

# Finding separation of church and state for New Zealand

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***The New Zealand Census is telling us citizens are moving away from religious identification while the government still embraces it. It's time for constitutional separation of church and state to be openly discussed, argue Max and Meg Wallace.***

On 31 July this year submissions closed to the government's Constitutional Advisory Panel concerning a constitution for New Zealand. New Zealand, like the UK, does not have a written constitution. On 13 July there was a day-long seminar sponsored by the Law Faculty at Victoria University in Wellington on the question of separation of church and state. One reason for this seminar was the lack of constitutional separation in New Zealand.

New Zealand is not alone in this respect. In Australia, there has been no High Court case interpreting s.116 of the federal constitution, based on the American First Amendment, to mean separation of church and state. The six Australian states also have constitutions written between 1840 and 1859. None of them have a section separating church and state. In fact, in 1853, a major figure in Australian, and to some extent, New Zealand history, William Charles Wentworth, said in the parliament that the New South Wales constitution would be a British constitution 'not a Yankee one.'

In Canada, there is no section in the 1867 Constitution Act separating church and state. Similarly, in the New Zealand 1986 Constitution Act, there is no such section. Canadian Prime Minister Stephen Harper has come right out and said separation of church and state is an American constitutional concept that does not apply to the Canadian constitution. While Canada dropped the Union Jack (a composite of crosses of Christian saints) from its flag to be replaced entirely by the maple leaf, that was done to placate the secessionist, French-speaking citizens of the province of Quebec.

So, what should New Zealand do? The likely answer can be found in another former British colony, not so far away: Fiji. This small, troubled nation became a republic after a coup in 1987. Twenty-five years later, the question of separation of church and state was addressed by a Constitution Commission, established in 2012, comprising some eminent persons headed by Professor Yash Ghai. On 6 September 2013, the day before Australia's federal election, the new constitution was promulgated.

It includes this section:

## **Secular State**

4.- (1) Religious Liberty, as recognised in the Bill of Rights, is a founding principle of the State.

(2) Religious belief is personal.

(3) Religion and the State are separate, which means –

(a) the State and all persons holding public office must treat all religions equally;

(b) the State and all persons holding public office must not dictate any religious belief;

(c) the State and all persons holding public office must not prefer or advance, by any means, any particular, religion, religious denomination, religious belief, or religious practice over another, or over any none-religious belief; and

(d) no person shall assert any religious belief as a legal reason to disregard this Constitution or any other law.

The Methodist Church of Fiji opposed separation, wanting Fiji to identify as a Christian nation. However, very importantly, both the Church of England and the Catholic Church in Fiji have embraced separation. They seem to have taken Professor Ghai's point that separation of church and state is not 'anti-religion, but just a feeling that the function and responsibility of religion or beliefs within societies should be separated from the functions and policies of the institution of the State.'

The conclusion we could reach from this example is that genuine constitutional separation of church and state may not be possible in the constitutional monarchies of Canada and New Zealand. The republican-style s.116 in the Australian Constitution of Australia's constitutional monarchy is yet to be properly tested. It seems likely however that separation would be more easily achieved if the three nations were republics.

Genuine separation occurs in three possible ways:

- Separation is written into a constitution (Fiji)
- A constitution implies separation and is interpreted that way by the highest court (US)
- Separation is legislated by a parliament (France)

It is widely believed that because a nation does not have an 'established' church – an official, legislated religion of the state (England), or officially promotes a particular religion, there is separation of church and state. But this mistakes partial, *conventional* separation for complete *constitutional* separation. Lack of an established church means only what it says: that there is no established church. By itself, it does not guarantee constitutional separation as detailed above.

By conventional separation we mean the notion that because churches do not participate in parliamentary lawmaking it follows there must be separation. This is simplistic because the Australian and New Zealand governments:

- Openly support the private beliefs of the religious with the use of public money via tax exemptions and donations for religious activities
- Allow exemptions and exceptions to law that do not apply to others
- Bow to the influence of religion concerning, for example, a woman's right to choose and voluntary euthanasia
- Subsidise proselytism and indoctrination through massive school funding
- Fund or allow religious instruction in public schools

New Zealand is in the awkward position of being constitutionally compromised by having a major religious figure, the Supreme Governor of the Church of England in England, the Queen, as head of state. The theocratic symbol of 'the Crown' with its Christian cross atop is reconfirmed by the National Anthem, *God Defend New Zealand*, which is effectively a Christian hymn. Parliament opens with Christian prayer, the flag still has the Union Jack.

One might argue that these are mere remnants of no real importance. So why are they still there, and, in fact, enhanced by the return of knighthoods? What they really are, are symbols of constitutional monarchist power. We are reminded of this every day with the currency we carry in our pockets. Turn over any coin and there is the head of state who also happens to be the Supreme Governor of the Church of England in England. We carry the constitutional position of the British in our pockets.

Is this what we want in 21<sup>st</sup> Century New Zealand? The population is much more multicultural than it was in the 19<sup>th</sup> Century. To many non-Anglo, non-Maori citizens the current system of government may seem non-inclusive. Fiji, on the other hand, plans to remove the Queen's face from its currency; the Queen's birthday public holiday has been abolished; the Union Jack is to be removed from the flag.

We hope that the Constitutional Advisory Panel, when it reports, has heard what was said at Victoria University on 13 July. We need to get lack of constitutional separation of church and state in New Zealand, and the likely reasons for it, openly discussed. The Census is telling us citizens are moving away from religious identification while the government still embraces it. It is doubly ironic that a very small nation, Fiji, with a large majority of citizens who are religious, can define itself constitutionally as a secular state, whereas New Zealand, with a near-majority of citizens who are not religious, cannot!

*Max and Meg Wallace are members of the New Zealand Association of Rationalists and Humanists. This article is reproduced with their permission. The views expressed are those of the author and do not necessarily represent the views of the NSS.*

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