

## **LAW AND RELIGION IN THE SOUTH PACIFIC**

**Background material prepared by the Hon Justice A P Randerson<sup>1</sup>**

**for a Symposium to be held at**

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1. I am honoured to have been invited to attend this Symposium and to renew my acquaintance with the Honourable Justice Clifford Wallace whom I have been privileged to meet on a number of occasions at judicial conferences in the South Pacific.
2. The European history of New Zealand is much younger than that of the United States, but our two countries share many common values. We have fought side by side in the Second World War and in a number of conflicts since then. Our links extend to matters of trade, security and to the many friendships existing between the citizens of our two countries. In matters of religion, churches from your country have been active in New Zealand and elsewhere in the South Pacific.

### **Religious expression in New Zealand**

3. Prior to the arrival of European settlers in New Zealand, our islands were occupied for at least 800 years by the indigenous Maori population. Maori had traditional religious practices and others have emerged since as a blend of Christian and traditional beliefs. With the advent of European settlers in the early part of the 19<sup>th</sup> Century, many Maori were converted to various forms of Christianity including those practised by the Church of England, Roman Catholic, Methodist and Presbyterian Churches. This reflected the fact that the great majority of the early settlers came from the United Kingdom. Later, other faiths were introduced including the Church of Jesus Christ of the Latter Day Saints (LDS). Figures prepared by the LDS in 2009 show there were just over 100,000 adherents, or 2.36% of the population of 4.2 million. More recently again, the religions of the Middle East and Asia have been introduced.

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4. Unlike the United Kingdom, New Zealand has never had a religion officially recognised by the State and there is a constitutional separation between church and State. Despite that, our National Anthem (God Defend New Zealand) is avowedly Christian in theme. A variety of New Zealand statutes recognise and protect our religious beliefs in a number of fields. These include laws prohibiting the incitement of religious disharmony;<sup>2</sup> disturbing congregations in public places or assembled for public worship is an offence;<sup>3</sup> blasphemous libel is an offence;<sup>4</sup> an employer must accommodate a religious or ethical belief so long as it does not unreasonably disrupt the employer's activities;<sup>5</sup> although teaching at State primary schools is to be of a secular nature, provision is made for schools to "close" for stipulated periods to enable religious instruction or observance to take place so long as parents are able to opt out of the instruction or observance for their children;<sup>6</sup> State funding of schools which reflect a "special character" includes schools in which religious observance and religious instruction is guaranteed.<sup>7</sup>
5. A "National Statement on Religious Diversity" has been prepared in New Zealand.<sup>8</sup> A copy of the Statement is attached.

### **The New Zealand Bill of Rights Act 1990**

6. Unlike the United States, New Zealand does not have a written constitution. Instead, the constitution is similar to that of the United Kingdom. It is based on both written and unwritten law comprising a series of individual statutes, common law and parliamentary conventions.
7. In 1990, New Zealand passed a Bill of Rights which operates in a similar way to the Canadian Charter of Rights. The Bill of Rights applies to acts done by the legislative, executive and judicial branches of the Government of New Zealand. It also applies to any person or body in the performance of any public function,

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<sup>2</sup> Human Rights Act 1993, s 131.

<sup>3</sup> Summary Offences Act 1981, s 37; Maori Community Development Act 1962, s 30(1),

<sup>4</sup> Crimes Act 1961, s 123.

<sup>5</sup> Human Rights Act 1993, s 28(3).

<sup>6</sup> Education Act 1964, ss 77–79.

<sup>7</sup> Private Schools (Conditional Integration) Act 1975.

<sup>8</sup> Prepared in 2007 for the New Zealand Diversity Action Programme (facilitated by the Human Rights Commission) and authored by Professor Paul Morris.

power or duty conferred or imposed by law.<sup>9</sup> The rights and freedoms contained in the 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.<sup>10</sup>

8. Unlike the courts of the United States, New Zealand courts do not have the power to strike down a statute. Instead, the court:

- (a) May declare that a statute or other governmental activity is inconsistent with the Bill of Rights;
- (b) May award damages in some cases as a means of vindicating rights infringed; and
- (c) Must interpret any enactment consistently with the rights and freedoms wherever such a meaning can be given.

9. In relation to religion, sections 13 and 15 of the Bill of Rights are important:

**13. Freedom of thought, conscience, and religion**

Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

**15 Manifestation of religion and 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.

10. Section 19 of the Bill of Rights provides for freedom of discrimination on any of the prohibited grounds of discrimination listed in the Human Rights Act 1993 including discrimination on the grounds of religious belief.

