

THE ARCHBISHOP'S EXAMINATION IN THEOLOGY

An exploration of the basis of legal authority in the
Anglican Church in New Zealand

A thesis submitted for the Degree of Master of Arts

by

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DEDICATION

The study of the canon law is a holy study, because the canon law itself is a very holy thing, and among all holy studies we venture to say none is more sacred than that of the *jus canonicum*. Not even mystical theology itself, treating though it does of the sublimest truths and deepest mysteries touching the divine espousals of the Christian Soul with God, not even this awful department of the great science is more sacred than is the sacred jurisprudence of the Church.

So wrote the Rev'd. Canon Edmund Wood in 1888, in *The Regal Power of the Church* ed. Eric Kemp (1948) 10. While this thesis extends beyond the narrower confines of the canon law, it is a sacred rather than a profane study. It is therefore with due diffidence that I, a layman, dedicate this work to the Most Reverend Te Whakahuihui Vercoe, Archbishop and Primate of the Anglican Church in Aotearoa, New Zealand and Polynesia.

ABSTRACT

This thesis is an exploration of the basis of the legal authority of the Church. It takes as its example the Anglican Church in Aotearoa, New Zealand and Polynesia.

It begins with an examination of the sources of fundamental authority within the Church, especially divine law as a superior source of law. This is followed by a brief look at the history and origins of canon law, the spiritual law of the Church. The legal position of the Church within the wider legal system is then examined, specifically within its original English setting. In particular, the development of the legal foundations of the Church in New Zealand is analysed.

The next step is an examination of the possible models which might be said to describe the situation of the Church in New Zealand – of dis-established churches, and non-established churches. In the first the church was once subject to the control of the secular power but has since then become autonomous. In the second the church was never subject to the control of secular authority, but rather relied upon an internal legal authority – itself derived in part from divine law.

The doctrine of consensual compact, the secular legal basis for church law, is then examined, along with the applicability of pre-existing canonical systems. In the first is examined the concept that the authority of the Church is derived from the agreement of its members, rather than imposed by an external authority. In the second the position of canon law inherited from a non-consensual model of church is examined. In particular, the effect of having a consensual basis for the authority of the church is that the canon law, the law which the church has itself enacted, cannot generally be enforced directly by the secular power.

However, even if the church law of the Anglican Church in New Zealand is based upon the consensus of the members of the Church, the laws of the State also have an important part to play. In particular, not only is the Church, as a juridical body, subject to the law of the land, it also has relied upon the State for the enactment of certain laws. This includes the very laws under which the Church constitution and canons are created. The Church is, to some extent, limited in its autonomy by this dependence upon a secular legal authority. This has been necessitated by the evolution of the Church in New Zealand, and is also a legacy of the pre-colonial Church of England. This is also affected by the lack of an indigenous method or style of approach in the exposition of ecclesiastical law.

In conclusion, it is asked whether the concept of separation of church and State, so influential in many parts of the world, has been overstated in this country. It is postulated that an absolute separation is alien to both the secular and spiritual laws. The true situation is an incomplete separation, but one which reflects the historical evolution of the English Church, particularly but not exclusively post-Reformation. Thus the legal authority of the Church also partakes of this twin basis.

The Church is neither established nor dis-established. The Anglican Church in New Zealand may be classified broadly as quasi-established in the sense that whilst having the status of contractual societies, there are significant legal links between the church and State, the authority of internal Church law rests at least in part upon the existence of secular legislation, and secular legislation expressly and directly regulates some of the temporal affairs of the Church. This is perhaps the legacy of a secular legalistic approach to jurisdiction. This is not to say that the State accords any special privileges to the Anglican Church, or that it is in any sense a State Church. But the evolution of the jurisprudence of the

Church, and the form and nature of the secular legal system, owe much to a shared history.

The thesis then moves to an evaluation of the nature of the authority vested in the legislative, judicial and ministerial arms of the Church. The authority of General Synod, of the church courts, and of the bishops and clergy are assessed. In particular, following from the conclusion in Chapter 2, that Church authority derives from both secular and religious sources – both of which can be seen as reflecting the divine will – the basis of authority of each arm is reviewed. It will be shown that in each case the basis of authority is a mixture of human and divine law, some made manifest through secular agencies, some through temporal agencies.

The ways in which the Church is administered has also been influenced by the secular legal system, and by the role of the State in society in New Zealand. It has also been heavily influenced by the existence of the Treaty of Waitangi, an 1840 agreement between the British colonial authorities and the indigenous Maori people, as have the administrative and legislative systems of the Church. As a consequence of this agreement the Church is now run on a multi-cultural or multi-racial model, with power distributed between the non-Maori and Maori sections of the Church. This has also influenced the treatment of the former missionary diocese of Polynesia, which also partakes of the shared power within the Church.

These diverging influences are each seen as a reflection of the divine within the church, and the evolution of the structure of the Church in New Zealand an ongoing attempt to reflect a true Fellowship within the One, Holy, Catholic, and Apostolic Church, within a changeful, and increasingly secular, world.

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ABBREVIATIONS

A. & E.	Law Reports, Admiralty and Ecclesiastical
A.C.	Appeal Cases
A.L.J.R.	Australian Law Journal Reports
A.L.R.	Australian Law Reports
Add.	Addams Reports
Admin. L.R.	Administrative Law Reports
All E.R.	All England Reports
All Nigeria L.R.	All Nigeria Law Reports
App. Cas.	Appeal Cases
Atk.	Atkyns Reports
B.C.L.	Butterworths Current Law
Beav.	Beavan Reports
Bing.	Bingham Reports
c.	caput
C.	Command
C.A.	Court of Appeal
C.B.	Common Bench
C.J.	Chief Justice
C.L.R.	Commonwealth Law Reports
C.P.	Court of Common Pleas
C.P.	Law Reports, Court of Common Pleas
Cd.	Command Paper
Ch.	Chancellor
Ch.	Chancery Division, High Court
Ch.	Law Reports, Chancery

Ch.D.	Law Journal Reports, Chancery Division
Chas.	Charles
cl.	clause
Cmd.	Command Paper
Co. Rep.	Coke's Reports
Const.	Constitution of the Anglican Church in Aotearoa, New Zealand and Polynesia
Cowp.	Cowper's Reports Kings Bench
C.P.	Court of Common Pleas
Cr. App. R.	Criminal Appeal Reports
Cranch	Cranch's Reports
Ct.	Court
D.	Scots Digest
D.C.L.	Doctor of Civil Law
D.L.R.	Dominion Law Reports
Dep. Ch.	Deputy Chancellor
E.R.	English Reports
East.	E.H. East King's Bench Reports
Edw.	Edward
El. & Bl.	Ellis & Blackburn Reports
Eng.	England
Eq.	Law Reports, Equity
F.	Family Division
F.	Federal Reporter
Fam.	Family
ff.	folios
fo.	folio

fols.	folios
Freeman	Freeman Reports
G.L.R.	Gazette Law Reports
Geo.	George
Godbolt	Godbolt's Reports
H.C.	High Court
H.C.A.	High Court of Australia
H.L.	House of Lords
H.L.	Law Reports, English and Irish Appeals
H.L. Cas.	House of Lords Cases
H.L.C.	House of Lords Cases
Hag. Con.	Haggard's Consistorial Reports
Hag. Ecc.	Haggard's Ecclesiastical Reports
Hen.	Henry
J.	Justice
J.C.L.	Licentiate in Canon Law
Jac.	James
JJ.	Justices
K.B.	King's Bench
L.C.	Lambeth Conference
L.J.	Lord Justice
L.R.	Law Reports
L.T.	Law Times
Lee	Lee's Ecclesiastical Judgments
Legge	Legge's Supreme Court Cases
LL.B.	Bachelor of Laws
LL.D.	Doctor of Laws
LL.M.	Master of Laws

M. & R.	Moody & Robinson's Nisi Prius Reports
M.A.	Master of Arts
Mich.	Michaelmas term
Moo. N.S.	Moore Reports, New Series
Moo. P.C.	Moore Reports, Privy Council
Moo. P.C.C.	Moore's Privy Council Cases
Moore	Moore Reports
Msgr.	Monsignor
N.C.	New Cases
N.L.R.	Natal Law Reports
N.S.	New Series
N.S.R.	Nova Scotia Reports
N.S.W.R.	New South Wales Reports
N.Z.	New Zealand
N.Z. Jur.	New Zealand Jurist Reports
N.Z. P.C.C.	New Zealand Privy Council Cases
N.Z.A.R.	New Zealand Administrative Reports
N.Z.L.R.	New Zealand Law Reports
No.	Number
Ont.	Ontario
p.	Page
P.	Law Reports, Probate
P. Wms.	Peere Williams Reports
P.C.	Privy Council
P.C.	Law Reports, Privy Council
P.D.	Probate, Divorce & Admiralty Division

para.	Paragraph
Phil.	Phillimore Reports
Phill. Ecc.	Phillimore Reports, Ecclesiastical
Phillim.	Phillimore Reports
Pl.	pleading number
Q.B.	Queen's Bench
Q.B.	Law Reports, Queen's Bench
Q.B.D.	Queen's Bench Division
Res.	Resolution
Ress.	Resolutions
Ric.	Richard
s.	section
Salk.	Salkeld's King's Bench Reports
S.A.S.R.	South Australian State Reports
S.C.	Supreme Court
S.C.	Scots Session Cases
S.C.C.	Supreme Court of Canada
S.C.R.	Supreme Court Reports
S.I.	Statutory Instruments
S.I. Rev.	Statutory Instruments Revision
S.R.	Statutory Regulations
S.R. & O.	Statutory Rules and Orders
Sc. & Div.	Law Reports, House of Lords, Scotch and Divorce Appeals
Scot.	Scotland
Sid.	Siderfin Reports
ss.	sections
Stat.	Statute of the Realm
tit.	title

T.L.R.	Times Law Reports
trans.	translated
Trin.	Trinity term
U.K.	United Kingdom
U.S.	United States Reports
U.S.	United States
U.S.A.	United States
Vent.	Ventris Reports
Vict.	Victoria
Vol.	volume
W.I.R.	West Indies Reports
W.L.R.	Weekly Law Reports
W.R.	Weekly Reporter
W.W.R.	Western Weekly Reports
Will.	William
Y.B.	Yearbook

INTRODUCTION

Government in the church¹ of God is an exercise of ruling power, *potestas regiminis*, or the power of governance.² This authority of the church has both secular and religious origins, though, in theological terms at least, the latter predominates. The church is the Church of God, in the world but not of this world, and is eternal and unchanging in its essential nature.³

The purpose of this thesis is to explore the basis of authority of the Anglican Church in New Zealand. It is intended that this thesis will show how the divine will is manifest through the institutions of the Church, and through the laws applicable to it. These laws are both secular and religious, in that some are the result of the actions of ecclesiastical institutions, and others are the result of the actions of secular institutions. But both reflect the will of God, though differently revealed and implemented. “The authority of the church arises from its commission to preach the Gospel to all the world and the promises, accompanying that commission, that the Lord would always be with his disciples, and that the Holy Spirit would guide them into all the truth.”⁴ In a similar way,

¹ “Church” is generally used throughout this thesis where a particular denomination is intended, “church” where the meaning is the community of faithful, at least those who acknowledge an historical and theological link with the early Christian church.

² James Coriden, *An Introduction to Canon Law* (1991) 18.

³ “It is misleading to speak of religious experience as something distinct from ordinary experience for the latter possesses a dimension of holiness”; J.G. Davies, *Every Day God: encountering the holy in world and worship* (1973) 80.

⁴ Commission on Christian Doctrine appointed by the Archbishops of Canterbury and York in 1922, *Doctrine in the Church of England* (1938) 35.

Roman Catholic canons are said to embody divine law if they are drawn directly from God's revelation or from the natural law, God's creation.⁵ The law may be drawn from divine law through both secular and spiritual avenues.

The basis of the authority of the church is, broadly speaking, the same whether we consider the Anglican Church in New Zealand, the Church of England by law established in England, or the dis-established Church in Wales, in that the sole source of authority is "the freedom and love of the Triune God". But the fact of establishment, dis-establishment, or non-establishment is important, for this affects the extent to which the law of the church is a part of, or recognised by, the secular legal system. The reverse is true also, for the law of the church must acknowledge the place and role of the secular State.

This thesis takes the Anglican Church in New Zealand as its subject, yet the lessons which it illustrates cannot be seen as unique. The treatment of the church in secular law, and the relationship between church and State, may (indeed does) differ markedly between countries. But the theological inheritance and influence remains strong in New Zealand, as it does elsewhere.⁶

⁵ James Coriden, *An Introduction to Canon Law* (1991) 33.

⁶ Nor is this influence only one-way, for the secular laws have been significantly affected through the ages by the church laws. See Noel Cox, "The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England" (2001-2002) 3(2) *Rutgers Journal of Law and Religion* 1-45 <http://www-camlaw.rutgers.edu/publications/law-religion/cox1.pdf>; See also Thomas Scrutton, *The influence of the Roman Law on the Law of England* (1885) 163-169; A.J.S. Reid, "Church and State in New Zealand, 1930-1935: A study of the social thought and influence of the Christian Church in a period of economic crisis" (1961) Victoria University of Wellington M.A. thesis; Peter Lineham, "The nature and meaning of Protestantism in New Zealand culture" (1993) 26(1/2) *Turnbull Library Record* 59.

It is the aim of this thesis to show, through a study of the authority of the Anglican Church in New Zealand, how church institutions derive their authority from both secular and religious sources, and that this is consistent with the theological basis of the church. Church courts derive their authority from church law and from State law, and have felt the influence of the secular common law. Bishops owe their authority to both secular legislation and canon law – though the first is but little remarked upon and has relatively slight doctrinal or liturgical, as distinct from administrative, significance. The Church bureaucracy owes its authority to statute law as well as to the Constitution and canons of the Church.

CHAPTER 1 – SOURCES OF AUTHORITY – ECCLESIASTICAL

I Introduction

The Anglican Church in Aotearoa,¹ New Zealand and Polynesia (formerly the Church of the Province of Aotearoa, New Zealand and Polynesia),² is a provincial Church of the worldwide Anglican Communion.³ It inherited the basic tenets and structure of the Church of England when that Church arrived in New Zealand during the nineteenth century,⁴ and has modified these over time to suit local conditions.⁵

As a basic principle within the Anglican Communion, the exercise of legislative power is confined to regional, national, provincial, or diocesan assemblies. The Churches are distinguished by their autonomy; the Catholic and Apostolic faith and order as set forth in the *Book of Common Prayer*; their particular or national form; and the lack of a central legislative and executive authority (except for the common

¹ “Aotearoa” is the name for New Zealand in the Maori language, though it would seem that before European contact its use was confined to the name for the North Island alone. Generally, see Bruce Briggs, *English-Maori: Maori-English Dictionary* (1990).

² As styled in the Constitution of the Anglican Church in Aotearoa, New Zealand and Polynesia, preamble and Part A, as amended 1992.

³ Being that group of Christian Churches including the Church of England, the Church of Ireland, the Episcopal Church in Scotland, the Church in Wales, and the Episcopal Church in the United States of America (and others), all of which are in full communion; Const. Preamble, 18: “... this Church is part of and belongs to the Anglican Communion”.

⁴ Robert Withycombe (ed.), *Anglican ministry in colonial Aotearoa-New Zealand and in the South Pacific* (2nd ed., 1994).

⁵ Most recently, by the institution of a trifurcated legislature, see particularly Chapter 3.

counsel of bishops in conference).⁶ But the Churches within the Communion vary in the degree to which they have adopted, or preserved, the “establishment”, or nexus of Church and State.⁷ This affects the ways in which power is exercised, and to some extent, the formal basis of authority also.

The formal legal, jurisdictional nature of the Anglican Church is less apparent than that of the Roman Catholic Church.⁸ But it is no less certain that the legal form and structure of the Church of England has been important in its evolution. In broad terms, the authority of the Church is not man-made law, but law derived of God, or divine law as revealed to mankind – including the canon law of the Church.⁹ Law also – perhaps inevitably – promotes legalism. Legalism, in St. Paul’s eyes, is dangerous because it focuses the mind on human achievement rather than on the inevitable inadequacy of that achievement in God’s sight.¹⁰ Yet much of the law governing the Church is to be found in secular statutes

⁶ L.C. 1930, Res. 48, 49 [“L.C.” hereafter refers to the Lambeth Conferences].

⁷ In England, this refers to the partial integration of the secular and religious legal systems, and the subordination of both to the authority of Crown-in-Parliament. In Scotland the concept is rather of a complete separation of religious and secular systems, and of sovereignty of each within its field. The Church of Scotland is more a national church than a legally established one; Gordon Donaldson, *The Scottish Reformation* (1960). In its purest form establishment meant mutual recognition of Church law and secular law, and equal validity within their respective spheres; James Coriden, *An Introduction to Canon Law* (1991) 18.

⁸ For instance, the study of canon law, or ecclesiastical law, does not form a part of the required training of Anglican clergy, as it does of Roman Catholic.

⁹ For the distinctions between these elements of divine law, see St. Thomas Aquinas, *Summa theologiae* (1963) I-II. xci. 2.

¹⁰ Anthony Brash, “Ecclesiastical Law and the Law of God in Scripture” (1998) 5(22) *Ecclesiastical Law Journal* 7, 10; see Heikki Raisanen, *Paul and the Law* (1983).

and the decisions of secular courts, in accordance with the relationship between church and State¹¹ as this has developed since the Reformation in England. Law is “holy, righteous and good”, because it confronts human beings with their inadequacy and prepares them to receive God’s gift of grace in Christ.¹²

The framework within which the Church of England in New Zealand operates may be characterised by two factors.¹³ Firstly, it is non-established in that it is not formally recognised or supported by the State, nor does it enjoy a privileged position.¹⁴ Secondly, although it has formally adopted the principal of partnership between Maori and non-Maori (so that parallel hierarchies have been established), the Church is a constituent member of the Anglican Communion, with the ecclesiastical, legal and historical continuity which that implies.¹⁵

¹¹ The term “State” is used throughout this thesis for convenience, though in the English constitutional tradition it is by no means certain that such an entity exists; see Noel Cox, “The Theory of Sovereignty and the Importance of the Crown in the Realms of The Queen” (2002) 2(2) Oxford University Commonwealth Law Journal 237-255.

