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RELIGIOUS FREEDOM IN NEW ZEALAND

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ABSTRACT

A new conception of religious freedom in New Zealand, a result of both external and internal influences, has largely replaced the old, though signs of transition are still apparent. The old conception, in keeping with its Christian history, was founded on an unwritten understanding by which the state endorsed no particular religion, and stood apart from sectarian rivalry. This has now fallen away with increasing secularization, social change, pluralism and the development of human rights discourse. Public perceptions of religion are broadening to include other faiths apart from Christianity, such as indigenous belief; it can be acknowledged that Maori also experienced colonization, especially the loss of land, as an assault on their religious freedom.

Each of the last three decades saw an adjustment in state policy which reflected these changes and involved the state in a more active role regarding religion, so altering the nature of religious freedom. These were, in order, the integrating of most religious schools into the state education system, the embracing of biculturalism, and the passing of new constitutional legislation (the Bill of Rights Act and the Human Rights Act). Examining what has been written (mainly by lawyers) on freedom of religion since the last of these revealed a range of reactions, in part determined by the authors' personal attitudes to religion which were able to be uncovered by using a Religious Studies perspective. Little has been written from within the discipline of Religious Studies on the implications of the above changes for religion.

Because the new conception of religious freedom is based on individual autonomy, it is displacing the authoritarian model of parenting and teaching; this is difficult for those who wish to retain the old model for religious reasons. Since religious freedom is now based on respect for the beliefs of others, whether 'religious' or not, rather than on the absence of state interference in religion, the way is open for the teaching in schools of courses about religion and belief to prepare children better for life and for living in a pluralist society.

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CHAPTER ONE

Issues

"The understanding and practice of religious freedom is the premise for the understanding and practice of all freedom."

Lloyd Geering¹

This thesis was initiated by an awareness that the educational opportunities of some children are severely restricted because of the religious beliefs of their parents, and the observation that members of some religious groups have fallen foul of the Human Rights Act 1993 HRA, an act from which members of religious groups, especially minority religious groups, might have expected to benefit, since section 21(c)² of this act prohibits religious belief as a grounds of discrimination.

Having observed that legal opinion is divided as to the justice of these decisions of the Human Rights Commission and having noted that there has been only a short time to evaluate this legislation compared to the United States of America where anti-discrimination law has been in force for much longer, I examined the ways in which freedom of religion has recently been contentious in New Zealand or has the potential to be so. This in turn brought me to an understanding that there are some unresolved issues concerning religious freedom in the context of the modern pluralist state of which New Zealand is an example, and further, that New Zealand's own historical and cultural experience and unique population mix is of significance in any discussion of these issues and has a direct bearing on the conception of religious freedom as it is being re-shaped to fit a less homogeneous society.

This thesis makes a study of freedom of religion in New Zealand which involves reviewing the past, evaluating the present and looking ahead to the future. This entailed an examination of the references to religion in constitutional and anti-discrimination law in

New Zealand, and also in family law and education law. It became apparent that the basis of contemporary New Zealand law in these areas lies to a large extent in international human rights instruments,³ so it was necessary to gain some understanding of these and how religion is viewed in them. To gain a wider perspective on religion and the modern state, it was of benefit to investigate how contemporary political theory looks at religion both in society and within the family, and at where both of these meet, in education. Some aspects of philosophy of education thus became relevant. All of these were of use in showing how the conception of religious freedom which prevailed from 1840 when New Zealand first came under British law until the 1960s has given way to a different conception.

The situation regarding religious freedom in New Zealand at present may briefly be summarised as follows: an older conception of what constitutes religious freedom is being challenged, as some see it, or simply becoming irrelevant, as others see it; this older conception hangs over from an increasingly displaced world view;⁴ a newer conception has already made some inroads on the older one, particularly over the last decade; this process is set to continue in the future; some tensions during this transition period are inevitable.

Conceptions of Religious Freedom

The older conception of religious freedom

- was historically contemporaneous with the beginning of the secular state in seventeenth century Europe
- had as its fundamental idea the separation of the state and religion
- evolved as a compromise solution to the problem of Christian sectarian rivalry in an otherwise relatively homogeneous society
- was libertarian in emphasis and assumed, rather than ensured, universal access
- sat well with the hierarchical worldview under which it evolved and under which obedience to authority was the controlling element in religious groups and family life

- saw New Zealand history as being virtually free from religious persecution and intolerance
- was an unwritten principle taken for granted under common law

The newer conception of religious freedom

- can be dated from the middle of the twentieth century (though the seeds were sown much earlier)
- can be related in New Zealand to the impact of secularization, pluralism, human rights discourse and biculturalism
- has as its fundamental tenet the autonomy of the individual and the right to self-determination
- is egalitarian in emphasis and is concerned at uneven access
- sees the state as having an enabling role rather than as a potential imposer of a theocracy, and so no longer insists on a strict separation between religion and the state
- sees diversity as a normal state of affairs rather than as a compromise
- sees 'state neutrality' of the past as a disguise for a Christian hegemony
- sees New Zealand's history of religious freedom as blemished by "proselytization with racism"⁵ and by assaults on indigenous belief particularly through the alienation of land
- is incorporated into written legislation

It should be noted that the above scheme is intended as an outline for clarity's sake only since it presents both conceptions in a fairly extreme form. In an age when the male parent was legally the head of the household, not all fathers were equally authoritarian. When considerable value was placed on conformity, there were always some who were tolerant of difference. Not every egalitarian today may approve of the 'enabling' role of the state since it can be seen as an encroachment on freedom.⁶ It is not even always clear what kind of legislation best serves egalitarian aims. Nevertheless discernible changes in public and private life which impinge on religious freedom are usefully summed up .

Not surprisingly, the differences in the two worldviews on which these conceptions of religious freedom rest show up sharply when matters of life and death are at issue. Such a matter arose in England in August 2000 which typifies the differences very well.⁷ Conjoined twins were born who if no attempt was made to separate them would both have eventually died. An attempt to separate them could save only one of them; the other would die as a result of this intervention.

The parents, devout Catholics from Malta, did not want the babies to be separated, believing that the right thing to do was to let both babies die, to 'let nature take its course.' God had given humankind a commandment not to kill and it was never justified to do so. If God himself took life He must have reasons for doing so which it is not given to human beings to understand. This view rests on the belief in a morally ordered universe under the control of a transcendent God who acts unilaterally.

When the issue went to court, the judiciary decided that saving a life overrode the strict principle of not killing and ordered that the babies be separated. This view arises out of a belief that the universe is not morally ordered, no supernatural being is in control and that morality is constructed by people. In this view, taking action to save one baby's life was preferable to letting both babies die.

Of course it would have been possible to argue that it would be better to let the babies die for other reasons than the parents presented, reasons that were 'secular' rather than 'religious', such as that the considerable resources required for treatment now and in the future were unjustified when the surviving child would be handicapped in any case, or that there would be fewer resources available for other worthy cases, or that it would be cruel to subject the child to the pain and suffering involved in the several future operations which would be necessary. Similarly, it would be possible to argue for the separation of the babies from a 'religious' standpoint, from a belief, for example, that an immanent God acts through people, through the skill of surgeons, etc. The point is not the outcome of

the moral dilemma presented by this case, but the worldviews on which the two parties based their thinking.

That this matter came to court at all demonstrates that both views, the old and the new, exist side by side (as they are likely to do so for some time), and that they are difficult to reconcile; that the new view prevailed in law is significant. Moreover, the religious freedom of the parents was restricted by the legal arm of the state in the interests of their child which is also significant. It is hard to imagine that the outcome would be any different if such a case were to occur in New Zealand.

In this country public debate about contemporary ethical issues shows the existence of a similar state of transition between worldviews. Speaking out against the introduction of euthanasia in December 2000, the Catholic bishop of Palmerston North, Peter Cullinane, invoked the old worldview thus: "...we don't have absolute dominion over our lives...the right relationship with God is to receive the gift [of life] gratefully and to live it in accordance with [His] plan".⁸ But significantly, he also put forward several non-religious arguments as well - that elderly people might feel subtly pressured to choose to die, that the pain of terminal illness could with proper palliative care be alleviated, etc. If Cullinane wished to persuade those who don't share his religious beliefs, he knew he must offer arguments which would speak to these people as well. He could not expect to be persuasive to a wide enough audience if he used the discourse of his particular religious community alone. However, by using this dual approach, he demonstrated his religious tolerance and a commitment to religious freedom by acknowledging the existence of other views which he does not share.

That we live in a society which encompasses a variety of different understandings of what religious freedom and its converse, religious tolerance, mean, and what the relationship of the state and religion should be, can become apparent when less serious issues arise too. This was made clear recently in Palmerston North. The local council erected an

illuminated cross on a free-standing clock-tower in the middle of the city as a Christmas decoration a number of years ago. For some years it was taken down and put back up annually, but because of the expense and inconvenience of doing this, it was eventually left there permanently. A recent suggestion that it be removed, on the grounds that a deliberate decision to have a cross on the clock-tower had never been made, provoked a lively correspondence in local newspapers.⁹ The reasons given, whether for retaining or removing the cross, were quite various and encompassed a range of suggestions as to what the relationship between the state/civic authority and religion should be in the multi-cultural society that New Zealand is becoming.

These reasons fell into three categories. The first category, about the value of symbols themselves, was from people who thought that symbols were either unimportant (this seemed to be disproved by the sheer number of people who wrote in on the matter), or misleading because people paid more attention to the symbols than to the substance that these symbols represent. The second category was from people with views on what the particular symbol in question - the cross - represented, and here opinions were sharply divided as to whether Christianity has been a force for good or ill. Those who believed it had been a force for good usually wished the cross to be retained.

The third category, more relevantly for this study, was from people concerned about the extent to which the symbol was representative of the whole community. Some thought it was fair enough that, since the majority had a Christian background at least, whether they were active church-goers or not, the cross should remain, even if only as a reminder of part of the history of New Zealand. Some thought the cross should be removed so it didn't make other religious communities feel excluded; others thought the cross should remain, with the symbols of these other religious communities added alongside, for the same reason. Some who supported keeping the cross assumed non-believers would not be offended since it meant nothing to them; some non-believers wrote of finding the cross an irritant and an inappropriate blot on the landscape. The opinion was expressed also that

while a cross was perfectly appropriate on a church, it was out of place on a civic building in a multi-ethnic society.

This third category of reasons draws on differing ideas of state neutrality regarding religion. Indeed three of these ideas line up with three of four different interpretations of the concept of equal treatment of all religions by the state outlined by Bikhu Parekh.¹⁰ He writes: "First, there is the conservative view, according to which the state is not to persecute or suppress any religion but remains at liberty to privilege one which is an integral part of its history and identity." This describes quite well the view of those correspondents who supported the retention of the cross. "Secondly," Parekh writes, "there is the strong liberal view that the state should protect all religions equally." Those correspondents who suggested any other religious groups who wished to do so could add their symbols to the Christian cross can be seen as supporting this view. "Thirdly, there is the weak liberal view that the state should protect no religion." Here we can see the view of those correspondents who thought the cross should be removed. This "weak liberal" view, the secularist view, does not favour any religion, and so causes least offence to those intolerant of religion. (The fourth of Parekh's views is discussed at the end of Chapter Four where it is most appropriate.)

The views expressed showed the divergence one would expect of a period of changing values. There were people for and against the retention of Christian dominance, for and against the state being in any way involved with religion, for and against the normalising of diversity. Some people upheld the old worldview already discussed, others upheld the new. The majority of the letters published were in this latter category; this may represent majority opinion, though the newspapers concerned were not claiming to be conducting a genuine survey, and may have simply selected letters to give the widest variety of opinion. In the main body of this thesis other similar examples of divergent views are discussed in the course of demonstrating the difficulties that can arise when the old conception of religious freedom comes into conflict with the new. These three examples above from

current affairs have already raised some of the important issues which are recurring themes throughout the thesis: the religious freedom of parents coming into conflict with children's rights; the role of religious discourse in the public sphere; the role of the state in bringing about freedom of religion. They also show that, while the questions this thesis discusses are of academic interest, they also have relevance in the 'real world', where issues that bring them to the fore not infrequently arise.

Approach

Religious freedom is an area where law and religion intersect. In the United States there are lawyers who specialise in cases where the law deals with religious issues and a discourse has arisen which concerns itself with this specialist area.¹¹ Religion has a higher profile in the courts in the United States than in New Zealand, not least because the original (written) constitution includes references to religion and its relationship to the state in the Establishment and Free Exercise clauses of the First Amendment;¹² the interpretation of these clauses has caused considerable controversy particularly - and this is significant - over the past fifty years, both with regard to what they originally meant and how they ought to be interpreted in the modern world.¹³

The existence of this discourse allows for discussion of such issues as the dynamics of the relationship between law and religion both past and present, the challenge of defining the common good which is a dialogue in which both law and religion can participate,¹⁴ the effect of what has been a Christian hegemony on the religious freedom of those of other faiths,¹⁵ the possibility - or impossibility - of articulating an adequate theory of religious freedom,¹⁶ and the matter of whether religious discourse can have any role to play in the public sphere and if so, what that role might be.¹⁷ Some of these issues have relevance in a New Zealand context even though the profile of religion here is lower, and will receive attention in this thesis.

Of particular interest is the work of those taking part in this discourse whose studies and

professional interest embrace both the law and Religious Studies. Such a person is Winnifred Fallers Sullivan who has applied principles employed in Religious Studies to dissecting the comments of the judges involved in the celebrated case of *Lynch v. Donnelly*.¹⁸ She was thus able to reveal the religious standpoint of each of the judges and demonstrated how this had determined their differing judgments. In so doing, she increased awareness of how there can be different understandings of what it means for the state to be neutral "among religions, and between religion and non-religion"¹⁹ and yet allow the free exercise of religion, and how difficult it is for legal decisions to be genuinely fair and impartial in religious matters. She suggests that unless there is also a greater awareness among the judiciary of differences between religions, any judicial decision runs the risk of establishing an unacknowledged religious viewpoint.²⁰

Because Chapter Two is devoted to an overview of what has been written in New Zealand on freedom of religion in recent years, and conducts, where appropriate, a similar analysis of the publicly expressed views on religious freedom of those in New Zealand who concern themselves with the topic, it is necessary to summarise the details of this case and the judges' comments on it and to give an outline of Sullivan's analysis of these comments.

Lynch v. Donnelly (1984) contentiously upheld a municipality's traditional practice of maintaining a crèche (nativity scene) in a public park during the Christmas season. The municipality (Pawtucket, Rhode Island) was perceived as the local embodiment of the state and as such, as promoting one religion, Christianity, in a way which contravened the Establishment clause. This case, it can be noted, has something in common with the issue of the cross on the Palmeston North clock-tower referred to earlier; in both cases the question arises whether civic authorities ought to use public space and money on symbols of one particular religion.²¹

Justice Burger, in comments supporting the majority decision, and Justice Brennan, in his

comments putting the dissenting view, exemplified quite different religious sensibilities and viewpoints which made themselves evident in their descriptions of what the crèche represented, in the language they used and in the kind of relationship they envisaged between religion and the state.

Burger spoke from what Sullivan saw as a viewpoint which was both Protestant and post-Christian. He considered the crèche to be a secular symbol, meaning that it was a reminder of the origins of that particular holiday season but that those origins are not of much significance for many of the people who celebrate the holiday. (A comparison can be made with the word 'holiday' itself which is derived from 'holy day'.) Sullivan suggested he thus "attempt[ed] to collapse the sacred and secular into one category",²² rendering religion "harmless and supportive of the state";²³ on the grounds that it was a secular symbol, the municipality was not establishing any particular religious position. She argued that there was evidence of Burger's Protestant bias in his approach to religious images (in that he did not see them as religious) and in his referring to the infant as 'Jesus' which emphasises the infant's humanity rather than his divinity. In not seeing the need to differentiate between state and religion, Burger was thereby defending the existing cultural domination of Protestant Christianity without realising that he was doing so.²⁴ Justice Burger's view, it can be noted, had something in common with the correspondent who suggested that the cross on the clock-tower in Palmerston North could be retained for 'historical' reasons, that is, assumed that it could be seen as a secular rather than a religious symbol.

Justice Brennan, on the other hand, saw the crèche wholly as a religious symbol and a specifically Christian symbol at that. His Catholic background, Sullivan argues, disposed him to see it as "a sign of God's presence and involvement in the material world".²⁵ He referred to the infant as 'Christ' thus emphasising his divinity rather than his humanity, and saw religion as a private matter located within the individual. Strict separation between state and religion should be maintained, he thought, because religion "is not about culture

or society or power".²⁶ This last comment encapsulates well why members of minority religions - even large minority religions - have seen the formal separation of religion and the state as important if they are not to be *excluded* from culture, society and power.

Sullivan makes a good case for lawyers making decisions in the area of religion either being required to have a better understanding of religion in all its variety or to take advice from those who do have this knowledge, if a judgment is to be anything more than an expression of one person's understanding of what religion is. This can be extended to say that a Religious Studies perspective can be of use to anyone in public life who must make decisions about religion. Hence an attempt is made in this thesis to conduct a similar analysis of the New Zealand commentators' points of view.

Freedom of religion in New Zealand is a subject in which a few lawyers take an active interest and their contribution in the form of articles and papers on constitutional changes and judicial decisions in this area over the past decade is discussed in Chapter Two. The writing of some educationists and others on religious freedom is also reviewed. This overview serves the function of opening up the issues as they have been perceived and defined to date. Along with some general comment and indication of which issues will receive further attention in subsequent chapters, the overview proceeds on two fronts. One is to identify where each writer sits in relation to the two concepts of religious freedom and the other is to uncover individual religious points of view which preclude the writers from being as objective as is desirable when discussing religion in the public domain.

Chapter Three argues that the alienation of Maori from their land was also a denial of their religious freedom according to the *new* conception of religious freedom and that the displacement of the old conception of religious freedom in New Zealand has been hastened by, and the character of the new conception in part determined by, the need to recognize the indigenous rights of Maori. The approach is briefly to recount the Maori experience of colonization using a Religious Studies perspective and thereby demonstrating why the old

conception of religious freedom was unable to accommodate primal religious belief. Using the same perspective some contemporary Maori reactions are noted.

Chapter Four makes reference to the origins of both conceptions of religious freedom and discusses the reasons for the change from one to the other, and also the means by which this change has come about. This may also be summed up as an examination of the consequences for religion of the predominant worldview changing through ninety degrees so that instead of seeing themselves in a vertical or hierarchical relationship with other people and the rest of creation, people perceive themselves and other people to be horizontally connected. Once again, the approach is not from any one particular religious viewpoint but attempts to view religion/s objectively in assessing the changing nature and strength of the influence of religion/s at particular periods of New Zealand's history.

Chapter Five examines the religious freedom of children and young people in New Zealand. Conflict between the two conceptions of religious freedom can be very apparent and intractable where child-raising and education are concerned, because the parenting and educating styles predicated by the two conceptions are so different. The new conception sees the parental and educator role being a matter of guiding rather than controlling, aiming to reach a consensus rather than impose authority, equipping for autonomy regarding the choice of lifestyle rather than inducting into one particular lifestyle. One difficulty for those upholding the new conception of religious freedom is that to impose this new conception on people against their will would be to compromise its principles. The approach taken overall is to assess children's religious rights in New Zealand against the relevant articles of the Convention on the Rights of Children. Within this framework, there are references to the U.K. for comparison, and some options for religious and general education in pluralist societies are considered, using Mark Halstead's analysis of educational approaches in multicultural societies.

