected religious liberty and thus, the spiritual and cultural matters were proper considerations in the ultimate determination.

Article 5's concern for the preservation of the religious upbringing rights of parents and guardians has been recognized in a number of statutory provisions in New Zealand domestic legislation and has featured in several cases. Article

\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id. at 198 (quoting New Zealand Steel Ltd, Panning Tribunal, Decision A116/81, Dec. 16, 1981).
\textsuperscript{180} Id. at 197.
\textsuperscript{181} Id. at 223.
\textsuperscript{182} Id. at 215.
\textsuperscript{183} Id. at 217.
5(1) mirrors the language of Article 18(4) of the International Covenant on Civil and Political Rights (ICCPR), with the latter granting parents the right “to ensure the religious and moral education of their children in conformity with their own convictions.”\textsuperscript{184} The ICCPR was ratified by New Zealand,\textsuperscript{185} and the Long Title of the NZBORA clarifies that one of the two objects of the statute is “[t]o affirm New Zealand’s commitment to the [ICCPR].”\textsuperscript{186}

The 1981 U.N. Declaration was passed prior to the adoption of the 1989 United Nations Convention on the Rights of the Child (CRC).\textsuperscript{187} The latter reiterates parents’ religious rights (and duties) but, significantly, the 1989 CRC also recognizes the emergent rights of religious autonomy for children.\textsuperscript{188} This potential clash of religious interests has yet to be fully analyzed, let alone resolved, in New Zealand jurisprudence but it is interesting that other cases citing to the 1981 U.N. Declaration have touched on this conflict.

In an important religious freedom case, \textit{Re J (An Infant): Director-General of Social Welfare v. B & B}, the 1981 U.N. Declaration (along with the CRC and the ICCPR) was mentioned, in passing, by the High Court.\textsuperscript{189} A three-year-old boy, J, had suffered a life-threatening nosebleed.\textsuperscript{190} His parents, devout Jehovah’s Witnesses, refused to permit the administration of a blood transfusion, a procedure deemed necessary and urgent by the medical staff at the local hospital.\textsuperscript{191} At the request of the attendant doctor, and with the help of the police and the Department of Social Welfare, the hospital sought and obtained the relevant court order without informing the parents.\textsuperscript{192} The Director-General of Social Welfare was appointed guardian of the child for the purpose of authorizing the transfusion.\textsuperscript{193} J received the blood transfusion as the attendant practitioner was adamant that J would have died without it.\textsuperscript{194} A second transfusion was also undertaken as a necessary part of J’s ongoing care.

\begin{footnotes}
\item[185] The ICCPR was signed by New Zealand on November 12, 1968; ratified on December 28, 1978; and entered into force on March 28, 1979.
\item[188] See id.
\item[191] Id.
\item[192] Id.
\item[193] Id.
\item[194] Id.
\end{footnotes}
due to the boy’s dangerously low hemoglobin level. Subsequently, the Director-General applied to the High Court under Section 9 of the Guardianship Act of 1968 for J to be placed under the guardianship of the Court, an application which was duly approved. The High Court appointed a doctor as an agent of the Court for the purposes of consenting to medical treatment, whilst the parents were appointed as general agents of the Court in all other respects. J recovered and required no further blood transfusions.

J’s parents were “deeply upset” by the High Court’s decision to override their wishes. Unfortunately, J had contracted Adult Respiratory Distress Syndrome, a life-threatening condition, seemingly as a result of the blood transfusions. The parents appealed to the Court of Appeal, arguing that the order was in breach of their fundamental rights as parents—to determine the religious upbringing and medical treatment of one’s children—guaranteed under the NZBORA. The Court of Appeal affirmed these parental rights but added that these rights never were, or could be, unlimited: “The upbringing of children extends to making decisions for them as to health and medical treatment. That is a right long recognized under the common law in any event . . . though . . . it was never absolute.”

