[for Paul Babie (ed), *Cultural and Religious Freedom under a Bill of Rights* (Edward Elgar, 2010)]

Religious Freedom in the Bill of Rights Era: The New Zealand Experience©

Rex Ahdar*

Introduction

The New Zealand Bill of Rights Act 1990 ("NZBORA" or "Act") is coming up to its twentieth anniversary. In this essay I wish to draw some lessons from the last two decades.

In Part I I will examine the genesis of the Act and the opposition by conservative religious groups to it. What were their particular concerns? Part II will consider what has happened since the Act came into force and the few religious freedom cases that have been decided post-1990. Part III offers some conclusions and speculations. In effect, I am endeavouring to answer three broad questions:

- What was the concern?
- What transpired?
- What are the lessons?

I The Genesis: What was eating Hone and Temepara Smith?

The first thing to note is that the Act is not a 'strong' entrenched, supreme-law type Bill of Rights ('BOR') like the American one or the Canadian Charter of Rights and Freedoms. It is an interpretative or statutory BOR that requires the courts to interpret ordinary legislation consistently with the NZBORA.[1] It expressly says New Zealand courts do not have the power to strike down legislation that infringes the rights set out in the NZBORA.[2]

---

* Professor, Faculty of Law, University of Otago.

1 Section 6.

2 Section 4.

The Fourth Labour Government (led by the late David Lange) in its 1985 "White Paper" floated an entrenched Bill of Rights, one substantially modeled on the Canadian Charter of Rights and Freedoms 1982 and the ICCPR 1966.[3] The White Paper proposal attracted much criticism from a diverse range of groups, including some religious ones. Whilst the Christian community was divided on this issue—as it is on most contemporary controversies (such as abortion, stem cell research, same-sex marraige, corporal punishment of children, climate change)—conservative Christians were adamantly opposed to it.[4] For the purposes of our discussion I will call our ordinary, but socially aware, Kiwi conservative Christians, "Hone and Temepara Smith".

While the opponents of the Bill were many and varied (including, for instance, the New Zealand Law Society), Sir Geoffrey Palmer, the principal architect of the White Paper, later singled out conservative Christians for special opprobrium: "[e]xtensive submissions from fundamentalist Christian groups did not help" the cause.[5] In the Parliamentary debates some Government members pilloried Hone and Temepara Smith, and their *whanau* (extended family), as "the looney Right".[6]

Many conservative Christian concerns coincided with those raised by others lodging submissions upon the Bill. Hone and Temepara also harboured, however, some distinctive misgivings.

Transfer of Power to an Unsympathetic Judiciary

The principal reason for opposition to the BOR proposal from the entirety of the submissions was the transfer of power from the elected Parliamentary representatives to the unelected judiciary.[7] The grant of wide-ranging power to determine social and political

---

3 *A Bill of Rights for New Zealand: A White Paper*, AJHR 1985, A6.

4 For a comprehensive account of the conservative Christian response to the White Paper, including detailed references, see Rex Ahdar, *Worlds Colliding: Conservative Christians and the Law* (Aldershot: Ashgate 2001) ch 5.

5 Geoffrey Palmer and Matthew Palmer, *Bridled Power: New Zealand Government under MMP* (Auckland: Oxford University Press, 1997) ch 15 at 268.

6 See eg, the Hon Bill Jeffries, Minister of Justice: "Much of the opposition to the Bill was led by the looney Right; it does not have any merit" (1989) 502 NZPD 13044.

7 See *Interim Report of the Justice and Law Reform Select Committee: Inquiry into the White Paper – A Bill of Rights for New Zealand*, 9 July 1987, AJHR 1987, 1.8A, at 8-9. The Prime Minister, Geoffrey Palmer,

matters to a select few (judges) and the resultant politicization of the judiciary were concerns for conservative Christians too. But there was a special danger for Hone and Temepara here. They doubted that judges would subscribe or be sympathetic to the Christian worldview. The Reformed Churches of New Zealand argued:

> It is clear that the Bill of Rights will involve the courts in determining matters of social policy . . . If we may posit for the moment that there is a liberal humanist world-and-life-view, and a traditional-conservative world-and-life-view it is reasonable to expect that the Cabinet and Parliament, insofar as it has jurisdiction, will appoint judges that reflect the dominant social consensus of the Government of the Day. This is exactly the situation in the United States.[8]

Secular Humanistic Foundation

Many conservative Christians (numbering some 25 submissions) were dismayed that there was no explicit acknowledgement of God as the source of rights. For Hone and Temepara, New Zealand still was a Christian nation; they sought to thwart any further erosion of the *de facto* or cultural Christian establishment (as I have called it).[9]