Methodology

Religious Studies interests itself in all aspects of religion, including its history, and the tracing of the relationship between religion and the modern secular state is an important part of the history of religion as well as of the state. Religions continue to evolve in a secular state, whether they embrace it and adapt to it or just co-exist with it, challenge or defy it, separate themselves as far as possible from it, wither away altogether or take new forms. Indeed, Religious Studies may comment on ways in which the modern state interacts with religion, or on the way the state may, paradoxically, make religious demands of its own, may institute 'civic' religious practices, may endorse quasi-religious ethical principles or utilise religion to further its own ends.²⁷ All of these developments are of relevance to Religious Studies as an observer and describer of religions.

Religious Studies is well placed to comment on difficulties which arise between religions and the state, to point out how 'impartial' treatment of religions by the state may impact unfairly on some religious groups,²⁸ to recognise misunderstandings that occur when religious discourse is used in the public arena,²⁹ and, of particular relevance to this thesis, to articulate the tension between recent state egalitarian legislation and those religious world views which are hierarchical. One Religious Studies scholar (who formerly practised law) writes that "in the face of ever increasing pluralism... a vital key to our society's survival" is that "we [in Religious Studies] all must become translators and interpreters."³⁰ Increasing our understanding of the "Other", a fundamental principle of Religious Studies, has a significance outside the discipline as a means of sustaining the viability of societies seeking to become more accommodating of difference.

Finally, this thesis has a special relevance to Religious Studies in that this discipline is dependent on the freedom of religion which the modern liberal democratic secular state offers, for its very existence.³¹ Religious Studies is founded on the basis that religion is both worthy of study and many-stranded, and one or other of these basic ideas would be considered subversive in a theocracy or an atheistic totalitarian regime.

There has been no detailed discussion of religious freedom in New Zealand from within the discipline of Religious Studies.

Resources

1. Library Resources. Books and journals, reports of legal conferences, human rights conventions, court case summaries, census figures, and Waitangi Tribunal documents were read. Library data bases brought to light some publications, theses and reviews subsequently accessed by interloan.
2. Correspondence (including e-mail). This was conducted with Dr. Claudia Orange, Sir Geoffrey Palmer, Prof. Mason Durie, Rex Ahdar, Janet Upton at the Office of the Commissioner for Children, Nick Smith M.P., Margaret Gamlin at the Correspondence School, the Ministry of Foreign Affairs and Trade (and U.N. matters) and Iain Stuart of the Maori Studies Department staff at the Eastern Institute of Technology in Taradale.
3. Discussion. To gain an insight into the thinking of Maori who are committed to their cultural heritage, about Maori religion past and present and the consequences of the arrival of Christianity, I participated in informal discussions with young students, mature students, staff and kaumatau at the Maori Studies Department at the Eastern Institute of Technology.
4. Newspaper articles. These have been useful for keeping up-to-date with such things as recent judgments on Bill of Rights matters, the incorporation of some parts of the Convention on the Rights of Children into New Zealand law, discussions on biculturalism, and general items on religion which have been newsworthy and revealed contemporary attitudes.
5. Conference attendance. The keynote speeches at the July 2000 conference of the Quality in Public Education Coalition held in Palmerston North were of relevance.

Notes

1. Geering, p. 25
2. Extracts from HRA appears in Huscroft and Rishworth, p. 505ff.
3. Hunt and Bedgood in Huscroft and Rishworth, pp. 49-58
4. Ahdar demonstrates this at considerable length in his thesis. See Ahdar 2000.
5. Mutua in van der Vyver and Witte, p. 430
6. See McLean in Huscroft and Rishworth, p. 263ff.
7. This case is discussed by Janet Radcliffe Richards in "The Wrong Moral Autopilot", New Statesman, 20/11/00, pp. 27-9
8. "Bishop Speaks Out on Euthanasia", The Tribune, 17/12/00
9. This correspondence appeared in the Manawatu Evening Standard and The Tribune on a number of days in June, 1999
10. Parekh in Kymlicka (ed.), p. 313
11. Cookson, p. 147
12. Sullivan, p. 167
13. " p. xii
14. Cookson, p. 148
15. " p. 150
16. " p. 149-150
17. " p. 152
18. Much of Sullivan's book is devoted to analysing the judgments in this case.
19. Witte and Christian Green in van der Vyver and Witte, p. 252
20. Sullivan, pp. x and xiii
21. The Prime Minister, Helen Clark, declined to have a tree in the grounds of her official residence decorated for Christmas 2000, her first Christmas in office. Although the reason given was the expense, it has been pointed out by Bronwyn Elsmore that Helen Clark may wish to be seen as neutral regarding religion.
22. Sullivan, pp. 88-9
23. " p. 87
24. This cultural domination was highlighted amusingly in the title of a book recently published by a Jewish author writing about the supposed separation of church and state in the U.S. The book is called Please Don't Wish Me A Merry Christmas: A Critical History of the Separation of Church and State. This book is reviewed by Cookson, p. 150.
25. Sullivan, p. 146
26. " p. 156
27. Keyes, Hardacre and Kendall in Keyes, Kendall and Hardacre, p. 5ff.
28. Donovan 1990, p. 14
29. Cookson, p. 149
30. Cookson, p. 149

31. Shelton and Kiss in van der Vyver and Witte, p. 561

CHAPTER TWO

Opinions

"Without value-conflict we would have no struggle, no change, no *life* at all."

Don Cupitt¹

Introduction

Three factors have created both stimulus and context for rather more interest in religious freedom in New Zealand in recent years: the advent of the Bill of Rights Act BORA in 1990 followed by the Human Rights Act HRA in 1993; the hardening of the division of the diminishing numbers of members of Christian denominations into liberals and conservatives;² the growing numbers of adherents of other religions such as Islam and Buddhism,³ through immigration primarily, or conversion. This chapter conducts a critical review of writing that has resulted. Much of it has been the work of lawyers, as already noted in Chapter One. By using Sullivan's procedure as discussed there, it may be possible to demonstrate in a New Zealand setting how a Religious Studies approach can offer a means whereby those who comment on religion in the public sphere in New Zealand can acquire an outlook which is broader than one which is drawn from individual experience of religion only. Attention will also be paid to the writers' conceptions of religious freedom, noting where each writer's conception sits in relation to the two conceptions of religious freedom outlined in Chapter One.

Paul Rishworth and Wayne Thompson

Paul Rishworth, Associate Professor of Law at Auckland University, has a special interest in freedom of religion and over the past eight years has commented at some length on the implications of BORA and HRA for religious freedom, and for education, including religious education, and on human rights legislation generally. His substantial contribution on these issues requires that his thinking be examined in some detail.

Four items written by Rishworth will draw comment. The first is a seminar paper "Biculturalism, Multiculturalism, the Bill of Rights and the School Curriculum" presented at the Legal Research Foundation Seminar on Education and the Law held in 1993. The second is an essay titled "Coming Conflicts over Freedom of Religion", one of a collection of essays called Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and The Human Rights Act 1993, edited jointly by G. Huscroft and Rishworth himself and published in 1995. The third is a journal article called "Human Rights - From the Top" which appeared in The Political Quarterly in 1997. The fourth is an unpublished paper called "Religion, Values and Rights in Education"⁴ which was given as a commentary on an address given by Brother Pat Lynch at a conference on church and state in New Zealand in 1997. Brother Lynch's address appears in printed form with other addresses from this conference in God and Government: The New Zealand Experience, edited by R. Ahdar and J. Stenhouse, and published in 2000. Further reference will be made to this book later in this chapter. A summary of this unpublished paper of Rishworth's appears in the introduction to God and Government.⁵

Comment will first be directed towards Rishworth's chapter "Coming Conflicts Over Religious Freedom" in Rights and Freedoms published in 1995. Some parts of this essay quite strikingly demonstrate the dislocation in thinking which can be expected to occur in the transition period when an older world view is giving way to a newer one.

At the very end of this chapter,⁶ Rishworth refers to some recent court cases involving Maori spiritual values coming into conflict with present or proposed land and water use and mentions similar cases brought by indigenous Americans. But at the beginning of the chapter,⁷ where he gives a brief historical overview of religious freedom in New Zealand, there is no mention of the alienation of land and resources from Maori in the past which was the antecedent to these cases arising in the present, and which was, it is argued in Chapter Three of this thesis, the most egregious example of the denial of religious freedom in New Zealand's history.

The past cannot be fairly assessed by the values of the present, but injustices that were committed in the past may now be recognized for what they were. Moreover, it is difficult to understand the present as far as freedom of religion in New Zealand is concerned if only one story, the European settler story, is told, instead of both stories, European and Maori.⁸ So in this chapter of Rishworth's there is a puzzling lack of explanation as to why cases involving Maori spiritual values should arise at all.

Rishworth's historical overview given at the beginning of this essay is irredeemably monocultural, and not only because the connection between the treatment of Maori in the past regarding land and resources and their present grievances regarding spiritual matters is not made. This overview claims, and this can be said to be true in a narrow sense from the colonialist perspective, that "Apart from some blemishes in our past, we have no significant history of intolerance and persecution of people for their religious beliefs".⁹ However, as Rishworth moves on to compare this country to the United States, to which he notes, in contrast to New Zealand, some religious groups migrated to escape persecution, the *indigenous* peoples of both countries remain invisible, since they receive no mention whatsoever. The most obvious comparison to make regarding the history of religious freedom in the two countries, the displacement in both countries of the indigenous inhabitants' primal religions along with their displacement from the land, is not made. (Chapter Three of this thesis looks at this in more detail from the New Zealand point of view.)

When he does use the word "indigenous", it is in not in the sense that one would expect. It is to point out that, in contrast to New Zealand, "the United States has spawned indigenous religious ...denominations of its own",¹⁰ referring to the Jehovah's Witnesses and the Church of Jesus Christ of Latter-day Saints.¹¹ Perhaps he is making the point that these two religions not only originated in the United States but have since spread to other parts of the world, but it reads as though there were never any indigenous denominations in New Zealand at all. And in New Zealand, of course, there have been

and are still in existence denominations indigenous¹² in the sense of "belonging to the original inhabitants" as well as in the sense of "originating in the place", the sense in which Rishworth uses the word.

It could also be noted that in Rishworth's use of the word 'spawn' - not a word which suggests dignity - one may discern a certain condescension towards those denominations originating in America which he mentions; this patronising attitude is at odds with other parts of this same article, where he discusses "the modern rationales for religious freedom"¹³ and lists among them that "religious diversity is to be valued"¹⁴, though Rishworth himself may not necessarily be assenting to these of course. Here we have further evidence of the dislocation referred to earlier. Rishworth is writing an article about the implications of religious freedom *in its newer conception* but the article itself at some points exhibits the mindset of the older conception in a way that Rishworth himself seems unaware of. One can observe that compared to New Zealand historians writing since the 1950's,¹⁵ Rishworth seems quaintly old-fashioned when he writes about New Zealand's past in such a one-dimensional way. Further indications that he has reservations in any case about at least some aspects of the newer conception of religious freedom will be discussed later.

Applying Sullivan' s approach to this piece of New Zealand legal writing on religion already bears out her conclusion that a Religious Studies approach would give the law a better understanding of religion and all its variety. Rishworth himself, it is clear, has a religious bias towards mainline Christianity. Christianity which takes other paths (Jehovah's Witnesses etc.) may be looked at askance, and primal religions, despite the presence of Maori in New Zealand, do not really register with him as being religion at all. This is another example of a dislocation in his thinking, because in another context, the 1993 paper, he demonstrates an awareness that state bicultural policies have implications for religion; he comments on conservative Christians complaining about 'pagan' Maori beliefs being taught in schools.¹⁶ He seems to overlook the full significance of biculturalism for

the relationship between religion and the state in any case, perhaps because he does not genuinely perceive Maori belief as religion. A Religious Studies approach would make him more aware of this bias and his narrow definition of religion, and an acquaintance with the religious history of Maori since European colonization would enable him to give a more even-handed account of the history of religious freedom in New Zealand.

This 1995 essay of Rishworth's goes on to spell out his conception of religious freedom quite explicitly. He claims that constitutionally speaking, religious freedom in New Zealand, since the introduction of the legislation of 1990 and 1993, has been devalued and acquired an uncertain status, despite being now enshrined in written law; his complaint¹⁷ is that to subject religious freedom to anti-discrimination law and the need to respect the human rights of others is to circumscribe it intolerably. He points to some paradoxical consequences of the anti-discrimination law whereby some members of minority religious groups - groups whose members might have been expected to benefit from this law - have found themselves in breach of it.¹⁸

Some lawyers who have an interest in this area of the law believe that religious freedom is rightly limited by HRA. These include Lord Cooke of Thorndon, Sir Geoffrey Palmer and Mai Chen. Mai Chen has written of her own personal experiences of discrimination¹⁹ as well as in a professional capacity.²⁰ Geoffrey Palmer, a leading architect of BORA, has always been opposed to the idea of an 'entrenched' bill of rights which would take precedence over all other law. He prefers an act in the light of which other law is considered.²¹ Lord Cooke, a former Court of Appeal president, has also written on this issue,²² and when addressing a constitutional conference in April 2000, claimed that New Zealand's human rights legislation was regarded internationally as "one of the weakest affirmations of human rights" and called for some kind of legislation allowing the courts to give greater protection to human rights. Not to do so would cause "international astonishment", he believed.²³

Rishworth and others such as Otago University Associate Professor of Law, James Allan,²⁴ invoking a conception of the liberal democratic state which is more libertarian and less egalitarian, and thus more aligned with what I have characterized in Chapter One as an older conception of religious freedom, believe the religious freedom clauses in BORA should not be restricted by HRA.

In the 1997 unpublished paper Rishworth succinctly reiterates this view when he notes:

"The...vision of rights in New Zealand... tends to emphasise the communitarian vision of rights as enshrined in the Human Rights Act 1993 at the expense of the classic liberal vision of rights as set out in the New Zealand Bill of Rights Act [1990]. That is to say, rights against discrimination are somewhat higher in the popular pecking order than rights to freedom of expression or religion..."²⁵

However, in a recent case (July - August 2000) which went to the Court of Appeal, Rishworth's libertarian view has been upheld. This case is of considerable interest because, although freedom of speech ("freedom of expression and the free flow of ideas"²⁶) was the actual issue in law, freedom of religion was also an issue. That these two freedoms are closely associated and supportive of each other is a recurring idea in this thesis. The case concerned a 'fundamentalist' Christian organisation - Rishworth was one of the lawyers acting on its behalf - which went to the High Court after the Film and Literature Board banned two anti-homosexuality videos it wished to import. The High Court upheld the Board's decision, but the Court of Appeal overturned this, finding that it was incorrect to "place a greater emphasis on a Bill of Rights provision guaranteeing freedom from discrimination than on another provision guaranteeing freedom of expression."²⁷ It is interesting to speculate whether this judgment would have resulted had the previously mentioned Lord Cooke still been President of the Court of Appeal. (The present incumbent is Sir Ivor Richardson.) Obviously, this is a landmark case and will set a precedent; it will take more cases for this relatively new legislation to be fully tested however.

In the 1995 essay, Rishworth expresses the view that a reconciliation amendment to HRA is needed, or, failing that, discretion should be exercised so that when freedom of (the exercise of) religion comes into conflict with anti-discrimination legislation, the former should prevail.²⁸ He instances two cases - one of which did not actually proceed - brought before the Human Rights Commission, one in which a woman was discriminated against in employment by a member of the Exclusive Brethren because she was married, and one in which a bookbinder objected to material he was asked to bind because it was offensive to his own beliefs.²⁹ At the end of the article, Rishworth spells out his conception of the place of religion in public and private life: "Religious organizations ought to be seen as 'sovereign' creators of their own values, free from state coercion."³⁰ Even so, he acknowledges that state values and those of religions have an influence on each other (which would seem to indicate that the word 'sovereign' means something less than 'supreme'), but argues that religious organizations should not be forced to adopt state values, because that breaches the "wall of separation" between church and state which is there for the mutual protection of both.

The first comment to make on all this is to query whether the wholesale adoption of the rhetoric of the American debate about religious freedom is always appropriate in a New Zealand context. Rishworth makes frequent, detailed allusions to the American legal and constitutional position regarding freedom of religion, and some of these allusions may well be pertinent in spite of the fact that some hold that U.S. disestablishment law and free exercise law are "in a state of confusion, even crisis".³¹ But in America, the separation between religion and the state is both more formal and more self-conscious than has ever been the case in New Zealand and his use of the phrase "wall of separation" would have resonance in an American context but simply does not ring true in a New Zealand one. There is a good historical reason why it is a meaningful phrase in an American context: a number of religious groups went to America to escape persecution as is well known.

But in New Zealand, not only was the separation of church and state, in Peter Lineham's

phrase, "never been a dogma"³² in the past but as Rex Ahdar notes, referring to the 'cosier' relationship here between church and state, it was considered that an anti-establishment clause regarding religion as in the U.S. constitution (which would create a "wall of separation") was inappropriate and was deliberately omitted from BORA, against the arguments of some.³³ Lineham remarks that "there are few meaningful models of church-state links in the circumstances of modern New Zealand."³⁴ It will be argued in later chapters that the new conception of religious freedom, with sectarianism no longer an issue, has already brought with it a number of ways in which the separation of church (or more accurately, religion) and state has actually been *reduced*, rather than maintained or increased. This makes Rishworth's "wall of separation" even less of a reality in this country and not an appropriate model.³⁵

Rishworth has been strongly influenced in his thinking here by Stephen Carter's book, The Culture of Disbelief: How American Law and Politics Trivialise Religious Devotion, which was published in 1993. This book resists the idea that religion should be 'relegated' to the private domain and argues that members of religious groups should be granted exemption from human rights legislation where it conflicts with their religious tenets on the grounds that religions are independent moral voices, or "sovereign creators of their own values",³⁶ and so act as a bulwark against state authority. (These are the phrases that Rishworth takes up and wishes to apply to New Zealand.) That Carter undermines this claim later, as Rishworth also does, by admitting that there is give and take between religion and the state is discussed below in the section on Rex Ahdar. Carter's definition of religion is a narrow one; he has in mind conservative Christianity and Carter's book can be seen as a shot fired in defence of the older conception of religious freedom.

But whatever the case in America, in New Zealand it is religious groups whose members actually *embrace* human rights, that is mainline Christian groups, rather than groups whose members oppose human rights, which do most of the overt challenging of the state, criticizing governments over the last thirty years on issues such as poverty-

creating policies,³⁷ nuclear-powered warship visits, housing and benefits for the less well off, Maori land injustices, the 1981 Springbok tour and the Vietnam war.³⁸ It is true some Christian groups not in sympathy with human rights thinking do challenge the state on family law and abortion and have even entered the political arena to do so,³⁹ but it is a feature of the separatist beliefs of those minority groups involved in the cases Rishworth cites that they do not take part in political or civil life because they do not wish to acknowledge state authority.

So once again, American thinking does not seem to be particularly applicable in a New Zealand context. And Sullivan's case for lawyers venturing into this field needing to extend their knowledge of religion is again vindicated in two respects. First, Rishworth has shown his knowledge of the relationship of various religious groups and the state in New Zealand is less than adequate for the purposes of his argument, and secondly, one wonders if he would be quite so sympathetic to the Exclusive Brethren employer in the case he mentions above if he had a proper idea of how thoroughgoing this religious group's lack of recognition and respect for the state and the law really is. Would he be prepared to defend them for their disregard for speed restrictions and non-compliance with seat-belt regulations (which only involve civil rather than criminal penalties, and so can freely be flouted) on the grounds that their religion encourages the attitude that the secular state is an irrelevance?⁴⁰

Rishworth, then, concurs with Carter's view that it is in the interests of democracy to permit some religious groups to disregard some human rights legislation. Without examining whether this idea has any validity, i.e. whether it really could be of benefit to the state beyond the benefits which freedom of speech and expression already bestow, one can acknowledge that Rishworth's liberal position, that the state should be as inclusive and non-coercive as possible, has laudable aspects. (He further demonstrates his own openness to all comers in his writing on religion and education, to be discussed in due course.) But there are difficulties with this position which neither Carter nor Rishworth nor

Wayne Thompson, another lawyer, who has similar views to Rishworth on this issue, ever really acknowledge.