11. These provisions have their origins in Articles 18(1) and 19(1) and (2) of the International Covenant on Civil and Political Rights (1996) and Article 9 of the European Convention on Human Rights and Fundamental Freedoms (1950). Their rationale is in the promotion of personal autonomy and fulfilment; assisting society's search for truth by encouraging the expression of a multiplicity of views; and, at least indirectly, facilitating democratic government.

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<sup>9</sup> New Zealand Bill of Rights Act 1990, s 3.

<sup>10</sup> New Zealand Bill of Rights Act 1990, s 5.

12. Happily, the courts in New Zealand have not been called upon with any frequency to determine the kind of heady issues which the courts of the United States, the United Kingdom and Europe have been called upon to deal with in this field. This probably reflects in part the generally secular nature of the community in New Zealand but also suggests a generally tolerant and respectful attitude towards the practice of religion in our country.
13. This is reflected, for example, in the common practice of churches sharing church buildings and facilities in smaller rural areas by holding services at different times in the same church. In other places, Christian denominations with broadly similar beliefs may form a United Church. Ecumenical services are also common with clergy from different faiths taking part in major public services or on special occasions.
14. The Court of Appeal of New Zealand has held that sections 13 and 15 of the Bill of Rights do not impose positive duties on the State. Rather, they affirm freedoms of the individual which the State must not breach.<sup>11</sup>

### **Justiciability**

15. In New Zealand, as in other parts of the common law world, the courts have had to grapple with the issue of justiciability in religious issues. In 2002, while a Judge of the High Court of New Zealand, I was asked to determine an issue in relation to the Bahá'í Church.<sup>12</sup> The plaintiff had been dismissed as a member of the Church and sought a declaration that this had occurred unlawfully and claimed a consequential order quashing her removal. The central reason for her removal was an allegation that she had failed to carry out the religion according to its tenets.
16. The principles of the Bahá'í faith had been expounded in over one hundred volumes of sacred texts. The prospects of being required to adjudicate on the merits of the plaintiff's dismissal were daunting to say the least. Counsel for the

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<sup>11</sup> *Mendelsohn v Attorney-General* (1999) 2 NZLR 268 (CA) at 273.

<sup>12</sup> *Marshall v National Spiritual Assembly of the Bahá'ís of New Zealand Inc* [2003] 2 NZLR 205 (HC).

Church submitted that the matters at issue were non-justiciable as being wholly or mainly spiritual or religious issues in which state courts should not intervene.

17. I did not have any difficulty in accepting the proposition that a determination of matters of faith is at the very margins of justiciability, given the existence of authorities in New Zealand and elsewhere to the effect that the courts are reluctant to determine disputes of an ecclesiastical nature where matters of faith or doctrine are at issue. On the other hand, the courts will intervene where economic or proprietary rights have been affected or where constitutional rights may be infringed.<sup>13</sup> Fortunately, I was able to decide the case by reference to the constitution of the Church which is administered by a supreme body called The Universal House of Justice located in Israel.
18. Not infrequently, the courts have been called upon to resolve disputes between factions of churches in New Zealand whose congregations are composed predominantly by immigrants from Pacific Island States, particularly Tonga and Samoa. Typically, substantial funds have been provided for church buildings and other purposes and, upon splits developing in the congregation, disputes arise as to which faction is entitled to the benefit of the funds contributed or, perhaps, which faction is entitled to choose a pastor to preside over the congregation. Issues such as these have largely been decided on the basis of property law and the interpretation of the constitution of the churches involved.

### **Some practical issues arising in the court**

19. In a recent case,<sup>14</sup> the District Court in New Zealand was called upon to decide whether two witnesses in a prosecution could give their evidence wearing burqas, a garment which covers a woman's entire face and body. The defendant argued that, if the witnesses were veiled, his right to a fair trial would be violated – in particular by the inability to question the witnesses with the benefit of viewing their

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<sup>13</sup> *Marshall v National Spiritual Assembly of the Bahá'is of New Zealand Inc* [2003] 2 NZLR 205 (HC); *Mabon v Conference of the Methodist Church of New Zealand* [1998] 3 NZLR 513 (CA) at 523; *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1992] 1 WLR 1036 (QB); *Ukrainian Greek Orthodox Church v Ukrainian Greek Orthodox Cathedral of St Mary the Protectress* [1940] SCR 586; *Lakeside Colony of Hutterian Brethren v Hofer* (1992) 97 DLR (4<sup>th</sup>) 17 at 17–20; *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95, 187 ALR 92 at 104 and 113.