The Reformed Churches' submission again provided the fullest theological critique:

> [W]e believe that the Bill fails because it does not acknowledge Almighty God as the Source and Bestower of human rights. We believe that as soon as fundamental rights are decreed from an immanent source, immanent in creation, the work of interpretation, administering, applying, or defining those laws must be given to some institution or body which will hold awesome powers . . .This means that any fundamental law to protect freedoms and rights, which is grounded in the creation, will inevitably remove freedoms and take away rights, for it will concentrate infallible power in one or some governmental institutions. They will function as the supreme authority, and will have absolutist prerogatives over the community.[10]

This was "a true irony"[11] given that one of the avowed aims of the Bill of Rights was to

---

acknowledged this in his Introduction speech to the New Zealand Bill of Rights Bill: (1989) 502 NZPD 13038.

8 White Paper ('WP') Submission 62, at 4.

9 See Rex Ahdar, "A Christian State?" (1998-1999) 13 J Law and Religion 453.

10 WP Submission 62 at 5.

11 Ibid.

restrain governmental power.[12] The only real check upon tyranny was the divine one: "Only by acknowledging Almighty God, to whom all human courts are subject, can effective limits be placed upon courts and parliaments."[13]

Some noted that there was a conspicuous absence in the NZ Bill of the theistic acknowledgement found in the Canadian Charter, the model for the Bill. (The Charter Preamble begins: "Whereas Canada is founded upon principles that recognise the supremacy of God and the Rule of Law"). The non-reference to the Deity in the White Paper stood in stark contrast to such a reference in the ill-fated NZ Bill of Rights 1963, a generation earlier.[14]

The Select Committee's response to the Preamble issue was to say that theistic or Christian reference would be unfair to non-Christians: "In our view it would be inconsistent with Articles 6 and 8 [to eventually become sections 13 and 15 respectively of the 1990 Act] to acknowledge the supremacy of God. These two articles would protect the beliefs and practices of those who reject the Christian God."[15] To the Committee, exclusion of reference to God was neutral; to Hone and Temepara it was a rejection of a theocentric foundation and its substitution with a humanist one.

A Downgrading of Christianity

The corollary of a failure to give God His due in the Bill was the relegation of Christianity to mere equality with all other religions. The Mount Maunganui Baptist Church, for example, decried the fact that "not only does the Bill ignore Christian values but gives equal pre-eminence to values which may be totally foreign to our society. To be extreme, the values of a Satanic cult or mind-bending group are given equal status to those of a Christian group."[16]

Not only would Christianity be placed on an even par with other religions, some submissions argued that certain religions—conservative or traditional ones especially—would

---

12 See WP at 5 and para 4.19.

13 WP Submission 62 at 5.

14 The Preamble began: "Whereas the people of New Zealand uphold principles that acknowledge the supremacy of God . . ." The 1963 Bill is reproduced in Tim McBride, *New Zealand Civil Rights Handbook* (Wellington: Price Milburn,1980) at 593-599.

15 *Interim Report* at 24.

16 WP Submission 266W at 2.

not even receive that. Religions challenging the supreme values inherent in the BOR would, Hone and Temepara predicted, fare poorly.

Disestablishment Ramifications

The lobby group, Coalition of Concerned Citizens, was concerned that the religious freedom provisions of the proposed BOR might be given an anti-establishment reading. This might seem odd, for the Bill contained no express anti-establishment provision—such as the opening clause in the First Amendment of the US Constitution (which stipulates that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"). The decision not to include an anti-establishment provision in the Bill was a deliberate one. The White Paper explained:

> That provision [the First Amendment] was designed to prevent the creation of a state or official religion. That does not appear to be a real question to address in New Zealand. The American provision moreover has been used to deny state aid to religious schools—a practice long followed in New Zealand—and even voluntary prayers or bible readings in schools. The Covenant [International Covenant on Civil and Political Rights 1966] and the Canadian Charter contain no such provision. Accordingly it has not been included in the above text.[17]

Some White Paper submissions were highly critical of the absence of a non-establishment clause. Two academic lawyers argued that, while the question of a state religion was not a contentious question at the present time, it might become one in the future and was it "not the very purpose of the Bill of Rights to attempt to foresee and prevent future abuses?" They suggested the insertion of an explicit unambiguous provision worded: "There shall be no official State religion in New Zealand." Without such a provision they considered religious freedom was not really protected.[18] The Auckland Ethnic Council, New Zealand Jewish Council, Society for the Protection of Public Education and the New Zealand Rationalist Association shared this view.[19]

---

17 WP at 81.

18 Their submission was published in book form: see Jerome B Elkind and Anthony Shaw, *A Standard for Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand* (Auckland: Oxford University Press, 1986) at 51-52.