¹² Anthony Brash, “Ecclesiastical Law and the Law of God in Scripture” (1998) 5(22) Ecclesiastical Law Journal 7, 10; Heikki Raisanen, *Paul and the Law* (1983); Romans 7.12.

¹³ See Norman Doe, *Canon Law in the Anglican Communion* (1998).

¹⁴ Though Doe prefers to categorise it as quasi-established; Norman Doe, *Canon Law in the Anglican Communion* (1998) 13-15.

¹⁵ Const. Preamble:

[T]he Church is the body of which Christ is the head”; “the Church (a) is One because it is one body, under one head, Jesus Christ; (b) is Holy because the Holy Spirit dwells in its members and guides it in mission; (c) is Catholic because it seeks to proclaim the whole faith to all people to the end of time and (d) is Apostolic because it presents the faith of the apostles and is sent to carry Christ’s mission to all the world.

Although not an established church, the Anglican Church in New Zealand has not been unaffected by the wider political situation in New Zealand. It occupies a unique position in New Zealand society, in part because of the close links between the Church and the Maori people. This in turn had its effect upon the “establishment” of the Church.¹⁶ In New Zealand the Anglican Church has also often taken a leading role in promoting recognition of the Treaty of Waitangi, with its principle of partnership between Maori (the indigenous people of the islands) and Pakeha (essentially the descendants of European settlers – originally predominantly British).¹⁷ Orthodox legal theory holds that the Treaty of Waitangi, signed in 1840 between representatives of the British Government and the majority of Maori chiefs, has socio-political, not legal force, as it was not a treaty recognised by international law.¹⁸ It

“Const.” as used hereafter refers to the Constitution of the Anglican Church in New Zealand.

In England, the Church of England is officially regarded as existing as a continuous body from its inception in Saxon times, retaining the same powers that it has held previously, irrespective of changes in the civil power or in the church’s civil control; *Merriman v. Williams* (1882) 7 App. Cas. 484, 510 (P.C.), *Baker v. Lee* (1860) 8 H.L. Cas. 495, 504.

¹⁶ In the Scottish, rather than English, sense of the term.

¹⁷ A paper, written by Professor Whatarangi Winiata and presented to the Government by the Anglican Church-led ‘Hikoi of Hope’ march on Wellington in late 1998, called for separate social, economic and political structures for Maori, on the model adopted by the Church; Interview with Sir Paul Reeves, former Archbishop of New Zealand and later Governor-General, 11 November 1998. For the background to the hikoi, see Ian Harris, “Why the hikoi missed its target”, *Dominion* (Wellington), 15 December 1998; p. 11; John Manukia, “Church a model for two nations says professor”, *New Zealand Herald*, 11 December 1998; A:11.

¹⁸ Anthony Molloy, “The Non-Treaty of Waitangi” [1971] *New Zealand Law Journal* 193. For a contrary view, based on the changing precepts of modern international law, see Klaus Bosselmann, “Two cultures will

therefore has effect only so far as legal recognition has been specifically accorded it.¹⁹ At some time either the courts or Parliament may give the Treaty legal recognition as part of the constitution of New Zealand.²⁰ But already the Treaty of Waitangi, as a principle of the constitution, is now effectively politically entrenched, if only because it is widely regarded by Maori generally as a sort of ‘holy writ’.²¹ The Anglican Church at least has emphasised the role of the Treaty of Waitangi, though not at the expense of losing the Church’s apostolic and catholic character.²² The structure remains distinctly episcopal, but it has been influenced by the nature and politics of the European settlement of New Zealand.

This Chapter will seek to identify the sources of legal authority within the church, particularly divine law and church-made canon law.

become one only on equal terms”, New Zealand Herald (Auckland), 1 March 1999. However, if the Treaty was not a treaty in 1840, it is difficult to see how it could be one now. It would be preferable to see its importance in domestic constitutional terms. See William Renwick, *Sovereignty and indigenous rights* (1991). See also Chapter 3.

¹⁹ Generally, see Wayne Attrill, “Aspects of the Treaty of Waitangi in the Law and Constitution of New Zealand” (1989) Harvard University LL.M. thesis. Even if it were a valid international treaty, its enforcement would be no more certain; see also David Williams, “Te Tiriti o Waitangi” in Arapera Blank et al (eds.), *He Korero Mo Waitangi 1984* (1985) 159-170.

²⁰ John Fogarty, [1993] New Zealand Law Journal 212. The courts have gone some way towards this; *New Zealand Maori Council v. Attorney-General* [1987] 1 N.Z.L.R. 641 (C.A.).

²¹ Interview with Sir Douglas Graham, former Minister in Charge of Treaty of Waitangi Negotiations, 24 November 1999.

²² Recognition of the Treaty of Waitangi-based principle of power sharing is more problematic for the Roman Catholic Church, given the greater centralisation of the authority of that branch of the Church.

II Sources of authority in a church

God, in creating mankind, ordered it to subdue the earth and to exercise dominion over the earth.²³ Mankind, in attempting to establish separate dominion and autonomous jurisdiction over the earth,²⁴ fell into sin and death. Subsequent efforts have been directed at recovering from this fallen condition. Biblical law is a covenant, a plan for dominion under God,²⁵ and is based on revelation. But even laws made by mankind, including by secular authorities, are in a limited sense laws of God.

The exact nature of the Biblical origins of the authority of the church may be the subject of debate, but it is reasonably clear that there was some form of structured authority within each local church in apostolic times.²⁶ This can be seen in the lists of ministries, and in references to elders and overseers.²⁷ But in these early years the

²³ Genesis 1.28:

And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.

This and later quotations are from the King James Version of the *Bible*.

²⁴ Genesis 3.5: “For God doth know that in the day ye eat thereof, then your eyes shall be opened, and ye shall be as gods, knowing good and evil”.

²⁵ Rousas John Rushdoony, *The Institutes of Biblical Law* (1973) 6-7.

²⁶ See, e.g. Kenneth Kirk (ed.), *The Apostolic Ministry* (2nd ed., 1957).

²⁷ 1 Corinthians 12.28 (“And God hath set some in the church, first apostles, secondarily prophets, thirdly teachers, after that miracles, then gifts of healings, helps, governments, diversities of tongues”); Ephesians 4.11 (“And he gave some, apostles; and some, prophets; and some,

government of the church was quite distinct from that of the State, though this was not to long remain so.²⁸ Law, and therefore government, is perhaps in any culture religious in origin. Because law governs mankind and society, because it establishes and declares the meaning of justice and righteousness, law is inescapably religious, in that it establishes in practical fashion the ultimate concerns of a culture. Modern humanism, the religion of the State, locates law in the State and thus makes the State, or the people as they find expression in the State, the “god” of the system.²⁹

In any society, any change of law is an explicit or implicit change of religion. Nothing more clearly reveals, in fact, the religious change in a society than a legal revolution. When the legal foundations shift from Biblical law to humanism, it means that the society now draws its vitality and power from humanism, not from Christian theism.³⁰ This means that the laws enacted by secular authorities can only with difficulty be seen as truly being the laws of God. Yet the law of God remains important within the Church, if not beyond it. The difficulty is in how to identify and interpret this law.

The laws which govern the Church in New Zealand are the ecclesiastical laws, which may be defined (in the absence of an official

evangelists; and some, pastors and teachers”); and Philippians 1.1 (“Paul and Timotheus, the servants of Jesus Christ, to all the saints in Christ Jesus which are at Philippi, with the bishops and deacons”) respectively; see James Coriden, *An Introduction to Canon Law* (1991) 4.

²⁸ The church benefited from the nexus of church and State from the fourth century, but also suffered some negative consequences; see, for example, Stephan Kuttner, *The history of ideas and doctrines of canon law in the Middle Ages* (1980).

²⁹ See, for example, John Locke, *Two Treatises of Government* ed. Peter Laslett (1988).

³⁰ Rousas John Rushdoony, *The Institutes of Biblical Law* (1973) 5.

definition) as so much of the laws of New Zealand as are concerned with the regulation of the affairs of the Anglican Church, and the internal or domestic laws of the Church, inapplicable to non-members.³¹ The sources of this law may be found in several places, depending upon whether it is direct or indirect law. First, in theology (the *Bible*, patristic writings, opinions of authors, pronouncements of Lambeth Conferences, liturgical formularies) – which have purely declaratory effect;³² secondly, in the internal laws of the Church – its constitution and canons,³³ thirdly, the common law of the realm; fourthly, the statute law so far as it impinges on ecclesiastical governance; and fifthly, subordinate legislation, whether enacted by secular or church agency.³⁴

This later category, subordinate legislation, includes diocesan laws, which are enacted by diocesan synods. “The General Synod/te Hinota Whanui may delegate to any Synodical Conference, Diocesan Synod or

³¹ Ecclesiastical law in England is said to be “the law relating to any matter concerning the Church of England administration and enforced in any court”, ecclesiastical or temporal, and “law administered by ecclesiastical courts and persons”; *Attorney-General v. Dean and Chapter of Ripon Cathedral* [1945] Ch. 238.

³² At the start of the first Lambeth Conference in 1867 Archbishop Longley made it clear that the gathering was a conference and not a synod, and that its resolutions would be purely declaratory, and not legislative or mandatory; Gillian R. Evans and Robert Wright (eds.), *The Anglican Tradition* (1991) 328.

³³ The rules of the church were early called “canons” to distinguish them from the secular laws of the Roman empire, the term being borrowed from the Greek *kanon* (κάνων) – reed or rod, meaning a measure or standard (as in Galatians 6.16 [“And as many as walk according to this rule, peace be on them, and mercy, and upon the Israel of God”] and Philippians 3.16 [“Nevertheless, whereto we have already attained, let us walk by the same rule, let us mind the same thing”]); James Coriden, *An Introduction to Canon Law* (1991) 3.

³⁴ After Garth Moore, *An Introduction to English Canon Law* (1967) 8, as modified for New Zealand circumstances, by removal of a reference to measures.

to any Board, commission or other body either specifically or generally as the case may require or under such general regulations as shall from time to time be laid down, any of the powers conferred upon General Synod/te Hinota Whanui by this Constitution.”³⁵ “Every Diocesan Synod may within the limits of such Diocese, exercise all such powers and make all such Regulations, not inconsistent with this Constitution or with any Canon or Regulation of the General Synod/te Hinota Whanui, as may be necessary for the order and good government of the Church in such Diocese.”³⁶ This is a relatively wide-ranging authority.

This multiplicity of sources, and reliance on secular as well as religious sources of law, is consistent with a long tradition – and not solely post-Reformation. Until the middle of the nineteenth century the ecclesiastical law in England was not regarded as an isolated system, but as a part, albeit with its own particular rules, of a much greater system, and one which might be illuminated and assisted by works of canonists in other lands.³⁷ Both theology and history demonstrate the ecclesiological nature of canon law.³⁸

The church was regarded as a perfect society (*societas perfecta*), but so was the State. Each contained in itself all that its nature requires

³⁵ Const. E.6.

³⁶ Const. E.7.

³⁷ Eric Kemp, *An Introduction to Canon Law in the Church of England* (1957) 62. Bishop Kemp points to *Welde alias Aston v. Welde* (1731) 2 Lee 580, a case replete with references to canonical and civilian texts and commentaries, as illustrating this point. See also Richard Helmholz, *Canon Law and the Law of England* (1987).

³⁸ There have been signs in recent years of a revival in the study of ecclesiastical law in the Anglican tradition, including the establishment of the Ecclesiastical Law Society; see also Christopher Hill, “Education in Canon Law” (1998) 5(22) *Ecclesiastical Law Journal* 46-48; “The Constitution and Rules of the Ecclesiastical Law Society” (1988) 1(3) *Ecclesiastical Law Journal* 41.

and all that is needed for the full discharge of its functions. It is not dependent upon any other earthly entity.³⁹ There could be no conflict between Church and State as each occupied a distinct field – though they were always mutually aware of one another.

It has been observed that “[e]cclesiastical law is not foreign law. It is part of the general law of England”.⁴⁰ The same is true, at least in part, of the ecclesiastical law of New Zealand – that it is part of the general law – though to a smaller degree since the scope of the ecclesiastical law in New Zealand is severely circumscribed in comparison with that in England. The Church is, for instance, generally subject to the secular human rights laws, and given only slight privileges with respect to confidentiality.⁴¹ But Christianity has played an important part in shaping New Zealand’s culture, traditions, and law. The law in many respects favours religion in general, and Christianity in particular, as against agnosticism and atheism,⁴² though this favouritism may be in decline.

Formal laws which affect the churches in general include Acts of Parliament, by-laws, rules and regulations, ordinances, resolutions, decrees, liturgical rubrics. Alongside the formal laws exist less formal and sometimes unwritten sources, including customs or traditions,⁴³ decisions of church courts, ‘principles of canon law’,⁴⁴ for some churches, the English canons ecclesiastical 1603, or pre-Reformation

³⁹ Hubert Box, *The Principles of Canon Law* (1949) 8.

⁴⁰ *Mackonochie v. Lord Penzance* (1881) 6 App. Cas. 424, 446.

⁴¹ Human Rights Act 1993 (N.Z.); Evidence Amendment Act (No. 2) 1980 (N.Z.), s. 31 (2).

⁴² Sir Ivor Richardson, *Religion and the Law* (1962) 61.

⁴³ “In accordance with Anglican tradition there shall be no celebration of the Eucharist unless at least one other person is present”; *A New Zealand Prayer Book* (1989) 517.

⁴⁴ ‘The principles of partnership’; Const. Preamble, 12.

Roman Catholic canon law.⁴⁵ Alongside laws properly so-called, churches are regulated by quasi-legislation, informal administrative rules designed to supplement the formal law: ‘directions’, ‘guidelines’, ‘codes of practice’ or ‘policy documents’.⁴⁶ The Church is essentially a bureaucracy, or teaching body which has for long – at least since its very earliest years – required rules by which to operate. As a perfect society, these rules ought to be solely of the church’s own making. But for various reasons secular as well as spiritual means are used to enact such laws, and have been since the days of Constantine the Great, if not earlier.

⁴⁵ The 1603 canons do not now apply in the Australian Church, unless dioceses adopt them; Standing Committee of the General Synod of the Church of England in Australia, *The Anglican Church of Australia, Canon Law in Australia: A Summary of Church Legislation and its sources* (c.1981) 5.

⁴⁶ Canon B.X.7: each diocesan synod and Te Runanganui o Te Pihopatanga o Aotearoa shall, have “proper regard for such guidelines as may be laid down from time to time by the Archives Committee”; Norman Doe, “Non-Legal rules and the courts: enforceability” (1987) 9 *Liverpool Law Review* 173-188; R. Baldwin and J. Houghton, “Circular Arguments: The Status and Legitimacy of Administrative Rules” (1986) *Public Law* 239.

III Divine Law as a Superior Source

Law is not law if it lacks the power to bind, to compel, and to punish. While it would not be correct to define law simply as compulsion or coercion, it is also an error to define law without recognising that coercion is basic to it. To separate power from law is to deny it the status of law.⁴⁷ Law must be coercive if it is to lead men to virtue,⁴⁸ though it is only in a limited sense that the church has the power of coercion.⁴⁹

Power itself is partly a religious concept, and the god or gods of any system of thought have been the sources of power for that system.⁵⁰ The monarch or ruler has a religious significance in part because of his power. Indeed, Christians had always – at least from the fourth century – considered the State a divine institution, recognising and promoting the Christian religion at the centre of its moral identity.⁵¹ When the democratic State gains power, it too arrogates to itself religious claims

⁴⁷ Norman Doe, “Non-Legal rules and the courts: enforceability” (1987) 9 *Liverpool Law Review* 173-188; R. Baldwin and J. Houghton, “Circular Arguments: The Status and Legitimacy of Administrative Rules” (1986) *Public Law* 239.

⁴⁸ St. Thomas Aquinas, *Summa theologiae* (1963) I-II. xc. 3.

⁴⁹ Purely spiritual, with obedience enforced negatively by exclusion from spiritual privileges; Matthew 18.15-17.

⁵⁰ i.e. Emile Durkheim, *Elementary Forms of Religious Life* trans. Carol Cosman (2001).

⁵¹ Edward Norman, “Authority in the Anglican Communion” (1998). Even before Christianity was established as the official State religion, the church taught that Christians owed allegiance to the State: Luke 20.25 (“And he said unto them, Render therefore unto Caesar the things which be Caesar’s, and unto God the things which be God’s”); Mark 12.17; Matthew 22.21.

and prerogatives. Power is jealously guarded in the post-Christian State,⁵² and any division of powers in the State, designed to limit its power and prevent its concentration, is bitterly contested.⁵³ It is not a coincidence that the conflict between church and State came to a head in Europe in the sixteenth century, at a time when the modern State began to succeed in its claims to a monopoly of mans' allegiance.⁵⁴

The law, both criminal and civil, claims to be able to speak about morality and immorality generally. Where it gets its authority to do this and how it settles the moral principles which it enforces, are vital questions. Undoubtedly, as a matter of history, it derives both partly from Christian teaching.⁵⁵ But the secular law can no longer rely on doctrine in which citizens are entitled to disbelieve, and even the law of the church is

⁵² Whether the State is post-Christian is another question; compare Sir Ivor Richardson, *Religion and the Law* (1962) 61 and Rex Ahdar, "New Zealand and the Idea of a Christian State" in Rex Ahdar and John Stenhouse (eds.), *God and Government* (2000) 59-76.

⁵³ Rousas John Rushdoony, *The Institutes of Biblical Law* (1973) 58-59.

⁵⁴ This conflict dates from the original linkage of Church and State under Constantine the Great, and has parallels in the state-sponsored paganism of (particularly) imperial Rome; Alan Watson, *The state, law, and religion* (1992).

⁵⁵ Matthew 28.18:

All authority hath been given unto me in heaven and on earth.