<sup>14</sup> *Police v Razamjoo* [2005] DCR 408.

demeanour. The Court held that the witnesses were to give evidence without wearing their burqas but could do so with the use of a screen. This meant that the public could not observe the witnesses. They would be seen only by the Judge, counsel and a female member of the court staff.

20. The Court held that the weight of the right to manifest one's religion had to be balanced against the right of the defendant to a fair trial and the broader public interest in maintaining public confidence in the criminal justice system.
21. One manifestation of the tolerance shown to different religious practices is that New Zealand courts and tribunals frequently allow prayers (called karakia) to be given by Maori in court where their interests are at stake. This reflects a growing acceptance of Maori culture and practice in public life following the settlement of historic claims between the State and Maori under the Treaty of Waitangi Act 1956, a process designed to right past injustices by the State towards Maori.
22. Witnesses in Court must swear an oath on the Holy Bible or on other sacred texts such as the Koran. Alternatively, a witness may make a simple affirmation declaring they will tell the truth.

### **Law and Religion in the South Pacific**

23. The Pacific Islands are commonly divided into three broad culture areas: Polynesia, Melanesia and Micronesia. Leaving aside Australia and New Zealand, the total population of Pacific Island countries and territories was approximately ten million in 2004. Three predominantly rural countries (Papua New Guinea, the Solomon Islands and Vanuatu) dominate population figures for the region. The bulk of the population live in rural areas and many are isolated geographically with major difficulties in transport and communication. Most of the Pacific Island states are now independent sovereign nations but some remain in constitutional or economic relationships with Australia, New Zealand, France, Britain, Germany and the United States. These relationships reflect colonisation in the 19<sup>th</sup> century.
24. Chief Justice Sapolu of Samoa will be much better placed than myself to speak of religious practices in the Pacific Islands, and this University has also previously

had the great advantage of a learned paper from Ron Paterson, Emeritus Professor of Law from the University of the South Pacific in Vanuatu.<sup>15</sup> My personal experience, however, extends to the Solomon Islands and Vanuatu in my role over the last ten years as Chancellor of the Anglican Church of Melanesia.<sup>16</sup> I have also visited Fiji, Tonga, the Cook Islands and Tahiti and have some knowledge of their circumstances.

25. As Professor Paterson noted in his paper, missionaries began visiting the South Pacific in the late 18<sup>th</sup> century but with greater frequency from the 1830's onwards. Of course they came mainly from England and Europe so that the Christian churches tended to predominate: Anglican, Roman Catholic, Presbyterian, Methodist and Lutherans. Mormon missionaries began to appear in eastern Polynesia in 1846, in New Zealand in 1854, and later in other Pacific Island countries. According to figures compiled by the LDS in 2009, there were about 220,000 adherents to that faith in Samoa (or 30% of the population), 120,000 in Tonga (45% of the population), and 65,000 (22% of the population) in American Samoa. The Church is also active in other Pacific Island states but in much lower numbers.
26. I can speak about the early formation of the Anglican Church in Melanesia. There has been a strong connection in this respect between New Zealand, the Solomon Islands and Vanuatu. That connection dates back to the 1840's when the first Anglican Bishop of New Zealand, George Augustus Selwyn, travelled by tiny boat to the Solomons. With the assistance of Bishop John Patteson (who was later martyred), Selwyn was successful in establishing the Church in both the Solomon Islands and the New Hebrides (now Vanuatu).
27. Today, about one-third of the population of the Solomon Islands are Anglicans and the Church is also strong in the northern parts of Vanuatu. The Church is an important stabilising influence in the sometimes volatile communities of the Solomons. Ethnic tensions there came to a head in the 1990s. A peacekeeping force provided by New Zealand, Australia and Fiji is still present. Members of the

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<sup>15</sup> Ron Paterson "New Impulses in the Interaction of Law and Religion: A South Pacific Perspective" [2003] BYU LRev 593.

<sup>16</sup> The Anglican Church (also known as the Church of England) is closest in beliefs to the Episcopalian Church in the United States.

Church are active in the fields of education, health and social services. In the period of “the troubles”, six young men belonging to the Melanesian Brotherhood were murdered on the weather coast of the main island (Guadacanal) while attempting to mediate problems which had arisen in the district while the police were endeavouring to capture a notorious criminal.