The parents argued that their parental rights could only be limited to the extent justified in a free and democratic society. The burden, they contended, rested upon the state to prove that any limitation upon their rights was “justified and [was] the least intrusive limitation necessary in the circumstances.” In terms of the particular medical procedure here, it was submitted that the state ought to have established, “to a high degree of probability,” that the blood transfusion was necessary, that it was not ineffective or controversial, that it would not cause substantial harm to the patient, and that there was no alternative medical management acceptable to the guardians available.
The approach sought by J’s parents was rejected. It was not, according to the Court of Appeal, a matter of deciding whether the state had justifiably restricted the parents’ rights. Rather, it was a question of what the parents’ rights were to begin with. Taking a child-centered approach, the Court held that certain fundamental rights and interests of the child inherently circumscribed the rights of the parents. One did not need to balance the interests of the state with those of the parents because the parents’ rights were inherently limited by the rights of the child. The Jehovah’s Witness parents’ religious freedom was intrinsically limited by their three-year-old son’s right to life.

While the Court of Appeal affirmed the parental right to religious upbringing, it also alluded to the potential curtailment of that right at the point when the maturing child is able to assert his or her own religious autonomy: “The right of parents to manifest religion in practice extends to bringing up and educating children in that religion until such time as their children are able to exercise their own freedom of religion.” The merits and potential operation of a child’s independent right of religious freedom is a fascinating subject that is beyond the scope of this paper.

CONCLUSION

In a 2004 report, the Human Rights Commission published a comprehensive survey of the state of human rights protection in New Zealand. Its overall verdict on the right to freedom of religion was favorable: “By world standards, New Zealand is very tolerant of religious diversity within the context of a secular State.” The conclusion section did, nonetheless, proffer a list of items under the heading, “where we need to do better.” These were:

[1] There continue to be some conflicts between the human rights of individuals and the beliefs of religious groups, particularly in relation to gender and sexual orientation.

203 Id. at 146.
204 Id.
205 Id. at 145.
206 See AH-DAR & LEIGH, supra note 83, at 203–09.
208 Id. ch. 9, § 5.
209 Id.

[3] The use of only Christian prayers in public or State ceremonials raises the question of offence to or exclusion of people of other beliefs or no religious beliefs.

[4] Accommodation of religious observance and practice in the workplace and in schools is not always accepted by employers, employees and or by the general public.

[5] While Maori spirituality is recognized in a variety of legislation, there is some criticism of the fact that other spiritual values are not accorded similar recognition.210

Most nations would, I suggest, take comfort in as short and mild a list of shortcomings as this. To take each point in turn, the first concern is probably alluding to clashes between conservative religious groups and gay persons, especially on the vexed question of the appointment of openly practicing homosexual or lesbian candidates as ordained clergy. While these clashes have no doubt been acrimonious for those involved, some denominations, such as the Methodist Church, have reached a consensus on the matter.211

Second, sporadic outbursts of animosity towards Muslims and other minority religionists have been rare. But, when they have flared, they have usually been met with equally fierce denunciation by the members of the public embarrassed at the ignorant behavior of a few of their benighted fellow citizens. For example, the public strongly condemned the actions of delinquent youths who sprayed offensive graffiti on Auckland mosques after the London bombings on July 7, 2005.212 There was similar swift denunciation of the deplorable desecration of Jewish cemeteries in Wellington in 2004.213 In 2006, Labour MPs, outraged at the Exclusive Brethren financial links with the national party, criticized the sect.214 A Brethren leader described the complaints as "‘one of the most vicious, hurtful and sustained attacks’ on a

210 Id.
214 See Chapple, supra note 7.
minority religious group [from senior members of the government] in the
history of New Zealand." While the public's defense of the Exclusive
Brethren was not overwhelming—the Brethren's inglorious history of ruthless
ostracism of former members excommunicated from the sect being well
known—there were, nonetheless, voices raised in support. When, by way of
retaliation, the government threatened to remove the Brethren's religious belief
exemption from union access to workplaces, the Otago Daily Times rightly
condemned this as "the act of a bully." 