19 *Interim Report* at 143 and 45.

In its Interim Report two years later, the Select Committee reaffirmed the view expressed in the White Paper that the establishment of a State religion did not loom as a "real question" adding, somewhat curtly, that inclusion of an anti-establishment provision would be "inappropriate." Further, there was no need either for an express recognition that freedom from religion was protected since the Bill did "not give any greater protection to persons holding a religious belief than it gives to those who do not."[20]

Interestingly, the submission of the subcommittee of the Auckland District Law Society predicted that the breadth of the language of the religious liberty provisions in the draft Bill meant that "an establishment of religion type approach was quite probable"[21].

The judgment of the Canadian Supreme Court in *R v Big M Drug Mart Ltd*[22] (published soon after the release of the White Paper) was cited by the subcommittee as an example of the "havoc" that could be wreaked upon New Zealand's trading hours legislation were an anti-establishment reading to be given to the religious liberty provisions. Concerns about possible challenges (on the same basis) to the tax deductibility of contributions to churches and religious charities were also expressed.[23]

Canadian case law on the religious freedom provision in the Charter (s 2(a)) — which is worded solely in terms of free exercise and contains no express anti-establishment prohibition — has interpreted that provision to proscribe governmental establishment of religion as well as restrictions upon the expression of religion.[24] In short, freedom *of* religion includes freedom *from* religion. In *Big M*, the Supreme Court observed:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination. But the concept means more than that. Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free . . .

---

20 Ibid at 45-46.

21 Ibid at 152.

22 (1985) 18 DLR (4th) 321.

23 *Interim Report* at 152.

24 See eg Margaret H Ogilvie, "Between liberté and egalité: Religion and the state in Canada" in Peter Radan et al (eds), *Law and Religion: God, the State and the Common Law* (London: Routledge, 2005) ch 6.

> Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.[25]

The passage gives an expansive notion to "coercion", a concept that, in the Supreme Court's view, embraced subtle, indirect efforts to determine religious and other behaviour. In *Big M*, the Court held that a law prohibiting Sunday trading worked "a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the [Lord's Day] Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians."[26] Non-Christians—whether Jews, agnostics, atheists or Muslims—were not required or compelled to observe the Christian Sabbath in the sense that they were compelled to attend Church or pray that day. But they were required to "remember the Lord's day of the Christians and keep it holy" insofar as they were "prohibited for religious reasons from carrying out activities which are otherwise lawful, moral and normal."[27] If one is precluded from doing an everyday activity (working, shopping, playing sport) to preserve the religious sensibilities of others, a form of coercion is arguably occurring. One is being indirectly forced to observe a religious practice; a practice that may directly offend one's own conscience. The "arm of the State"[28] ought not to do this.

Early Canadian Charter experience thus provided some basis to the Coalition's anxiety that an anti-establishment interpretation might be given to the Bill's religious liberty provisions.

The Reformed Churches predicted that "almost certain[ly] all references to the Lord, and to the institutionalizing of Christianity in our national life would be removed."[29] The National Anthem, Speaker's Prayer and other instances of what Americans dub "ceremonial deism" would be eradicated. Perhaps, "it could even get down to local Governments being

---

25 (1985) 18 DLR (4th) 321 at 353-354 per Dickson J.

26 Ibid at 354.

27 Ibid.

28 Ibid.

29 WP Submission 62 at 10.

forbidden to take part in Christmas festivities or put up nativity scenes, as has happened in the United States."[30]

Recapitulation

Following the widespread opposition to the original entrenched BOR having the force of supreme law, Geoffrey Palmer, by now Prime Minister, was forced to set his sights lower. An interpretative Bill of Rights, having the status of an ordinary statute, was the result.

With the notion of a supreme law abandoned, most conservative Christians (including Hone and Temepara) lost interest. The fears of an unsympathetic judicial elite instigating humanistic social engineering had dissipated. Few Christian individuals or organizations issued submissions on the diluted Bill that was now proposed. The Seventh-Day Adventist Church alluded in its submission to the danger of the Bill being easily altered to become entrenched by later Parliaments.[31] In parliamentary debate, conservative Christian MP for the National Party, Graeme Lee, agreed: "It will just be a matter of time until the Bill will move from being ordinary law—albeit *de facto* supreme law—to being the bench-mark for all New Zealand law: the original objective."[32]

II What Transpired

In the last 19 years the religious freedom provisions of the Act have seldom been mentioned or invoked, nor have they excited much controversy—either in or outside legal circles. As Professor Paul Rishworth observed in an important recent article: "there has been remarkably little religious freedom litigation in New Zealand"[33].