This is then delegated to the church (John 20.21)

As the father hath sent me, even so send I you.

not immune from this destabilising influence.⁵⁶ It is necessary therefore to look for some other source of authority.⁵⁷

The law of Western civilisation has been Christian law, but its faith is increasingly humanist. The old law is therefore neither fully understood, nor obeyed, nor enforced.⁵⁸ But in a society where the church has ceased to be (or never was) the church of the people, but rather a voluntary association, questions of the divine nature of law remain important within the church. Fundamental questions of competence are perhaps more vigorously fought in these circumstances, for the extent (or existence) of unalterable tenets or laws may be disputed.⁵⁹ Whether the church itself should make all its own laws, whether and to what extent these laws are immutable, and whether the church should utilise secular laws, remain vitally important, yet difficult to resolve.⁶⁰ This is because a church, composed of men and women, cannot be truly infallible,⁶¹ nor can be, of itself, aware of the entire divine plan. A church must also, though comprising the Kingdom of God upon

⁵⁶ Edward Norman, “Authority in the Anglican Communion” (1998).

⁵⁷ Patrick Lord Devlin, *The Enforcement of Morals* (1959) 9. See, for example, changes in the marriage laws.

⁵⁸ Rousas John Rushdoony, *The Institutes of Biblical Law* (1973) 69.

⁵⁹ See, however, the dispute regarding the ordination of woman priests. The desire to preserve a catholicity of the Church led to calls for this step to not be taken. This argument proved stronger in the Church of England than the Anglican Church in New Zealand, but was ultimately unsuccessful in both. See Aambit, *The Newsletter of the Association for Apostolic Ministry*, No. 3, July 1988; Thomas Torrance, *The ministry of women* (1992).

⁶⁰ Thomas Glyn Watkin, “Vestiges of Establishment: The Ecclesiastical and Canon Law of the Church in Wales” (1990) 2 *Ecclesiastical Law Journal* 110.

⁶¹ “Papal infallibility” is in a sense a misnomer. See Hans Küng, *The church, maintained in truth: a theological meditation* trans. Edward Quinn (1980).

Earth, reconcile itself to existence alongside secular states and systems. These systems vary from country to country and over time, and so the position of the church varies.⁶²

Whatever the apostles were commissioned to do, the church today has the authority to do.⁶³ However, unlike in the Roman Catholic Church, within the Anglican Communion the question of authority is one which had rarely been directly addressed since the Reformation⁶⁴ – at least until the 1970s.⁶⁵ In part this was a consequence of the formal constitutional establishment of the Church of England in England, which allowed theological questions to be masked in secular legal forms, or described in the most general terms.⁶⁶ As the 1922 Commission on Christian Doctrine reported, “The authority of the church arises from its commission to preach the Gospel to all the world and the promises, accompanying that commission, that the Lord would always be with his disciples, and that the Holy Spirit would guide them into all the truth.”⁶⁷ There is no clear statement of the source of authority of the church, and how it is to be authoritatively interpreted. This is a curious omission given the centrality

⁶² Noel Cox, “Ecclesiastical Jurisdiction in the Church of the Province of Aotearoa, New Zealand and Polynesia” (2001) 6(2) Deakin Law Review 266-284.

⁶³ Edward Norman, “Authority in the Anglican Communion” (1998).

⁶⁴ See however, Stephen Sykes (ed.), *Authority in the Anglican Communion* (1987).

⁶⁵ For several factors which contributed to the discussions about authority at the 1978 Lambeth Conference see Stephen Sykes, *The Integrity of Anglicanism* (1978).

⁶⁶ The formal legal authority was vested in the Crown-in-Parliament; e.g. Act of Supremacy 1534 (26 Hen. VIII c. 1) (Eng.); Act of Supremacy 1558 (1 Eliz. I c. 1) (Eng.).

⁶⁷ Commission on Christian Doctrine appointed by the Archbishops of Canterbury and York in 1922, *Doctrine in the Church of England* (1938) 35.

of teaching to the mission of the church, and the claimed catholicity of the Anglican Communion. But this is perhaps not surprising, given the post-Reformation history of the Church of England, and its Erastian inheritance.⁶⁸ The Anglican concept of authority relates directly to the primary function of maintaining the church in the truth. This led to an emphasis upon process rather than on the juridical form.⁶⁹ However, questions of the origins and nature of authority cannot always go unaddressed, nor can they always be expressed in vague and general terms without the risk of departing from theological truths.⁷⁰

Every church, although based on what its members believe to be divine revelation, is also a human institution.⁷¹ Theology is concerned with God's revelation and the church's teachings,⁷² and canon law with the patterns of practice within the community of faith.⁷³ This law accorded certain privileges and powers to those in positions of

⁶⁸ Erastianism may be characterised as where the State has superiority in ecclesiastical affairs, and makes use of religion to further State policy; Leo Pfeffer, *Church, State and Freedom* (1953) 28-62.

⁶⁹ Archbishop Henry R. McAdoo, "Anglicanism and the Nature and Exercise of Authority in the Church" (1976) 2 *New Divinity* 87-88.

⁷⁰ Including the danger of moral and religious relativism, concerns about which was one of the motivating factors which led to the declaration of the Primates' Meeting at Canterbury in April 2002; Anglican News Service A.C.N.S. 2962, 17 April 2002, 17 April 2002, "Statement of Anglican Primates on the Doctrine of God", Report of the Meeting of Primates of the Anglican Communion: Appendix II, <<http://www.anglicancommunion.org/acns/articles/29/50/acns2960.html>> at 18 March 2003.

⁷¹ James Coriden, *An Introduction to Canon Law* (1991) 3.

⁷² The teaching office of the church, or *magisterium*, is at the heart of its role; Edward Norman, "Authority in the Anglican Communion" (1998).

⁷³ Report of the Archbishops' Commission on Canon Law, *The Canon Law of the Church of England* (1947) 3.

authority.⁷⁴ But to hold a position of authority among the disciples of Jesus meant to serve others, after the example of the Master.⁷⁵

⁷⁴ Though a misunderstanding of St. Paul on law and the Gospel has also influenced evangelical and charismatic thinking; Christopher Hill, "Education in Canon Law" (1998) 5(22) Ecclesiastical Law Journal 46.

⁷⁵ Matthew 20.25-28:

²⁵But Jesus called them unto him, and said, Ye know that the princes of the Gentiles exercise dominion over them, and they that are great exercise authority upon them.

²⁶But it shall not be so among you: but whosoever will be great among you, let him be your minister;

²⁷And whosoever will be chief among you, let him be your servant:

²⁸Even as the Son of man came not to be ministered unto, but to minister, and to give his life a ransom for many.

Mark 10.42-45:

⁴²But Jesus called them to him, and saith unto them, Ye know that they which are accounted to rule over the Gentiles exercise lordship over them; and their great ones exercise authority upon them.

⁴³But so shall it not be among you: but whosoever will be great among you, shall be your minister:

⁴⁴And whosoever of you will be the chiefest, shall be servant of all.

⁴⁵For even the Son of man came not to be ministered unto, but to minister, and to give his life a ransom for many.

Luke 22.25-27:

²⁵And he said unto them, The kings of the Gentiles exercise lordship over them; and they that exercise authority upon them are called benefactors.

²⁶But ye shall not be so: but he that is greatest among you, let him be as the younger; and he that is chief, as he that doth serve.

²⁷For whether is greater, he that sitteth at meat, or he that serveth? is not he that sitteth at meat? but I am among you as he that serveth.

The church must work within this framework. Whilst it has been observed that “the church can never invent or create doctrine, but it can define or declare them”,⁷⁶ the Constitution of the Anglican Church in New Zealand provides that General Synod may “safeguard and develop its doctrine.”⁷⁷ The difficulty in determining what is doctrine, and what may be changed by national synods, is a question which the Anglican Communion in general has not yet settled.⁷⁸ Indeed, it has been said that “[a]s far as the taking of authoritative decisions is concerned there is clearly a vacuum at the centre, whether one chooses to evaluate it positively or negatively”.⁷⁹ This has been both a strength and a weakness of the Anglican Communion.

St. Thomas Aquinas observed that there are two ways human law may be derived from the divine law. It may embody a deduction from principles contained in divine law, or it may be a more particular statement of those principles.⁸⁰ But it remains difficult to determine

⁷⁶ Edward Norman, “Authority in the Anglican Communion” (1998).

⁷⁷ Const. Preamble. Cf. Article 21 of the *Thirty-Nine Articles of Religion*, enacted in 1562, and confirmed in 1571 by the Subscription (Thirty-Nine Articles) Act 1571 (13 Eliz. I c. 12) (Eng.), which declares that the Church has authority to declare what the Catholic faith is and always has been; see also Richard Hooker, *Of the Laws of Ecclesiastical Polity* ed. Arthur McGrade (1989) Book V, pp. viii, 2.

⁷⁸ Edward Norman, “Authority in the Anglican Communion” (1998).

⁷⁹ Robert Wright, “The Authority of Lambeth Conferences, 1867-1988” in Guy F. Lytle (ed.), *Lambeth Conferences. Past and Present* (1989) 282. It is also important to note that until 1964 the General Synod met only once every three years, thereby weakening the development of consistent and strong doctrinal themes; Peter Lineham, “Government Support for the Churches in the Modern Era” in Rex Ahdar and John Stenhouse (eds.), *God and Government* (2000) 45.

⁸⁰ St. Thomas Aquinas, *Summa theologiae* (1963) I-II. xcv. 2.

precisely that these laws are.⁸¹ There is a divergence of opinion as to how far a particular Church is competent to alter or abolish laws and customs observed by the Universal Church.⁸² Anglican ecclesiology recognises that General Councils may pronounce doctrine,⁸³ but is sceptical of the infallibility of any institution or council.⁸⁴ The dispersed authority of the Anglican Communion is spelt out in Report IV of the 1948 Lambeth Conference,⁸⁵ in what Sykes calls “the most satisfactory public statement of the Anglican view of authority”.⁸⁶ It amounts, in the words of Canon Edward Norman, addressing a later Lambeth Conference, to a “singularity and diversity dependent on modern concepts of representation and limited government, drawn from the practice of

⁸¹ This should perhaps be unsurprising; there was a vigorous and unresolved debate in the New Testament about the validity of the Old Testament law for Christians; Anthony Brash, “Ecclesiastical Law and the Law of God in Scripture” (1998) 5(22) *Ecclesiastical Law Journal* 7, 8; Ed P. Sanders, *Jesus and Judaism* (1985).

⁸² Hubert Box, *The Principles of Canon Law* (1949) 46. Francisco Suarez, *Tractatus de legibus, ac Deo legislatore* (1679) vii. xviii, 6 [the Churches might depart]; Edward Bicknell, *A Theological Introduction to the Thirty-Nine Articles of the Church of England* (1955) 379-383 [they might not].

⁸³ The Act of Uniformity 1559 (1 Eliz. I c. 2) (Eng.), which enshrined the Elizabethan Settlement, endorsed the first four œcumenical council – Nicea 325, Constantinople 381, Ephesus 431, and Chalcedon 451 – as the authorities by which heresy would be defined; Stephen Platten, *Augustine’s Legacy* (1997) 29. “That which has been believed everywhere, always and by all” cannot be set aside without destroying the community itself; St. Vincent of Lérins, *The Commonitorium of Vincentius of Lerins* ed. R.S. Moxon (1915), II, 3.

⁸⁴ Edward Norman, “Authority in the Anglican Communion” (1998); Article 21 of the *Thirty-Nine Articles of Religion*, enacted in 1562, and confirmed in 1571 by the Subscription (Thirty-Nine Articles) Act 1571 (13 Eliz. I c. 12) (Eng.).

⁸⁵ L.C. 1948, Report IV, “The Anglican Communion”.

⁸⁶ Stephen Sykes, *The Integrity of Anglicanism* (1978) ix.

secular modern government.”⁸⁷ The 1948 Lambeth Conference Report on the Anglican Communion⁸⁸ states that authority is both singular in that it derives from the mystery of the divine Trinity, and plural, in that it is distributed in numerous, organically related elements. Elements in authority are an ongoing process of describing the data, ordering them, mediating and identifying them.⁸⁹ While descriptive of the nature of the Anglican Communion at mid-twentieth century, it did not afford clear guidance as to whether they were the product of piecemeal and haphazard evolution, or symptomatic of a more fundamental truth.

The church remains influenced by the legacy and tradition of its post-Reformation⁹⁰ constitutional relationship with the State in England, even where the church has never been established. The Elizabethan theologian Richard Hooker observed that:

Of God came all of the diverse guides to human conduct, working through the created order (the moral law of reason), through such law as is necessary to govern human societies (positive human law, international law), and through that special revelation provided to correct the imperfections of other laws (the revelations of God in Christ as transmitted in and through scripture and tradition).⁹¹

Hooker viewed the State as authoritative in relation to God’s universe of laws, and specifically in relation to positive human law, such law as encompasses not only the State but also ecclesiastical government,

⁸⁷ Edward Norman, “Authority in the Anglican Communion” (1998); William Sachs, *The Transformation of Anglicanism* (1993) 2.

⁸⁸ L.C. 1948, Report IV, “The Anglican Communion”.

⁸⁹ Stephen Sykes, *The Integrity of Anglicanism* (1978) 87-88.

⁹⁰ There are also important elements of pre-Reformation tradition also, as the church enjoyed close relations with the State.

⁹¹ Richard Hooker, *Of the Laws of Ecclesiastical Polity* ed. Arthur McGrade (1989) Book I, pp. xviii, xix; see also Gerald Cragg, *Freedom and Authority* (1975) 98-99.

including the authority of bishops.⁹² “*Kings* have dominion in *Ecclesiasticall* causes but according to the lawes of the *Church*”.⁹³ The Anglican Communion remains influenced by these views of law, although it was never formally established in most of the world in which it is found. This influence may be seen in the dependence upon secular legislation for certain aspects of church law, particularly trusts and financial administration but also for the enactment of the Church Constitution.

⁹² John E. Booty, “The Judicious Mr. Hooker and Authority in the Elizabethan Church” in Stephen Sykes (ed.), *Authority in the Anglican Communion* (1987) 108-109.

⁹³ Richard Hooker, *Of the Laws of Ecclesiastical Polity* ed. Arthur McGrade (1989) Book VIII, 3.3, cited in John E. Booty, “The Judicious Mr. Hooker and Authority in the Elizabethan Church” in Stephen Sykes (ed.), *Authority in the Anglican Communion* (1987) 108-109.

IV History and Origins of Canon Law

Although State laws may be crucial to the operation of the church, even where the church is not established, the primary source of law for the church is that which it creates for itself, including constitutions, and the canon law. Central to the nature of ecclesiastical law is the history of the canon law. Canon law is clearly distinguished from other kinds of human law. It derives its authority from the Church, the Body of Christ.⁹⁴ It is also something more than a collection of rules, it embodies a fundamental governing principle, and “each canonical enactment derives its sanction not from some isolated authority, not from some or any power external to the church, not from the consent of the governed, but because it is a part of the great whole, the *jus canonicum*.”⁹⁵ Even where canon law is seen as the product of national legislation, it is customary to provide that it might be challenged as contrary to the doctrine and sacraments of the church.⁹⁶

Historically, canon law meant something very different to what the term now represents.⁹⁷ The distinction between ecclesiastical law and canon law depends upon the relationship of the church and the secular government. As a general rule, ecclesiastical law relates to the Church but may be made for the church by the State,⁹⁸ while canon law is (in the

⁹⁴ Hubert Box, *The Principles of Canon Law* (1949) iv-v.

⁹⁵ Hubert Box, *The Principles of Canon Law* (1949) 11.

⁹⁶ As also in New Zealand; see Chapter 5.

⁹⁷ Richard Helmholz, *Canon Law and the Law of England* (1987); Norman Doe, *The Legal Framework of the Church of England* (1996).

⁹⁸ Canon A.II.3: clergy undertake to be “obedient to the ecclesiastical laws” in force in the diocese. These include the Constitution and code of

European tradition – and in the Anglican Church in New Zealand) made for the church by the church itself.⁹⁹ More accurately perhaps, ecclesiastical law may be taken to include canon law, laws made by the church which are not canon laws, and laws made by the State for the church. The importance of the latter will vary from church to church, and over time.

The canon law has validity only within the framework of its principal and parent, the divine law, as the authority of the church to make laws is not absolute.¹⁰⁰ Thus the church can only make rules relating to the details, not the essential nature, of the law.¹⁰¹ Other laws may be informed with theological principles, but are not bound by the limitations imposed by divine law.¹⁰²

Yet the law of the church has been strongly influenced by secular laws – indeed the theological basis of the ecclesiastical law is generally undeveloped in Anglican jurisprudence.¹⁰³ In the post-apostolic and early

canons. “Ecclesiastical law” as such is not defined in the Constitution or canons.

⁹⁹ Thomas Glyn Watkin, “Vestiges of Establishment: The Ecclesiastical and Canon Law of the Church in Wales” (1990) 2 *Ecclesiastical Law Journal* 110.

¹⁰⁰ Which is why constitutions generally provide that enactments contrary to the doctrine and sacrament of the church are invalid.

¹⁰¹ Garth Moore, *An Introduction to English Canon Law* (1967) 2.

¹⁰² Roman Catholic canons are said to embody divine law if they are drawn directly from God’s revelation or from the natural law, God’s creation. The vast majority of canons are human law, that is, enactments of the church’s own authority and, consequently, alterable; James Coriden, *An Introduction to Canon Law* (1991) 33.

¹⁰³ Norman Doe, “The Principles of Canon Law. A focus of legal unity in Anglican-Roman Catholic Relations” (1999) 5(25) *Ecclesiastical Law Journal* 221, 226; Norman Doe, “Towards a critique of the role of theology in English Ecclesiastical and Canon Law” (1990-92) 2(11) *Ecclesiastical Law Journal* 328.

church, particularly in the later years of the fourth century, the Roman empire supported the social and charitable work of the church, exempted the clergy from taxes and military service, and conferred judicial authority upon the bishops. In return the church respected and supported the imperial authority and policies, and the State borrowed the church's authority in matters of faith, the discipline of the clergy, liturgy, and the administration of church property.¹⁰⁴ An example of one of the areas where the church and State influenced one another is in the mediæval theory of sovereignty.¹⁰⁵ The influence of this nexus, or establishment, is still felt.¹⁰⁶

The history of the canon law is beyond the scope of this thesis, but a brief outline may prove instructive. As the church matured, local custom, varied or controlled by local episcopal regulation, soon built up a series of elastic and rudimentary systems. Later, local councils and General Councils issued canons of more general application¹⁰⁷ and, with the growth of papal authority, the decretals of the popes assumed an ever-

¹⁰⁴ James Coriden, *An Introduction to Canon Law* (1991) 12; Generally, see Desmond O'Grady, *Beyond the empire* (2001).