Thompson's views are expressed in a 1996 New Zealand Law Journal article called "Religious Practices and Beliefs: a Case for their Accommodation in the Human Rights Act 1993".⁴¹ Thompson acknowledges Rishworth's helpful comments in writing his article, in which he expresses support for those who discriminate on religious grounds. His article also draws heavily on Carter's book.

One difficulty with the position that Thompson and Rishworth take is that in keeping with the older conception of religious freedom, this freedom is placed ahead of fairness. What of the rights of those discriminated *against* on religious grounds? The expectation is that individuals who do not even share those religious beliefs will have to suffer the consequences of them, which assigns these people a place in the community of lesser worth than those who would discriminate. Several human rights instruments⁴² specify that religious freedom is limited by the rights and freedoms of others but there is no attempt on the part of Rishworth or Thompson to explain how the amendments they advocate would marry with these instruments to which New Zealand is a signatory. These instruments assume it is the state's business to see that all of its citizens are treated justly and fairly.

Certainly in Thompson's article there is some confused thinking on this issue. He suggests that all citizens should share the cost of religious freedom for these groups⁴³ without confronting the fact that it is in practice a particular individual who suffers discrimination and not the population as a whole. And as it is a particular individual who commits the offence, there is the further question of whether the dictates of religion can absolve people from personal responsibility for their actions. Thompson's suggestion shows no awareness that there are difficulties with the concept of group or communal rights: it is not clear how groups can exercise decision-making capacity and agency in a

relevant manner; there is always potential for conflict both between groups, and between a group's interest and the interests of component individuals who themselves are vested with human rights. Indeed, since human rights are intrinsically bound up with protecting individuals from "the coercive effects of enforced community standards",⁴⁴ they are by definition incompatible with the concept of group rights. Lineham sums this up well: "The church [as an institution] cannot extend its protection to its members conceived of as a community of Christians living within the broader society."⁴⁵ Because this difficulty is one of the main stumbling blocks between what I have called the old and new conceptions of freedom of religion, and because of the rise of indigenous rights claims, this thesis will return to it a number of times in order to explore it more fully.

There is more confusion in the thinking in Thompson's article, and also in Rishworth's and Carter's writing, though less overt, which would have been avoided had a Religious Studies approach been employed. Thompson confuses religion itself with the *object* of religion. Religion, as Sullivan notes, is a *human* institution ("...creating religion is something people do..."⁴⁶) and as such it is not itself sacred or unquestionable. It is the object of religion which is sacred or divine. And to argue otherwise is, in religious terms, to set up a false god. "Government is not God, neither is religion"⁴⁷ is how one writer puts it.

A common observation in this thesis is that freedom of religion and freedom of speech are very closely associated - after all, freedom of speech and expression are the visible aspects of freedom of thought and belief - and the presence of one usually guarantees the presence of the other; the latter guarantees that religion can be questioned and criticised and debated and forced to defend itself, and can in turn question and criticise others' views, including those of the state.⁴⁸ These are held to be the healthiest conditions for religion to evolve, and therefore to survive, because it is not protected from internal or external criticism. Thompson, however, believes that HRA should yield to a "higher law".⁴⁹ In doing this, he assumes that religion itself is sacred and unable to be questioned rather than human and open to question, and that religious claims made in the public

domain should be privileged. Van der Vyver's brisk response to this is that "the state ought not to avoid its juridical responsibility simply because matters of faith or religious institutions might be involved."⁵⁰

Thompson also states - although there is no logical reason why this should follow - that the state is denying the possibility of the existence of any transcendent authority if it refuses to recognize this higher law.⁵¹ That there are more problems in applying religious discourse to public life in a pluralist society than he realises once again shows that the wider appreciation of religious matters in general that Sullivan advocates would have been useful to Thompson. Sufficient to say here that Thompson has not noticed that religious discourse is not a singular thing; there are many religious discourses (which particular one would he privilege and on what grounds?) including some which do and some which do not concur with the state on the matter of human rights. Thompson simply adheres to the old conception of religious freedom, and assumes that religion means some kind of generic Christianity.

Nor does he see that the state must therefore maintain an open-ended discourse (which must therefore be procedural, to keep within its competence, rather than teleological) with all its citizens of all religions and none;⁵² this precludes it from making a theological statement of the kind that he suggests, which is of a type found in closed (religious) discourses.

It is surprising that as a lawyer Thompson does not see the consequences of privileging religious discourse in the public domain. A case in California in November 2000 demonstrates this well.⁵³ An appeals court overturned the death sentence against a convicted murderer on the grounds that the prosecution argued that God sanctioned capital punishment and suggested to the jury that they could disregard the legal questions before them in favour of "a higher law" and that destroying the accused's mortal body might be the only way to "save [his] eternal soul". The logical extension of Thompson's suggestion

is the establishment of a theocracy, in which freedom of religion does not exist.

He argues further, as does Carter, that if the state "relegates" religion to the private domain on the grounds that it is subjective and not open to rational argument, it conveys the idea that religion is not important.⁵⁴ But the "relegation" to the private domain of religion has always been the price of religious freedom in the modern state. (This may have been disguised while the U.S. - along with New Zealand, as Ahdar demonstrates⁵⁵ - was a *de facto* Christian state.) One could actually argue that it was because religion was too important, rather than unimportant, that the state's neutral role was originally forced upon it. That formal religion is less important in many people's lives now than it once was probably has much more to do with the secularization of society than any particular behaviour of the state. Indeed I argue in Chapters Three and Four that under the new conception of religious freedom the state is actually more accommodating of religion in some ways than under the old. Thompson's and Carter's association of the word 'private' with 'unimportant' is also questionable when we live in a society in which private goods are commonly valued above community goods.

To return to the discussion of Rishworth's views. He expresses other reservations about human rights generally while at the same time acknowledging the profundity of the change that HRA embodies in the role of the state, and incidentally supporting the contention of this thesis that New Zealand is moving to a new conception of religious freedom. In the journal article of 1997 he makes the point that human rights is more than just prohibiting government actions which violate or threaten individual rights, that its goal is actually "...the transformation of culture and society..." and that the government and legal structure are undergoing a "human rights revolution".⁵⁶ He complains that these reforms are coming from the top down and do not have the whole-hearted political support and public consent within the community, and are therefore not democratic. He seems to assume that the state should always follow in such matters rather than lead, a view which could be challenged. In any case, it could be pointed out that although objections to the

legislation were certainly voiced, the governments during the years in which the legislation was introduced and passed were *elected* and that the legislation was thereby democratically enacted. Rishworth also seems unaware of studies which track changes in public thinking on human rights.⁵⁷

He also expresses concern in this article about the practicability of reconciling all other legislation with HRA because of the huge size of the task; this concern may be well-founded but hardly seems a sound reason for not enacting it. What we are seeing here is Rishworth's philosophical reservations about some aspects of human rights legislation being translated into a different form; he has cast around for practical, rather than philosophical, objections to further express his dis-ease with present trends. That he is not altogether happy with egalitarian values is clear.

Because education is an area where there is great potential for conflict between religious freedom and other human rights, Rishworth has in three of the four items discussed it, i.e. in all the items except the 1997 journal article. The 1993 and 1997 papers are in fact devoted to education; only a few pages of the 1995 essay, which ranges over a number of more general points, are devoted to it. Not surprisingly some issues are discussed more than once. Chapter Five of this thesis gives education special attention so a number of the following issues are taken up there in a more general way.

Section B of the 1993 paper, entitled "Freedom of Religion and the School Curriculum", examines the conflict between religious freedom and compulsory education, and what the law says regarding religious observance and instruction in primary and secondary schools; it looks at religious issues arising in the general secular curriculum and the interpretation of the 'opt-out' clause (s25A Education Act 1989). It arrives at the conclusion that for parents private schooling is the only option to 'state' values (by which he means values in line with human rights legislation) being taught to their children.⁵⁸ Rishworth's own view at that time was that the state system inculcates a homogeneous uniformity and works

against diversity.

Five years later his stance seems to have softened a little. In the unpublished 1997 paper, he concedes that "realistically, there are limits on religious freedom which parents opting for the state system simply have to accept. They are part of living in a pluralistic society..."⁵⁹ He does acknowledge that most parents actually have no choice but to use the state system. In this later paper he also distances himself a little from those conservative Christians who are "unduly critical of the Human Rights Act and its impact on religious conscience in education and other fields. The avoidance of discrimination on immutable characteristics is surely a religious ideal, and the Human Rights Act and its international counterparts stand in a lengthy tradition of religious thought..."⁶⁰ His support for the HRA is qualified here by the word "immutable" of course; it is not clear exactly what he would regard as immutable.⁶¹

Earlier in this 1997 paper he salutes the Private Schools Conditional Integration Act (1975) as a "milestone in the development of religious freedom in New Zealand".⁶² He is echoing Brother Lynch's paper to which he is replying and about which more will be said later in this chapter. He does wonders if the act had not already been in effect, whether it would be enacted in the present, because it would now be seen as permitting some schools to "perpetuate discriminatory religious beliefs at public expense."⁶³ We see here again that as a liberal he is keen to embrace as wide a diversity as possible, but he eschews discussion of the difficult questions that this diversity brings with it. Only the religious and educational rights of parents, and not children, are considered in these essays and papers and quite deliberately so; Rishworth simply observes in the 1993 paper that "...the dichotomy between parental and children's rights is controversial..."⁶⁴ Though he is certainly aware of the problems⁶⁵ of deciding when education becomes indoctrination and of the teaching of intolerant exclusivist attitudes, of questions of equality of educational opportunity for both sexes, and the perpetuation of patriarchal values etc., he chooses not take these issues on.

Rex Ahdar

Rex Ahdar is a Senior Lecturer in Law at Otago University. Three items of his will draw comment. The first is a journal article called "Religion in Custody and Access" which appeared in the New Zealand Universities Law Review in 1996. The second is a paper called "New Zealand and the Idea of a Christian State" and given at the 1997 church and state conference already referred to and later published in God and Government. This paper will not be discussed separately since its thinking informs a substantial part of the first section of the third item, which is his Ph.D thesis called "Worlds Colliding? Aspects of New Zealand conservative Christians' encounter with the law" (September, 2000).

Ahdar's continuing concern across all three items is the religious freedom of those minority religious groups who find their views are not easily accommodated in the modern secular state that New Zealand now is.

The first item examines the judgments made since the Guardianship Act 1968 in the Family and High Court in which religion has been a feature in determining which of a child's divorcing parents is awarded custody. Ahdar's view is that a parent of a minority faith can be at a disadvantage in gaining custody because judges generally believe a 'normal' i.e. 'majoritarian' upbringing is best for children.⁶⁶ He suggests that the religious rights of minority faiths would be better served by the judiciary if very solid proof of likely harm or detrimental effect was required, and not just conjecture, before a parent's religion played a part in whether this parent gained custody.⁶⁷

He does acknowledge the difficulty of establishing what constitutes 'harm' or 'detrimental effect';⁶⁸ he himself sees a socially restricted life as not necessarily harmful and educational deprivation as definitely harmful. This view does not take account of two articles of the Convention on the Rights of the Child 1989. Article 10 upholds the child's right not to be alienated from the wider family, and article 15(1) upholds the child's right to

freedom of association. These would seem to rule out a 'socially restricted life.' Ahdar does refer to articles 12 and 14 of this convention in his article but does not seem to have noticed he has been selective in his reference to it. (This convention is discussed further in Chapter Five.)

In advocating that the judiciary need to have a better knowledge of religion to work from rather than uninformed or unconscious prejudice, Ahdar is concurring with Sullivan in her view that fairer legal decisions on religious matters would result. What is less clear is whether this would necessarily result in parents of minority faiths gaining custody more often. Ahdar automatically seems to assume that it would, but given New Zealand's adoption of the Convention on the Rights of the Child, which Ahdar has not properly considered as a whole, this cannot be assumed; the child-rearing practices of minority faiths are more likely to be at odds with this convention. These matters are also discussed in more detail in Chapter Five.

Ahdar's thesis is "a study of a particular religious group, 'conservative Christians', and their reaction to cultural and legal change in recent decades. Their religious liberty is a key focus."⁶⁹ Ahdar is very sympathetic to this group - in fact he identifies with them completely at some points - and sets out in considerable detail how this group have emerged as a result of the change in the predominant worldview and why their thinking is now incongruent with it. Human rights and family law are central issues and a number of case studies are considered. Like Rishworth and Thompson, he has been influenced by Stephen Carter and other American authors who think similarly.

However, in spite of all the material he presents which puts the conservative Christian point of view and challenges the supposed neutrality of the liberal democratic state, in the end Ahdar has to concede that, given what he calls the prevailing "Wellington worldview", the future does not look comforting for them. As he puts it, "Hegemony lost is seldom regained....the Enlightenment happened and religion lost."⁷⁰ Just as the Mormons had to

reinterpret their faith regarding polygamy in the light of state legislation, he feels "some conservative Christians may revisit their views on homosexuality, religious upbringing, smacking and so on."⁷¹

Such an admission weakens his championing of religious groups as independent sources of supposedly absolute moral authority.⁷² Stephen Carter compromises his position in the same way; he expends much energy being critical of 'relativist' secular values and then later admits that the Mormons had a change of heart regarding black leadership, and the Episcopalian Church regarding women priests, after human rights legislation was passed in the U.S.⁷³

There are several other examples of similar inconsistencies and contradictions. For example, he, like Thompson and Carter, laments the fact that religious discourse is not privileged over the human tool of reason in the public arena. Ahdar writes: "attempts to 'impose' the truth...are rebuffed, as are efforts to dethrone reason as the adjudicating touchstone"⁷⁴ but later admits that there is "a certain inevitable incommensurability, a *differend...* between the two groups"⁷⁵ and that if the efforts of conservative Christians to influence public policy weaken, it will be partly due to an internal deficiency on their part, that of being unable "to generate intelligent, secular arguments sufficient to carry the day."⁷⁶ Ahdar presumably means here arguments such as those presented by Bishop Cullinane on euthanasia already noted in Chapter One.

Again, at one point he expresses sympathy for religionists who are likely to be denounced for opposing "the goodness of ideological pluralism",⁷⁷ complaining that "Tolerance is meted out in proportion with liberal, pluralist values: [conservative Christians] must know their place".⁷⁸ At another point he writes that "tolerance is nothing to be sneezed at"⁷⁹ and that liberal states grant religionists a greater measure of freedom than in any other stage in recent world history and more freedom than that afforded religion in other non-liberal nations!⁸⁰ He seems unable to decide whether the members of the particular

religious group he is studying are fortunate or unfortunate, whether to bemoan their losses or console them. That they are finding change difficult seems to be his main point, though it is clear that Ahdar himself is as much caught between the two conceptions of religious freedom as the subjects of his thesis are caught between the two world views these conceptions rest on.

Similar dissonances appear between, on the one hand, Ahdar's sympathetic explanation of the fears conservative Christians have that parental authority and control over children's religious and general upbringing appear to be threatened by such human rights conventions as the Convention on the Rights of the Child, and, on the other hand, his apparent agreement that a child has a "right to an open future".⁸¹ Discussion of these tensions is extended in Chapter Five.

Ahdar wants to have his cake and eat it too. He wants the predicament conservative Christians are in acknowledged, but he does not have a theory of liberalism to offer which deals with their illiberalism in such a way that their predicament can be eased, though he can and does offer speculation at a number of points as to the likely legal consequences of human rights legislation for conservative Christians, and some of this may allay their alarm. He uses religious discourse in an academic legal thesis,⁸² but he does not see that he is thereby falling into the same parochialism in his understanding of religion that in his 1996 journal article he is critical of the judiciary for displaying, and that Sullivan would wish those dealing with the law and religion to be more aware and wary of.

A Religious Studies approach, which is interested in what is singular about individual religions and also offers generalizing insights⁸³ (that religion is a human creation; that "As societies change, religion necessarily changes too. As society fragments, religion also fragments..."⁸⁴) might have given Ahdar the perspective with which to perceive his contradictory stances more clearly and the context in which to understand them better.

In Ahdar's view, the new conception of religious freedom which he so reluctantly acknowledges to be now prevailing is so skewed in favour of the state that it would be more accurate to talk about religious tolerance rather than religious freedom.⁸⁵ He might be more sanguine about the position of religion if, in keeping with a Religious Studies approach, he took a wider view of it, saw its universality as well as its detailed individual forms, and did not allow the conservative Christian experience virtually to define religion for him. After all, in coming to the defence of religious tradition, "[conservative Christians] cannot help but transform it...What was an inescapable inheritance becomes an object of voluntary allegiance. What was implicit is made explicit. A new stringency is imposed. Traditions lose their catholicity, their tolerance of variety and dissent. "He who is not against us is with us" is replaced by "He who is not with us is against us"."⁸⁶

God and Government: The New Zealand Experience

Several references to this collection of essays which appeared in 2000 have already been made. It is not specifically about religious freedom but because it (as did the 1997 conference that gave rise to it) deals with the relationship between religion and government in New Zealand, it is not surprising that religious freedom receives some incidental attention. Three essays in particular raise the matter at some point in more than a passing comment and reference has already been made to all three. One of these, Rex Ahdar's "New Zealand and the Idea of a Christian State", has already received mention with Ahdar's other work.

Another, Peter Lineham's "Government Support of Churches in the Modern Era"⁸⁷ usefully traces some of the changes in the relationship between religion and the state which will be of relevance in Chapter Four. After examining the thinking of Rishworth, Thompson and Ahdar, it is difficult not to see the influence of the American Stephen Carter's ideas on the relationship between religion and the state as unhelpful and all-pervasive. His inflated rhetoric seems to have bemused many into accepting his thinking in an unexamined way and prevented them from seeing *New Zealand's* situation clearly.

How refreshingly straightforward and moderate Lineham sounds as he accurately sums up the New Zealand scene:

"Yet churches are composed of ordinary members whose thinking is shaped by both secular and spiritual concerns...The churches never directly mirror the state's values, and Christians and non-Christians have somewhat different values. But one must also recall the great variety of churches and standpoints. Can one speak of a general church position? It would be wiser to speak of a spectrum of church opinion, and recognise that this spectrum adjusts over time, for example over homosexuality and the role of women."⁸⁸

At the end of his article he has some wise reflections on the problem religions have with the kind of language which it is appropriate to use in the public sphere and yet which still allows them to retain their own sense of their identity. He also has concerns about the implications of the Human Rights Act for the religious freedom of some Christian groups, but shows a better appreciation of the difficulties of remedying the situation⁸⁹ than does Thompson. As a historian writing in his area of interest, Lineham's approach is sympathetic, yet objective. Of the writers discussed in this chapter, he best defines the attributes of the relationship between religion and the state in New Zealand which makes it unique.