The explanation for this is, as Rishworth notes, multifaceted: the BORA is not a supreme law and thus winning plaintiffs cannot succeed in scuttling infringing legislation; the absence of strong, well-organized religious (or secular) pressure groups; a less litigious

---

30 Ibid at 10.

31 Seventh-Day Adventist Church, submission 5W.

32 (1990) 510 NZPD 3471. Richard Northey, in the third reading debate, dismissed this "Trojan horse" thesis: (1990) 510 NZPD 3763.

33 "The Religion Clauses of the New Zealand Bill of Rights" [2007] NZL Rev 631 at 632.

culture and a sense that litigation would be unproductive; and a more tolerant, live-and-let-live atmosphere coupled with a "prevailing egalitarianism" amongst New Zealanders.[34] On the last point the Human Rights Commission in its 2004 human rights 'report card' observed:

> The Commission's complaints data, the Action Plan consultation and other research reveals *widespread acknowledgement of, and appreciation for, the high level of religious freedom and tolerance generally experienced in New Zealand*. Of 2,559 complaints received by the Human Rights Commission in 2002–2003, only 105 (4.1 percent) claimed discrimination on the basis of religious or ethical belief and, of those, 33 were outside jurisdiction. A further 47 were discontinued either by the complainant or by the Commission. Of the remaining 33, 14 have been resolved.[35]

This fairly benign state of affairs may not continue and the Act may yet prove to be more frequently utilized and have more 'bite' than it has to date. I will return to this in Part III.

New Zealand's religious freedom jurisprudence, to cite Rishworth again, "is found principally in the record of the legislative and executive branches, and has not been exclusively, or indeed hardly at all, the province of the judiciary."[36] The core of religious liberty is located not in flowing rhetoric emanating from high-profile court cases, but "the harsh particularities of legislation and practice in various discrete fields."[37] Historically, the preservation of religious freedom has been primarily overseen and undertaken by the Legislature and Executive,[38] and this continues to be the pattern post-1990.

In the Bill of Rights era we continue to see legislative "accommodation" made for religious practice. Prior to 1990 Parliament had carved out exceptions for religionists who might otherwise be caught by the application of the general law of the land. For example, medical personnel were granted a conscientious exemption by Parliament from participation in abortion and sterilization procedures and religious employers were permitted to deny access to union officials to their workplaces.[39] After 1990, the same approach continues. For

---

34 Ibid at 633 and 636.

35 "The Right to Freedom of Religion and Belief", *Human Rights in New Zealand Today* (HRC, Sept 2004) ch 9 (emphasis added). [http://www.hrc.co.nz/report/downloads.html]

36 Rishworth, "Religion Clauses", at 634.

37 Ibid at 649.

38 Ibid.

39 See respectively the Contraception, Sterilisation and Abortion Act 1977, s 46, and the Employment Relations Act 2000, ss 23-24.

instance, our anti-discrimination laws contain carefully crafted exemptions excepting religious employers and institutions from the usual prohibitions on sex and religious discrimination in employment, training, education and so on.[40]

So what of the cases that dealt with the Act's religious freedom provisions? These provisions are, in brief, the right to freedom of conscience, thought, religion and belief,[41] the right to manifest one's religious beliefs in worship, observance, practice and so on,[42] and the right of religious minorities to enjoy their religion.[43]

To reiterate, there have been relatively few cases.[44] In summary, we have had cases on such disparate matters as:

- parental refusals to allow potentially life-saving medical treatment to be administered to their children based on the parents' religious beliefs
- the longstanding ban on shop trading at Easter weekend
- the wearing of a burqa by a Muslim witness in an insurance fraud case
- an exorcism that resulted in the death of the unfortunate church member
- a resident who sought to justify a large spotlit swastika on the wall of his house on religious grounds
- parents of minority religions whose faith is raised as a negative, disqualifying factor in child custody and access disputes
- a Rastafarian who invoked religious freedom in the face of a marijuana charge
- an erstwhile leader of a 'New Age' religious community who complained the government did nothing to prevent the community's dissolution following the jailing

---

40 Religious institutions are allowed to discriminate on the basis of sex or religion when appointing persons to positions of leadership: Human Rights Act, s 28(2). Other religious exemptions are found, for instance, in s 27(2)(domestic employment) and s 39(1)(qualifying bodies).