28. The real issues in the Solomons and Vanuatu are not so much the maintenance of religious freedoms which are alive and well. Rather, the issues relate to poverty, unemployment, health, education and social issues such as alcohol and drug abuse and domestic violence. The Church has a central role in all these issues but can only operate in a stable and secure political context. The first objective must therefore be to secure and maintain a stable environment in which the work of the Church can flourish.
29. The potential for violence and political unrest is never far below the surface in a number of Pacific Island countries as recent events in Tonga and Fiji have illustrated. All faiths including the LDS play an important part in addressing these issues.

### **A Case Study on the Relationship between the Constitution and Freedom from Religious Persecution in Tuvalu**

30. The role of Christianity in many other Pacific states is of major significance. Churches and their leaders enjoy powerful positions both at village and national levels. Rather than the freedoms of religious minorities being challenged by secular majorities, the freedoms of both secular and religious minorities have been challenged by religious majorities.
31. Despite the fact that all the written constitutions of the Pacific jurisdictions, except Niue, contain some protection of the right to freedom of religion, a major issue has been the freedom of minority denominations to practise their religions. Some jurisdictions have legislative restrictions on authorised faiths. In the Cook Islands, for instance, legislation provides that any faiths other than the four already authorised by the legislation must obtain the approval of the Minister of Justice

before they can be established.<sup>17</sup> Notably, art 64 of the Cook Islands Constitution guarantees freedom of religion and other fundamental rights, subject to limitations imposed by law “for protecting the rights and freedoms of others or in the interests of public safety, order, or morals, the general welfare, or the security of the Cook Islands”.

32. This kind of emphasis on majoritarian control and stability is well illustrated by the Tuvaluan experience. Tuvalu’s Constitution appears to protect freedom of religion, but that right may be restricted where necessary if the exercise of that right may be “divisive, unsettling or offensive” to the people, or may “directly threaten Tuvaluan values or culture”.<sup>18</sup> In *Teonea v Pule o Kaupule*,<sup>19</sup> Tuvalu’s High Court was confronted by a case where the Exclusive Brethren Church had attempted to establish itself on an outlying Tuvaluan island, only to be banned by the Island’s council of elders and to have its congregation subject to an attack by stoning. The High Court held that the right to freedom of religion was subordinate to the cohesion of Tuvaluan society. This was overturned by the Court of Appeal (Fisher JA and Paterson JA, Tompkins JA dissenting).<sup>20</sup> Fisher JA, delivering the leading majority judgment, held that the constitution required the balancing of the varying interests in each individual case, and social cohesion should not necessarily trump individual rights. In this case the restriction of such an important right was excessive and the need for stability should not have prevailed.<sup>21</sup>
33. In similar cases in Samoa the courts have set aside decisions limiting the number of churches in a village.<sup>22</sup> And in New Caledonia, two women refused to perform certain customary tasks on account of their being Jehovah’s Witnesses. They were banished and when they refused to leave they were whipped. The Cour de Cassation rejected the proposition that the whipping could be justified as a form of customary justice.<sup>23</sup>

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<sup>17</sup> Religious Organisations Restrictions Act 1975 (CK).

<sup>18</sup> Constitution of Tuvalu, art 29.

<sup>19</sup> *Teonea v Pule o Kaupule* [2005] THC 5.

<sup>20</sup> *Teonea v Pule o Kaupule* [2005] TVCA 2.

<sup>21</sup> I believe this decision may be subject to a further appeal to the Privy Council in the United Kingdom.

<sup>22</sup> For example *Sefo v Attorney-General* [2000] WSSC 18.

<sup>23</sup> *Waehnya et autres* Cour de Cassation Ch Crim 5871.

## **New Zealand Law Commission Paper on the interface between issues of customary law and human rights in the Pacific**

34. In 2006, the Law Commission of New Zealand issued a study paper comprehensively dealing with issues of customary law and human rights in the Pacific.<sup>24</sup> The Law Commission is a law reform agency established by statute and supported by the State. Over time, it has produced many worthwhile reports on law reform on matters referred to it by the Government or investigated on its own initiative. Its findings are widely respected amongst the members of the legal profession and the wider community. The paper provides important factual material identifying the constitutional provisions relating to the Pacific Island states and the sometimes difficult choices which have to be made between maintaining local values and custom while implementing universal human rights now widely recognised internationally. The paper offers suggestions as to how human rights and local custom may be harmonised.