Brother Lynch's "Religious Education: A Right and a Growing Social Imperative"⁹⁰ is a possible target for one reviewer's criticism of God and Government, namely that it needed "...less cheer-leading and more scrutiny of the actual thorny issues..."⁹¹ Lynch certainly picks his way around a number of thorny issues without stopping to examine them. For example, he is full of enthusiasm⁹² for the consequences for religious freedom of the Integration Act of 1975 already mentioned, but it is Rishworth in his unpublished paper replying to Lynch who points out that the beneficiaries of this act are overwhelmingly Catholics and this is likely to continue to be so since the initial capital costs required to build new schools now make it difficult for other religious groups to benefit in the same way.⁹³ And while both make reference to human rights conventions in their papers, neither acknowledges that a United Nations committee in 1994 found the extent to which Catholic

schools receive state support quite alarming, given the modest proportion of the New Zealand population which is Catholic.⁹⁴

In his survey of different forms of religious education available in New Zealand, Lynch quotes articles of the Convention on the Rights of the Child and other conventions on children's religious and educational rights when they suit his purpose, but he omits to mention the CRC article which states that children themselves have the right to religious freedom as they become mature enough to exercise it. Thus he circumvents the question of whether the imparting of a religious education always takes account of this. Lynch's overview of home schooling⁹⁵ is superficial and once again avoids difficult issues. He does not seem to be aware that supervision by the Education Review Office is considerably less rigorous than the picture he paints. Although he mentions the packaged American educational programmes used by some home schooling parents, he avoids mention of their quality (see Walker below). Other 'thorny' issues regarding religious education, such as gender discrimination, are not referred to by Lynch but are raised by Rishworth as we have seen, and will be discussed in Chapter Five.

Peddie and Walker

Two items which have appeared during the past eight years do take on some of the thorny issues regarding religion and education. These are Ruth Walker's article "The Ethics of Fundamentalist Christian Schooling" in Godly School? Some Approaches to Christian Education in New Zealand⁹⁶ and William Peddie's Ph.D thesis entitled "Alienated by evolution: the educational implications of creationist and social Darwinist reactions in New Zealand to the Darwinian theory of evolution." The issues these items raise are given further attention in Chapter Five.

Walker sees an open-ended religious education as a basic requirement of religious freedom; otherwise the freedom of parents to rear their children in accordance with their own religious beliefs restricts the religious and educational rights of their children. Because some

conservative Christians directly oppose training in independent critical inquiry, children's ability to make free choices of their own about religion when they are old enough is compromised and their higher educational opportunities and vocational options are restricted. Walker's article offers a critique of teaching methods and content which offend in this way - in particular, of the American materials mentioned but not criticised by Lynch - and also of the principles they are based on, which she finds to be logically incoherent.⁹⁷ It is clear that she takes the new conception of religious freedom very seriously; she is concerned that some children are being denied an equal opportunity with regard to religious and general education.

The last chapter of Peddie's thesis, "The educational implications of the non-negotiable nature of a position involving intense personal belief", deals with the fact that secondary school science teachers such as himself must sometimes confront freedom of religion issues when teaching biology, so much of which today hangs on Darwinian theory. He judges that secondary children are certainly of an age that in a non-confrontational way this theory can be presented to them. The right of freedom of religion of parents who reject Darwin on religious grounds must give way to the students' rights to freedom of thought and religion and also their educational rights, even if this leads students to challenge the attitudes and thinking of their parents and their belief system.

Peddie demonstrates a number of exemplary attitudes for those living in pluralist contemporary New Zealand, and his approach is also in keeping with that of Religious Studies. He is writing directly out of multicultural teaching experience (inner Auckland schools with high numbers of church-going Maori and Polynesian students) and he offers a number of useful suggestions to help other teachers in this position. He is aware that for some people, the rejection of evolution is the rejection of the secularisation of society, and he sees the conflict in terms of trying to find a solution which shows respect for people and yet allows for the pursuit of truth.⁹⁸ He also shows concern that students from minority groups, whether of a religious, cultural or racial nature, should not be denied access to

advanced scientific education.⁹⁹

Matsis

In 1997, T. Matsis, a student at the Law Faculty of the Victoria University of Wellington wrote a Master's research paper called "Freedom of Religion: the Tradition of Legislating Religious Holidays". In this he argues that the Christian majority - he might be on safer ground using the word 'majority' here if he spoke of those with a Christian background - is favoured because Christian religious holidays are public holidays and this constitutes a limitation on the religious freedom of those of other faiths, who cannot work on Good Friday, Christmas Day etc. and yet do not get holidays on their own festival days.

Matsis raises a very real practical problem which pluralist societies must wrestle with - how to be fair to all religious groups and those of no religion when it comes to public holidays. In Canada, U.S.A., and Britain this has already been a matter of public debate. How can minorities, who have generally in the past just accepted these constraints, be less constrained by the majority? For example, what can be done about a Muslim student, or teacher¹⁰⁰ in a state school who wishes to attend a mosque on Friday and come to school at the weekend instead?

Thus Matsis questions state 'neutrality' in New Zealand towards all religions and puts the case for minority religions to be less circumscribed by the majority - for their freedom of religion not to be compromised by their being in a minority. He shows himself to be open to the idea of a more diverse society and to be prepared to support the implementation of measures to accommodate this, in keeping with the new conception of religious freedom.

Diversity and Injustice: Proceedings of a Seminar to Mark the United Nations Year of Tolerance 1995

This item comprises six short papers given at a seminar organised by the Institute of Policy Studies at the Victoria University of Wellington. They discuss political, ethnic and

religious tolerance, the United Nations contribution and human rights. Three of the papers make some mention of the confinement of religion to the private sphere in pluralist societies. This can be seen as a restriction of religious freedom in so far as beliefs cannot always be 'lived out' in the wider society. This has of course been a major concern of Rishworth, Ahdar and Thompson, as we have seen.

C. Tremewan in "Tolerance and Human Rights: Emerging Trends, Issues and Questions" argues that freedom of religion and intellectual freedom need the solidarity of each other;¹⁰¹ exclusivist claims on the part of some religious groups threaten freedom of thought and belief, and so religion itself must be kept in the private domain. This is a fairly extreme view which Morris takes issue with below.

J. Hinchcliff in "Religious Tolerance" notes that human rights, including freedom of religion, can be justified from *within* all the great religious traditions, which in fact have contributed to the establishment of human rights discourse, but that these traditions are many-stranded and because some strands would deny others freedom of religion and other human rights, it becomes necessary to keep religion out of public life.¹⁰²

P. Morris, however, in a summing up paper called "The United Nations, New Zealand and Tolerance" questions the public/private dichotomy of liberal theory, as feminists have long done. Writers of human rights instruments also recognize this dichotomy as a major stumbling block if it prevents human rights norms from being applied within families.

Discussion of a double or split world is concerned with the freedom of the expression and exercise of religion coming into conflict with the freedom of, or from, religion of others and with the right not be discriminated against. These three writers (or speakers in this context) are primarily concerned with the free expression of religion. While Tremewan and Hinchcliff would have religion continue to keep a low profile (neither of them explain why all religion and not just exclusivist views should be confined to the private sphere), Morris

believes "a genuine pluralism would allow the claims of ...religious groups to be debated openly in the public sphere".¹⁰³ He does *not* suggest religious discourse be privileged in the public sphere, though. He would be in agreement with those who link the right to proselytise and propagate religion to a balancing right to "criticise any religion or belief or its practices."¹⁰⁴ Freedom of religion should not inhibit freedom of speech, he believes. Morris also advocates the development of new skills in cultural mediation, so that, presumably, the pluralist society can co-exist with a lively ongoing debate without conflict becoming unmanageable.

Summary

The writers who have been discussed in this chapter have exhibited a range of opinions, from those who are uncomfortable with the new conception of religion and hark back to the old one, to those who take the new conception for granted. One point that emerges is that those who have exclusivist views and wish to privilege religious discourse in the public domain are those who complain most about religion being confined to the private domain, but ironically it is they who, because of their uncompromising intolerant attitudes, have done most to bring this about. The tragedy of this is that when religious groups do have something to say that is useful and relevant to the wider community, they are less likely to be listened to and taken seriously.

Notes

1. Cupitt, p. 22
2. A. Davidson, chapters 15 and 16
3. Donovan in Donovan 1996, pp. 261-2
4. Available from Rex Ahdar
5. Introduction, Ahdar and Stenhouse, pp. 17-8
6. Rishworth in Huscroft and Rishworth, pp. 253-4
7. " " " p. 225
8. Elsmore 1989, p. 358
9. Rishworth in Huscroft and Rishworth, p. 225. Rishworth mentions two "blemishes" in a note (p. 255): the Tohunga Suppression Act 1907 - this is discussed in Chapter Three - and the treatment of Jehovah's Witnesses in the 1940's. He might also have mentioned the treatment of conscientious objectors during World War One, given the physical brutality involved. A brief account of this is given by Stenhouse in Gilling 1992, pp. 16-8.
10. Rishworth in Huscroft and Rishworth, p. 225
11. The form of the name of the latter group given by Rishworth is incorrect.
12. See Elsmore 1989.
13. Rishworth in Huscroft and Rishworth, p. 231
14. " " " p. 231
15. Stenhouse in Ahdar and Stenhouse, pp. 21-2
16. Rishworth 1993, p.44ff.
17. Rishworth in Huscroft and Rishworth, p. 246ff.
18. " " " p. 249
19. Chen 1993
20. Chen April 1992 and May 1992
21. Rishworth in Huscroft and Rishworth, pp. 23-4
22. Cooke 1993
23. Cooke quoted in "NZ 'behind the play' on human rights laws" in Evening Standard, 10/4/00
24. "NZ 'behind the play' on human rights laws" in Evening Standard, 10/4/00
25. Rishworth 1997 paper, p. 6
26. "Court quashes ban on anti-homosexual films" in The Dominion, 1/9/00. A background article by Steven Price, "Perversions of the truth", appeared in New Zealand Listener, 8/7/00, pp. 30-31.
27. "Court quashes ban on homosexual films" in The Dominion, 1/9/00
28. Rishworth in Huscroft and Rishworth, pp. 251-2
29. " " " p. 249
30. " " " p. 254. The phrase "free from state coercion" is Stephen Carter's (Carter, p. 187) whose influence on Rishworth, Thompson and Ahdar is

noted in due course. While the possibility of state coercion in connection with religion seems to concern him greatly, the possibility of coercion in connection with religion on the part of parents, or on the part of religious groups against their own members, seems to be of no concern at all.

31. Witte and Christian Green in van der Vyver and Witte, p. 553
32. Lineham in Ahdar and Stenhouse, p. 53; see also pp. 41-4. A. Davidson (p. 175) notes that Archbishop Paul Reeves was Governor-General of New Zealand from 1985 to 1990; thus church (Anglican) and state leadership roles were combined in one person but this caused little controversy.
33. Ahdar in Ahdar and Stenhouse, p. 74
34. Lineham in Ahdar and Stenhouse, p. 41
35. Aggressive separation of religion from the state can be a form of hostility as Cole Durham in van der Vyver and Witte (p. 19) points out.
36. Carter, p. 37
37. Lineham in Ahdar and Stenhouse, p. 44
38. A. Davidson, pp. 173-6
39. See Boston's article in Ahdar and Stenhouse for an account of this.
40. This information is from A. Saunders who has had casual employment in an Exclusive Brethren-owned business.
41. March 1996, pp. 106-115
42. For example, the Convention on the Rights of Children, Article 14 (3) and the International Covenant on Civil and Political Rights, Article 18 (3).
43. Thompson, p. 113
44. Malik in Gearty and Tomkins, p. 147
45. Lineham in Ahdar and Stenhouse, p. 56
46. Sullivan, p. 25
47. D.W. Shriver in the Foreword to Gustafson and Juliver, p. xi
48. Morris in Institute of Policy Studies, p. 32, and Shelton and Kiss in van der Vyver and Witte, p. 592
49. Thompson, p. 113
50. van der Vyver in van der Vyver and Witte, p. XLIV
51. Thompson, p. 113
52. Malik in Gearty and Tomkins, p. 144, and also Rawls p. 90. Nussbaum (p. 37) writes: "It is no sign of disrespect to any religious tradition to ask that its members use in the public realm arguments that can be understood by people from other traditions..."
53. "God 'saves' US killer" in The Dominion, 8/11/00
54. Thompson, p. 112
55. Ahdar in Ahdar and Stenhouse, pp. 63-5
56. Rishworth 1997 journal article, pp. 177-8

57. See Webster and Perry.
58. Rishworth 1993, p. 44
59. " 1997 paper, p. 10
60. " " pp. 12-3
61. The issue of what characteristics should qualify for discrimination avoidance are discussed by McLean in Huscroft and Rishworth, especially pp. 269ff.
62. Rishworth 1997 paper, p.1
63. " " p. 6
64. Rishworth 1993, p. 55, note 17
65. " 1997 paper, pp. 5-6
66. Ahdar 1996, p. 131
67. " p. 134
68. " p.139
69. Ahdar thesis 2000, p. i
70. " " pp. 389-0
71. " " p. 388
72. " " p. 379
73. Carter, p. 146
74. Ahdar thesis 2000, p. 380
75. " " p. 387
76. " " p. 388
77. " " p. 381
78. " " "
79. " " p. 390
80. " " p. 111
81. " " p. 245
82. " " p. 389 "that render public expression of universal truth..." and also p. 391 (quotation from Hand)
83. Neusner, p. 28
84. Sullivan, p. 26
85. Ahdar thesis 2000, p. 389
86. "Spirit in the sky" by Edward Skidelsky reviewing Karen Armstrong's The Battle for God: Fundamentalism in Judaism, Christianity and Islam in New Statesman, 8/5/00, p.49
87. Lineham in Ahdar and Stenhouse, pp. 41-58
88. " " " pp. 57-8
89. " " " pp. 56-7
90. Lynch in Ahdar and Stenhouse, pp. 93-104
91. Heidi Thomson in her column reviewing paperbacks, The Dominion, 1/7/00
92. Lynch in Ahdar and Stenhouse, pp. 98-9

93. Rishworth 1997 paper, p. 5
94. Ministry of Foreign Affairs and Trade, pp. 25-6 and 35
95. Lynch in Ahdar and Stenhouse, pp. 100-101. The Education Review Office only visits a home if an annual report is not submitted by the homeschooling parent. This is a very loose system of supervision. (This information provided by the Procter family, who home school their children.)
96. Walker in Gilling 1993, pp. 101-118
97. For another critique of this American material, see Baldwin in Gilling 1993.
98. Peddie, p. 207
99. " p. 216
100. Jones in Goodwin and Pettit, pp. 551-2, discusses such a case which arose in London.
101. Tremewan in Institute of Policy Studies, p. 9
102. Hinchcliff " " p. 22
103. Morris " " p. 31
104. " " p. 32

CHAPTER THREE

Maori

"The subject of indigenous religions is one of the most under-developed areas of inquiry in human rights."

Makau Wa Mutua¹

Introduction

This chapter attempts to give an overview of religious freedom in New Zealand as it might appear from a Maori point of view. The aim of this is two-fold: first, it is an attempt to go some way toward redressing the lack of balance in the overview given by New Zealand's leading commentator on religious freedom, Paul Rishworth;² secondly, there is an intention to demonstrate that a policy of "serious biculturalism"³ necessarily has implications for any conception of religious freedom which New Zealand espouses and that the supposedly neutral, 'hands off' approach on the part of the state which was integral to the older conception of religious freedom is no longer an appropriate model.

Part One of this chapter considers the theoretical freedom of religion formally granted to Maori in 1840. Part Two surveys some of the reasons that religious freedom for Maori remained theoretical only and did not translate into a practical reality. Part Three refers to the specific articles of the Draft Declaration on the Rights of Indigenous Peoples which articulate what constitutes religious freedom for indigenous minorities such as Maori, and Part Four considers some of the wider implications of this declaration and of biculturalism generally.

Part One: The Treaty of Waitangi and Religious Freedom

The first formal declaration on religious freedom in New Zealand was made at Waitangi on February 6th 1840 just before the signing of the Treaty. It was a verbal pronouncement in Maori; the words Governor Hobson read aloud to the meeting are recorded as Article the

Fourth (unwritten) of the Maori Text of the Treaty signed at Waitangi.⁴ It simply states that the Governor would protect alike "the several faiths (beliefs) of England, of the Wesleyans, of Rome, and also the Maori custom [ritenga]..."

Taken at face value, this statement seems peculiarly enlightened for the times in its even-handed approach to Christian - referring by name to those churches which had already established a missionary presence in New Zealand - and non-Christian i.e. Maori beliefs. But it is this very aspect which alerts us to the fact that an examination of its historical context is necessary if this declaration is to be seen for what it was, for only then does its relevance to present concerns become clear. It is necessary to know the identity and the motives of the proposer/s, how Maori might have received it at the time of the signing and how Maori view it now.

The knowledge that the declaration was proposed by one of the missionaries present and amended by another is immediately puzzling; why would they ask for protection for beliefs from which they had dedicated their lives to convert Maori? As Orange says, it "ran counter to nineteenth-century Christian sensitivities"⁵ by which she presumably means that Christians of the period saw Maori beliefs as inherently primitive and inferior.

Pompallier, as a Frenchman and a Roman Catholic missionary, was the initial proposer, his initiative prompted by the need to establish his right to continue to proselytise in a New Zealand about to become officially established as a British colony. The Catholic presence was resented by the Church of England and Wesleyan missionaries already established when Pompallier arrived early in 1838.⁶ The Catholic Emancipation Act removing legal discrimination against Catholics had only become law in England in 1829; it was understandable that Pompallier felt the need for reassurance, and politically astute of him to take the initiative to this end.

Pompallier's proposal - which in the first instance did not include the reference to Maori

belief - must have been difficult to stomach for Colenso and Williams, the other churchmen present. There had been missionary pressure on Britain for a number of years⁷ to incorporate New Zealand formally as a colony just so that the 'papist French', who were active in the whaling industry throughout the Pacific, might not gain a foothold in New Zealand as they were obviously planning to do. A French settlement was established at Akaroa only a few months after the signing of the treaty at Waitangi.⁸ Conversely, the Protestant missionary presence in New Zealand had stimulated Catholic laity who had spent time in the western Pacific to request their church to establish itself there.⁹ That the Catholic Church in France was sufficiently outward-looking to take up the request at this particular period can be ascribed to its resurgence following the anti-clerical stance of the French Revolution and the more active, less contemplative, role assigned to it by Napoleon.¹⁰

The task fell to François Pompallier, from Lyon, a prosperous French city at this time with a strong interest in supporting missionary work and where the Society for the Propagation of the Faith was based. As Vicar Apostolic of Western Oceania, Bishop Pompallier had, though not himself a member of their order, led a group of Marist fathers the headquarters of whose fledgling order was also in Lyon, to New Zealand.¹¹

That the Protestant missionaries should resent Pompallier was unavoidable and not just because he represented Rome. Maori social custom embraced concepts of rank so the fact that he was of a higher rank and also more splendidly attired on special occasions than the other missionaries was impressive to Maori.¹² He had been generous in his distribution of gifts on arrival (though financial support for his mission on the same scale was not forthcoming in later years) and he had great personal charm.¹³ He was more gracious towards, and more tolerant of, his missionary rivals than they were in return, and he was, moreover, more understanding of Maori spiritual and cultural difference than they; Catholic missionaries comprehended better that a degree of indigenisation was a necessary part of genuine conversion.¹⁴

Colenso it seems proposed the addition of Maori belief to the declaration in a cynical attempt to trivialise and devalue and so 'neutralise' this freedom granted to the Catholic faith which Colenso, child of the Reformation that he was, regarded as pagan, as he also regarded Maori belief. The inclusion of Maori belief thus arose out of "sectarian jealousy"¹⁵ and was not sincerely meant. This unwritten clause with its clear distance between the literal meaning of the words and the intention that lay behind the words may stand as an example of the sort of misunderstandings and difficulties which have abounded in attempts to interpret the written clauses of the Treaty proper as well. It is not surprising that this particular 'unwritten' declaration is now perceived by some present-day Maori as yet another example of Pakeha perfidy.¹⁶ It is hard to imagine that the Maori tribes assembled at Waitangi in 1840 would not also have taken it at face value, since they lacked an exclusivist approach to religion themselves, seeing no need to discard old beliefs in order to accommodate the new,¹⁷ and must have had only a limited understanding at this stage of the historical reasons for the missionary rivalry they witnessed with some bewilderment.