¹⁰⁵ Kenneth Pennington, *The Prince and the Law, 1200-1600* (1993); See also Stephan Kuttner, *The history of ideas and doctrines of canon law in the Middle Ages* (1980); Walter Ullmann, "This Realm of England is an Empire" (1979) 30(2) *Journal of Ecclesiastical History* 175; Conrad Earl Russell, "Whose Supremacy? King, Parliament and the Church 1530-1640" (1997) 4(21) *Ecclesiastical Law Journal* 700.

¹⁰⁶ See, for example, Thomas Glyn Watkin, "Vestiges of Establishment: The Ecclesiastical and Canon Law of the Church in Wales" (1990) 2 *Ecclesiastical Law Journal* 110.

¹⁰⁷ A conciliar, consultative process for making decisions, especially on major policy matters, may be observed in Acts 15 and Galatians 2 (the "Council of Jerusalem").

growing importance. These decretals were later incorporated into codes.¹⁰⁸

Canon law drew from Roman civil law for the training of its lawyers,¹⁰⁹ and for its procedure, and for much of its jurisprudential concepts and language.¹¹⁰ For its substantive law, however, it looked to the general codes and canons and decretals and to the ordinances of provinces and of dioceses.¹¹¹ After the Reformation the canon law of the Church of England developed along distinct, though sometimes parallel, paths to that of the Roman Catholic Church. Constitutional developments necessitated the creation or codification of canons in the overseas churches of the Anglican Communion in the course of the eighteenth and nineteenth centuries,¹¹² and in England itself in the twentieth century.¹¹³

The twentieth century was a time of codification for the Roman Catholic Church. The Latin Church obtained first the 1917¹¹⁴ and then the 1983 Codes of Canon Law.¹¹⁵ In addition, a Code of Canons for the Eastern Churches was granted in 1990 for the twenty-one Churches in

¹⁰⁸ Garth Moore, *An Introduction to English Canon Law* (1967) 3. See also Sir John Baker, *Monuments of Endlesse Labours* (1998); Richard Helmholz, *The spirit of classical canon law* (1996).

¹⁰⁹ Though Roman Catholic lawyers are predominantly canonists as such, rather than civilians; Ladislav Örsy, *Theology and Canon Law* (1992) 32.

¹¹⁰ James Coriden, *An Introduction to Canon Law* (1991) 12-14; Albert Gauthier, *Roman Law and its Contribution to the Development of Canon Law* (2nd ed., 1996).

¹¹¹ Garth Moore, *An Introduction to English Canon Law* (1967) 4.

¹¹² For New Zealand, with the enactment of a constitution and canons in the middle of the century.

¹¹³ In particular, the 1963 and 1969 canons.

¹¹⁴ *The 1917 or Pio-Benedictine Code of Canon Law* Edward Peters, Curator (2001).

¹¹⁵ *The Code of Canon Law* prepared by the Canon Law Society of Great Britain and Ireland (1983).

full communion with Rome.¹¹⁶ The existence of different codes gives prominence to the plurality of constituent churches, and it also discourages mistaking the Latin Church for the universal Catholic Church.¹¹⁷ The retrieval of a common and formative heritage means that the study of the shared canonical past, a part of the more general theological and ecclesiological heritage, is to be pursued for more than antiquarian or scholarly ends. The retrieval of a common memory contributes to shaping our present Christian identity.¹¹⁸

The decree on œcumenism of the Second Vatican Council (1962-65) taught that those who believe in Christ and have been truly baptised are in some kind of communion with the Roman Catholic Church, even though this communion is imperfect.¹¹⁹ The œcumenical hope being expressed is not that one standardized canonical system will emerge from the reunion of Christians.¹²⁰ It is likely and desirable that each Christian denomination would retain some of its canonical traditions after

¹¹⁶ *Code of Canons of the Eastern Churches. Latin-English Edition* (1992).

¹¹⁷ Robert Ombres, “Ecclesiology, Œcumenism and Canon Law” in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (1998) 50-51.

¹¹⁸ Robert Ombres, “Ecclesiology, Œcumenism and Canon Law” in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (1998) 52.

¹¹⁹ “Unitatis Redintegratio,” in *Decrees of the Œcumenical Councils* ed. Norman P. Tanner (1990) vol. 2, 910.

¹²⁰ Though it must be noted that there is a distinction between inter-communion and the true unity of the universal church; Edward Norman, “Authority in the Anglican Communion” (1998). See also Quentin Edwards, “The canon law of the Church of England: implications for unity” (1991) 2 *Ecclesiastical Law Journal* 18.

reunion.¹²¹ Canonists must therefore be comparatively minded.¹²² While the perspective of the Churches may differ from that of Rome, the belief in an ideal of unity remains strong. The laws of the Anglican Church in Aotearoa, New Zealand and Polynesia, include ecclesiastical laws and canon laws, the latter of which at least partly reflect a joint and common legal and theological heritage with Rome.¹²³ Ombres argues, from the Roman Catholic point of view, that canon law issuing from an œcumenically-minded ecclesiology will be both convergent and provisional.¹²⁴ But there are difficulties inherent in any system which is based upon independent and equal churches, particularly when they are, like the Anglican Church in New Zealand, strongly influenced by socio-political factors. The divergence threatens to overwhelm the convergence, which is based upon the essential nature of canon law as the product of divine law.

Canon law shares some of the characteristics of secular law and some of theology. If canon law is seen as simply the set of norms of a human society, then it will change according to social and political pressures and circumstances. If canon law is seen as theological, because it has supernatural sources and aims, then it will be created, understood,

¹²¹ Robert Ombres, “Ecclesiology, Œcumenism and Canon Law” in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (1998) 54.

¹²² Robert Ombres, “Ecclesiology, Œcumenism and Canon Law” in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (1998) 55.

¹²³ As it is based on 1603 canons, themselves derived from the pre-Reformation canons of the Church in England; See Richard Helmholz, *Roman Canon Law in Reformation England* (1990); Philip Hughes, *The Reformation in England* (1963).

¹²⁴ Robert Ombres, “Ecclesiology, Œcumenism and Canon Law” in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (1998) 49.

and practised in specifically Christian ways.¹²⁵ This conflict was particularly noticeable over the question of the ordination of women, and in New Zealand, in the creation of a separate Maori hierarchy.¹²⁶

In an age which has been marked by the triumph of humanism, it is not surprising that the church too has come to be influenced by this approach. The scope of the divine, unalterable law has been narrowed.¹²⁷ Indeed, with the triumph of the predominantly secular Parliament¹²⁸ over the spiritual Convocation as a consequence of the Reformation in England,¹²⁹ and the resultant legislative weakness of the English Church, this is hardly surprising. The Anglican Communion has only slowly emerged from the influence of the royal supremacy,¹³⁰ and it arguably

¹²⁵ Robert Ombres, “Ecclesiology, Ecumenism and Canon Law” in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (1998) 57; Robert Ombres, “Canon Law and the Mystery of the Church” (1996/7) 2 *Irish Theological Quarterly* 200-212; Christopher Hill, “Bishops: Anglican and Catholic” in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (1998).

¹²⁶ The position of the diocese of Polynesia is distinct, since that is geographically separate.

¹²⁷ And been challenged directly, as by calls for the ordination of homosexuals; Anglican Communion News Service A.C.N.S. 3522, 24 July 2003, “Anglican leaders raise concerns regarding human sexuality”, available at <http://www.anglicancommunion.org/acns/articles/35/00/acns3522.html> > at 29 July 2003.

¹²⁸ Note however that the Lords Spiritual were members, though fewer in number than the Lords Temporal. The House of Commons for long did not include any clerics.

¹²⁹ The Tractarians always maintained that establishment was compatible with spiritual autonomy so long as Parliament could be estimated to be an assembly of the Church’s laity; Edward Norman, “Authority in the Anglican Communion” (1998).

¹³⁰ We must remember that this “royal” supremacy had for long meant the supremacy of Parliament, rather than the Sovereign personally;

still suffers from a relative jurisprudential weakness compared to the fullness of the Roman Catholic canon law.¹³¹ This is so even where the church is not established. However, it would seem that this is gradually changing. The 1978 Lambeth Conference requested the primates to institute a study of authority, its nature and exercise, within the Anglican Communion.¹³² The single most important catalyst for this was the ordination of women in some provinces.¹³³ At the Primates' Meeting at the Kanuga Conference Centre, North Carolina, 2-8 March 2001, it was resolved:

- to explore the common principles by which our Churches are organised beginning with the way we ourselves meet as Primates;
- to enlarge and deepen our theological vision; and
- to collaborate and share our resources in theological education.¹³⁴

Thus, there was to be further study of the authority, doctrinal or canonical authority of the Church. In the following year, at the Primates' Meeting at Canterbury, in April 2002,¹³⁵ the canon law common to the

Robert Rodes, *Law and Modernisation in the Church of England* (1991) 5.

¹³¹ As well as that of the Eastern Churches in communion with Rome.

¹³² Res. 11: "The Conference advises member Churches not to take action regarding issues which are of concern to the whole Anglican Communion without consultation with a Lambeth Conference or with the episcopate through the Primates' Committee, and requests the Primates to institute a study of the nature of authority within the Anglican Communion".

¹³³ "The People of God and Ministry" L.C. 1978, pp. 76-77. Moral and religious relativism also played a part.

¹³⁴ Anglican Communion News Service A.C.N.S. 2410, 8 March 2001, "A Pastoral Letter and Call to Prayer", available at <<http://www.anglicancommunion.org/acns/acnsarchive/acns2400/acns2410.html>> at 18 March 2003.

¹³⁵ Anglican News Service A.C.N.S. 2962, 17 April 2002, "Statement of Anglican Primates on the Doctrine of God", Report of the Meeting of Primates of the Anglican Communion:

churches of the Anglican Communion was recognised as a fifth instrument of Anglican unity:

In the light of current challenges to historic Christian doctrine from various quarters, and of the growing influence of different kinds of “post-modern” theory which question the very idea of universal and abiding truth, the Primates wish to reaffirm the commitment of the Anglican Communion to the truths of the fundamental teachings of the faith we have received from Holy Scripture and the Catholic Creeds.

1. Our God is a living God

We believe that God is real and active, creating and sustaining the universe by power and freedom, and communicating with us out of unlimited holy love so that we may share his joy. God is infinitely more than a thought in our minds or a set of values for human beings.

2. Our God is an incarnate God

We believe that God the eternal Son became human for our sake and that in the flesh and blood of Jesus of Nazareth God was uniquely present and active. All claims to knowledge of God must be brought to Christ to be tested. Through Christ alone we have access to the Father. We believe that Christ’s Resurrection is the act of God in raising to life the whole identity and reality of Jesus. We believe that it is not simply a perception or interpretation based on the subjective experience of the apostles.

3. Our God is a triune God

We believe that by the gift of the Holy Spirit bestowed through the life, death and resurrection of Jesus Christ, we are able to share the eternal intimacy and delight which is the very life of God in the mutual love of three divine persons.

4. Our God is a faithful God

We believe that God is always as he shows himself to be in Jesus. In Holy Scripture we have a unique, trustworthy record of the acts and promises of God. No other final criteria for Christian teaching can supplant this witness to the self consistency of God through the ages.

5. Our God is a saving and serving God

We believe that God calls us into the Church and commissions us to proclaim and work in active hope for the dawning of God's kingdom in the world.¹³⁶

Perhaps unfortunately for the Anglican Communion, unlike the Latin Church there is no single body of canons.¹³⁷ But there are common elements grounded in the *jus canonicum*. It must be the aim of the Anglican Communion to identify these common elements and build upon them.

The recognition of the importance of the canon law, came at a time that the Anglican Communion as a whole, and the Church in New Zealand in particular, was reassessing its role and nature.¹³⁸ But whereas in the Communion as a whole the emphasis was upon fundamental

¹³⁶ Anglican News Service A.C.N.S. 2962, 17 April 2002, "Statement of Anglican Primates on the Doctrine of God", Report of the Meeting of Primates of the Anglican Communion: Appendix II, <<http://www.anglicancommunion.org/acns/articles/29/50/acns2960.html>> at 18 March 2003.

¹³⁷ Principally because there is no single source of executive, legislative, and judicial authority within the Anglican Communion.

¹³⁸ As for example in the controversy surrounding the nomination in 2003 of the Jeffrey John, a homosexual (though not, by his own admission, now physically active), as Bishop of Reading; Anglican News Service A.C.N.S. 3498, 6 July 2003, "Archbishop of Canterbury's response to Jeffrey John's withdrawal", <<http://www.anglicancommunion.org/acns/articles/34/75/acns3498.html>> at 29 July 2003.

teachings, in New Zealand the emphasis seemed to be more on wider societal questions and the role of the Church.¹³⁹

¹³⁹ See Chapter 3.

V Conclusions

The Anglican Church in Aotearoa, New Zealand and Polynesia¹⁴⁰ is a provincial Church of the worldwide Anglican Communion. It inherited the basic tenets and structure of the Church of England when that Church arrived in New Zealand during the nineteenth century, and has modified these to suit local conditions – particularly socio-political.

The churches within the Communion are distinguished by their autonomy, by their Catholic and Apostolic faith and order, their particular or national form, and the lack of a central legislative and executive authority.¹⁴¹ Although they may differ on certain points, their juridical nature is directly derived from that of the Church of England, itself a product of the Reformation of the sixteenth century. As an example, the requirements for ordination in the pre-Reformation Church, the Church of England, and the Anglican Church in New Zealand all contained common elements. For instance, the minimum age for valid ordination to the diaconate and priesthood, and the requirement for certain periods of time to elapse before promotion, contain common elements, as well as differences which have arisen over time.¹⁴²

¹⁴⁰ As styled in the Constitution of the Anglican Church in Aotearoa, New Zealand and Polynesia, preamble and Part A, as amended 1992.

¹⁴¹ L.C. 1930, Ress. 48, 49.

¹⁴² New Zealand: deacon 23 years (Title F canon XIII.3.2), one year before promotion (Title F canon XIII.3.4);

Church of England: deacon 23 years, one year before promotion (D lix c. 2; 1603 canon 32);

Roman Catholic Church (1917): deacon 22 years (*The 1917 or Pio-Benedictine Code of Canon Law* Edward Peters, Curator (2001) canon 975), one year before promotion (*The 1917 or Pio-Benedictine Code of Canon Law* Edward Peters, Curator (2001) canon 978);

Both the Church of England and the later Anglican Communion derive their authority not from a power to coerce alone, but from a power based upon divine revelation, Biblical authority and a long tradition of service and teaching.¹⁴³ Whilst the sources of authority in a church include both divine and human laws, as the church is the manifestation of the body of God on Earth, it is the former which is the most important, yet often the most difficult to identify, interpret, or follow. Even this authority has been affected by secular influences, such as notions of representative democracy, which have caused additional uncertainty. Perhaps more critically, the notion of the supremacy of divine law over human-created canon law appears at odds with the supremacy of Parliament.¹⁴⁴

Roman Catholic Church (1983): deacon 23 years (*The Code of Canon Law* prepared by the Canon Law Society of Great Britain and Ireland (1983) Canon 1031), six months before promotion (*The Code of Canon Law* prepared by the Canon Law Society of Great Britain and Ireland (1983) Canon 1031).

¹⁴³ See Const. A1.

¹⁴⁴ Norman Doe, "Towards a critique of the role of theology in English Ecclesiastical and Canon Law" (1990-92) 2(11) *Ecclesiastical Law Journal* 328, 345.

CHAPTER 2 – SOURCES OF AUTHORITY – SECULAR

I The Legal Position of the Church

In the previous Chapter we examined the spiritual basis of the law of the church, especially canon law. But the church relies on more than internal authority – though as a perfect society internal authority ought to be sufficient. In this Chapter we will examine some of the possible reasons for this partial reliance on secular forms of law.

The law of the Church in New Zealand defines the Church's nature as a constituent member of the Anglican Communion,¹ a Fellowship within the One, Holy, Catholic, and Apostolic Church.² It is a regional rather than a purely national Church, as it includes the diocese of Polynesia, as well as the dioceses of New Zealand and the Maori dioceses.³ At the same time its constitutional structure and laws, as well as its general laws, reflect its place in New Zealand's secular constitutional structure and history.

¹ Const. Preamble, 18: “ ... this Church is part of and belongs to the Anglican Communion”.

² “[T]he Church is the body of which Christ is the head”; “the Church (a) is One because it is one body, under one head, Jesus Christ; (b) is Holy because the Holy Spirit dwells in its members and guides it in mission; (c) is Catholic because it seeks to proclaim the whole faith to all people to the end of time and (d) is Apostolic because it presents the faith of the apostles and is sent to carry Christ's mission to all the world”; Const. Preamble.

³ Indeed, the very concept of a national church is one which raises a number of theological difficulties as the church is essentially outside national possession; Edward Norman, “Authority in the Anglican Communion” (1998).

The Constitution of the Church in New Zealand has a comprehensive statement of its reasons for existence.⁴ The mission of the Church includes: “proclaiming the Gospel of Jesus Christ”; teaching, baptising and nurturing believers within eucharistic communities; responding to human needs by loving service; seeking “to transform unjust structures of society, caring for God’s creation, and establishing the values of the Kingdom”; and that the Church must advance its mission, safeguard and develop its doctrine, and order its affairs.⁵ In order to carry out its mission on earth, the Church requires rules, codes and laws for its members. The Constitution itself provides a justification for these internal laws:

Clause Three of the Constitution made provision for the said Branch to frame new and modify existing rules (not affecting doctrine) with a view to meeting the circumstances of the settlers and of the indigenous people of Aotearoa/New Zealand.⁶

In the Anglican Communion, further laws regulate the churches’ relations with the State and with non-members. The sources of these laws are different in countries which have – or have formerly had – established churches, yet even in New Zealand the church and State are not as completely legally separate and distinct, as may at first appear.

The respective role of church and State in modern society is markedly different to what has often been the historic role. Today, rulers

⁴ Const. Preamble. See also Norman Doe, *Canon Law in the Anglican Communion* (1998) 14.

⁵ Const. Preamble.

⁶ Const. Preamble, 10. This is consistent with the emphasis on self-regulation expressed in the 1850 letter from a group of New Zealand laity led by the Governor, Sir George Grey, to Bishop Selwyn; (1852) V Colonial Church Chronicle 161.