41 Section 13 states: "Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference."

42 Section 15 provides: "Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private."

43 Section 20 reads: "A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practice the religion, or use the language, of that minority."

44 For analysis and commentary, at least up to 2005, see Paul Rishworth et al, *The New Zealand Bill of Rights* (Melbourne, Oxford University Press, 2003) ch 11; Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (Wellington: LexisNexis, 2005) ch 14.

of its founder (for child molestation)

• an offender who wished to be excused attendance at the periodic detention induction programme run on his Sabbath day

• a church official who granted false charitable donations receipts to enable parishioners to claim a tax rebate

The outcome of the cases has been rather predictable. Thus:

• the Jehovah's Witness parents' refusal to permit life-saving blood transfusions for their three-year-old child was over-ridden by doctors with the courts' approval[45]

• the Good Friday shop trading ban survived the attempt by a Wanaka bookshop to secure a "declaration of inconsistency" under the NZBORA from the court[46]

• the devout Afghani woman was required to unveil in court, but only before the judge, counsel and female court staff[47]

• the Korean Pentecostal pastor was not able to hold up the shield of religious faith in defence of a manslaughter conviction for a disastrously botched exorcism[48]

•the bigoted neighbour's Nazi symbols were removed pursuant to an abatement notice ordered by the Wellington City Council despite his spurious quasi-religious objections[49]

• Family Court judges have *mostly* not been swayed by embattled spouses playing the 'religion card' in custody and access battles[50]

• the Rastafarian's religious liberty plea in response to his conviction for cannabis

---

45 *Re J (An Infant): Director-General of Social Welfare v B and B* [1996] 2 NZLR 134 (CA). See also *Auckland District Health Bd v AZ and BZ*, HC Auckland, Civ 2007-4-4-2260, 27 April 2007, Baragwanath J; *Waikato District Health Bd v L*, HC Hamilton, Civ 2008-419-1312, 23 Sept 2008, Stevens J.

46 *Department of Labour v Books and Toys (Wanaka) Ltd* (2005) 7 HRNZ 931 (DC).

47 *Police v Razamjoo* [2005] DCR 408 (DC). See further David Griffiths, "Pluralism and the Law: New Zealand Accommodates the Burqa" (2006) 11 Otago L Rev 281; Erich Kolig, "New Zealand Muslims: The Perimeters of Multiculturalism and its Legal Instruments" (2005) 20 NZ Sociology 73.

48 *R v Lee* [2006] 3 NZLR 42 (CA).

49 *Zdrahal v Wellington City Council* [1995] 1 NZLR 700 (HC). See Bede Harris, "Viewpoint Neutrality and Freedom of Expression in New Zealand" (1996) 8 Otago L Rev 515.

50 See Rex Ahdar, "Religion in Custody and Access: The New Zealand Experience" (1996) 17

cultivation and supply fell on deaf ears[51]

• the state was held to have no positive duty to ensure the survival of an embattled faith community[52]

• the Seventh-Day Adventist offender was still required to complete the court-directed periodic detention induction programme on Saturday[53]

• the Tongan Anglican Mission Church official's optimistic appeal to religious and cultural matters to excuse his tax fraud was to no avail[54]

In my opinion every one these outcomes were just as likely to have resulted *without* a Bill of Rights. In most of the cases, the religious freedom arguments were a makeweight and were treated as such by the court—as evidenced by the cursory analysis and discussion of the meaning and scope of Act's religious freedom provisions.[55]

In those decisions where the religious liberty plea was more central to the case, the courts have not taken a very sympathetic or generous stance to the meaning or breadth of the right of religious freedom.

Take, *Re J*, a case concerning devout Jehovah's Witness parents who refused to permit a blood transfusion for their three-year-old child suffering from a severe and potentially life-threatening nosebleed. The Court of Appeal said that particular right of religious freedom at issue ought to be defined at the outset to exclude certain kinds of conduct (an approach known in constitutional law parlance as "definitional balancing").[56] This means that the state is not required to justify limits upon the right, but rather, the right is limited by the state (the court) under the guise of defining the right.

NZULR 113.

51 *R v Anderson,* Court of Appeal, CA27/04, 23 June 2004.

52 *Mendelssohn v AG* [1999] 2 NZLR 268 at 273 (CA).

53 *Feau v Department of Social Welfare* (1995) 2 HRNZ 528 (HC).

54 *Tahaafe v CIR*, HC Auckland, CRI 2009-404-102, 10 July 2009, Chisholm J.