Part Two: Christianity and Colonisation

The following century and a half saw the working out of Colenso's cynicism and the erosion of Maori ability to exercise those rights set out in the Treaty proper. This in turn impinged upon Maori ability to exercise the religious freedom which in any case supposedly applied to all living under British, and later New Zealand, (common) law,¹⁸ regardless of the unwritten clause of the Treaty referred to in Part One of this Chapter. How this came about is the story of the New Zealand version of an experience common to other indigenous peoples, that of the impact of European colonisation, whereby European culture, with its superior technology, believed itself to be superior in every way; other cultures, having been superseded, were only fit to be put aside.¹⁹

That this attitude was not inevitable, but the product of a particular historical period, is clear from the debates beginning in the sixteenth century as to whether conquest and

imperialism in the Americas, including forced religious conversion, could be justified.²⁰ The Dominican priest Bartolomé de Las Casas campaigned tirelessly over many years for indigenous rights on behalf of native Americans. The Calvinist pastor, Jean de Léry, travelled among the natives of Brazil and published a sympathetic account of their way of life in 1578. Later, Montaigne and Rousseau displayed a "rational tolerance"²¹ toward the customs of exotic peoples.

This benign view evaporated particularly towards the end of the nineteenth and early twentieth century when social evolutionary theory became fashionable as Darwin's work became known, misinterpreted and popularised. That this just happened to coincide with a severe decline in Maori population numbers seemed to lend some credence to the theory.²² But there were other difficulties, some arising in the first years of contact, some arising later as the number of settlers increased.

That early nineteenth century Christian missionaries acted out of motives they accorded highest cannot be questioned.²³ All their powers of persuasion were turned towards influencing Maori to put aside their own beliefs and take up Christianity. Though, and because, missionaries believed they were bringing inestimable benefits to Maori, proselytization was combined with racism,²⁴ religion often being the first point of attack in the process of acculturation, "part of the cultural package of colonialism"²⁵ in spite of formal assurances that their way of life would not be threatened.

So freedom of religion for Maori was not an issue; the Christian missionaries did not even perceive Maori belief to be religion in the proper sense, as they saw neither buildings dedicated to religion nor witnessed religious services.²⁶ They believed it was their Christian duty to convert Maori to the 'one true religion', their own. Such beliefs as Maori had might be demonized and/or discredited. One may compare this assessment of the non-Christian with the way the word 'heathen' was used in a derogatory sense of Chinese immigrants on the goldfields of the South Island.²⁷ But the missionary efforts did not

always bear the expected fruit; Maori made use of their Bible-based literacy to combine their own beliefs with Christianity "in an easy syncretism"²⁸ rather than becoming fully Christianized immediately. Indigenous religious movements with combined elements, often selecting from the Bible what seemed particularly relevant to their own situation²⁹ and giving it their own rather than the 'received' interpretation, which arose (see below also), were considered to be "foolish delusions"³⁰ or the prostituting of the Scriptures "to base use".³¹ They were certainly not considered to be proper religion. What Europeans understood by freedom of religion at this time was the freedom to embrace whatever *Christian* church they wished without direction from the state, in accordance with this freedom's origin in a post-Reformation Christian Europe torn apart by religious wars.

Not that the state showed any inclination to direct Maori belief either, whether it was seen as religion or not, except on one occasion and that was not until early in the twentieth century. A specific piece of legislation was passed which could be seen, and sometimes is regarded,³² as oppressive to Maori belief, and that was the Tohunga Suppression Act of 1907 (repealed 1962). This was enacted as a public health measure, an attempt to reduce the TB rate among Maori by encouraging them to go to a doctor rather than a tohunga when they were ill; it was unlikely to have been aimed, as is sometimes claimed, at such figures as Rua Kenana whose settlement at Maungapohatu was at its zenith at this time. The fact that the Quackery Prevention Act was passed the following year makes it fairly clear that charlatanism generally was being targeted. It is true that it was not perceived at the time as an infringement of freedom of religion in the way that it might have been, had it been Christian religious leaders or Christian faith-healers who were being forbidden to practise. Many Maori were in favour of the passing of the act.³³ The divergence in thinking among Maori regarding the role of tohunga was also demonstrated a little over a decade later when Ratana began his religious movement and argued that tohungaism kept Maori in fear and misery.³⁴

A further difficulty in the way of Maori being able to continue with their own customs and

beliefs was the alienation of much of their land. This impinges upon the religious freedom of indigenous peoples in a way which is peculiar to primal religions. By definition, proselytising and universalist religions no longer confine themselves to the ethnic group of origin nor locate the supernatural in the landscape of that particular ethnic group in the way that primal religions do, though universalist religions may have certain sacred sites. The European forms of Christianity settlers brought with them to the colonies generally did not dispose them to see the usurpation of land as a religious issue, even if they had regarded the beliefs of the original inhabitants as anything more than superstitious nonsense.

It is now possible to see that those indigenous religious movements, such as the King movement and Te Whiti's passive resistance movement at Parihaka, at the same time creative syntheses of indigenous and Christian belief³⁵ and yet critiques of the latter, which began to appear about the middle of the nineteenth century were intimately connected to attempts either to prevent the further alienation of land, or to recover land already confiscated, or to assist Maori to recover from the demoralisation resulting from the loss of land and consequent loss of spiritual bearings, or a combination of several of these. It has been noted that the areas where most of these new religious movements arose were areas which suffered most through sale or confiscation of land.³⁶

The founder of one such movement, Tahupotiki Wiremu Ratana, was over many years unswerving in his determination to address all of these issues related to land loss mentioned above.³⁷ Believing he was called by God to do so, he not only healed people and established the religious movement, which eventually became a separate church and still exists, but he also travelled to London hoping, in vain, to be permitted to petition the King to have the Treaty ratified; on his return he looked for political solutions to the Treaty problem and allied his movement with the Labour Party in the hope that land confiscation and other Treaty issues might be addressed.

That the Maori response to the loss of land could be an important factor in the formation of (misunderstood) religious movements is evidence of the indivisibility of the land from Maori identity and basic beliefs. In common with other indigenous peoples, Maori see themselves as being owned by the land, rather than owning it in the European sense, and the fact that 'whenua' is the word for placenta as well as for land further bears out the belief that they are born from the land.³⁸ Christian theology has traditionally had little to say concerning the relationship of people to the earth; the Genesis account of creation which places humankind at the centre of creation and in control of it has until recently been taken at face value. Ecological concerns of recent times and scientific research proving the inter-connectedness of all things on the earth have helped to generate a greater respect for and understanding of indigenous peoples' spiritual ties with their land, but such insights were not those of earlier generations of Europeans interacting with Maori.

Further to the loss of land was the assault on the Maori language. As the Maori population declined and the European population dramatically increased, assimilationist policies entailing the learning of English only were assumed to be the best thing for Maori; thus the culture and the beliefs underpinning that culture and carried in the language were inevitably eroded. George Steiner writes that each language "...generates and articulates a world-view, a narrative of human destiny, a construct of human futurities for which there is no facsimile in any other [language]"³⁹ and later "...the varieties of religious beliefs and experience, the Aladdin's cave of cosmogonies, what Wallace Stevens called the 'supreme fictions' of our philosophies and metaphysics, relate immediately to linguistic diversities. They are built of language(s)".⁴⁰ Or in the words of the Waitangi Tribunal: "The language is the embodiment of the particular spiritual and mental concepts of the Maori".⁴¹ One striking example is the way Maori envisage the past as being spread out in front of them, with the future, as yet unseen, behind them; so the past is an ever-enlarging, re-assuring presence instead of ever-diminishing as it is left behind.⁴² Such are the differences between the two languages at a conceptual level that some Maori do not think English translations of karakia etc. should be attempted, not out of courtesy to

non-Maori speakers who might be present, but because the concepts do not exist in English and any attempt to translate will be misleading and thereby unsuccessful.⁴³

The urbanisation of Maori for economic reasons since World War Two has been an additional factor in accelerating this erosion in that it physically removed many Maori from contact with ancestral land and from elders who spoke the language and were knowledgeable about their culture. Moana Jackson explains: "The mental health and emotional well-being of a Maori person...was sustained by the secure interrelationship which he had with the religious or spiritual world, and was nourished by his language and his ties to the land."⁴⁴ Urbanisation also led to some Maori losing knowledge of their tribal affiliations and thus suffering a double alienation.

Part Three: Religious Rights Restored

The last few decades have seen changes in the way Maori perceive their own culture and in the way their culture, including religious beliefs, is officially perceived by non-Maori. There has been a Maori cultural renascence. There is an official government policy of biculturalism since the late 1970's which is attempting to be more than tokenism, and a "strenuous effort ... to come to terms with ...diversity."⁴⁵ There has been some real progress made in the settlement of land claims and greater recognition of the spiritual significance of land to Maori. The 'evolutionary' view of religion which believed the universalist or 'world' religions to be more advanced has been largely discarded by mainline Christian churches, though intolerant exclusivist views are retained by some conservative Christians.

There is a greater understanding of what the experience of colonialism entailed for the colonised, and of the psychological importance of a strong sense of identity in living a purposeful life. A long-term Massey University study, Te Hoe Nuku Roa, led by Mason Durie, is discovering that those Maori who feel most positive about the future are those "secure in their cultural identity and with access to Maori culture and Maori resources."⁴⁶

Health status and educational achievement were also correlated to feeling secure in their cultural identity. Indeed, since disadvantage was found to be greater when marae participation was low, "the study suggests that loss of culture is at least one cause of socio-economic disadvantage, not the other way round."⁴⁷

"The politicisation of spirituality"⁴⁸ as part of a worldwide indigenous rights movement, which in itself is a development of the human rights movement, has been one factor helping to broaden the concept of religious freedom so that it now encompasses the freedom of indigenous peoples to practise those aspects of their primal religion that they wish to maintain. This development of human rights is of interest because not only does it extend our understanding of what religious freedom can mean, but the recognition of indigenous rights extends our understanding of human rights by recognizing group rights.

While human rights instruments have referred to the individual for reasons outlined in Chapter Two, this individual has been conceived of as a member of society "entitled to realization...of the economic, social and cultural rights indispensable for his [sic] dignity and the free development of his personality" according to Article 22 of the human rights foundation document, the Universal Declaration of Human Rights. Individuals have also had the right to freedom of association under Article 20. Moreover, under Article 29 (1) everyone has duties to the community. But this has not been sufficient to prevent cultural and ethnic identities being denied expression by more powerful cultures. So, along with the resurrected doctrine of aboriginal rights, which existed independently of the Treaty of Waitangi but was broadly consistent with it, it has been the principle of self-determination which has been advanced by the Draft Declaration on the Rights of Indigenous Peoples, the formulation of which was completed by 1993.⁴⁹ Two fundamental human rights instruments, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which together with the Universal Declaration of Human Rights make the so-called International Bill of Human Rights, have an identically worded first article: "All peoples have the right of self-

determination..."

The problem which arises with collective or group rights - a problem to which there are several references in this thesis with regard to religious groups - namely that group rights could override the rights which group members enjoy as individuals, has led to New Zealand taking the position regarding the Draft Declaration that all existing human rights must be safe-guarded.⁵⁰ Indigenous rights are additional to, rather than instead of, existing human rights. New Zealand's efforts over the past twenty-five years to accord greater respect to the Treaty of Waitangi, whose main concepts run in parallel with the Draft Declaration, mean that concepts of self-determination - such as that suggesting a distal relationship⁵¹ between the Maori and the wider community - which do not imply secession,⁵² inappropriate in New Zealand's case where the indigenous population is integrated into the wider community, have already evolved.

Freedom of religion for indigenous peoples is articulated in the United Nations Draft Declaration on the Rights of Indigenous Peoples⁵³ in terms of having access to religious and cultural sites, in recognition of the part the land plays in primal religions, and in terms of having recognition of, and the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies. Whether or not these entail practices and acts which European Christianity has hitherto envisaged as religious is irrelevant; hence the centrality of self-determination referred to in the previous chapter. Indeed some of these practices may include what is normally illegal, such as the hunting and/or use in ceremonies of protected species, or parts thereof, such as feathers and bone.

The April report states that Christianity is the religion of Maori culture.⁵⁴ The relationship between Christianity and pre-Christian Maori belief is a very complex one and it would be surprising if in some respects it were not an ambivalent one, in that Maori may feel they have lost much that was valuable, such as prayers and chants that were lost when

language was lost,⁵⁵ and yet gained also - for example, a way out of revenge cycles or *utu*.⁵⁶

The interpenetration of the two has been well documented and the result of a century and a half of contact is that the present religious expression of Maori is pluralist in a way that Maori culture itself is not. Mason Durie writes: "There are powerful commonalities which bind Maori..."⁵⁷ The combination of biculturalist policies and the acknowledgement of indigenous religious rights, along with other cultural and social factors, has coincided with a considerable falling away over the past generation, as in the population at large, from those traditional forms of Christianity which served as vehicles for Maori spirituality; while some will retain their links with traditional Christianity because they see it as having been incorporated into Maori culture, others, especially young people, question these practices⁵⁸ and are interested in the efforts of Maori scholars to research and retrieve past religious forms, and where these are irrevocably lost, their efforts to re-create old forms in ways which directly relate to Maori culture as well as having relevance in the modern world.

An example of this is the desire some have to see the recreation of the *tohunga* role; such a person would be able to conduct marriages, burials and house blessings without the need for clergy from the various Christian denominations having to be called in as at present.⁵⁹ Another example which has been suggested is where prayers used in *powhiri* etc. which may at present take a Christian form could be replaced with *karakia*⁶⁰ drawn from surviving indigenous religious movements such as *Pai Marire* and *Ringatu*, although they too have become more Christianized over time. A limited kind of reversal of the acculturation process thus may ensue.

Whatever the outcome of this process, indigenous religious beliefs and practices and those who wish to observe them will need to be accorded respect as are those of the dominant culture, which may need to remove obstacles it has placed in the way

preventing or making difficult the observance of such beliefs and practices.

Part Four: Implications for Religious Freedom

Because the concept of what religion is has been broadened and because the role of the state has changed from a passive to a more active one, religious freedom itself needs to be redefined. Indigenous minorities, as indicated above, may find it difficult to conduct certain practices in certain places without the active support of the state, without "the willingness and the ability of the state to act in an enabling fashion".⁶¹ Indeed, while the United Nations Declaration on the Rights of Indigenous Peoples has only draft status at this stage, the New Zealand government already has a biculturalism policy in place whereby it undertakes to support and fund indigenous culture, which includes religious practices. Given the pluralist nature of Maori religion already noted, the state is undertaking to support and fund a variety of religious expressions from surviving or reconstructed indigenous forms through to various Christian forms with or without indigenous accretions.

So New Zealand does not have a state religion, but one group's religious practices - as distinct from one religion - is protected by the state. This is, according to Sir Geoffrey Palmer, an expert in constitutional law and an architect of BORA, "a necessary qualification upon the theoretical state neutrality in matters of religion".⁶² He does admit that it raises the question of the guarantee of equal protection of religious freedom for all. This is discussed below.

This government support for religious beliefs and observances by a defined indigenous group in New Zealand can be compared to the position of the Malay community in Singapore, who as the indigenous people, are recognised as such in the Constitution where it is made the responsibility of the government "to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language."⁶³ Since the religion in this case is Islam, which is not

unique to Singapore, how much more in need of government support are the equivalent Maori "interests" and language which are unique to New Zealand?

It can be argued by those who believe the state should be neutral and take no active role whatsoever in matters of religion that such a policy is in conflict with the principle of equal religious protection for all. There are several ways of replying to this. One reply could be that without government support for their culture - which cannot be divorced from language and spirituality, and which is not found elsewhere in the world - Maori cannot really feel at home in their own country. It can be argued that protection of Maori forms of religion is by virtue of their being an integral part of Maori culture rather than as religion as such.⁶⁴ Nor does such protection involve the displacement of any other religious practices or beliefs. It can also be argued that if the state is to guarantee religious freedom for all, that may involve *in some cases* bringing about the conditions which make this possible, that is, what is important is not whether or not the state plays a role, but the end result. Indeed it can be argued, as Matsis does (see Chapter Two), that the state already actively supports Christianity - and has always done so - by organising some public holidays around Christian festivals.

Thus the debate has moved well away from the nineteenth century idea that freedom of religion meant that people should be permitted to follow without state assistance or direction whichever branch of Christianity they choose. State support for biculturalism has already had an impact, and will continue to impinge, on two main areas: in the teaching of Maori culture and beliefs in schools, and in public/civic ceremony. Some believe that Maori ceremonial should form the basis of the development of a uniquely New Zealand "civic religion",⁶⁵ given "the traditional Maori belief of a broad spiritual base to life"⁶⁶ and the inclusiveness of this spirituality. The "wall of separation" between religion and the state advocated by some and discussed in Chapter Two certainly does not seem an appropriate model.

It is possible to distinguish some groups of people for whom this development is likely to be disturbing. It is fairly clear, however, that state support for biculturalism is not fully endorsed by those who believe that the state should be strictly secular, that is, keep its distance from religion entirely. And as there are intolerant religionists, so there are intolerant secularists, who do not accept the principle of an "equitable distribution of freedom"⁶⁷ and object to religion of any kind, such as a lecturer at Victoria University of Wellington who recently expressed an objection to the Maori blessing at the opening of a new university building;⁶⁸ some intolerant religionists, as Rishworth notes,⁶⁹ may feel strongly enough to wish to withdraw their children from classes - or schools - which teach Maori culture, confusing respect for a belief system with acceptance of it;⁷⁰ there are those, conversely, who feel that Christianity will become more entrenched than ever as the state *de facto* religion, since Maori indigenous aspects can be difficult to separate from Christian aspects; there are those who are intolerant of things Maori through prejudice rather than on religious grounds. Some of these attitudes are discussed in Chapter Four and the value of teaching about Maori culture - and other cultures - is given more attention in Chapter Five.