(at least in liberal democracies) protect individual freedom of choice. The ruler is not the arbiter and defender of his or her people's particular faith,⁷ though he or she may be a defender of faith in the abstract.⁸ Secular State laws usually assert ecclesiastical autonomy, and generally are based on the premise of the freedom and equality of religions.⁹ This leaves the relationship between church and State at times difficult.

Churches, in their relationship with the State, may be classified as established, quasi-established,¹⁰ dis-established, or non-established. All but the first are normally based on the principle of consensual compact, in which it is the voluntary membership of the church which alone imposes binding or mandatory obligations upon members.¹¹ The Church

⁷ Though it may in some totalitarian countries, which often ignore religious questions (suppression of religion, on the other hand, is not the same as ignoring it).

⁸ As suggested by the Prince of Wales, in a remark which may appear surprising to a common law audience as it may appear a constitutional commonplace to the citizens of most continental countries; Thomas Glyn Watkin, "Church and State in a changing world" in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (1998) 88.

⁹ See the Human Rights Act 1993 (N.Z.), and the New Zealand Bill of Rights Act 1990 (N.Z.); also Art. 18 of the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, protecting freedom of religion, and *Mendelsohn v. Attorney-General* [1999] 2 N.Z.L.R. 268 (C.A.).

¹⁰ Under secular legislation the Church of England in Nova Scotia [Mutiny Act 1758 (32 Geo. II c. 5) (G.B.)], New Brunswick [Trade with America Act 1786 (26 Geo. III c. 4) (G.B.)], and Prince Edward Island [Indemnity Act 1802 (43 Geo. III c. 6) (U.K.)] enjoyed certain statutory privileges over other Churches. The Church in Australia also rests in a fundamental way upon secular legislation; Church of England Constitution Act 1961 (Australia); *Scandrett v. Dowling* [1992] 27 N.S.W.L.R. 483, 489 (Mahoney J.A.) (N.S.W.).

¹¹ Though *Scandrett v. Dowling* [1992] 27 N.S.W.L.R. 483 (N.S.W.) would appear to support the proposition that church members are associated only on the basis of a shared faith without legal sanction for its

in New Zealand may be broadly regarded as non-established, yet for several reasons this fails to fully explain the true nature of the Church in this country. In part this is because the State may be still characterised – or at least was until comparatively recently – as de facto Christian,¹² in the sense that it is a “Christian Society under the aspect of legislation, public administration, legal tradition and form”.¹³ It is, to quote from a writer on the somewhat dissimilar American situation, “a nation whose predominant institutions, including government, reflect Christian pre-suppositions and Christian morality”.¹⁴ This has led to a continuing legal relationship between Church and State, as had the very forms through which the Church regulates its own affairs (such as trusts).

In this Chapter we will examine the sources of secular authority in the Church – in particular secular legislation. We will also examine the establishment of the church in New Zealand in the nineteenth century, and the nature of its relationship with the State.

enforcement; Bruce McPherson, “The Church as consensual compact, trust and corporation” (2000) 74 *Australian Law Journal* 159, 171.

¹² In particular, see Rex Ahdar, “New Zealand and the Idea of a Christian State” in Rex Ahdar and John Stenhouse (eds.), *God and Government* (2000) 59-76. It has been observed, in the English context, that there are “fears lest any prising apart of the links between Church and State could threaten the national recognition of Christianity”; David Say, “Towards 2000: Church and State Relations” (1990-1992) 2(8) *Ecclesiastical Law Journal* 152, 154.

¹³ Thomas s. Eliot, *The Idea of a Christian Society* (1939) 26.

¹⁴ David Smolin, “Regulating Religious and Cultural Conflict in Postmodern America: A Reply to Professor Perry” (1991) 76 *Iowa Law Review* 1067-1104, 1097. See also Ivanica Vodanovitch, “Religion and legitimation in New Zealand: redefining the relationship between church and state” (1990) 3 *British Review of New Zealand Studies* 52-62, 52 [“non-specific and non-sectarian Christianity”]. However, Stout C.J., a freethinker, characterised New Zealand as a secular state; *Doyle v. Whitehead* [1917] N.Z.L.R. 308, 314; Peter Lineham, “Freethinkers in Nineteenth-Century New Zealand” (1985) 19 *New Zealand Journal of History* 61-81, 71.

II Dis-established and Non-Established Churches and the Doctrine of Consensual Compact

The Church of England remains established by law in England.¹⁵ Some of the other Churches of the British Isles,¹⁶ and those of the West Indies,¹⁷ and India,¹⁸ have been dis-established.¹⁹ Since the Church was

¹⁵ See, for instance, the *Thirty-Nine Articles of Religion*, enacted in 1562, and confirmed in 1571 by the Subscription (Thirty-Nine Articles) Act 1571 (13 Eliz. I c. 12) (Eng.); There has occasionally been talk of this status ending, a possibility which was again raised with the appointment of Rowan Williams, Archbishop of Wales (where the Anglican Church is dis-established), as Archbishop of Canterbury. For his translation see Anglican Communion News Service, “Announcement of the 104th Archbishop of Canterbury”, 23 July 2002, available at <<http://www.anglicancommunion.org/acns/articles/30/50/acns3072.htm>> at 31 July 2003.

¹⁶ By the Irish Church Act 1869 (32 & 33 Vict. c. 42) (U.K.), the Church of Ireland is now a voluntary association; *State (Colquhoun) v. D’Arcy* [1936] IR 641. The independent Church in Wales was created by the Welsh Church Act 1914 (4 & 5 Geo. V c. 91) (U.K.), though dis-establishment was delayed until after the end of the First World War; Suspensory Act 1914 (4 & 5 Geo. V c. 88) (U.K.); Welsh Church (Temporalities) Act 1919 (9 & 10 Geo. V c. 65) (U.K.). The Scottish Episcopal Church was dis-established in 1689 (Claim of Right Act 1689 c. 28) (Scot.). The Church of Scotland is established in a different sense to that used in England, being more a national church than a legally established one; Gordon Donaldson, *The Scottish Reformation* (1960).

¹⁷ Barbados – Anglican Church Act 1969 (Barbados) [see *Blades v. Jagers* [1961] 4 WIR 207, 210]; Bermuda – Church of England in Bermuda Act 1975 (Bermuda); Dominica – Laws of Dominica 1961, Ordinance 1878 (Dominica); Grenada – Church of England Dis-establishment Act 1959 (Grenada); Jamaica – Church of England Dis-establishment Law 1938 (Jamaica).

¹⁸ The Church in India remained established, at least in some respects, until the Indian Church Act 1927 (17 & 18 Geo. V c. 40) (U.K.); Indian Church Measure 1927 (17 & 18 Geo. V No. 1) (U.K.).

never formally established in New Zealand – though it played an influential part in the nineteenth century settlement of this country from the British Isles,²⁰ and there were early suggestions that it should have been established²¹ – this category need not detain us longer.

Most Churches within the Anglican Communion (and beyond) are non-established, in that they are not formally recognised or supported by the State, do not enjoy a privileged position with respect to other churches, and were never in that position, vis-à-vis other bodies. This is, within the Commonwealth, broadly based upon the principles which eventually governed the status of the dissenters in England.²² Thus, in the absence of formal regulation by the State, or the recognition by the State of church laws and institutions, the non-established Anglicans, like the non-conformists in earlier centuries in England, were governed on the basis of consensual compacts – or associations of co-religionists.²³

¹⁹ The Church of England in the United States of America, established in some of the colonies, was dis-established by the American Revolution in 1776; *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 47 (1815). See George Brydon, *Religious Life of Virginia in the Seventeenth Century* (1957) 14 [the Church of England was established in Virginia from 1607].

²⁰ William P. Morrell, *The Anglican Church in New Zealand* (1973).

²¹ For discussion of these see Alexander H. McLintock, *Crown Colony Government in New Zealand* (1958).

²² These were developed by the courts from the principles of such Acts of Parliament as the Toleration Act 1688 (1 Will. & Mary c. 18) (Eng.), and the Nonconformist Relief Act 1779 (19 Geo. III c. 44) (G.B.). Scottish Episcopalians were associated under canons after 1727; P.H.E. Thomas, “A Family Affair. The Pattern of Constitutional Authority in the Anglican Communion” in Stephen Sykes (ed.), *Authority in the Anglican Communion* (1987) 123. See also Leo Pfeffer, *Church, State and Freedom* (1953) 28-62.

²³ The dissenters were, however, long subject to persecution on account of their non-conformity:

This principle of consensual compact was stated by Lord Romilly, M.R., in *Lord Bishop of Natal v Gladstone*, as follows:

Where there is no State religion established by the legislature in any colony, and in such a colony is found a number of persons who are members of the Church of England, and who establish a Church there with the doctrines, rites and ordinances of the Church of England, it is a part of the Church of England, and the members of it are, by implied agreement, bound by all its laws. In other words, the association is bound by the doctrines, rites, rules and ordinances of the Church of England except so far as any statutes may exist which (though relating to this subject) are confined in their operation to the limits of the United Kingdom of England and Ireland.²⁴

The penalties are all of them suspended by the statute 1 W. & M. st. 2 c. 18, commonly called the Toleration Act; which exempts all dissenters (except papists, and such as deny the trinity) from all penal laws relating to religion, provided they take the oaths of allegiance and supremacy, and subscribe the declaration against popery, and repair to some congregation registered in the bishop's court or at the sessions, the doors whereof must be always open: and dissenting teachers are also to subscribe the thirty nine articles, except those relating to church government and infant baptism. Thus are all persons, who will approve themselves no papists or oppugners of the trinity, left at full liberty to act as their conscience shall direct them, in the matter of religious worship.

– Sir William Blackstone, *Commentaries on the Laws of England* ed. Richard Burn (first published 1765, 9th ed., reprint 1978) Book IV, p. 53.

²⁴ *Lord Bishop of Natal v. Gladstone* (1866) L.R. 3 Eq. 1, 35-36 per Lord Romilly, M.R. The Privy Council adjudged Bishop Gray's letters patent, as metropolitan of Cape Town, to be powerless to enable him "to exercise any coercive jurisdiction, or hold any court or tribunal for that purpose," since the Cape colony already possessed legislative institutions when they were issued; and his deposition of Bishop Colenso was declared to be "null and void in law". With the exception of Colenso the South African bishops forthwith surrendered their patents, and formally accepted Bishop Gray as their metropolitan. Generally, see Hermitage Day, *Robert Gray, First Bishop of Cape Town* (1930).

The courts would not intervene in any internal dispute unless a justiciable right was involved,²⁵ that is, a matter which is properly capable of being decided by a court.²⁶ Secondly, a trust for a religious body was enforceable as any charitable trust.²⁷ Thirdly, members of such a church were bound by contract to one another,²⁸ though the concept of contract is difficult to reconcile with the nature of a church. In such a situation internal rules have, under secular law, the status of terms of a contract, enforceable as a matter of private law.²⁹ These churches are not subject to statutory regulation, as such.³⁰

²⁵ This is interpreted more narrowly in the United States of America and more widely in Australia; *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 US 440 (1969); *Gonzales v. Roman Catholic Archbishop*, 280 US 1 (1929) and *Attorney-General of N.S.W. v. Grant* (1976) 135 C.L.R. 587, 600 per Gibbs CJ (H.C.A.).

²⁶ *Phipps v. Royal Australasian College of Surgeons* [1997] 2 N.Z.L.R. 598.

²⁷ See the definition of “charitable” in the Charitable Uses Act 1601 (43 Eliz. I c. 4) (Eng.).

²⁸ For an example from a dissenting church, see the Scottish case of *Dunbar v. Skinner* (1849) 11 D 945 (Court of Sessions).

²⁹ *Long v. Lord Bishop of Cape Town* (1863) 1 Moo. N.S. 411, 461-462 (Lord Kingdown) (P.C.); *In re Lord Bishop of Natal* (1864) 3 Moo. P.C.C. N.S. 115 (P.C.); *Lord Bishop of Natal v. Gladstone* (1866) L.R. 3 Eq. 1. See also Anthony Ive, *The Church of England in South Africa: A Study of Its History, Principles and Status* (1966).

³⁰ *Scandrett v. Dowling* [1992] 27 N.S.W.L.R. 483, 489 per Mahoney J.A.:

The Constitution of the Anglican Church ... came into existence formally on the enactment of the Church of England in Australia Constitution Act 1961 ... to an extent the Act of 1961 has given statutory force ... [but it was not the case that] the Act intended that the rule should have the force of a statute.

The doctrine of consensual compact was refined in *Forbes v Eden*,³¹ though in that case Lord Colonsay applied a narrower definition, and Lord Cranworth a wider definition. In some circumstances the courts will only intervene where a strict property issue is involved, and where a wider civil right is involved. To these principles a fourth was added. If a church was at one time established, and its affairs regulated by law, its members and the trustees of its property would be deemed to have agreed to use the applicable legal rules among themselves when the church was dis-established or carried into a new country.³²

In its purest form, establishment meant mutual recognition of Church law and secular law, and equal validity within their respective spheres.³³ This cannot apply where the church is based on voluntary membership alone, unless State law provides that canonical contract has the same effect as State law.³⁴ But where a church has been established, some traces of establishment occasionally survive.³⁵

³¹ (1867) L.R. 1 S.C. and Div. 568, per Lord Cranworth and Lord Colonsay.

³² *Halsbury's Laws of England* (4th ed., 1975) vol. 14, "Ecclesiastical Law" 157-163; Robert Rodes, *Law and Modernisation in the Church of England* (1991) 321-322.

³³ Hence the usage for the (established) Church of Scotland. At the apogee of papally-asserted *plenitudo potestatis* Boniface VIII stated that the spiritual authority of the church was superior to the temporal power of civil rulers, and that church leaders could both instruct and sit in judgment upon those rulers; James Coriden, *An Introduction to Canon Law* (1991) 18.

³⁴ The author is indebted to Professor Norman Doe for this suggestion.

³⁵ See, for example, Thomas Glyn Watkin, "Vestiges of Establishment: The Ecclesiastical and Canon Law of the Church in Wales" (1990) 2 *Ecclesiastical Law Journal* 110.

The doctrine of consensual compact has been applied to the Anglican Church in New Zealand.³⁶ A fundamental consequence of this doctrine is that internal church rules are inferior to secular law in case of inconsistency.³⁷ In turn, secular courts may entertain challenges to the validity of internal church law, on both substantive and procedural grounds.³⁸ Consensual compact is based upon the concept of free association of members of the Church rather than upon the imposition of the legal authority of the State.

However, the relationship between church and State has been two-way, with the church influencing secular law, and the secular law

³⁶ *Baldwin v. Pascoe* (1889) 7 N.Z.L.R. 759; applied in *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, 708 [though this was based, in argument in the latter case, solely upon the wording of the Constitution]; *Carrigan v. Redwood* (1910) 30 N.Z.L.R. 244, 252. Generally see Sir James Hight and Harry Bamford, *Constitutional History of New Zealand* (1914) 76-77, 130-131, 162-163, 378-380. It has also been applied in Australia: *Gent v. Robin* (1958) SASR 328 (S.C.) [English ecclesiastical law preserved established customs through a consensual compact].

³⁷ The institutions and procedures of a church are seen as private or domestic, see, for example, *Gray v. M.* [1998] 2 N.Z.L.R. 161 (C.A.), where a letter of complaint by the respondent to an official of the Methodist Church complaining about the plaintiff's behaviour as a minister of the church was not protected by absolute privilege either under the Defamation Act 1992 (N.Z.) or at common law. However, a private incorporation Act takes precedence over a public general statute in relation to the specific Church for which the private Act was made; *Re Incorporated Synod of the Diocese of Toronto and HEC Hotels Ltd* (1987) 44 D.L.R. (4th) 161, 61 (2d) 737 (Ont. C.A.).

³⁸ *Baker v. Gough* [1963] N.S.W.R 1345. cf. In England the court also assumed jurisdiction to inquire into the validity of a synodical measure of the Church of England; once enacted, however, it would enjoy the same effect as a parliamentary statute; *R. v. Ecclesiastical Committee of Both Houses of Parliament, ex parte Church Society* (1994) 6 Admin. L.R. 670 (C.A.).

influencing, in some degree, that of the church.³⁹ Churches have in turn influenced the form of secular laws, especially (though not exclusively) where the Church has been established. This is despite the fact that secular laws are created for the temporal welfare of society, rather than for supernatural ends.⁴⁰ For these reasons the churches are not simply in the same position of voluntary associations such as unincorporated clubs, or incorporated societies.⁴¹ Yet not all churches are the same. Those which retain in large measure the historic canon law, and forms of governance, preserve also some of the historic nexus with the secular State – or at least some of the consequences of that nexus (such as reliance upon secular legal forms). This is ironic given that the canon law was the product of a clear assertion of church independence of the State. The nexus is also more noticeable in some legal systems than in others.⁴²

We shall now look at the circumstances in which the ecclesiastical law became a concern of the secular authorities in New Zealand – the arrival of the Church in New Zealand. The legal basis of the country is typical of nineteenth century British imperial settlement. The laws of New Zealand are based upon the reception of English laws in the middle of the nineteenth century, when New Zealand was first settled as a

³⁹ See Noel Cox, “The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England” (2001-2002) 3(2) Rutgers Journal of Law and Religion 1-45 <http://www-camlaw.rutgers.edu/publications/law-religion/cox1.pdf>.

⁴⁰ Ladislav Örsy, *Theology and Canon Law* (1992) 133.

⁴¹ For the laws on the latter see the Incorporated Societies Act 1908 (N.Z.).