35. Chapter 9 of the report is devoted to freedom of religion and freedom of speech and movement. The paper concludes<sup>25</sup> that:

Presently, custom prevails over human rights only where constitutions exempt particular customs from the application of certain human rights or where constitutions omit certain rights that may conflict with custom. More usually, however, constitutions give guidance to courts on how any conflicts between custom and rights are to be managed.

36. The Law Commission paper rejects as unhelpful the conclusion that human rights on the one hand, or custom on the other, should trump or override the other. Both are considered to be plainly important. The Commission expresses the view that:<sup>26</sup>

... the better approach is one that acknowledges that cultures and legal systems throughout the world have had to adapt to universal human rights standards – Pacific culture and custom law no more than many others –

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<sup>24</sup> Law Commission *Converging Currents, Custom and Human Rights in the Pacific* (NZLC SP17, 2006).

<sup>25</sup> At 14.21.

<sup>26</sup> At 14.25. A “general guidance” clause of this type would be set out in the constitution of the country in question.

and that encourages and enables a more nuanced and contextual approach to questions of conflict between custom and human rights. To that end we prefer a general guidance clause to trumping.

37. Building on this, the paper suggests that courts should first look for the essential values of each system.<sup>27</sup>

The court [should] maintain, as far as practicable, the values and purposes of the custom law, while modifying it to the extent necessary to give effect to the relevant human right.

### **A final observation**

38. The relative lack of flashpoint freedom of religion issues in New Zealand might be considered cause for the celebration of the tolerance of New Zealanders. On the other hand, as Stanley Fish puts it, tolerance is exercised in inverse proportion to there being anything at stake.<sup>28</sup> In other words, it is easy to be tolerant where there are no real (or perceived) threats to the majority position.

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<sup>27</sup> At 14.26.

<sup>28</sup> Stanley Fish "Almost Pragmatism: Richard Posner's Jurisprudence" (1990) 57 UChiLRev 1447 at 1466.

## ***Statement on Religious Diversity***

New Zealand is a country of many faiths with a significant minority who profess no religion. Increasing religious diversity is a significant feature of public life.

At the signing of the Treaty of Waitangi in 1840, Governor Hobson affirmed, in response to a question from Catholic Bishop Pompallier, "the several faiths (beliefs) of England, of the Wesleyans, of Rome, and also Maori custom shall alike be protected". This foundation creates the opportunity to reaffirm an acknowledgement of the diversity of beliefs in New Zealand.

Christianity has played and continues to play a formative role in the development of New Zealand in terms of the nation's identity, culture, beliefs, institutions and values.

New settlers have always been religiously diverse, but only recently have the numbers of some of their faith communities grown significantly as a result of migration from Asia, Africa and the Middle East. These communities have a positive role to play in our society. It is in this context that we recognise the right to religion and the responsibilities of religious communities.

International treaties including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights uphold the right to freedom of religion and belief - the right to hold a belief; the right to change one's religion or belief; the right to express one's religion or belief; and the right not to hold a belief. These rights are reflected in the New Zealand Bill of Rights Act and Human Rights Act. The right to religion entails affording this right to others and not infringing their human rights.

The following statement provides a framework for the recognition of New Zealand's diverse faith communities and their harmonious interaction with each other, with government and with other groups in society:

### *1. The State and Religion*

The State seeks to treat all faith communities and those who profess no religion equally before the law. New Zealand has no official or established religion.

### *2. The Right to Religion*

New Zealand upholds the right to freedom of religion and belief and the right to freedom from discrimination on the grounds of religious or other belief.

### *3. The Right to Safety*

Faith communities and their members have a right to safety and security.

### *4. The Right of Freedom of Expression*

The right to freedom of expression and freedom of the media are vital for democracy but should be exercised with responsibility.

5. *Recognition and Accommodation*

Reasonable steps should be taken in educational and work environments and in the delivery of public services to recognise and accommodate diverse religious beliefs and practices.

6. *Education*

Schools should teach an understanding of different religious and spiritual traditions in a manner that reflects the diversity of their national and local community.

7. *Religious Differences*

Debate and disagreement about religious beliefs will occur but must be exercised within the rule of law and without resort to violence.

8. *Cooperation and understanding*

Government and faith communities have a responsibility to build and maintain positive relationships with each other, and to promote mutual respect and understanding.