55 As Paul Rishworth observed: "One particular feature of the New Zealand landscape has been the relatively low-level resolution of many rights controversies in the religion field. Instead of culture-changing legal precedents, we tend to get ad hoc and unreasoned, but generally satisfactory settlements. A debate about school prayer or religion classes in school… might flare in the newspapers and on television for a few days, but it is informally resolved (or fades away altogether) with no necessary determination of how such issues should be resolved for the future." "Human Rights and the Reconstruction of the Moral High Ground" in Rick Bigwood (ed), *Public Interest Litigation: New Zealand Experience in International Perspective* (Wellington: Lexis Nexis NZ, 2006) 115 at124-125.

56 [1996] 2 NZLR 134 at 145-146.

Here, it meant that the Jehovah's Witness parents' right to determine their child's medical treatment in accordance with their faith was defined to exclude any exercise of the parental rights of religious upbringing and medical decision-making that endangered the child's health or life. The other, and in my opinion, better approach (called "ad hoc balancing") would be to initially define the right broadly and then require the state to justify its restriction. In the present case it would translate into saying that parents have a broad right to determine their child's medical treatment (including the right to refusal the administration of blood transfusions), but the state may veto this if it discharges its onus of establishing that the overriding of parental consent was fully justified here. On the facts of *Re J* the different approaches did not make any material difference to the outcome, but the choice of methodology might well do so in other instances.

In *Mendelssohn v Attorney-General*[57] the plaintiff, Mendelssohn, a senior member of a small and highly controversial 'New Age' religious community, Centrepoint, argued that the Attorney-General had been negligent in failing to protect the group's religious liberty. Centrepoint been structured in the form of a trust. It experienced considerable disruption following the successful prosecution of their leader Herbert (Bert) Potter in 1992 for indecently assaulting minors living in the community. In 1995 Mendelssohn wrote to the Attorney General seeking action to restore the operation of the Trust to its proper purposes. The Attorney General declined to do so. Quite the opposite: he ordered an independent inquiry into the affairs of the Trust that ultimately resulted in the Public Trustee being substituted for the existing trustees.[58] Mendelssohn viewed the Attorney-General's conduct as in breach of what Mendelssohn asserted was a positive duty to take steps to protect his, and other Centrepoint followers', religious freedom. The Court of Appeal rejected his claim. The plaintiff had misunderstood the nature of the right to religious freedom contained in various provisions of the NZBORA: "The short answer to [Mr Mendelssohn's] submission is that in their essence those provisions do not impose positive duties on the state, at least in any sense relevant to this case."[59]

---

57 [1999] 2 NZLR 268 (CA).

58 The Court of Appeal dismissed a challenge by Mendelssohn to this appointment: *Mendelssohn v Centrepoint Community Growth Trust* [1999] 2 NZLR 88.

59 [1999] 2 NZLR 268 at [14](italics in original).

In *Director of Human Rights Proceedings v Catholic Church of New Zealand*,[60] the High Court had to decide whether the Catholic Church was caught by the Privacy Act 1993's disclosure regime. A woman had complained after the Church had refused her request for personal information pertaining to the annulment of her marriage by the Catholic Tribunal. The Church contended that compelled release of personal information would impede the institution's religious freedom: the future adjudication of annulment and divorce proceedings would be hampered if sensitive confidential statement made by others (such as an estranged spouse) were circulated more widely. The Court, however, could not see how the Church's right of religious liberty under section 15 of the Act was "threatened in any way"[61] by the Privacy Act's disclosure requirements.

Perhaps the only case where the right to religious freedom had any 'traction' was the Korean Pentecostal pastor exorcism trial, *R v Lee*. There, the Court of Appeal recognized that the right to manifest religious belief in section 15 of the NZBORA included the right to conduct exorcisms (and consent to undergo the same) and rejected the argument that only "mainstream" methods of performing exorcisms were included within the right.[62]

III The Lessons

New Zealanders' enjoyment of religious freedom has been fairly healthy prior to the BORA, and it continues to be so. Indeed, one sector of society, Maoridom, has fared better in the BOR era than it did before.

Not so long ago, government and legal recognition of Maori religious and spiritual concerns was unthinkable; now it is virtually *de rigeur*.[63] Here, however, we must be alert not to confuse correlation with causation. The state recognition of Maori religious interests began *prior* to the BORA, and it can hardly be said that the passing of the Act has been the principal

---

60 [2008] 3 NZLR 216 (HC).