⁴² See, for example, the break with the State which occurred in parts of North America in 1776; *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 47 (1815).

colony.⁴³ It had been early established as a principle of imperial constitutional law that settled colonies took English law.⁴⁴ The English Laws Act 1858 (N.Z.)⁴⁵ specifically provided that the laws of England as existing on 14 January 1840 were deemed to be in force in New Zealand,⁴⁶ so far as they were applicable to the circumstances of the colony.⁴⁷ This Act was passed, in the words of the long title of the Act, ‘to declare the Laws of England, so far as applicable to the circumstances of the Colony, to have been in force on and after the Fourteenth day of January, one thousand eight hundred and forty’. The purpose of the statute was really to clarify some previous uncertainty as to whether or not all Imperial Acts passed prior to 1840 were in force in New Zealand

⁴³ *R. v. Symonds* (1847) N.Z. P.C.C. 387 (P.C.); *Veale v. Brown* (1868) 1 N.Z.C.A.152, 157; *Wi Parata v. Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S.) S.C. 72; *R. v. Joyce* (1906) 25 N.Z.L.R. 78, 89, 112; *Re the Ninety Mile Beach* [1963] N.Z.L.R. 461, 475-476. It is a general rule that common law applies to a colony unless it is shown to be inapplicable, but English statutes do not apply unless shown to be applicable – *Uniacke v. Dickinson* (1848) 2 N.S.R. 287 (Nova Scotia); *Wallace v. R* (1887) 20 N.S.R. 283 (Nova Scotia); *R. v. Crown Zellerbach Canada Ltd* (1954) 14 W.W.R. 433 (British Columbia).

⁴⁴ Sir William Blackstone, *Commentaries on the Laws of England* ed. Richard Burn (first published 1765, 9th ed., reprint 1978) Book I, p. 107. Scots lawyers do not necessarily agree however: Sir Thomas Smith, “Pretensions of English Law as ‘Imperial Law’” in *The Laws of Scotland* (1987) vol. 5, paras. 711-719.

⁴⁵ 21 & 22 Vict. No. 2 (N.Z.). Considered in *King v. Johnston* (1859) 3 N.Z. Jur. (N.S.) S.C. 94.

⁴⁶ David Williams, “The Foundation of Colonial Rule in New Zealand” (1988) 13(1) *New Zealand Universities Law Review* 54.

⁴⁷ Sir William Blackstone, *Commentaries on the Laws of England* ed. Richard Burn (first published 1765, 9th ed., reprint 1978) Book I, p. 107: “colonists carry with them only so much of the English Law as is applicable to their own situation and the condition of the infant colony”. The common law was their birthright; *Anonymous* (1722) 2 P. Wms. 75.

(provided they were otherwise applicable).⁴⁸ Although the uncertainty had been with respect to parliamentary statutes alone, the 1858 Act went further and in s. 1 expressly stated that:

The Laws of England as existing on the fourteenth day of January, one thousand eight hundred and forty, shall, so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of justice accordingly.⁴⁹

“The laws”, not simply the statute law, were deemed to be in force. The principle of this Act has been followed in all relevant legislation passed by the New Zealand Parliament, and by courts when considering the common law, since then. However, it is not always easy to decide what law is applicable.⁵⁰ Indeed, Blackstone’s statement that “colonists carry with them only so much of the English Law as is applicable to their own situation and the condition of the infant colony” (that is, a settled colony) is, like so many generalisations, somewhat misleading. It would perhaps have been more accurate if he had written that “colonists carry with them the mass of English law, both common law and statute, except those parts which are inapplicable to their own situation and the conditions of the infant colony”. The test requires an evaluation of the applicability of laws at the time the colony was settled, and not at the time the court considers the question.⁵¹ What became applicable was far

⁴⁸ David Williams, “The Foundation of Colonial Rule in New Zealand” (1988) 13(1) *New Zealand Universities Law Review* 54.

⁴⁹ English Laws Act 1858 (21 & 22 Vict. No. 2), s. 1 (N.Z.).

⁵⁰ *Whicker v. Hume* (1858) 7 H.L.C. 124, 161 (Lord Carnworth).

⁵¹ David Williams, “The Foundation of Colonial Rule in New Zealand” (1988) 13(1) *New Zealand Universities Law Review* 54.

greater in content and importance than that which had to be rejected as inapplicable.⁵² As a general rule, English laws which were to be explained merely by English social or political conditions had no application in a colony.⁵³ However, the courts have generally applied the land law, though this had a feudal and territorial origin.⁵⁴

In practice few areas of the laws of England have been found to be inapplicable⁵⁵ – principally those with only local effect,⁵⁶ or which governed aspects of life which had no equivalent in a new country.⁵⁷ The ecclesiastical law has generally been regarded as one which was deemed to be inapplicable, largely because:

⁵² Sir William Blackstone, *Commentaries on the Laws of England* ed. Richard Burn (first published 1765, 9th ed., reprint 1978) Book I, p. 107.

⁵³ *Lawal v. Younan* [1961] All Nigeria L.R. 245, 254 (Nigeria Federal S.C.). In *Highett v. McDonald* (1878) 3 N.Z. Jur. (N.S.) S.C. 102, Johnston J. observed, in finding that the Tippling Act 1751 (24 Geo. II c. 40) (G.B.) was in force in New Zealand, that provisions for the maintenance of public morality and the preservation of the public peace were, in their general nature, applicable to all the colonies. Similarly, *Ruddick v. Weathered* (1889) 7 N.Z.L.R. 491 held that the gaming statutes were applicable.

⁵⁴ *Veale v. Brown* (1868) 1 N.Z.C.A.152.

⁵⁵ See, for instance, Noel Cox, “The British Peerage: The Legal Standing of the Peerage and Baronetage in the Overseas Realms of the Crown with Particular Reference to New Zealand” (1997) 17(4) *New Zealand Universities Law Review* 379-401, and Noel Cox, “The Law of Arms in New Zealand” (1998) 18(2) *New Zealand Universities Law Review* 225-256.

⁵⁶ Such as enclosure Acts.

⁵⁷ The Wreak of the Sea Act 1324 (17 Edw. II st. 1 c. 11) (Eng.) (governing “royal fish”) was held to be not in force in New Zealand: *Baldick v. Jackson* (1911) 30 N.Z.L.R. 343 per Stout C.J. [it was held that a Magistrate had jurisdiction to hear and determine a claim for possession of a whale, which, although found three miles from the shore, had been brought to land].

It cannot be said that any Ecclesiastical tribunal or jurisdiction is required in any Colony or Settlement where there is no Established Church, and in the case of a settled colony the Ecclesiastical Law of England cannot, for the same reason be treated as part of the law which the settlers carried with them from the Mother-country.⁵⁸

What laws the Church requires must therefore be introduced and enacted by some other means, such as by consensual compact (by the Church itself), or statute (by the local legislature). The presumption is that the ecclesiastical laws do not extend to settled colonies, and therefore the local Church, if any, is unestablished.

The ... Church of England ... is not a part of the constitution in any colonial settlement, nor can its authorities or those who bear office in it claim to be recognised by the law of the colony otherwise than as the members of a voluntary association.⁵⁹

The ecclesiastical law is a part of the laws of England, but not part of the common law.⁶⁰ The common law courts might therefore be able to recognise the existence of a rule of ecclesiastical law, but not determine whether it had been correctly applied.⁶¹ The ecclesiastical law of England

⁵⁸ *In re Lord Bishop of Natal* (1864) 3 Moo. P.C.C. N.S. 115, 148, 152; approved in *Baldwin v. Pascoe* (1889) 7 N.Z.L.R. 759, 769-770.

⁵⁹ *In re Lord Bishop of Natal* (1864) 3 Moo. P.C.C. N.S. 115, 148, 152 (P.C.); approved in *Baldwin v. Pascoe* (1889) 7 N.Z.L.R. 759, 769-770.

⁶⁰ *Evers v. Owen* (1627) Godbolt's Report 432; New canon law could only be created by Act of Parliament, and now by Measure, under the Church of England Assembly (Powers) Act 1919 (9 & 10 Geo. V c. 76) (U.K.). Any canon is binding on clergy in ecclesiastical matters; *Matthew v. Burdett* (1703) 2 Salk. 412.

⁶¹ The royal prerogative is the public law equivalent; *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374.

consists of the general principles of the *ius commune ecclesiasticum*,⁶² foreign particular constitutions received by English councils or so recognised by English courts (secular or spiritual) as to become part of the ecclesiastical custom of the realm; and the constitutions and canons of English synods. The Submission of the Clergy Act 1533⁶³ provided that only the canon law as it then stood was to bind the clergy and laity, and only so far as it was not contrary to common and statute law, excepting only the papal authority to alter the canon law, a power which ended in later in 1533, when it was enacted by Parliament that England was “an Empire governed by one supreme head and king”.⁶⁴ But this did not mean that the Church in New Zealand was in the same position. The courts have held (perhaps not entirely convincingly),⁶⁵ that an established Church is, by its very essence, of a territorial nature, and requires to be expressly transplanted from its native soil.⁶⁶

It is perhaps overly simplistic to categorise the church in the antipodes⁶⁷ as necessarily non-established, despite the general acceptance of the doctrine of consensus. Indeed, it was once assumed that the church

⁶² *Evers v. Owen* (1627) Godbolt’s Report 432 (K.B.) per Whitlock J.

⁶³ 25 Hen. VIII c. 19 (Eng.).

⁶⁴ Appointment of Bishops Act 1533 (25 Hen. VIII c. 20) (Eng.).

⁶⁵ *In re Lord Bishop of Natal* (1864) 3 Moo. P.C.C. N.S. 115; approved in *Baldwin v. Pascoe* (1889) 7 N.Z.L.R. 759. In earlier times some churches were established. See the next section.

⁶⁶ *In re Lord Bishop of Natal* (1864) 3 Moo. P.C.C. N.S. 115, 148, 152; approved in *Baldwin v. Pascoe* (1889) 7 N.Z.L.R. 759, 769-770.

⁶⁷ Commonly used to mean Australia and New Zealand, as being on the opposite side of the earth to the United Kingdom.

was established in the colonies.⁶⁸ King Charles I, by Order-in-Council in 1634, placed all British subjects overseas under the ecclesiastical jurisdiction of the Bishop of London. The bishop was to retain this exclusive jurisdiction for 160 years.⁶⁹ Indeed, the first overseas diocese or bishopric only dates from 1787.⁷⁰ The East India Company was responsible for the payment of salaries to a bishop and any archdeacons, if the Government appointed any.⁷¹ By letters patent of 2 May 1814 the Bishop of Calcutta was appointed, and granted full power and authority to exercise a bishop's spiritual and ecclesiastical functions as prescribed by ecclesiastical laws in England.⁷² On 27 May 1824 this jurisdiction was extended to those lands under the Charter (rather than the Government) of the Company – then including Australia and Van Diemen's Land.⁷³ In

⁶⁸ Leonard Labaree (ed.), *Royal Instructions to British Colonial Governors 1670-1776* (1935, reprinted 1967) 694-710.

⁶⁹ Sir Robert Phillimore, *The Ecclesiastical Law of the Church of England* (2nd ed., 1895) vol. II p. 1770. In 1726 a royal commission was issued to the Bishop of London defining this jurisdiction; (1726) 3 Acts of the Privy Council (Colonial) 74, 89.

⁷⁰ The See of Nova Scotia, letters patent 9 August 1787 (Bishop Charles English, appointed 12 August 1787). The first bishopric of the Church of England overseas was actually that of the (dis-established) See of Connecticut, in 1784 (Bishop Samuel Seabury); Standing Committee of the General Synod of the Church of England in Australia, *The Anglican Church of Australia* (c.1981) 2, 3.

⁷¹ East India Company Act 1813 (53 Geo. III c. 155) (U.K.).

⁷² By the Submission of the Clergy Act 1533 (25 Hen. VIII c. 19) (Eng.), the right of nomination to a bishopric lay in the Crown, and letters patent were issued in the colonies to make the nomination effective till 1863, as a consequence of *Long v. Lord Bishop of Cape Town* (1863) 1 Moo. N.S. 411 (P.C.).

⁷³ Robbie A. Giles, *Constitutional History of the Australian Church* (1928) Appendix C, p. 198. In the 1823 letters patent of Reginald Heber, second Bishop of Calcutta, the jurisdiction covered Australia, Van Diemen's Land and the adjacent islands; Standing Committee of the

1835 these lands were no longer mentioned in the letters patent of the Bishop, and so presumably passed back to the inherent jurisdiction of the Bishop of London.⁷⁴

Australia

In the early years of the Australian colonies the Church of England was locally constituted as a military chaplaincy, subject to the direction of the governors.⁷⁵ At this time it was believed that troops impliedly carried ecclesiastical law with them, which thereby became the law of the land.⁷⁶ This could arguably apply to New South Wales, the earliest colony in Australia.⁷⁷ Indeed the Church was widely regarded there as established by 1826,⁷⁸ though this establishment was to be rapidly dismantled after

General Synod of the Church of England in Australia, *The Anglican Church of Australia* (c.1981) 4.

⁷⁴ Standing Committee of the General Synod of the Church of England in Australia, *The Anglican Church of Australia* (c.1981) 4-5.

⁷⁵ Ross Border, *Church and State in Australia 1788-1872* (1962) 11. This arrangement was not without its opponents, and John Thomas Bigge, *Report of the Commissioner of Inquiry into the Colony of New South Wales* (1822) Parliamentary papers House of Commons Session 1822 vol. 20 Command No. 448 recommended that the chaplaincy system be abandoned.

⁷⁶ Rather than merely personal (or contractual) law; *R. v. Inhabitants of Brampton* (1808) 10 East. 282 (mentioned also in *Beard v. Baulkham Hill Shire Council* (1986) 7 N.S.W.L.R. 273, 277); *Ex parte The Reverend George King* (1861) 2 Legge 1301 (N.S.W.).

⁷⁷ Standing Committee of the General Synod of the Church of England in Australia, *The Anglican Church of Australia* (c.1981) paras. 2113-2117.

⁷⁸ Ross Border, *Church and State in Australia 1788-1872* (1962) 50-57; *Wylde v. Attorney-General of New South Wales* (1949) 78 C.L.R. 224 (H.C.A.). Some elements of English ecclesiastical law certainly reached

1829, especially under Lieutenant-General Sir Richard Bourke, Governor 1831-1837.⁷⁹ By letters patent of 13 October 1823, passed under the authority of the New South Wales Act 1823 (U.K.),⁸⁰ the Supreme Court of New South Wales exercised an ecclesiastical jurisdiction.⁸¹

On 18 January 1836 letters patent were conferred on William Broughton, as Bishop of Australia.⁸² His jurisdiction was stated to include:

All the Territories and Islands comprised with or dependent upon our Colonies of New South Wales, Van Diemen's Land and Western Australia ...⁸³

The new bishop was to be subject to the authority of the Archbishop of Canterbury in the same manner as any bishop within the province of Canterbury, and the Crown retained the power of revoking the letters patent. The letters patent assumed, and stated, that the Church was the Church of England, and that the laws of that Church applied in the colony – though it was accepted that only part of the law could be

New South Wales; *Beard v. Baulkham Hill Shire Council* (1986) 7 N.S.W.L.R. 273, 277.

⁷⁹ Ross Border, *Church and State in Australia 1788-1872* (1962) 89.

⁸⁰ 4 Geo. IV c. 96.

⁸¹ Charter of Justice, passed under the authority of “An Act to provide until the first day of July One thousand eight hundred and twenty seven and until the end of the next session of Parliament for the better administration of justice in New South Wales and Van Diemen's Land and for the more effective Government thereof and for other purposes relating thereto” (New South Wales Act 1823) (4 Geo. IV c. 96) (U.K.); Ross Border, *Church and State in Australia 1788-1872* (1962) 46.

⁸² Standing Committee of the General Synod of the Church of England in Australia, *The Anglican Church of Australia* (c.1981) 5.

⁸³ Standing Committee of the General Synod of the Church of England in Australia, *The Anglican Church of Australia* (c.1981) 5.

applied.⁸⁴ The letters patent purported to give the bishop the same jurisdiction as an English bishop – though in practice he could not exercise this full jurisdiction.⁸⁵ It was partly this practical difficulty – relating particularly to discipline – that led the local legislature to enact the Church Act 1837 (N.S.W.),⁸⁶ which regulated the relationship between the bishop and his clergy. But this was still regulation of Church government by Parliament, and not Church self-government.

From 1836, at least until 1850, the question of the nature and extent of the authority and jurisdiction of the bishop was widely discussed.⁸⁷ But the Australian Church never, during this period, clearly defined where authority in the Church lay.⁸⁸ Similar doubts were present in New Zealand, but these did not have the same practical affect. Bishop Selwyn had summoned synods in his diocese of New Zealand in 1844 and 1847.⁸⁹ However, doubts were expressed by the metropolitan and bishops at an 1850 conference in Australia, as to “how far we are inhibited by the

⁸⁴ Ross Border, *Church and State in Australia 1788-1872* (1962) 96. Broughton admitted that British Acts regulating the Church of England in England might not be in force in Australia. He relied instead on the inherent authority of the episcopacy, and the existence of canon law; Ross Border, *Church and State in Australia 1788-1872* (1962) 145.

⁸⁵ Ross Border, *Church and State in Australia 1788-1872* (1962) 97.

⁸⁶ In full, An Act to Regulate the Temporal Affairs of the Churches and Chapels of the United Church of England and Ireland in New South Wales 1837 (8 Will. IV No. 5) (N.S.W.), ss. 19, 20.

⁸⁷ Ross Border, *Church and State in Australia 1788-1872* (1962) 97-98. Cases such as that of the Rev'd. Gregory Bateman epitomized these difficulties; Ross Border, *Church and State in Australia 1788-1872* (1962) 114-124.

⁸⁸ Ross Border, *Church and State in Australia 1788-1872* (1962) 98. Broughton relied on the inherent authority of the episcopacy, and the existence of canon law; Ross Border, *Church and State in Australia 1788-1872* (1962) 145.

⁸⁹ See Henry W. Tucker, *Memoir of the Life and Episcopate of George Augustus Selwyn, DD* (1879) vol. I, p. 158.

Queen's supremacy from exercising the powers of an ecclesiastical synod".⁹⁰ It was felt at this time by many in Australia that authority lay not in the royal supremacy, bishops or clergy, or laity, but in the Church as a whole.⁹¹ The problem became a practical one with respect to patronage, as the local State officers claimed patronage for the Crown. But the Secretary of State for the Colonies declined that claim, and left patronage entirely to the bishop, on the grounds (arguably incorrect in respect of certain colonies⁹²) that the Church of England was not established outside England.⁹³

In the case of *Long v Lord Bishop of Cape Town*,⁹⁴ the Judicial Committee of the Privy Council confirmed that the Crown had power to appoint bishops in colonies, but that it had no power to introduce any portion of the ecclesiastical law of England that the common law did not already acknowledge.⁹⁵ This could be seen as leaving episcopal authority with a statutory basis – or consensual – since the Crown acting alone

⁹⁰ Robbie A. Giles, *Constitutional History of the Australian Church* (1929) Appendix K, p. 238.