The difficult question of whether public utterances strongly critical of
minority religious groups ought to be condemned as "religious vilification" or
"incitement to religious hatred" has yet to be finally resolved in New
Zealand. In 2005, New Zealand First Leader, Winston Peters, was accused of
"Islamic bashing" in a speech in which he warned of the dangers of "open-
door immigration policies." Peters stated, "We cannot take our tradition of
toleration for granted when we are importing fanatics for whom that tradition
is alien. In New Zealand the Muslim community has been quick to show us
their more moderate face, but there is a militant underbelly here as well." It
may be that a law to prohibit religious vilification will be introduced here in
the near future in the name of "combat[ting] intolerance," to use the words in
Article 4 of the 1981 U.N. Declaration. This is clearly a challenging subject
for another article, but I believe such a law would be misplaced.

Third, the last vestiges of public Christian ritual and symbolism are just
that. There is a steady pattern of dismantling these historic Christian remnants
from the public square. With each passing year, people of faiths other than
Christianity, as well as atheists and agnostics, have less to complain about.
Indeed, it might be replied that it is the Christian community that has been

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215 Id.
union may be denied access to a workplace if all the employees of a workplace are employed by an employer
who holds a current certificate of exemption. Employment Relations Act, 2000, 2000 S.N.Z. No. 24, § 23(a)
(N.Z.). Exemption certificates may be issued to an employer who is "a practising member of a religious
society . . . whose doctrines or beliefs preclude membership of any organisation or body other than the
religious society . . . of which the employer is a member." Id. § 24(1).
218 The government had "no plans to legislate against hate speech" as of March 2005. Opinion, No Plans
220 Id.
222 See Ahdar & Leigh, supra note 83, at 377-87.
remarkably tolerant. Not only are most of their cherished historic public observances being expunged, but they face regular gallling reminders that Christianity must “know its place” in 21st century New Zealand. For instance, the Broadcasting Standards Authority recently dismissed a complaint by a Presbyterian pastor about a promotion run on the state-owned television station. According to the Authority, the exclamation, “For Christ’s sake!” in the commercial, was not a blasphemous phrase and did not call for censure by the state watchdog. There is no small irony here. The same Commission that expresses pleasure at the explicit state recognition of indigenous spirituality seems oblivious to the offense that a much greater segment of New Zealand society feels when their privileged religious symbols and institutions are criticized, if not outright dismantled. Privileging of Maori spirituality is fine; privileging of Christianity, however, implicates religious liberty.

Fourth, resistance to the accommodation of religious difference by those New Zealanders long insulated from cultural and religious diversity is undoubtedly present, but I strongly suspect time alone will break down such attitudes. Events such as the Diversity Forum on National Identity, Cultural Diversity and Harmonious Relations in Wellington, August 21–22, 2006, where over 650 people attended to discuss and formulate a Draft National Statement on Religious Diversity, may contribute to this end.

Finally, criticism of the state’s privileging of Maori spirituality remains as an irritant amongst many. However, the criticism remains civil and temperate in tone, and is probably nothing more than a healthy public venting of contrary opinion. The most obvious “other spiritual values [that] are not accorded similar recognition” are the Christian beliefs of the majority. One solution may be to retain the Christian ceremonial remnants while broadening state recognition of the religious demographics of its citizenry to include Muslim,

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223 Editorial, Pastor’s Complaint Not Upheld, OTAGO DAILY TIMES, Aug. 21, 2006, at 7.
224 See NEW ZEALAND TODAY, supra note 207, ch. 9, §5 (stating under the heading, “Where New Zealand does well,” that “Maori spirituality is recognised in some legislation” and that “Maori spiritual beliefs are an important source of values, education and support for human rights initiatives”).
226 NEW ZEALAND TODAY, supra note 207, ch. 9, § 5.
Hindu, and other relatively recent religious traditions alongside the currently fashionable Maori spiritual rituals.

Overall, religious liberty might be said to be in a healthy condition. New Zealand's record is not perfect, and there ought never to be room for complacency, but I think the framers of the 1981 U.N. Declaration would be quietly pleased to learn that the spirit, if not always the full letter, of their Declaration has been kept in a small, liberal democracy in the temperate zone of the South Pacific.