61 Ibid at [68] per Cooper J.

62 [2006] 3 NZLR 42 at [326] to [330] and [345]. The Court quashed Pastor Lee's conviction for manslaughter and ordered a new trial on the basis the High Court had erred in not allowing the defence of consent to go to the jury.

63 See eg the Resource Management Act of 1991, ss 6-8; *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 402 (HC). See further Rex Ahdar, "Indigenous Spiritual Concerns and the Secular State: Some New Zealand Developments" (2003) 23 Oxford J L Stud 611; Fiona Wright,

catalyst for Maori spirituality's 'come back'. Rather, it has ridden on the coat-tails of the broader cultural renaissance of, and political solicitude towards, *Maoritanga* (Maori custom and way of life) that began in the 1980s. Hone and Temepara's pagan cousins, Rangi and Ngaire Morrison, are much happier these days now that their firm beliefs in *taniwha* (spiritual guardians or monsters), *mauri* (life-force), *waahi tapu* (sacred sites) and the like are taken seriously by civil tribunals in environmental, bioethical and other decision-making contexts.

Earlier I mentioned that the paucity of religious freedom cases might not continue. There are several reasons why.[64]

First, there is the increase in "rights consciousness". Next, there is the growth in non-Christians faiths, expansion driven by recent immigration. Not all these believers will assimilate and 'do in Rome as the Romans do'. It is not unreasonable to expect a burgeoning number of conflicts between them and the law. After all, the legal system was not formed with polygamous-minded Muslims or dagger carrying Sikhs in mind. Third, the law continues to penetrate deeply into the private sphere: the re-design of church buildings to meet contemporary liturgical needs clashes with preservation of historical places legislation, Hone and Temepara's desire to physically discipline their three children clashes with children's rights laws, and so on. Fourth, New Zealand society and the governing elite are becoming more secular. The situations where conflict may arise between the state and religious groups, especially traditionalist or conservative ones, are increasing. Hone and Temepara go to the pentecostal Destiny Church, perhaps the most disliked and vilified religious body in modern New Zealand.[65] I wish to now explore the last point more fully.

New Zealanders are becoming a more secular lot. Each successive census reveals an increase in those who indicate that have "no religion". The latest 2006 Census recorded some 1.297m New Zealanders (34.7 %) who identified themselves as squarely in the non-religious fold.[66]

"Law, Religion and Tikanga Maori" (2007) 5 NZJPIL 261.

64 See again, Rishworth, "Religion Clauses", at 633, and also his earlier excellent essay: Rishworth, "Coming Conflicts over Freedom of Religion" in Grant Huscroft and Paul Rishworth (eds), *Rights and Freedoms* (Wellington: Brookers, 1995) ch 6.

65 See "Protesters hold up Destiny Church march", *NZ Herald*, 7 March 2005.

66 Statistics New Zealand, "Religious Affiliation", 2006 Census. http://search.stats.govt.nz/search?w=religion. See Caroline Courtney, "Religion: Who needs it?" *North and South* (April 2007) 67. But note: there are still high levels of belief about life after death, heaven, reincarnation, astrology, fortune tellers, etc: "Religion in New Zealand", ISSP Survey,

Second, and relatedly, the cultural sway of organized religion is waning. The decreasing numbers of adherents formally affiliated to churches would, one suspects (and other things being equal) translate into declining social and political influence. Thus, for instance, opposition to the abolition to the residual public symbols and rituals of Christianity is likely to be less incisive in 2009 than in 1989, or certainly, 1969.

For example, there was minimal fuss when the Prime Minister, Helen Clark(a self-acknowledged agnostic), refused to allow the saying of grace at the Commonwealth Heads of Government banquet attended by Queen Elizabeth II in 2002.[67] Then there was the outcry by Christians (and Muslims) over the screening in 2006 of an episode of *South Park*, the American satirical television cartoon show, which showed a statue of the Virgin Mary menstruating over the Pope. The Prime Minister,Helen Clark denounced the screening of the episode as "quite revolting". The Broadcasting Standards Authority, however, found no violation of the TV Broadcasting Code's standards of taste and decency.[68]

I noted earlier that disestablishment potential of the Act has yet to be realized. The freedom *from* religion interpretation has seldom exerted itself, at least in the courts. The pressures just mentioned could yet see the Act have a similar secularizing impact to the Canadian Charter. There are warning signs are there. We have had:

- A spat over a Corrections Department decision to rigidly uphold its alcohol ban and not allow communion wine to be given to prisoners[69]
- A complaint about a Marlborough high school's refusal to let girls wear a cross

---

Marketing Department, Massey University, March 2009, at 2.