⁹¹ Ross Border, *Church and State in Australia 1788-1872* (1962) 180-181; For a discussion of Richard Hooker's views on this see Stephen Platten, *Augustine's Legacy* (1997) 36-37. See also the letter from Sir George Grey, Governor of New Zealand, and many leading laymen, to Bishop Selwyn; (1852) V Colonial Church Chronicle 161.

⁹² Such as Barbados (*Blades v. Jagers* [1961] 4 WIR 207), and possibly also New South Wales itself.

⁹³ George Goodman, *The Church in Victoria during the Episcopate of the Right Reverend Charles Perry, first Bishop of Melbourne* (1892) 242ff.

⁹⁴ (1863) 1 Moo NS 411, 461-462 (Lord Kingdown) (P.C.).

⁹⁵ *In re Lord Bishop of Natal* (1864) 3 Moo. P.C.C. N.S. 115 [the Crown cannot impose any law but the common law without the consent of Parliament]. The prerogative power of the Crown to make laws in colonies ends once a representative assembly is established; *Campbell v. Hall* (1774) 1 Cowp. 204.

could not invest bishops with coercive powers of discipline.⁹⁶ Whether the episcopacy ever relied upon coercive powers was another question, since the conditions of the new colony rendered discipline difficult.

The basis of episcopal authority was legislative in a number of parts of the empire – including India,⁹⁷ the maritime colonies of Canada,⁹⁸ and Jamaica.⁹⁹ There were certain advantages in this approach, not least of which was the avoidance, at least in theory, of the limitations imposed by the inability of the Crown to impose any law but the common law without the consent of Parliament.¹⁰⁰ Although the canon law of the church ought, theologically, to be a sufficient basis, it was not, as it could not be readily altered to the circumstances of the Australian colonies.

Bishop Tyrrell of New South Wales was led by the judgment of the Judicial Committee of the Privy Council, in the case of *Lord Bishop of Natal v Gladstone*,¹⁰¹ to believe that an enabling Act was unnecessary to give the Church sufficient powers of governance.¹⁰² But that case showed the practical difficulties inherent in relying on a consensual compact where the churches were partially established.¹⁰³ After this case the

⁹⁶ Generally, see Bruce McPherson, “The Church as consensual compact, trust and corporation” (2000) 74 Australian Law Journal 159-174.

⁹⁷ Importation and Exportation Act 1813 (53 Geo. III c. 55) (U.K.), s. 49.

⁹⁸ Nova Scotia [Mutiny Act 1758 (32 Geo. II c. 5) (G.B.)], New Brunswick [Trade with America Act 1786 (26 Geo. III c. 4) (G.B.)], and Prince Edward Island [Indemnity Act 1802 (43 Geo. III c. 6) (U.K.)].

⁹⁹ Clergy Act 1826 (6 Geo. IV c. 17) (Jamaica); *Bowerbank v. Lord Bishop of Jamaica* (1839) 2 Moo. P.C. 449, 452-453 (P.C.).

¹⁰⁰ *In re Lord Bishop of Natal* (1864) 3 Moo. P.C.C. N.S. 115.

¹⁰¹ (1866) L.R. 3 Eq. 1, 35-36 per Lord Romilly, M.R.

¹⁰² Ross Border, *Church and State in Australia 1788-1872* (1962) 248-249.

¹⁰³ Bruce McPherson, “The Church as consensual compact, trust and corporation” (2000) 74 Australian Law Journal 165.

Crown gradually ceased to issue letters patent for the appointment of colonial bishops, and in 1873 the remaining letters patent were officially suspended.¹⁰⁴ More importantly, the position of the Church in New Zealand had already been settled by this time, through the declaration of a consensual compact and the establishment of synodical government.¹⁰⁵

New Zealand

New Zealand was not expressly included in Broughton's letters patent as Bishop of Australia, but Samuel Marsden (of Australia) had been active there.¹⁰⁶ George Augustus Selwyn was appointed the first Bishop in New Zealand in 1841.¹⁰⁷ After the establishment of a colonial government in New Zealand in 1840,¹⁰⁸ letters patent, modelled upon those of the

¹⁰⁴ Sir Robert Phillimore, *The Ecclesiastical Law of the Church of England* (2nd ed., 1895) vol. II, p. 1786.

¹⁰⁵ See, for example, "Those parts of the Service for the Consecration of Bishops which relate to the King's Mandate shall be omitted and discontinued" – Title G canon I.1.1. (1874).

¹⁰⁶ Standing Committee of the General Synod of the Church of England in Australia, *The Anglican Church of Australia* (c.1981) 6.

¹⁰⁷ There was a call for a bishopric of New Zealand at the time of the formation of the Colonial Bishops Fund; William Sachs, *The Transformation of Anglicanism* (1993) 115-116.

¹⁰⁸ By the Treaty of Waitangi and a series of proclamations; David Williams, "The annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi" [1985] *Australian Journal of Law and Society* 41; David Williams, "The Constitutional Status of the Treaty of Waitangi: an historical perspective" (1990) 14(1) *New Zealand Universities Law Review* 9; David Williams, "The Foundation of Colonial Rule in New Zealand" (1988) 13(1) *New Zealand Universities Law Review* 54.

Bishop of Australia, of which New Zealand had been a suffragan,¹⁰⁹ erected the latter country into a see on 14 October 1842.¹¹⁰

In 1850 a group of New Zealand laity led by the Governor, Sir George Grey, wrote to Bishop Selwyn that

Although we are bound together by a common faith, and have common duties to perform, we are united by but a few of the usual ties of long and familiar acquaintance, whilst there is no system of local organisation which might tend to draw us together as members of the same Church ... it is our earnest conviction that a peculiar necessity exists for the speedy establishment of some system of Church Government amongst us, which, by assigning to each order in the Church its appropriate duties, might call forth the energies of all, and thus enable the whole body of the Church most efficiently to perform its functions ... Actuated by these views and wishes, we beg to submit for your Lordship's consideration, and we trust, for your approval, the outline of a plan of Church Government, resembling in many points that which we are informed has proved so beneficial to our brethren in America".¹¹¹

Grey proposed a General Convention of bishops, in an Upper House, and elected deputies of clergy and laity in a Lower House. Neither house would be empowered to alter the doctrines or ritual of the Church of England, or the Authorised Version of the *Bible*.¹¹² It was important to note that this petition was to the bishop, rather than to the governor, perhaps showing that a broader view of church authority

¹⁰⁹ In a parallel development, New Zealand was administered as a part of New South Wales at this time; Alexander H. McLintock, *Crown Colony Government in New Zealand* (1958).

¹¹⁰ Standing Committee of the General Synod of the Church of England in Australia, *The Anglican Church of Australia* (c.1981) 118.

¹¹¹ (1852) V Colonial Church Chronicle 161.

¹¹² Ross Border, *Church and State in Australia 1788-1872* (1962) 186.

existed in New Zealand than in Australia at that time.¹¹³ Because of the continuing, though diminished, partial establishment of the Church in Australia, dating from the days of the military chaplaincy, it was perhaps inevitable that the Church in Australia would continue to be influenced by a need to show secular legal authority for its actions. But in New Zealand the Church had arrived independently of the secular authorities, and time and circumstance had not encouraged the development of the closer inter-dependence which existed across the Tasman Sea.

Selwyn agreed with the broad basis of the proposal of Sir George Grey and others.¹¹⁴ He wrote 19 April 1852 that it was necessary because

First that the Church in this Colony is not established by law; and consequently, that a large portion of the Ecclesiastical Law of England is inapplicable to us. Secondly, that the Church in this Colony is dependent mainly upon the voluntary contributions of its members ... It follows, therefore, that we must either be content to have no laws to guide us, or that we must apply for the usual power granted to all incorporated bodies – to frame by-laws for ourselves in all such matters as relate to our own peculiar position; reserving to her Majesty, and the heads of the Church of England, such rights and powers as may be necessary to maintain the Queen's supremacy, and the unity and integrity of our Church.¹¹⁵

The reservation in favour of the royal supremacy was significant, in view of the concept of consensual compact *vis-à-vis* establishment. In order to maintain the Queen's supremacy, and the unity of the Church, Selwyn foresaw a constitution which would be submitted to the Secretary of State for the Colonies, and to the Archbishop of Canterbury, with a

¹¹³ Thus there was no expectation that it was for the colonial authorities to determine.

¹¹⁴ (1852) V Colonial Church Chronicle 161.

¹¹⁵ (1853) VI Colonial Church Chronicle 168f.

petition to Her Majesty either by Act of Parliament or by Royal Charter to permit the Church to have self-government in New Zealand.¹¹⁶ The instrument by which the broad aim was to be achieved was the 1857 Constitution, which was not however enacted by Parliament or expressly consented to by the Crown.¹¹⁷

Meanwhile, attempts during 1850-54 to obtain an imperial Act for the Church in Australia had failed.¹¹⁸ In part this was due to reluctance by the Imperial Parliament to legislate for those parts of the empire which had their own legislature, a stage just reached in New Zealand by this time.¹¹⁹ But it was also due to the belief that an attempt was being

¹¹⁶ (1853) VI Colonial Church Chronicle 168f.

¹¹⁷ Though the role of the Crown was not altogether ignored:

PROVIDED THAT nothing herein contained shall prevent the General Synod from accepting any alteration of the above-named formularies and Version of the Bible as may from time to time be adopted by the United Church of England and Ireland, with the consent of the Crown and of Convocation.

PROVIDED ALSO THAT in case a Licence be granted by the Crown to this Branch of the Church of England to frame new and modify existing rules (not affecting doctrine) with the view of meeting the peculiar circumstances of this Colony and native people, it shall be lawful for this Branch of the said Church to avail itself of that liberty.

– Const. A2, 3.

¹¹⁸ Ross Border, *Church and State in Australia 1788-1872* (1962) 190-198.

¹¹⁹ This was introduced by the New Zealand Constitution Act 1852 (15 & 16 Vict. c. 72) (U.K.). There were limitations upon the authority of colonial legislative assemblies to change settled principles of the common law until the passage of the Colonial Law Validity Act 1865 (28 & 29 Vict. c. 63) (U.K.).

made to obtain exclusive privileges for the Church of England.¹²⁰ The irony was that “Establishment” by this time meant that the colonial Church had more restrictions upon it than the Roman Catholic Church, or non-conformists,¹²¹ and few, if any, advantages.

The Victorian colonial legislature did pass the Victoria Church Act 1854 (Vict.).¹²² The law officers of the Crown had advised the Queen against giving her assent.¹²³ However, the royal assent was finally given in 1855, after British Ministers had considered the matter.¹²⁴ This Act was to be the model for all subsequent church constitutions in Australia,¹²⁵ whether based on consensual compact, on the South African model,¹²⁶ or legislative enactment, as in Canada.¹²⁷

Finally, by 1960 all Australian dioceses had obtained enabling legislation for new constitutions, and from 1 January 1962 the “Church of England in the Dioceses of Australia and Tasmania” became the

¹²⁰ Ross Border, *Church and State in Australia 1788-1872* (1962) 204.

¹²¹ Ross Border, *Church and State in Australia 1788-1872* (1962) 192-193.

¹²² 18 Vict. No. 45 (Vict.).

¹²³ *The Times* (London), 21 April 1855; George Goodman, *The Church in Victoria during the Episcopate of the Right Reverend Charles Perry, first Bishop of Melbourne* (1892) 245.

¹²⁴ George Goodman, *The Church in Victoria during the Episcopate of the Right Reverend Charles Perry, first Bishop of Melbourne* (1892) 248.

¹²⁵ For example, An Act to Enable the Bishop, Clergy and laity of the United Church of England and Ireland in Tasmania to Regulate the Affairs of the Said Church 1858 (22 Vict. No. 20) (Tasmania).

¹²⁶ Ross Border, *Church and State in Australia 1788-1872* (1962) 209-210.

¹²⁷ Ross Border, *Church and State in Australia 1788-1872* (1962) 209-210. See Nova Scotia [Mutiny Act 1758 (32 Geo. II c. 5) (G.B.)], New Brunswick [Trade with America Act 1786 (26 Geo. III c. 4) (G.B.)], and Prince Edward Island [Indemnity Act 1802 (43 Geo. III c. 6) (U.K.)].

“Church of England in Australia”.¹²⁸ Constitutional focus is upon the Fundamental Declaration:

The one Holy Catholic and Apostolic Church of Christ as professed by the Church of Christ from primitive times and in particular as set forth in the creeds known as the Nicene Creed and the Apostles’ Creed.¹²⁹

The Australian Church is now a “particular or national church” in accordance with Article 34 of the *Articles of Religion*, a status New Zealand achieved a century earlier,¹³⁰ though the Church may now be said to be regional or provincial. But the new constitution did not radically alter the relationship of Church and State, except that it deprived the State of the power to interpret the formularies of the Church under which property was held.¹³¹ Further, discipline was now without recourse to civil courts. Finally, the Church could now alter its own laws and formularies within prescribed limits.¹³²

Meanwhile, on 13 June 1857, at a General Conference held at Auckland, the Bishops¹³³ and many of the clergy and laity of the Church

¹²⁸ Church of England Constitution Act 1961 (Australia).

¹²⁹ Church of England Constitution Act 1961 (Australia).

¹³⁰ With the 1857 constitution, see next section.

¹³¹ Though not ousting the jurisdiction of the courts over property matters not involving the interpretation of the formularies.

¹³² Those established by the Church of England Constitution Act 1961 (Australia).

¹³³ After the diocese of New Zealand (eventually to be renamed Auckland in 1868), dioceses were subsequently formed in Christchurch (1856), Waiapu, Wellington and Nelson (1858-59). Dunedin was added

in New Zealand, including missionary clergy, agreed to a Constitution for the purpose of associating together by voluntary compact as a branch of the “United Church of England and Ireland”.¹³⁴ The Constitution declared the Doctrine and Sacraments which the Church held and maintained,¹³⁵ and provided for a General Synod.¹³⁶

In accordance with the then still current imperial practice, the bishop received a letter patent from the Crown when he became a metropolitan in 1858. However, following the example of the South African bishops, in 1865 this was surrendered.¹³⁷

1869 (formerly part of Christchurch), and Waikato (from the southern part of Auckland) in 1925.

¹³⁴ Since the passage of the Irish Church Act 1869 (32 & 33 Vict. c. 42) (U.K.), no longer the United Church.

¹³⁵ Const. A.1.

¹³⁶ Const. Preamble.

¹³⁷ In 1862, when the diocese of Ontario was formed, the bishop was elected in Canada, and consecrated under a royal mandate, letters patent being by this time unused. And when, in 1867, a coadjutor was chosen for the bishop of Toronto, an application for a royal mandate produced the reply from the colonial secretary that “it was not the part of the crown to interfere in the creation of a new bishop or bishopric, and not consistent with the dignity of the crown that he should advise Her Majesty to issue a mandate which would not be worth the paper on which it was written, and which, having been sent out to Canada, might be disregarded in the most complete manner.” The Canadian bishops pressed the Archbishop of Canterbury to convene a conference of all the world’s Anglican bishops, and the first “Lambeth Conference” met in 1867, as a consequence of this jurisdictional difficulty; Jan Nunley, “Authority versus autonomy an old debate for Anglicans” *Episcopal News Service* 2001-47 (23 February 2001) at <<http://www.episcopalchurch.org/ens/2001-47.html>> at 9 October 2002. See also Margaret Ogilvie, *Religious Institutions and the Law in Canada* (1996).

Thus, in New Zealand, the legal basis for the Church was consensual compact, rather than legislative enactment,¹³⁸ although specific parliamentary Acts were needed to provide for trusts and similar ancillary institutions.¹³⁹ At least until 1865 the royal supremacy was acknowledged, but thereafter, under the influence of wider imperial developments, this became largely inapplicable.¹⁴⁰

The legal independence of the Church seems to have been accepted rather less readily in Australia than in New Zealand. The opinion was expressed in 1910 that in Australia

The Anglican Churches in Australia and Tasmania are all organised upon the basis that they are not merely Churches 'in communion with' the Church of England, but are actually parts of that Church.¹⁴¹

A consequence of this was that the Church in Australia was bound by the constitutional rules of the Church of England, though the 1603 canons do not now apply in the Australian Church, unless the dioceses

¹³⁸ Ross Border, *Church and State in Australia 1788-1872* (1962) 249.

¹³⁹ William Sachs, *The Transformation of Anglicanism* (1993) 191; Henry W. Tucker, *Memoir of the Life and Episcopate of George Augustus Selwyn, DD* (1879) vol. I, p. 89f; G.A. Wood, "Church and State in New Zealand in the 1850s" (1975) 8(3) *Journal of Religious History* 255-270.

¹⁴⁰ Because the Crown generally had little involvement in appointing bishops; see Sir Robert Phillimore, *The Ecclesiastical Law of the Church of England* (2nd ed., 1895) vol. II, p. 1786.

¹⁴¹ Arthur Cohen, Lord Cecil and Archbishop King (United Kingdom), and Adrian Knox, J.M. Harvey (Australia); Ross Border, *Church and State in Australia 1788-1872* (1962) 275.

adopt them.¹⁴² The potential danger of this arrangement was shown in South Africa. In 1870 the synod of the Province of South Africa had declared in its constitution that the decisions of English ecclesiastical courts were no longer binding, and that in the future its formularies would be interpreted by its own courts.¹⁴³ This was challenged in 1882 in the Privy Council, and the Church was declared to have forfeited its rights to the property of the “Church of England”.¹⁴⁴ Thereafter the Church was divided between the Church of England in South Africa, and the Church of the Province of South Africa.¹⁴⁵

The source of authority in the church in Australia was for long uncertain, though in principle covered by fairly well understood rules. In New Zealand, by contrast, the church early assumed independence, and was less concerned with the nature of the underlying basis of authority – at least until its constitutional debates and reforms of the late twentieth century.

¹⁴² Standing Committee of the General Synod of the Church of England in Australia, *The Anglican Church of Australia* (c.1981) 5.