Notes

1. Mutua in van der Vyver and Witte, p. 431
2. See Chapter Two
3. Maybury-Lewis, p. 153 (adapted from his phrase "serious multiculturalism")
4. Blank, Henare and Williams, p. 174
5. Orange, p.53
6. Elsmore 1985, p. 21
7. Belich, p. 182
8. " p. 179
9. Simmons, p. 16
10. Munro, p. 38
11. " p. 10
12. " pp. 11-12
13. Simmons, p. 195
14. Munro, pp. 63-6 and *passim*
15. Orange, p. 53
16. An editorial comment on the text by Williams in Blank, Henare and Williams, p. 174.
17. Elsmore 1985, p. 58
18. Rishworth in Huscroft and Rishworth, p. 227
19. Maybury-Lewis, pp. 13-5, and B. Davidson, Chapter 1, and Mutua in van der Vyver and Witte, pp. 417-440
20. Maybury-Lewis, p. 13
21. " "
22. Olssen and Stenson, p. 338, and B. Davidson, p. 16
23. Elsmore 1985, p. 15
24. Mutua in van der Vyver and Witte, p. 430
25. " " " p. 418
26. Elsmore 1985, pp. 15-6. A comparison can be made with the way pre-dispositions about the nature of religion - the importance of texts, creeds, etc. - prevented European missionaries in Asia from recognizing "festival, ritual and communal observances - precisely those aspects that were at the heart of popular religious life" as being religion in the full sense of the word. (Keyes, Hardacre and Kendall in Keyes, Kendall and Hardacre, p. 5)
27. Olssen and Stenson, p. 176
28. Elsmore 1985, p. 58
29. " " Chapter 5
30. Scott, p. 74 (citing Fox and Bell's description of the prophet Te Whiti as being "full of foolish delusions")
31. Scott, p. 74 (citing Rev. T.G. Hammond)

32. L. Smith in Peters, pp. 188-9. A New Zealand Listener (7/10/00) article, "Beyond belief" by Jane Clifton, notes that "the role of the tohunga...is a minefield of historical interpretation" (p. 24).
33. Elsmore 1999, p. 325
34. Rice, p. 298
35. Elsmore 1999, pp. 154-5 and Belich, pp. 222-3
36. " 1985, p. 94
37. " 1999, p. 341 and Rice, pp. 298-300
38. Waitangi Tribunal, pp. 146 and 51
39. Steiner, p.101
40. " p. 90
41. Waitangi Tribunal quoted by Patterson, p. 92
42. Irwin, p. 7
43. This point was made by students at E.I.T. See Chapter One, Resources.
44. Quoted from a radio broadcast in Patterson, p. 93
45. Maybury-Lewis, p. 153
46. "Maoris 'positive' about future" by Alan Samson, The Dominion, 11/7/00
47. "Gaps policy is not enough" by Mason Durie, The Dominion, 5/10/00
48. L. Smith in Peters, p. 199
49. Quentin-Baxter, p. 4
50. " " p. 6
51. Booth in Crawford, p. 9
52. Quentin-Baxter, p. 8
53. " " p. 206, Article 13
54. Henare in Royal Commission on Social Policy, p.32
55. This point was made by students at E.I.T.
56. Walters in Crawford, p. 70 and Waitangi Tribunal, p. 48
57. "Gaps policy is not enough" by Mason Durie, The Dominion, 5/10/00
58. Stuart, p. 23. Bishop Muru Walters remarks: "There is a thread of anti-colonialist and anti-church sentiment in the search for the authentic Maori soul..." This was quoted in the New Zealand Listener (7/10/00) article "Beyond belief" by Jane Clifton, outlining the debate about the nature of authentic Maori spirituality (pp. 22-24).
59. Matiu Bennett, Kaumatua at E.I.T., made this comment.
60. Stuart, pp. 23-4
61. Maybury-Lewis, p. 155
62. In a letter dated 31/1/00
63. Louis, p. 96
64. M. Henare asserts: "Religion ...for Maori ...is a lived experience which is elaborated in the culture". This is quoted in the Foreword to Donovan 1996 (p. 7). It seems we have

here a nice reversal of the situation when Christianity was part of the "cultural package of colonialism". See note 25.

65. Donovan in Ahdar and Stenhouse, pp. 81-2

66. Elsmore 1999, p. 242

67. Jones in Goodwin and Pettit, p. 556

68. "Maori blessing 'culturally offensive'", The Dominion, 11/2/00

69. Rishworth 1993, p. 45

70. Walker in Gilling 1993, p. 112

CHAPTER FOUR

Pakeha

" [In New Zealand] grand themes of world history are often played out more rapidly, more separately, and therefore more discernibly, than elsewhere."¹

James Belich

Introduction

Part One of this chapter discusses the conception of religious freedom which prevailed from the time of the establishment in 1840 of New Zealand as a British colony until the middle of the twentieth century. Part Two points to some factors which taken together have brought about a change in this conception. Part Three discusses human rights philosophy and religion, and Part Four reflects on the conception of religious freedom prevailing in the present in New Zealand.

Part One: European Settlement

The fracturing of Western Christendom by the Protestant Reformation, which began in the early sixteenth century and was primarily a religious movement, also had political implications which have taken centuries to work through. The dispute over religious authority became a revolution in secular history, greatly facilitating and consolidating state power and bringing about the establishment of the modern secular version of the state.²

Part of the logic of Protestantism was its protest against the interposition of the Church between God and the believer³ and between God's word (the Bible) and the believer, and this had within it the seeds of a more democratic and individualistic⁴ view of religion which paved the way for religious toleration.⁵ The more democratic and individualistic outlook was not to confine itself just to religion. That political unity and stability was possible in

spite of religious difference may have been a war-weary compromise in seventeenth century Europe,⁶ but it has its sequel in contemporary liberal declarations that the politico-legal system is the only point on which individuals in a secular state must maintain a working consensus. Only here must we submit to the judgment of an umpire.

But New Zealand began to be settled by Europeans about two thirds of the way along this time frame between the Reformation and the present. Although the rise of science and the new Biblical criticism⁷ was underway, their effects were not yet much in evidence and Christianity had not yet begun to be undermined by the theories of Darwin. The energies of the religious in Britain were directed to evangelical reform, the defence of sectarian positions and the support of missionary societies. The first half of the nineteenth century saw political and religious change once again occurring in tandem.⁸ Abuses in the realms of both church and state were attacked, and a number of acts were passed, such as the 1832 act known as the Reform Bill, which began the process of reforming the parliamentary system and ultimately led to universal suffrage. Other acts in this period reformed the system of ecclesiastical patronage, tithing, the organisation of church property etc.⁹

Church and state in England had been very closely associated during the eighteenth century, with the Church being seen as an arm of the state; but the state now resolved to distance itself from religious matters.¹⁰ Though the Church of England remained the established church, civil disabilities based on religion were no longer felt to be justified, and, as has already been noted in the previous chapter, Catholic emancipation was enacted in 1829. Ten years later, Lord Macaulay wrote: "We consider the primary end of government as a purely temporal end, the protection of the persons and the property of men...Government is not an institution for the propagation of religion...all civil disabilities on account of religious opinions are indefensible..."¹¹

We can see here in the words of a prominent public figure of the time the kind of thinking

about religion and the state which was current when European government was set up in New Zealand and European settlement really got underway. For one thing, this thinking would not have disposed the Europeans to comprehend that for Maori the world could not be divided sharply between religious and temporal matters (see Chapter Three). For another thing, given the tenor of these sentiments, the possibility that New Zealand would have an established church seemed remote, though some Church of England adherents might have hoped otherwise. There was, in fact, widespread opposition to any idea of a state religion. "Special privileges were not accorded to one denomination over another and local reaction was immediate whenever this principle of equality appeared to be under threat."¹² The sectarian rivalry that existed, such as that exhibited by the missionaries at the signing of the Treaty, thus served to prevent any one denomination getting the upper hand.

Some settlements, particularly in the South Island, were established by groups most of whom belonged to a particular Christian denomination, such as the Free Church of Scotland in the case of Dunedin,¹³ the Lutheran Church in the case of the German settlement in the Moutere valley near Nelson,¹⁴ and the Church of England in the case of Christchurch,¹⁵ but people coming to settle in New Zealand were not generally doing so primarily for religious reasons. Some hoped to leave religious bigotry behind them and indeed settlers living in remote and harsh conditions relied on each other out of necessity, and religious differences had little relevance. Jessie Munro, discussing the climate of tolerance Suzanne Aubert found when she went to work in Hawke's Bay, writes: "The settlers coming into New Zealand were on the whole impatient of transferred grievances." They had "a similarity of aims and values which would pull them together, making religious differences a lesser consideration."¹⁶ Munro points out the worst period of New Zealand's history for religious bigotry was during and after the First World War¹⁷ and the two main clerical bigots, one Catholic and one Protestant, responsible for this had both only recently come to New Zealand.¹⁸

It is clear from the above that what was understood by freedom of religion - and of course, it was only an unwritten assumption, a principle behind the common law, and not defined in any kind of written form - was something rather narrower than what is meant today. The word 'secular' used today of the state is taken to mean neutral regarding any religion, but the concept of religious freedom then existed in a Christian context. Hence it was, as has already been discussed, that pre-Christian Maori belief was counted as superstition and not true religion, as were other religions which were not part of the Christian tradition. Though the state was 'secular' and there was no official state religion, New Zealand was a *de facto* Christian state, committed to a "non-specific and non-sectarian"¹⁹ Christianity, a situation which, it has been argued, continued until the 1960s,²⁰ and of which some vestiges still remain, such as public holidays which are Christian festivals. The fact that the state has needed to tread so carefully around sectarian Christian rivalry until recent decades, has had profound implications for education which are discussed in other chapters. It had the effect overall of forcing the state into a passive role regarding both religion and religious freedom.

Part Two: Change of Consciousness

As has already been noted several times, the withering of mainstream Christian sectarian rivalry over the past few decades has been accompanied by falling numbers of adherents and a new division along conservative and liberal lines.²¹ Those in the latter division for the most part no longer adopt an exclusivist religious position; with the recognition that no tradition has a monopoly on the truth,²² the various denominations see their differences as being less important than what they have in common and this has helped in the development of a pluralist ethos with its acceptance of difference. As John Pobee notes in remarking on the need for a theology of pluralism to underpin this new ethos, "religious bigotry and intolerance are rooted in narrow notions of God",²³ and it is these notions which have been challenged and increasingly rejected. This withering of sectarian rivalry has also removed the original *raison d'être* for the state's strictly impartial role. It is one of the factors which has freed the state to behave in a more active, enabling and cooperative

capacity regarding religion and religious freedom.

Growing support and sponsorship since the Second World War, and particularly from the 1960s, by the state for religious social welfare organisations, chaplaincies, etc. has been documented.²⁴ Since sectarianism is no longer an issue, the state is not perceived to be discriminating between religious communities on grounds of theological or ideological criteria when it treats or supports them differently according to their secular performance.²⁵

The 1975 Integration Act has already been discussed in Chapter Two and will receive further attention in Chapter Five. It was passed when lobbying which had been conducted over several generations finally brought about state financial support for religious schools. Because most of these schools were Catholic, sectarian rivalry had previously rendered such a move politically impossible.

It is a truism to comment that the last few decades especially since the 1960s have been ones of rapid change, both technologically and socially.²⁶ New Zealand's population has become more multicultural, more mobile and more urban (an environment where diversity is both more common and more acceptable) and less isolated from the rest of the world. It has become more secular in that increasingly people choose to nominate the 'no religion' category rather than specify a particular religion or denomination²⁷ on their census form, and in that commerce is less likely to be affected by Sundays and Christian holidays. Male supremacy had been challenged and women occupy more positions of power and authority in society than they once did. This has religious implications in that religious traditions which have sacralized divergent roles for men and women are likely to find this is no longer reflected in the society around them.

While the above can be seen to have caused former ways of viewing religion to seem irrelevant, other events with no immediate connection at all to religion or religious freedom

have been influential. For example, while the suggestion that New Zealand should have a Bill of Rights was an idea which had been discussed and rejected as being unnecessary on a number of occasions since the abolition of the Upper House in 1950,²⁸ it was the unconstitutional actions of the National Party government 1975-1984 when Robert Muldoon was Prime Minister which finally persuaded people of the need for such legislation,²⁹ which finally appeared in 1990.

Another important factor which has helped to change the meaning of the concept of religious freedom in New Zealand has been the emergence of human rights discourse. This emergence can be dated to the middle of the twentieth century and support for it was prompted by disastrous man-made events of the first half of the twentieth century.³⁰ "The Universal Declaration of Human Rights [was] drafted not only to protect individuals from abuses by the state, but to establish a set of enduring values to counter the descent into barbarism [of the kind] that culminated in the Second World War."³¹ However the thought which formed its basic precepts can be traced at least to eighteenth century philosophical endeavours which led to the "gradual replacement of an ethic of obedience with the concept of self-governance, culminating in Kant's idea of the dignity of all autonomous rational agents".³² Two centuries later, the inadequacy of the defence of war criminals who justified their actions by claiming they had been carrying out orders made the moral bankruptcy of the "ethic of obedience" plain for all to see.

The internalisation of morality and the grounding of it in human nature³³ rather than in respect for authority whether human or divine, has its consequence in the wording of Article 1 of the Universal Declaration of Human Rights which states that "All human beings... are endowed with reason and conscience..." Hence it is that the right to self-determination is seen as a fundamental human right. Without this fundamental right, no other right could be secured.³⁴ And if individuals are morally autonomous beings, they are fully responsible for their actions, provided they are not acting under any kind of duress such as torture. Thus it was that war criminals were held to be accountable whether they

had given or simply received orders. This has implications for religion in that by the same logic those who claim to be following divine orders may still be held accountable to their fellow human beings for their actions.

Part Three: Human Rights and Religion

The relationship between religion and human rights is a complicated one. Each is able to offer a critique of the other and yet there is considerable overlap in their concerns. Something of the paradox and complexity which attends this relationship can be summed up thus:

1. Human rights discourse attempts to articulate a global ethic, universal in scope and not restricted by the parochial and ideological concerns of particular religions.³⁵ It wishes to stand outside religious traditions and yet to encompass people within them.
2. Though human rights discourse is a secular one, and though this secular discourse has been described as a child of the Enlightenment, it has also been described as a step-child of Christianity,³⁶ speaking historically, and as a quasi-religion itself, with its own value-system, its own ethic and its own scriptures, located respectively in its unquestionable upholding of the inviolability of the individual person, tolerance of diversity, and its Conventions.³⁷
3. The reason that human rights discourse has appeared at all can be seen in some ways as an indictment of religion, for while such concepts as respect for human life, justice and charity, which have their parallels in human rights discourse, are upheld in most religious traditions, this has not prevented in the past, and still is not preventing in the present, appalling human rights abuses being committed either in the name of religion or with the active or passive support of religion.

While some religious groups, as has already been noted, find human rights values so congruent with their own religious values they are happy to embrace them, other religious groups object to human rights on the grounds that they are human-centred rather than

God-centred,³⁸ and dictatorial in their requirement for tolerance.³⁹ They may also complain, as may others from a non-religious standpoint, that they are too individualistic and take insufficient account of community values and group identity and loyalties.⁴⁰ The development of indigenous rights reflects some these concerns. Others see human rights as a Western European ideology being imperialistically foisted in a culturally insensitive way on all the world's peoples. Still others point out the fact that their effectiveness in preventing human rights abuses has been so limited as to be indiscernible⁴¹ and that since they have been proved a failure they should be abandoned.

A number of points can be made in answer to these but the general point can be made that the gap between the two ethics is difficult to bridge because the "ethic of obedience" is based on a hierarchical worldview with the power imbalances between individuals that this entails. Those who perceive themselves as benefiting from such power imbalances will be anxious to furnish arguments which uphold the status quo, and religion in some cases may be allied with, or may be, these conservative interests. As Fred Halliday puts it, "The limitations [on human rights] are often imposed not by cultures or traditions as such, but by those in power in certain societies who choose to interpret their cultures in a way convenient for them."⁴² It is necessary to take note of the situation of those making criticisms of human rights when considering the legitimacy of such complaints.

Given that not all religions are theistic and not all people embrace a religion, the criticisms that human rights are not theistic, and that they are dictatorial in demanding tolerance, can be seen as the expression of those who would be dictatorial themselves. It is obviously not possible for human rights to be 'God-centred' and still be embraced by those of all religions and none. That human rights do not encourage respect for authority can be answered by pointing out that human rights conventions always encourage respect for the law and legitimate authority.

That human rights should concern itself with the individual in the first instance rather than

the group or community is hardly surprising or avoidable; if people are to determine for themselves with whom they will associate, they are not thereby prevented from forming groups and communities, and indeed the preambles to human rights instruments make it clear that individuals are always conceived of as part of a community. That communities may oppress individuals who would then have no redress is the difficulty of giving primary rights to groups or communities. This problem has already been discussed in Chapter Three and will arise again in Chapter Five.

How human rights have emerged from European civilisation and yet can be held to apply universally has been much discussed. If they are *human* rights, they must be transcultural; "they postulate the whole world as one moral sphere or community"⁴³ and any form of cultural relativism is incompatible with them. That they were first codified by Europeans does not mean that "the thoughts and values behind them are not reflected in other civilizations and cultures"⁴⁴ and have not been so in the past. Indeed there are ironies in that as far as religion is concerned, some non-Western religions have traditionally been considerably more tolerant than Christianity, nor has European history in the first half of the twentieth century set any sort of example in human rights.

Not all champions of human rights are from the West. The Nobel prize-winning economist, Amartya Sen, has a particular interest in religious toleration. As a young child growing up as a Hindu in what was to become Bangladesh, he witnessed the murder of a Moslem motivated by the religious intolerance between Hindus and Moslems which eventually resulted in the partition of India.⁴⁵ Not surprisingly, he has no doubt that the intolerant should not be tolerated.⁴⁶ He defends human rights by looking within the great diversity of religious traditions of East Asia,⁴⁷ and holds that human rights are necessary for economic development,⁴⁸ as well as being of intrinsic value.

The claim that human rights have not been effective overlooks the time it takes for adjustments in thinking to take place and the advances that have in fact already been

made. Modern media and communications, through publicity about human rights abuses as they happen, help to keep these ideals in front of people's minds and bring about changes in thinking far quicker than would ever have been possible in previous ages. News items in our own media in recent years have included, amongst others, items concerning the on-going struggle for human rights in China, Pakistan, Afghanistan, South Korea, Indonesia, and Kenya. Obviously people in those countries do not believe that human rights are only for the West; "...few states are uninfluenced by these human rights standards or can hope to prevent such influence over the longer term".⁴⁹ Trans-cultural global concern about human rights abuses and even action whether by non-government international agencies (NGOs) or foreign governments is no longer unusual,⁵⁰ whereas in the past, before human rights were codified, state boundaries were considered absolute and there was no protection for people against their own governments.

Individuals now have a limited international status and identity which is recognised beyond the boundaries of the national state.⁵¹ Until relatively recently, only states possessed international legal personality; individuals did not. Now people can and do complain directly via international complaint mechanisms if the rights are guaranteed by international human rights treaties.⁵² So what some religionists call 'state' values are actually *supra* state values with the potential to protect people from the state. Sometimes, in Asia particularly, it is, in fact, minority religious groups which are at the forefront of struggles for human rights, including freedom of religion, against the state.⁵³

Part Four: Assessment of the Present

New Zealand legislation in common with that of many other countries has been heavily influenced by international human rights conventions for several decades and is likely to continue to do so.⁵⁴ With the passing of the Bill of Rights Act in 1990 and the anti-discrimination act, the Human Rights Act of 1993, religious freedom in New Zealand entered a new era. Instead of being a rather vague unwritten understanding, it is now a definite part of written law. The implications of this new status for religious freedom are

perhaps wider than might be generally realised.

By virtue of the new order, all religions are put on the same footing along with non-religious belief. This means that Christianity's *de facto* hegemony has officially come to an end. This of course has relevance when the numbers of adherents of Christianity are reducing and the numbers of adherents of Asian religions and those of no religion are increasing. Moreover people have been provided with a means of redress if they are discriminated against in public life on the grounds of religion or of not having a religion, and they may now expect reasonable allowances to be made by employers to accommodate religious practices which may have previously proved to be disadvantageous when seeking and retaining employment.⁵⁵

But there is a *quid pro quo*: people may expect to be more restricted by law if they wish to discriminate against others for religious reasons. As has already been noted, "A distinguishing characteristic of the freedom of religion and belief is... that it is not only capable of being violated by the state but by the people who make up the state. Indeed, religious minorities who may be the target of discrimination can also be the source of intolerance to others as well."⁵⁶ The new order is more concerned to make religious freedom a practical reality especially for those whose religions are minority faiths in New Zealand, yet it limits in some ways the religious freedom of those minority faiths whose religious beliefs and practices are not in accord with human rights values.