[67] "Lack of grace leaves no trace", *Otago Daily Times*, 9 March 2002, A7. The Prime Minister, Helen Clark, defended: "There was no grace for the same reason as there is none now in New Zealand, because we're not only a society of many faiths, but we're also increasingly secular. In order to be inclusive, it seems to me to be better not to have one faith put first. We haven't had the grace at state banquets for the last two years."

[68] Broadcasting Standards Authority Decision No 2006-022 (26 June 2006). The High Court affirmed the BSA decision in an appeal launched by the NZ Catholic bishops: *Browne v CanWest TV Works Ltd* [2008] 1 NZLR 654 (HC). See further Rex Ahdar, "The Right to Protection of Religious Feelings" (2008) 11 Otago L Rev 629.

[69] Following the Minister of Corrections' intervention, the Department stated it would allow communion wine in prisons: see "Government wants review of ban on communion wine", *NZ Herald*, 26 April 2007; "Catholic Bishop praises Corrections Dept for reversing decision", *The Tablet* (Otago), 17 June 2007, at 6.

around their neck (despite Maori symbols being allowed)[70]

• Questioning of the propriety of the Speaker of Parliament's Prayer[71]

• Public agitation about the proposal to remove the large illuminated cross atop the municipal clocktower in Palmerston North—a spat that abated once the wind blew the cross down![72]

• A complaint about a voluntary, non-teacher-led, lunch-time evangelical Christian "KidsKlub" at a Wellington primary school[73]

• Human Rights Commission mediation between warring parents over the 52-year-old practice of saying the Lord's Prayer at an Auckland primary school's weekly assembly[74]

• Ministry of Education guidelines questioning of the continuance of the longstanding voluntary "Bible in Schools" Christian education programme and religious observances in state primary schools[75]

• Successive bills to abolish the Good Friday retailing ban[76]

Some of the disputes that currently are resolved by a fortuitous mixture of quiet, behind-the-scenes compromise by the state—or tactful retreat by the religionists (or atheists) concerned—may instead, in the future, go to court. Admittedly, New Zealand does not have the equivalent orgnizations to the United State's renowned rights pugilists, such as the ACLU

---

70 "Marlborough Girls school board stands by dress code", *NZ Herald*, 18 February 2004: see Butler and Butler, *NZ Bill of Rights Act*, at 421.

71 Letter from Matt Robson, Progressive Party MP, to Jonathan Hunt, Speaker of the New Zealand House of Representatives (May 6, 2003): quoted in Allan Davidson, "Chaplain to the Nation or Prophet at the Gate? The Role of the Church in New Zealand Society" in John Stenhouse (ed), *Christianity, Modernity and Culture* (Adelaide: ATF Press, 2005) 312 at 314.

72 Patrick Goodenough, "City riled by dispute over cross", Crosswalk.com: <http://www.crosswalk.com/1222304/>.

73 Stewart Dye, "School Split over Religion Club Ban", *NZ Herald*, 10 June 2005; "School gives way on lunchtime Bible study", *Dominion Post*, 7 July 2005. See further Rex Ahdar, "Reflections on the Path of Religion-State Relations in New Zealand" [2006] BYUL Rev 619 at 639-641.

74 "School in trouble over Lord's Prayer", *Otago Daily Times*, 19 December 2005; "Prayers for school to decide"(editorial), *NZ Herald*, 22 December 2005; Paul Rishworth, "Religious issues in State schools" in John Hannan et al, *Education Law* (NZ Law Society Seminar, May-June 2006) at 87-114.

75 "Guidelines on religion in schools stun some", *Otago Daily Times*, 25 August 2006; Rex Ahdar, "Review better than rows over religion in school", *Otago Daily Times*, 1 September 2006.

76 See eg the Shop Trading Hours (Easter Trading Local Exemption) Bill 2004 (No 168-1), sponsored by Doug Wollerton MP; "Wait for Easter law", *Otago Daily Times*, 22 February 2007 (debate

or the Rutherford Institute, and awareness of one's civil rights is hardly as second-nature as it appears to be for the ordinary American. So, my pessimism may be misplaced and the placid picture may continue. Nonetheless, if Hone and Temepara asked me, "Do you think our ability to live out our faith is likely to get easier or more difficult?", I would be slow to answer. After all, prediction is very difficult—especially about the future.[77]

on private member's Bill sponsored by Jacqui Dean MP).

[77] Attributed to Nobel Prize winning Danish Physicist, Dr Niels Bohr (1885-1962): http://www.quotationspage.com/quotes/Niels_Bohr/.