Religion itself, it could be argued, has been devalued to some extent. It is no longer seen as an area of people's lives which is unable to be questioned by the state putting aside matters of health and safety of children, where legislation has previously permitted the state to intervene. It has become another kind of diversity along with race, colour, gender, marital status, sexual orientation etc. Emphasis on individual choice of religion itself changes the nature of the relationship people have with their religion. It is, along with political opinion, not as immutable as some other grounds of possible discrimination

mentioned above - one chooses to practise or not to practise a religion except where culture and religion are very closely associated, whereas one has no choice regarding one's race, colour, or gender - but its importance for people's sense of identity is given full recognition.

The change in the role of the state regarding religious freedom under the new dispensation is perhaps of most interest. Whereas previously the state was simply 'absent' from religion, leaving people to their own devices in this area of their lives, now the state is an agent which is under some obligation to ensure that religious freedom is genuinely available to all in such a way that the rights of some do not impinge on the rights of others. There is a paradox in that the state must involve itself more actively in order to ensure distribution of religious freedom is fairer, whereas previously it was the state's supposed distancing of itself from religion which acted as the guarantee of religious freedom.

So not only is the state an agent in ensuring religious freedom, the state is also less concerned to appear to be impartially secular. The policy of biculturalism involves the state endorsing Maori culture including religious practices. The state also gives financial support to religious schools, without taking any account of the numbers of adherents of those religious groups as a proportion of the population. It also gives support to church community organisations. Using the "wall of separation" model to characterise the relationship between church and state in New Zealand seems more inappropriate than ever under the new dispensation, as has previously been argued. Looking to Parekh's four different interpretations of the concept of equal treatment of all religions (see Chapter One) may provide more useful ways of describing the relationship.

Either the first or third interpretation, "conservative" or "weak" view, might describe New Zealand under the old conception of religious freedom, depending on whether one argues that Christianity was favoured sufficiently to qualify as a *de facto* established religion, or that officially, at least, no religion was favoured. Neither of them makes much sense as a

description of the new conception of religious freedom. The second interpretation makes better sense, but the fourth interpretation makes the best sense of all; although it was not conceived with New Zealand in mind, it accommodates the bicultural dimension of the new conception of religious freedom well. All religions are considered worthy of protection but one religious tradition in special need of protection is given it. The protection for all religions takes several forms: legislation guaranteeing religious freedom (BORA) and affording redress in the case of discrimination on religious grounds (HRA); public education about avoiding religious discrimination (HRA); support for integrated religious schools regardless of whether those schools espouse the values which permit them to exist. And it is education which is the concern of the next chapter.

Notes

1. Belich, p. 7
2. Roberts, p.547
3. Smart, p. 581
4. " p. 549ff.
5. " p. 581
6. Cole Durham in van der Vyver and Witte, p. 1
7. Smart, pp. 624
8. Hanham, p. 417
9. " "
10. " "
11. " pp. 428-9
12. Munro, p. 128
13. Olssen and Stenson, pp. 118-9
14. Bade, pp. 52-3
15. Olssen and Stenson, p. 121
16. Munro, p. 127
17. " p. 383
18. " p. 396
19. Ahdar in Ahdar and Stenhouse, p. 63
20. " " "
21. A. Davidson, p. 167 amongst others. Lynch (in Ahdar and Stenhouse, p. 93) notes that religious differences are no longer threatening.
22. A number of writers comment on this; for example, Isichei in Donovan 1996, p. 85, and Donovan in Donovan 1996, pp. 260-1. Nussbaum (p. 259) quotes the Pope: "Our respect for the culture of others is...rooted in our respect for each community's attempt to answer the question of human life...every culture has something to teach us about...that complex truth."
23. Pobee in van der Vyver and Witte, pp. 412-3.
24. Lineham in Ahdar and Stenhouse, pp. 53-4. This has never been done in the United States, but at the end of January 2001, the incoming president of the United States, George W. Bush, established a new office which for the first time will assist faith-based organisations to seek federal funds to help solve social problems such as drug addiction and homelessness. This move is expected to be challenged legally on constitutional grounds. ("White House faith office draws flak", The Dominion, 31/1/01)
25. Heckel in van der Vyver and Witte, p. 197
26. Veitch in Donovan 1996, p. 90-2
27. See table and accompanying text, Donovan in Donovan 1996, pp. 262-3.
28. Rishworth in Huscroft and Rishworth, p. 5

29. Rishworth in Huscroft and Rishworth, p. 10
30. Boyle and Sheen, p. 4
31. "In the Footsteps of H. G. Wells" by Francesca Klug, New Statesman, 9/10/00, p.8
32. Rauscher (quoting Schneewind), p. 627
33. " " p. 628
34. Mutua in van der Vyver and Witte, p. 437
35. Marshall in Atkin and Evans, p. 26
36. " " p. 28
37. Rishworth 1997 paper, p. 13
38. Ahdar thesis 2000, p. 381
39. " " pp. 113-4
40. Mutua in van der Vyver and Witte, p. 439
41. Boyle and Sheen, pp. 1, 7, 11, 12
42. Fred Halliday in "A new world myth" reviewing S. Huntingdon's The Clash of Civilizations and the Remaking of World Order in New Statesman 4/4/97, p. 43
43. Dower, p. 79
44. Boyle and Sheen, p. 4
45. Sen, p. 8
46. " p. 234
47. " p. 231ff.
48. " *passim*
49. Boyle and Sheen, p. 11
50. Hunt and Bedggood in Huscroft and Rishworth, pp. 39-40
51. " " " " p. 38
52. Butler and Butler, p. 174
53. Keyes, Hardacre and Kendall in Keyes, Kendall and Hardacre, pp. 6-7
54. Hunt and Bedggood in Huscroft and Rishworth, p. 37
55. HRA ss1(c), 65, 86
56. Boyle and Sheen, p. 2

CHAPTER FIVE

Children

"The deep divisions over children and religious rights illustrate that the family is likely to become a major testing ground for the success or failure of human rights law in the next century as the divine and the secular either clash or learn to cohabit."¹

G. Van Bueren

Introduction

This chapter considers the rights and freedoms of children and young people in matters of religion and belief in New Zealand. The words 'child' and 'children' are generally used but what is meant is 'minors', i.e. those not yet of adult age.

It has come to attention more than once previously in this thesis that liberal theory and basic human rights instruments deal with people as individuals because this is the only way to establish people as independent, autonomous beings with the right to self-determination and the other rights that follow from this. One of these rights is freedom of association. People are free to belong to groups which do not share the values on which liberal theory and human rights instruments are based. Adults are free to join and free to leave such groups, whether they be family, indigenous or religious groups. Children are not in the position of being able to leave at will, and their religious, educational and vocational rights may therefore be restricted by varying degrees. No theorist has been able to come up with a satisfactory solution to this problem. Perhaps because of this problem, the Convention on the Rights of Children 1989 is particularly inimical to the worldview which the old conception of religious freedom assumes, as this chapter will show.

Part One notes the articles relevant to religious freedom in the Convention on the Rights of the Child CRC, which is to be used as a benchmark, along with some implications and reactions. Other human rights conventions do not exclude children, but CRC focusses on children particularly. Part Two looks at the obligations of parents and educators. Part Three examines the way children's religious, educational and vocational rights may be restricted by the exercise of parental religious rights and discusses strategies for education in pluralist societies which include illiberal minorities. Part Four looks more closely at education and religious rights in New Zealand.

Part One: Convention on the Rights of the Child

New Zealand became bound by the Convention on the Rights of the Child (United Nations 1989) in 1993. Article 14(1) reads: "State Parties shall respect the right of the child to freedom of thought, conscience and religion." Article 14(2) places State parties under a duty to respect the rights and duties of parents "to provide direction to the child in the exercise of his or her rights in a manner consistent with the evolving capacities of the child." This last phrase makes it clear that parents' right to raise their children in their own religion, which appears in several United Nations conventions (for example, UDHR Article 26(4), ICCP Article 18(4)), is not a constant; it is most appropriately exercised when children are very young and diminishes to vanishing point as children mature.

Article 14 needs to be taken in conjunction with other articles intimately connected to freedom of religion, such as article 12, giving children the right to participate in decisions that affect them; Article 13, the right to freedom of expression including "freedom to seek receive and impart information and ideas of all kinds"; Article 15, the right to freedom of association and peaceful assembly; Article 28, the right to be educated in accordance with their religious and philosophical convictions; article 29, the right to be educated "to their fullest potential"; Article 30, the (negative) right not to be denied the right to profess and practise their own (minority) religion. Of course, these rights and freedoms are limited in Article 14(3) in the usual way by the rights and freedoms of others and the protection of

public order, safety, health, etc.

Taken together, the articles of the Convention on the Rights of the Child break new ground in seeing children as persons and not merely objects of concern, and in restricting the rights of parents to act on their children's behalf accordingly. In Michael Freeman's words, "We have to treat them as persons entitled to equal concern and respect and entitled to have their present autonomy recognized and their future autonomy safeguarded."² Walker draws attention to Lomasky's point that 'autonomy' here does not mean that the child ought to be free from all outside influences in their decision making; it is "not only inevitable but also legitimate for parents to influence their children"³ who may adopt the same goals as their parents if they wish.

A useful definition of 'autonomous' is Snook's. This can be summarised thus: an attribute of someone who has (a) been - or, as CRC would have it, is in the process of being - "equipped with the basic tools for making reasonable choices" about his or her life-style, and who has (b) the opportunity to make such choices.⁴ Of the above CRC articles it is clear that some - Articles 13 and 29 - are to fulfil the requirements for (a), and Articles 14, 12, 28 and 30 are to fulfil the requirements for (b). Article 15 can be seen to pertain to both (a) and (b) in that freedom of association and assembly permits the free exchange of ideas with other people as well as attendance at a place of worship. The latter requirement (b) is dependent on the former (a); to exercise freedom of religion, children must have some knowledge of what choices there are in order to make a genuine choice. Religious rights and educational rights for children are concomitant for the same kinds of reasons that freedom of religion and freedom of speech and information are individually hardly conceivable without each other.⁵

It has already been noted that much New Zealand legislation has been influenced by human rights instruments. Although CRC is not actually New Zealand law; it sets an international standard, and judges in New Zealand courts have already made reference to

it. It is an example of a convention which is ahead of New Zealand's legislation - and probably ahead of many people's thinking - in several respects and therefore something of an embarrassment.⁶ The Commissioner for Children, like the Human Rights Commissioner, can act only on a complaint made; it is not pro-active. In the case of children this probably means even less chance of the redress of wrongs than in the case of adults. The Commissioner for Children did, however, approach the (new) government in January 2000 with the request to be given the right to initiate court action - where human rights conventions could be invoked - and to have a special parliamentary committee set up to focus on children's issues.⁷

The recent drive in politics to privatise state services has emphasised parents' rights at the expense of children's, with parental choice on educational matters, for instance, being used as a political catch-cry to win votes. In the unlikely event of the voting age being lowered - this has been seriously suggested and 16 years is in fact the voting age in some countries⁸ - the rights of children and young people might begin to engage the attention of politicians. The possibility of children exercising religious rights in accordance with their ability to do so has attracted little attention.

The political ethos in Britain at the time that CRC appeared also favoured what are euphemistically called "family values" (which usually means hierarchical family relationships), and the (English) Children's Act (1989) only allows for children's views to be heard in a public court and not at school or in the home, but in 1995, the Children's Rights Office in London did publish a booklet called "Building Small Democracies" in which the democracies referred to are families, as part of a campaign to educate people about the implications of CRC; this booklet discourages authoritarian models of family life. Moreover, CRC - in particular Article 12 - was anticipated there by the *Gillick* decision (1986),⁹ which set a legal precedent for children (under 16 years) to make their own decisions on acquiring sufficient understanding and intelligence to do so, and which created considerable controversy. This case, although not concerned with religious freedom,

expresses similar sentiments to CRC, articles 12 and 14(2).

A New Zealand lawyer argued at the 1996 New Zealand Law Conference that Article 12 is "very much the lynchpin" of CRC, and that New Zealand law "undoubtedly falls short of complying with its obligations under Article 12".¹⁰ She cites a custody case in 1993 involving a 'minority' religion where the judge disregarded Article 12, and the children's wishes, and acted instead according to Article 14(2) on the grounds that the parents could not exercise the rights referred to in this article unless they had custody. This was also in accordance with the Guardianship Act of 1968 which only requires that children's wishes be ascertained and taken notice of "to such an account as the court sees fit". This case is of particular interest because it concerns a 'minority', human-rights-dissenting religious group and a number of children's rights including religious rights, and because it illustrates that although CRC is the best safeguard of children's religious rights New Zealanders have, if Article 12 is indeed the lynchpin of CRC, then adjudicating that is done according to CRC will not necessarily always ensure religious freedom for children.

That the judgment was not an easy one is clear. The case concerned three children whose parents had left the Exclusive Brethren three years before, and whose upbringing had since that time been carried out by the children's Exclusive Brethren grandparents. The parents requested custody of the children and gained it even though the children themselves wished to remain with their grandparents.

There could have been several reasons why the judge disregarded Article 12. He may have felt that there were a number of other rights which the children would be denied if they remained in the Exclusive Brethren - the right to freedom of religion and thought and association, the right to seek receive and impart information, the right to be educated to their fullest potential - and that these taken together simply outweighed Article 12, the right to make their own decision on their future; that is, he felt it was necessary to withhold recognition of their present autonomy the better to safeguard their future autonomy. CRC

itself offers no recognition that the one could compromise the other as would seem to be the case here. He may have felt that the grandparents were in a position to influence the children unduly and unfairly in making their decision. He may have acted as some judges have in the past, according to Rex Ahdar¹¹ (see Chapter Two) out of religious prejudice against 'minority' religions instead of keeping the children's well-being and happiness uppermost in his considerations. He may have acted out of regard for one or a combination of some or all of these factors. The case was rendered particularly poignant because of the Exclusive Brethren practice of banning further contact of any kind with ex-members, even those who are close relatives: the children were unlikely ever to see again whichever couple was not granted custody. The case encapsulates the difficulties which can arise with religious groups whose beliefs are at odds with human rights values (see Chapter Four).

One reason that some custody cases have raised the question of children's wishes regarding religion at all (see reference to Ahdar above) is because according to New Zealand law both parents whose marriage is dissolved - and not just the parent granted custody as in France, for example - retain the right to have an influence in the child's religious education.¹² Thus where both parents have not followed the same religion the court has been required to settle the question of which religion the child would follow. That such a child had no right to decide for himself or herself which religion to follow *before* the custody case points up an anomaly which CRC could resolve if it were used as a standard. It is clear that there are children in New Zealand the custody of whom has been in dispute who have set a precedent in exercising the religion of their choice even before New Zealand became a party to CRC, and it is difficult to see why children whose custody is not in dispute should not be afforded the same right to choose their religion.

Part Two: Obligations of Parents and Educators

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (1981), Article 5(3) reads: "The child... shall be brought up in a spirit

of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others and in full consciousness that his energy and talents should be devoted to the service of his fellow men."¹³ Parents then have the right to induct their children into their own religion or belief but have an obligation at the same time to teach a tolerant attitude toward those of other religions and beliefs and permit access to information about other religions and beliefs. The children of those whose beliefs involve the rejection of religion likewise need to be taught a tolerant attitude towards those who embrace a religion.

This prescription makes it clear that religious freedom and religious tolerance are two sides of the same coin. The religious freedom of one individual can only be justified if that same freedom is available equally to all other individuals. Freedom of religion means accepting that others may choose differently as well as freedom to chose one's own religion. So religious education wherever it takes place - either in or outside the home, such as in a place of worship or a school - should teach tolerance, and should also be open-ended as CRC makes clear, so that children may come to form and express their own opinions as they become able to do so. Thus can religious education be distinguished from indoctrination, which inculcates one view and suppresses any attempt to make an independent assessment or decision. Snook sets out at some length how children may be raised in the religion of their parents and yet be encouraged to arrive at their own decision as to whether they wish to follow that religion themselves.¹⁴ Those religious groups which do not accept children as full members until they are approaching adulthood are thereby acknowledging the need for a free decision to be made.

Human rights conventions including CRC conceive of the state providing compulsory schooling for all children. Education *in* a religion in these schools would fall foul of the principle of freedom of religion since this would constitute indoctrination by the state, but education *about* religion, which teaches about a number of religions in a neutral way, in such schools does not.¹⁵ Parents who wish to send their children to a school offering

education *in* a particular religion may do so but the state is under no obligation to provide such schools or subsidise them directly or indirectly. Indeed New Zealand's 'integrating' of religious schools into the state system is considered to be highly questionable in United Nations reports¹⁶ because state money supports religious schools, and in the process, a large number of Roman Catholic schools in a way which seems out of proportion with the numbers of the population overall who belong to this denomination, as was noted in Chapter Two. Britain and Holland also offend by subsidising religious schools. History explains how this came about but does not justify it in United Nations Observers' eyes, though what the writers of human rights conventions insisting on the secular nature of compulsory education have in mind are Islamic countries where non-Islamic minorities are not afforded the opportunity of non-Islamic education.¹⁷

State money in New Zealand also supports Te Kohanga Reo and Kura Kaupapa which do not observe the secular ruling either but freely incorporate Christian and Maori 'spirituality'.¹⁸ It has already been demonstrated in this thesis that bicultural policies and educational funding mean that the state in contemporary New Zealand does not follow a model of strict separation of religion and state, but creates its own model to suit its own circumstances. What America does, or what Islamic states ought to do, is not particularly relevant.

Secular education only was offered when state primary schools were set up in New Zealand in the 1870's, not because religious education was considered unimportant; on the contrary, it was considered essential but because of sectarian disagreement about what should be taught, it was decided to leave religious education to parents and religious institutions to carry out.¹⁹ Catholics found this unacceptable and consequently established their own schools; a century later, the Private Schools Conditional Integration Act 1975 permitted these schools to become integrated into the state system, retaining their religious character, and most have now done so. While the reason that state school systems in countries such as Australia and New Zealand were secular was perceived at the time as a

negative - failure to agree on the nature of religious education - human rights conventions' advocacy of secular schooling is now perceived as a positive - "out of respect for the right of parents to ensure ... education and teaching in conformity with their own religious and philosophical convictions".²⁰ This is surely a very clear demonstration of the move to a pluralist outlook, from the old conception of religious freedom to the new.

Education *about* religion, as described in human rights documents, as distinct from *in* religion should achieve several things: it should imbue "understanding of religion as a distinctive way of interpreting experience";²¹ so that children are in a position to comprehend what it is to exercise their freedom of religion and also acquire greater understanding and tolerance of the religions and beliefs of others. It may, though indirectly only, better equip them "to make reasonable choices" regarding their own beliefs, though the inculcation of any particular beliefs is of course against the tenor of 'all faiths' religious education. Education for religious tolerance has been identified by the United Nations Special Rapporteur on Religious Intolerance as his "key goal".²² With respect to this goal, it is worth noting that one experiment in having children taught *in* their own religions in state schools, that is, divided into groups according to religion for certain times of the week, proved very divisive and served merely to heighten tension and a sense of difference; it was abandoned.²³

There may be other broader educational objectives too in advocating an 'all faiths' approach: Jacob Neusner argues that if we are to teach children about the world as it really is, and he points to such areas as Northern Ireland, former Yugoslavia, the Middle East and the Indian sub-continent, where religion and politics are inextricably entwined, "the facts point to religion as the center of the curriculum".²⁴ An English journalist living in Washington D.C. has similar concerns.²⁵ Because the First Amendment of the U.S. constitution was interpreted in the 1960's to mean that prayers should not be held in state schools, although teaching *about* religion was not forbidden, in practice, many schools have avoided any kind of reference to religion at all in case offence was taken. This has

resulted in gross distortions in the teaching of history and current affairs, and increased the bigotry that follows from ignorance. As a demonstration of the consequences of such ignorance he indicates the ease with which the American media could present Islam as being synonymous with terrorism, thus making the American public more easily manipulated into supporting the Gulf War and sanctions against Iraq.

While teachers in New Zealand do not have to tread around a constitutional minefield as American teachers do, most children in New Zealand learn very little *about* religion in school. Such courses are not generally offered, and many of these children may learn very little at home either. This means that many children are not equipped to exercise the freedom of religion that CRC proposes for them, nor well prepared for life in a multicultural society, and of course their general education is limited as well. This limitation, the unfortunate and unforeseen legacy of the omission of religious teaching in schools for sectarian reasons, is in some people's eyes a very severe one. Ruth Sutton writes:

"It strikes me... that in its fierce avoidance of anything which smacks of religion, the secular education system in New Zealand may be limiting its aspirations at the expense of its young people. How can our schools prepare young people for the moral and ethical choices they already face and will continue to face beyond school when the focus of almost all their education neglects the most fundamental questions..."²⁶

Ivan Snook also believes children need to be taught values in a critical/reflective way, and be given some understanding of the major ethical and religious traditions.²⁷

If courses about religion and ethics were to be introduced on a wide scale, three factors would need to be considered: the teachers who would teach them; the content of such courses; the attitude of society to such courses.

Some information on the last of these has recently been gained from a survey²⁸

conducted on a random sample of the New Zealand public which found that introducing 'all faiths' religion into the school curriculum in primary schools was favoured by 32% of those polled and in secondary schools by 43% of those polled. Those polled actually had three choices: 1. an 'all faiths' approach; 2. specifically Christian religious education; 3. no religious education whatsoever. 21% in the case of primary schools and 36% in the case of secondary schools chose this last option. Even if it is allowed that some of those who chose 2, a specifically Christian religious education, would opt for no religious education whatsoever in schools rather than an 'all faiths' approach, it is fair to say there would still be a majority of those polled who would be likely to favour teaching *about* religion in schools if it were the only choice, going on the fact that 79% chose either 1. or 2. with respect to primary schools and 63% with respect to secondary schools.

The survey did not examine the reasons why it met with such strong approval. Some may support it for the educational reasons given above. Some support may have come from people who thought it would give them 'values', but while an 'all faiths' course would refer to the fact that religions have an ethical dimension, such a course is likely also point out to children that ethics may be discussed independently of religious belief. Some school study of ethics could stimulate students' thinking as to what constitutes right and wrong. One suspects that some supported the idea because they would like to see a return to old worldview thinking in the hope that it might be easier to discipline children if obedience once again became the principal virtue of childhood, though for most people, according to a survey done in 1999, only 22% (down from 45% in 1989) thought obedience should be taught at home²⁹ - further evidence of changing values.

Another consideration is the content of such courses. 'All faiths' programmes for different age groups have been developed in Britain, Canada and Australia, and as a Sixth Form option in New Zealand which very few schools have taken up.³⁰ Any courses adapted for, or written in New Zealand would need to take account the religious mix and background of the New Zealand population including the indigenous people, and New Zealand's

geographical position. A number of approaches are possible.³¹ It could be taught as a separate subject or integrated into existing subjects. The approach could be historical - either tracing the religious history of the world or tracing New Zealand's religious history. It could be topic based; for example, comparing the responses of various religions and beliefs to common existential questions. It could be comparative, where a number of different religions and beliefs are studied and compared. It could be argued that the inclusion of taha Maori in the curriculum of New Zealand state schools has already established a basis on which an 'all faiths' approach could be built.

Finding teachers for such courses, the third consideration, would perhaps prove to be the greatest difficulty. Teachers who were interested and competent, who had respect for the subject matter and were prepared to teach it in an open and even-handed manner might not be easy to find, and for this reason alone such courses could probably only be introduced gradually, in the way that the Philosophy course 'P4C' is.³²

Part Three: Children Whose Religious Freedom is Compromised

While a number of children in New Zealand have their freedom of religion limited by a lack of understanding at a conceptual level, there are a smaller number of children on the other hand who are actively deprived of their freedom of religion - neither requirements (a) or (b) (see above) are fulfilled - because they are reared in families belonging to religious groups which are human-rights-dissenting in that they are exclusivist, and sometimes separatist, and in that they may sacralize male power and authority by insisting on hierarchical 'norms' believed to be required by scripture. Learning to be obedient to God's will, or to those who claim to be able to discern God's will, may conflict directly with educational aims which value the autonomy and religious freedom of all individuals.³³

A multicultural society which upholds religious freedom is committed, if it is not to compromise its principle of tolerance, to extending that freedom to those members who themselves have no such commitment to religious freedom. Although some religious

groups are opposed to pluralist ideas and human rights values, it is these very ideas they may invoke to justify their existence as a minority in a society. As Geoffrey Partington puts it with regard to educating the children of such minorities:

"...although it is always right to expose double standards, this exposure does not provide a basis on which to decide which cultural and educational niches Western societies should, in their own interests, afford to Islam or...Christian fundamentalists."³⁴

He points out that the wider society will still be influential on the young people growing up in such groups and that it is better for the wider society if these groups are not alienated by having their demands regarding the education of their children refused. His approach has much in common with that of Kymlicka,³⁵ who has written at length on minority rights, and believes persuasion is the liberal society's only recourse with illiberal groups. Rawls writes that the tolerant can only be intolerant of an intolerant group if the former's own security and liberty are in danger.³⁶ Neither Kymlicka nor Rawls come to grips with children's rights.

Mark Halstead who has written extensively on educating Muslim minorities in Europe probes more deeply and puts questions which can be asked about the education of the children of any human-rights-dissenting religious groups, Muslim or Christian:

"Do [these] children have an 'equal right' to an open future and, therefore, an education which introduces them in an unbiased way to a variety of ways of thinking about the world? Do ...parents have an 'equal right' to make decisions about their children's future, even if those decisions imprison their children within a particular culture?"³⁷

He proposes a number of possible practical approaches to the problem which illustrate a range of opinions found in liberal democratic societies and "serve to highlight the theoretical issues involved".³⁸

The two extreme positions are discussed first. What he terms assimilationism (A) involves encouraging or forcing such minorities to conform to majority values - the

religious and educational views of minorities are not considered to be as important. At the other extreme is the separatist stance (S) where the minority group chooses to withdraw into itself and have as little contact as possible with the rest of society; education is conducted entirely within the group to conform totally with the group's religious beliefs. Other positions, different forms of multiculturalism (M), range in between, some lying closer to A, others to S, some resulting from the action of the majority (as A), some from the action of a minority (as S), and some resulting from joint initiatives.

When different forms of schooling in New Zealand are analysed according to this scheme and assessed according to the degree of religious freedom that they permit, the following points can be made:

A is not an approach which would be contemplated in present-day New Zealand, though in the past it may have been, because of this country's acknowledgment that it is bicultural and multicultural. A historical example of A is the way the United States state (public) education was quite deliberately set up as a means of welding together into one (Christian) nation the huge immigrant populations taken in at the end of the nineteenth century. It is an approach followed by societies which wish to become more homogeneous or to remain so. Halstead offers Sweden as an example of the latter; halal-killed meat is not provided for meals in schools because it does not conform with cruelty to animals legislation. Religious freedom for minorities exists only in so far as it does not conflict with majority values, to which children are exposed in schools. Their own communities may provide teaching out of normal school hours to redress the balance in these cases.

S is a position adopted by some Christian sects in New Zealand. They may be divided into two classes. A less extreme S position is assumed by those groups such as the Exclusive Brethren, who isolate themselves socially from the wider community and yet live within it. A more extreme S position is assumed by those groups such as The Christian Community on the west coast of the South Island, who isolate themselves not only socially but physically as well by removing themselves to a very remote part of the

country.

A variety of other positions ranging between A and S also exist in New Zealand. Halstead distinguishes between two different meanings of the phrase "multicultural education", both of which may operate side by side, and in fact, do operate side by side in New Zealand. The first involves schools making concessions to children from minority religions and cultures. An example involves an Auckland school bowing to the Human Rights Commissioner's ruling that a Muslim boy be permitted to wear trousers rather than the regulation school uniform shorts so that he might conform to Muslim teaching on modesty of dress.³⁹ The second meaning refers to where the actual teaching actively aims to prepare children for living in a pluralist society with people of different religions and cultures. An example is when teachers in a school comprising children from many ethnic groups organise leaders from these communities to come to the school to teach all the children about these cultures. Another potential example would be the 'all faiths' religious education discussed above. Both of these forms of M more closely approach A than S because the values exemplified are human-rights-based.

An M approach followed in New Zealand which lies more closely to S, and can be considered an example of a joint initiative, is where the state provides funds for schools run by minority religious groups, such as occurs with integrated schools, and an example even closer to S, when the state pays an allowance to parents who home school their children. An assessment of the extent to which these children, and all children in New Zealand are educated in accordance with the articles in CRC which pertain to religious freedom is set out in the following section.

Part Four: A Closer Look at Education and Religious Rights

Legitimating what had happened anyway for many years before, the Education Act of 1964 permitted optional religious instruction of a non-denominational Christian nature to be given for a limited time each week in primary schools, the so-called "Nelson" system;⁴⁰

the schools are theoretically closed so as not to contravene the requirement that the teaching be secular. This requirement to be secular has never applied to secondary state schools - most of them were set up years later - but they have eschewed any kind of religious instruction in the main, though prayers and hymns are used by some at assemblies. There are aspects of this arrangement for religious instruction in primary schools which do not conform with the CRC articles. There is the somewhat specious statement that the school is "closed" for the instruction, yet instruction *in* religion is being conducted in a state school. Withdrawal can only be effected by a parent writing a note, not by children acting on their own account.

As far as the curriculum goes in state primary and secondary schools, teachers, as agents of the state,⁴¹ must teach in accordance with human rights legislation which is already on New Zealand statute books (BORA and HRA). This may mean that some material is incompatible with the beliefs of some parents and children. The options for these parents and children are private schooling or home schooling or, if these are neither affordable nor available nor appropriate for some other reason, there is a very wide 'opt-out' provision (Section 25A of the 1989 Education Act).⁴² This is very liberal compared to other similar countries and allows parents to give notice ahead and withdraw their children from any part of the curriculum which is not in keeping with their beliefs, providing suitable supervision either at home or school is available.

This more recent provision is of interest since it does permit children - their age and maturity and ability to express themselves are to be taken into account here - to express their views to the principal of the school who must be satisfied that the children themselves wish to withdraw, and in this respect it is more in keeping with CRC than any other legislation in this area. However while it appears to go a considerable way towards protecting the religious freedom of children, it is not, on closer examination, very practicable when topics such as tikanga Maori are integrated through a number of curriculum areas, as is particularly the case in primary schools, and when the general

ethos of the school is determined by human rights values. It is, however, used by a small number of students mostly at secondary level to opt out of such subjects as Social Studies and Science.

The 'opt-out' provision for various reasons is not always used by parents whose own beliefs and whose children's beliefs are at odds with what is being taught. Teachers are often aware that what they are teaching in Science, for example, falls into this category.⁴³ Here they must tread sensitively without compromising their teaching aims and in such cases children are being treated in accordance with CRC articles on freedom of information and freedom of religion, in being given an opportunity to make their own judgment.

Alternative schools to those offered by the state are the integrated schools and the private schools. Of course, the 'opt-out' provision is not relevant to these schools since a choice for a particular type of education in religion has been made. Here we may distinguish between the long-established 'mainline' church schools, both integrated and private, where human rights values may be justified from within religious tradition and endorsed, and the more recently set up religious schools such as the "new Christian"⁴⁴ schools and the Muslim "Zayed College for Girls" which opened in Mangere at the beginning of 2000, where parents avoid their children being educated in 'state' and human rights values such as religious tolerance, equal educational opportunities for both sexes, and the right to education to capacity.

Whether teachers operating in the private sector are bound by human rights legislation is an interesting but unresolved question.⁴⁵ The European Court has found a teacher in an English private school who was not paid by the state guilty of a human rights violation (corporal punishment) so this matter remains unclear.⁴⁶ There is an opinion that if teachers are being paid by the state they should be bound by it. That teachers in a number of religious schools are paid by the state in New Zealand and that this is in breach of

human rights articles on education is a point which has already been made earlier. At a recent (July 2000) conference of the Quality Public Education Coalition, two of the keynote speakers, Ivan Snook and Brian Hill, expressed the opinion that so important is the teaching of values such as religious tolerance and respect for difference, that schools which do not teach these values should be permitted to exist but should receive no state funding of any kind.⁴⁷

Parents who wish to avoid human rights values being part of their children's education can also home school. Some do this for educational or pedagogical reasons alone but many more do it for religious reasons. Fewer impediments are put in the way of those parents who wish to home school in New Zealand than in the U.S., where there has been protracted litigation about the courses which can be taken, or Australia where there has been litigation because some states require the parent to be a trained teacher.⁴⁸ This option has become more popular in recent years: in 1992 approx. 2000 children were home schooled; in 1998 this had risen to approximately 5000. This is still less than .01% of children of school age.⁴⁹ Some of the apparent increase in popularity can be put down to the Exclusive Brethren elders more strictly insisting on home schooling for Brethren children about eight years ago - until then many had attended state schools.⁵⁰ The figures given by the Ministry of Education for home schooled students in recent years may actually be misleading because the Correspondence School contracts out some of its teaching and marking and materials to some high schools in areas where Brethren populations are concentrated. The students are actually counted statistically as being on the roll of those high schools and thus do not appear in correspondence school statistics.⁵¹

It would be fair to estimate that the children in New Zealand who are being educated in a way which is completely in opposition to human rights legislation either at home or at school would number more than 5,000 but less than 10,000 children. Those who are most acutely deprived by CRC standards would probably be those being educated entirely

within a religious group which isolates itself from the rest of the community not just socially as the Exclusive Brethren do, but physically, as in the case of the Christian Community, who have a very isolated settlement on the west coast of the South Island and have a reputation for treating children harshly in the name of religion.⁵² Although only a small number of children, comparatively speaking, will be involved in such groups of which there are very few any way, it is these children who are most in need of CRC's incorporation into New Zealand law and most in need of a pro-active Commissioner for Children. Previous attempts to bring charges on behalf of these children have failed through no witnesses who are willing to testify being available.⁵³

Summary

The new conception of religious freedom has more far-reaching implications for children than for adults. Until they are mature enough to conduct themselves more independently in the wider world, family life and then schooling form the two centres of their lives. Since autonomy of the individual is the basis of the new conception of religious freedom, this becomes a primary aim of child rearing and education, and past practices in these areas are giving way to new models more in keeping with this aim.

It will be of considerable interest to students of Religious Studies in the future to observe how religious traditions and religious education have responded to the significant changes in worldview and ethics which have occurred over the past half century, and how New Zealand's particular circumstances have helped to shape this response.

Notes

1. van Bueren, p. 163
2. Michael Freeman, p.37
3. Walker in Gilling 1993, p. 115, outlining Loren Lomasky's libertarian theory.
4. Snook and Lankshear, p.47. Michael Freeman writes: "To believe in autonomy is to believe that anyone's autonomy is as morally significant as anyone else's. Nor does autonomy depend on the stage of life a person has reached..." (p. 35) Freeman sums up here how children's rights are an integral part of the new conception of religious freedom.
5. van der Vyver, p. VLVII
6. See "Suffer the not-so-little children" by Sarah Catherall, Sunday Star-Times, 2/8/98. An editorial note on p. v of Victoria University of Wellington Law Review, 29/1, 1999, points out that of thirty-four Human Rights Instruments to which New Zealand is committed, CRC is one of the six "most important in domestic terms"; these six have had, and will continue to have, a positive influence on New Zealand law. States are required to bring their domestic law into conformity when new international norms become recognised.
7. "More powers wanted to help children", The Dominion, 13/1/00
8. Michael Freeman, pp. 81-2
9. " " pp. 56 and 348
10. Margaret Freeman, p. 110-112
11. Ahdar 1996, p. 131
12. " " p. 126
13. A lack of gender-inclusive wording reflects the era of this document. More recent conventions such as CRC are explicit in their wording that male and female have identical rights.
14. Snook 1972, pp. 68-98
15. van Bueren, p. 161
16. Ministry of Foreign Affairs and Trade, pp. 25-6 and 35
17. van Bueren, p. 245
18. Petersen in Gilling 1993, p. 96
19. McGeorge and Snook, p. 9
20. van Bueren, p. 240
21. Louis, p. 189, citing M. Grimmitt. The reference to Grimmitt is given by Louis as follows: M. Grimmitt, What I can do in Religious Education, cited in Gopinathan, S., "Religious Education in a Secular State: The Singapore Experience" in Asian Journal of Political Science, 3(2), December, Singapore, (Times Academic Press, 1995)
22. Boyle and Sheen, p. 15
23. Louis, p. 185 describes the result of such an experiment in Singapore.
24. Neusner, p. 24
25. "When God is Expelled from School" by Andrew Stephen in New Statesman, 21/2/00,

p. 20

26. "Spirituality in a secular world" by Ruth Sutton in New Zealand Education Review, 3/9/99, p. 32
27. Ivan Snook in a speech given at the Quality in Public Education Coalition conference, July 2000. Nussbaum expresses similar sentiments (p. 6).
28. International Social Survey Programme survey on Religion conducted by Massey University's Department of Marketing in 1998, reported in Massey News, ("Religion in schools wins thumbs-up"), issue 6, 1/3/99, p.10.
29. "Child obedience rated low in study", New Zealand Study of Values survey reported in Manawatu Evening Standard, 3/2/99.
30. Rishworth 1993, p. 29ff.
31. Noddings, p. 134ff.
32. "Life Studies" by Tom Rodwell in New Zealand Listener, 3/2/01
33. Walker in Gilling 1993, pp.114-5, discussing Michael Drake's idea of the goal of a Christian education.
34. Partington in Turner, p. 50
35. See Kymlicka in Multicultural Citizenship, Chapter 8.
36. Rawls, p. 93
37. Halstead 1996, p. 387
38. " in Tulasiewicz and Cho-Yee To, p. 164ff.
39. Rishworth in Huscroft and Rishworth, p. 261, note 98
40. McGeorge, pp. 1-16
41. Rishworth 1993, p. 18
42. " p. 41
43. See assessment of Peddie in Chapter Two.
44. On the topic of 'new' Christian schools, see Coleman in Gilling 1993, pp. 122-129.
45. Rishworth 1993, pp. 18-9
46. Reports of Hill's ("Ethical values must be taught, says visiting prof" by Don Kavanagh) and Snook's ("Values here for all to see, says prof" by Ewan Sargent) speeches appeared in Manawatu Evening Standard, 24/7/00.
47. van Bueren, p. 251
48. Hunter in Gilling 1993, p. 182
49. Figures from the Statistics New Zealand web-site.
50. and 51. These pieces of information from Bruce Taylor, teacher in charge of correspondence ar Tararua College, Pahiatua.
52. This information from Nicolette Dennis who lived in this community for a short time in 1990.
53. This information from Janet Upton of the office of the Commissioner for Children in Wellington.

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