¹⁴³ Constitution of the Church of the Province of Southern Africa, Preamble (Provisionally adopted in the Provincial Synod of 1870 and amended and confirmed by the Provincial Synod of 1876, and as further amended up to 1992).

¹⁴⁴ *Merriman v. Williams* (1882) 7 App. Cas. 484 (P.C.).

¹⁴⁵ For a detailed history of these legal and theological disputes, see Anthony Ive, *A Candle Burns in Africa* (1992).

III The Applicability of Pre-Existing Canonical Systems

Not only is it necessary to ascertain the nature of authority in a colonial church, it is also necessary to establish precisely what pre-settlement English laws apply, and what their effect is. Various devices are employed by Churches to ensure the binding effect of church laws and the rights and duties conferred by them.¹⁴⁶ These devices may be applied to clergy, lay officers or the lay membership generally. They include overriding principles containing general statements that the law of the Church is binding, and declarations, promises or oaths by which an undertaking is made to assent to or conform to the law of the Church or the decisions of its tribunals. There may also be provisions requiring compliance with executive directions (typified by the doctrine of canonical obedience).¹⁴⁷ The legislative organs of the Church generally create these regulations, but they may include rules inherited by the Church at settlement.¹⁴⁸ The most ancient of these are the canons, which were preserved, at least in partially pre-settlement form, in at least some overseas churches.

¹⁴⁶ Such as consensual compact binding on the conscience of the individual members. Its provisions are without contractual force and are not justiciable in a civil Court, except to the extent that they may be involved in a matter concerning church property governed by statute; *Dodwell v. Bishop of Wellington* (1886) N.Z.L.R. 5 S.C. 263 and *Scandrett v. Dowling* (1992) 27 N.S.W.L.R. 483, 512, 554, 564 (CA N.S.W.); cf. Bruce McPherson, “The Church as consensual compact, trust and corporation” (2000) 74 Australian Law Journal 159, 171.

¹⁴⁷ For example, in New Zealand, Title A canon II.3; *Gregory v. Bishop of Waiapu* [1975] 705, 712 per Beattie J. Mr. Justice Beattie had been Chancellor of the Diocese of Auckland 1967-69, from which position he resigned upon appointment to the Supreme Court of New Zealand.

¹⁴⁸ Settlement meaning, in this context, the arrival of the Church as a disciplined body in the new colony.

The pre-1533 canons were covered by the Act for the Submission of the Clergy 1533,¹⁴⁹ which approved those:

Which be not contrariant or repugnant to the law, statutes and customs of this realm, nor to the damage or hurt of the King's prerogative.¹⁵⁰

They also included those recognised by the:

Other ecclesiastical laws or jurisdiction spiritual, as be yet accustomed and used here in the Church of England.¹⁵¹

This latter category included the *Provinciale*, the 1430 compilation by William Lyndwood.¹⁵² No final decision was ever taken on which pre-

¹⁴⁹ 25 Hen. VIII c. 19 (Eng.).

¹⁵⁰ It is “clear that the main structure of the church – its institutions and ecclesiastical offices, the territorial organisation in provinces, dioceses and parishes, the ecclesiastical courts, the holding of property by spiritual corporations, advowsons and the exercise of patronage, were founded in pre-Reformation law that remained part of English law”; Archbishop of Canterbury and York's Commission on Church and State, *Report of the Archbishops' Commission on Church and State* (1970) 88.

¹⁵¹ Canon Law Act 1543 (35 Hen. VIII c. 16) (Eng.).

¹⁵² *Martin v. Mackonochie* (1868) L.R. 2 A. & E. 116; 153; see also Edmund Gibson, *Codex Iuris Ecclesiastici Anglicani* (2nd ed., 1761 reprinted 1969); Richard Burn, *Ecclesiastical Law* (4th ed., 1781); Report of the Archbishops' Commission on Canon Law, *The Canon Law of the Church of England* (1947) 44-47; Brian Ferme, “Canon Law in Late Mediæval England: A Study of William Lyndwood's *Provinciale* with particular reference to Testamentary Law” (2000) 34 *Studia Canonica* 535-537.

Reformation canons were legally binding,¹⁵³ as had been required by the Submission of the Clergy Act 1533.¹⁵⁴

Though Maitland argued that the *decretals* were binding upon the church as a whole, clergy and laity alike,¹⁵⁵ Kemp countered that this view was anachronistic.¹⁵⁶ The modern view of the 1603 canons is similarly limited.¹⁵⁷ The canons of 1603 were passed by convocation under the authority of the Submission of the Clergy Act 1533.¹⁵⁸ In *Middleton v Crofts*,¹⁵⁹ a secular court held that the canons did not bind the laity, as Parliament did not confirm them. However, a canon would be binding if it were declaratory of “the ancient usage and law of the Church”.¹⁶⁰ This latter point appears to conflict with contemporary

¹⁵³ Conrad Earl Russell, “Whose Supremacy? King, Parliament and the Church 1530-1640” (1997) 4(21) *Ecclesiastical Law Journal* 700, 701.

¹⁵⁴ 25 Hen. VIII c. 19 (Eng.).

¹⁵⁵ See J.W. Gray, “Canon Law in England: some Reflections on the Stubbs-Maitland Controversy” in *Studies in Church History* (1964) vol. iii, pp. 48-68. For the view of Stubbs that the English church law was binding, but not that of the papacy, and of Maitland, that the *jus canonicum* was *ipso facto* binding, see also Arthur Ogle, *The Canon Law of Medieval England. An examination of William Lyndwood’s “Provinciale,” in reply to the late Professor F W Maitland* (1912).

¹⁵⁶ Eric Kemp, *An Introduction to Canon Law in the Church of England, being the Lichfield Cathedral Divinity Lectures for 1956* (1957).

¹⁵⁷ Richard Holmholz, “The Canons of 1603: The Contemporary Understanding” in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (1998) 22.

¹⁵⁸ 25 Hen. VIII c. 19 (Eng.).

¹⁵⁹ (1736) 2 Atk. 650 (K.B.).

¹⁶⁰ *Middleton v. Crofts* (1736) 2 Atk. 650, 653 (K.B.). Such ‘binding force’ is, however, merely illusory. In such a view it is really the common law which binds. See Norman Doe, *The Legal Framework of the Church of England* (1996) 231.

views, however, and may no longer be good law.¹⁶¹ The 1640 canons were not binding on the laity – except by consent.¹⁶²

Unlike in England, in most of the overseas Churches canon law is binding on the laity, at least those laypersons who are members of the Church¹⁶³ However, whether this is legally binding – in the sense that it

¹⁶¹ Indeed, in the earlier *Prior of Leeds Case* (1441) Y.B. Mich. 20 Hen. VI, pl. 25 (K.B.), Newton J observed that Convocation cannot do anything that binds the temporality (“ils ne poient faire ascun chose qui lier la temporalte”). But all this meant was that the Church had no authority to overturn a grant by the king, which was a traditional view. The pope himself had no power to legislate in purely temporal matters – except in his limited jurisdiction as a sovereign prince. The papal doctrine of *potestas absoluta*, as advocated by Hostiensis, was soon adopted by secular monarchs, who also asserted that their legal authority was unlimited within their respective jurisdictions; Francis Oakley, “Jacobean Political Theology: The Absolute and Ordinary Powers of the King” (1968) 29 *Journal of History of Ideas* 323.

More usefully, in *Bird v. Smith* (1606) Moore 781, 783 (Ch.) it was said that “[The] canons of the Church made by Convocation and the King without Parliament will bind in all ecclesiastical matters, just as an Act of Parliament”.

¹⁶² *Cooper v. Dodd* (1850) 7 Notes of Cases 514, 516; Robbie A. Giles, *Constitutional History of the Australian Church* (1928) 161-167. See Gerald Bray, *The Anglican Canons, 1529-1947* (1998).

¹⁶³ *Middleton v. Crofts* (1736) 2 Atk. 650 (K.B.) [binding only if declaratory of ancient usage and law]; approved in *Lord Bishop of Exeter v. Marshall* (1868) L.R. 3 H.L. 17. In New Zealand, ordained ministers give a declaration of canonical obedience to their bishop at ordination (Title D canon I.C1.2.1), and on appointment to office any ordained minister and office bearer to be licensed make a declaration of Adherence and Submission (Const. C.15) and a Declaration (Title A canon II.3; Title D canon I.C1.2.2). Non-licensed office bearers make a declaration of Adherence and Submission (Const. C.15) or a declaration of Acknowledgement of Authority of General Synod (Title B canon XXI; Title D canon I.C1.2.2). “All persons who are subject to episcopal jurisdiction in this Church shall be liable to discipline for any of the

is justiciable in the secular courts – or merely morally binding, or enforceable in the church courts or tribunals, is a further issue.¹⁶⁴ The question remained however as to just what comprised the canon law. In the Episcopal Church of the United States of America (ECUSA), English ecclesiastical law continues for some purposes only,¹⁶⁵ and English canon law does not now generally apply in Australia.¹⁶⁶ Since these churches are consensual bodies, these pre-settlement laws are not automatically enforceable. The applicable canon law was generally that new canon law created by the provincial or national churches, or their dioceses.

The Church of the Province of Aotearoa, New Zealand and Polynesia, is an autonomous branch of the universal Catholic Church, as well as a provincial Church of the world-wide Anglican Communion. Even consensual associations are subject to the secular power, even if “the ... Church of England ... is not a part of the constitution in any

following acts or omissions ... “; Title D canon I.C2.3; *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705.

¹⁶⁴ Bruce McPherson, “The Church as consensual compact, trust and corporation” (2000) 74 *Australian Law Journal* 159-174.

¹⁶⁵ *Town of Pawlet v. Clark*, 13 U.S. (9 Cranch) 292 (1815).

¹⁶⁶ *Ex parte The Rev'd. George King* (1861) 2 Legge 1301 (N.S.W.); cf. *R. v. Inhabitants of Brampton* (1808) 10 East. 282 per Lord Ellenborough, C.J. [ecclesiastical law carried by settlers]. Indeed, each diocese has its own canon law; Standing Committee of the General Synod of the Church of England in Australia, *The Anglican Church of Australia, Canon Law in Australia* (c.1981) 5. However, this has only been since the independence of the Australian church, as in 1850 it was affirmed by a conference of metropolitan and bishops that the 1603 canons were applicable; Robbie A. Giles, *Constitutional History of the Australian Church* (1929) Appendix K, p. 238.

colonial settlement”.¹⁶⁷ The Queen in Parliament has authority ‘over all persons in all causes, as well ecclesiastical as temporal, throughout her dominions supreme’, for Parliament can legislate for the Church as it can for any part of society. This is a consequence of the Reformation and the development of parliamentary supremacy,¹⁶⁸ and was recognised by Selwyn and Grey,¹⁶⁹ and later in the Constitution of the Church.¹⁷⁰ However, since 1857 the Church in New Zealand made its own canons, which have supplanted and replaced the pre-existing canon law of the Church of England.¹⁷¹

Equally importantly, the Church in this country chose, for pragmatic reasons, a model of government which appeared to emphasise the links of Church and State on the English model. It did so in that secular legislation was widely utilised to regulate aspects of the church. The Roman Catholic Church in New Zealand relied to a lesser extent upon secular legislation,¹⁷² in part because of its post-Reformation tradition as a non-established Church in England, and in part because of

¹⁶⁷ *In re Lord Bishop of Natal* (1864) 3 Moo. P.C.C. N.S. 115, 148, 152 (P.C.); approved in *Baldwin v. Pascoe* (1889) 7 N.Z.L.R. 759, 769-770.

¹⁶⁸ Noel Cox, “Ecclesiastical Jurisdiction in the Church of the Province of Aotearoa, New Zealand and Polynesia” (2001) 6(2) Deakin Law Review 266-284; Conrad Earl Russell, “Whose Supremacy? King, Parliament and the Church 1530-1640” (1997) 4(21) Ecclesiastical Law Journal 700-708.

¹⁶⁹ See the 1850 letter from a group of New Zealand laity led by the Governor, Sir George Grey, to Bishop Selwyn; (1852) V Colonial Church Chronicle 161. For Selwyn’s reply see (1853) VI Colonial Church Chronicle 168f.

¹⁷⁰ Const. A2-A4.

¹⁷¹ The authority for New Zealand canons derives from the Constitution, B.5; Church of England Empowering Act 1928 s. 3.

¹⁷² Important surviving examples being the Roman Catholic Lands Act 1876 (N.Z.) and the Roman Catholic Bishops Empowering Act 1997 (N.Z.).

its more fully developed canon law and comparatively active judiciary.¹⁷³ The emphasis upon the Church as a perfect society is also stronger – and aided by a greater degree of international centralisation.

The Church, however constituted, cannot avoid the consequences of the triumph of secular power in the sixteenth century. Gone are the days of parallel legal systems and courts, with mutual recognition of each others exclusive jurisdiction,¹⁷⁴ though the Church of England in England has, since 1919, enjoyed a considerable measure of independence, as the Measures of the General Synod have the full force and effect of an Act of Parliament.¹⁷⁵ The Church in New Zealand is equally subject to secular laws, but its own laws are not of this nature.

¹⁷³ The latter may be attributed to the survival of the faculty jurisdiction. For this see George H. Newsom, *Faculty Jurisdiction of the Church of England* (1993).

¹⁷⁴ See Noel Cox, “The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England” (2001-2002) 3(2) *Rutgers Journal of Law and Religion* 1-45 <http://www-camlaw.rutgers.edu/publications/law-religion/cox1.pdf>.

¹⁷⁵ Church of England Assembly (Powers) Act 1919 (9 & 10 Geo. V c. 76) (U.K.).

IV The Anglican Church in New Zealand

The Church in New Zealand may be classified broadly as quasi-established in the sense that whilst having the status of a contractual society, there are close legal links between Church and State. The authority of internal Church law rests at least in part upon the existence of secular legislation, and secular legislation expressly and directly regulates some of the temporal affairs of the Church.¹⁷⁶

Several parliamentary statutes “declare and define the Powers of the General Synod of the Church of the Province of New Zealand”,¹⁷⁷ they govern the alteration of the formularies of the Church,¹⁷⁸ and they regulate its trust property,¹⁷⁹ its (former) missionary dioceses,¹⁸⁰ and its clergy pensions funds.¹⁸¹ The secular courts may intervene to ensure compliance by the Church with its own internal law and with State law

¹⁷⁶ Norman Doe, *Canon Law in the Anglican Communion* (1998) 14; Noel Cox, “Ecclesiastical Jurisdiction in the Church of the Province of Aotearoa, New Zealand and Polynesia” (2001) 6(2) *Deakin Law Review* 266-284.

¹⁷⁷ Church of England Empowering Act 1928 (N.Z.) (as amended), Preamble.

¹⁷⁸ Church of England Empowering Act 1928 (N.Z.) (as amended).

¹⁷⁹ Anglican Church Trusts Act 1981 (N.Z.). From 1858 Church property had been vested in trustees, prior to that government; William Sachs, *The Transformation of Anglicanism* (1993) 191; Henry W. Tucker, *Memoir of the Life and Episcopate of George Augustus Selwyn, DD* (1879) vol. I, p. 89ff; G.A. Wood, “Church and State in New Zealand in the 1850s” (1975) 8(3) *Journal of Religious History* 255-270.

¹⁸⁰ Church of England (Missionary Dioceses) Act 1955 (N.Z.).

¹⁸¹ New Zealand Anglican Church Pension Fund Act 1972 (N.Z.).

applicable to the Church.¹⁸² In New Zealand the secular courts will enforce the constitution and rules of churches,¹⁸³ though they will be reluctant to intervene in church matters unless there are valid and strong reasons for doing so.¹⁸⁴

However, even where a statute has been passed specifically relating to a church or religious organisation and its property, this does not involve parliamentary recognition of the institutions and procedures established by the rules of the church. The institutions and procedures are still seen as private or domestic.¹⁸⁵ But even though the institutions may be private, nevertheless they are relying, for at least a part of their legal authority, on the laws of the State.

Even within its own jurisdiction the authority of the Church is limited. With respect to its fundamental provisions, “it shall not be within the power of the General Synod, or of any Diocesan synod, to alter, revoke, add to, or diminish any of the same”.¹⁸⁶ In New Zealand this law is fundamental in the sense that it is unalterable by the Church acting alone – though it may be altered in accordance with the provisions of an Act of Parliament.¹⁸⁷ The limitation on the legislative competence of the

¹⁸² For historical material see William P. Morrell, *The Anglican Church in New Zealand* (1973). See also Chapter 4 section XI.

¹⁸³ *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705.

¹⁸⁴ *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, 708 per Beattie J. cf. *Barker v. O’Gorman* [1971] 1 Ch. 215; [1970] 3 All E.R. 314.

¹⁸⁵ *Gray v. M.* [1998] 2 N.Z.L.R. 161 (C.A.), where a letter by the respondent to an official of the Methodist Church complaining about the plaintiff’s behaviour as a minister of the church was not protected by absolute privilege either under the Defamation Act 1992 (N.Z.) or at common law.

¹⁸⁶ Const. A.6.

¹⁸⁷ Const. A.1; Church of England Empowering Act 1928 (N.Z.). In accordance with the principle of the supremacy of Crown-in-Parliament;

Church was stated in qualified terms. It was not comparable to the superficially analogous limited competence of the (colonial) New Zealand Parliament; rather, its origins lay much deeper. The Constitution states of the Church that

This Branch of the United Church of England and Ireland in New Zealand doth hold and maintain the Doctrine and Sacraments of CHRIST as the LORD hath commanded in His Holy Word, and as the United Church of England and Ireland hath received and explained the same in the Book of Common Prayer, in the Form and Manner of Making, Ordaining, and Consecrating of Bishops, Priests, and Deacons, and in the Thirty-nine Articles of Religion. And the General Synod hereinafter constituted for the government of this Branch of the said Church shall also hold and maintain the said Doctrine and Sacraments of CHRIST, and shall have no power to make any alteration in the authorised version of the Holy Scriptures, or in the above-named Formularies of the Church.¹⁸⁸

However, it is also stated that

2. PROVIDED THAT nothing herein contained shall prevent the General Synod from accepting any alteration of the above-named formularies and Version of the Bible as may from time to time be adopted by the United Church of England and Ireland, with the consent of the Crown and of Convocation.¹⁸⁹

This suggests that there was some residual authority inherent in the Church of England – perhaps associated with the royal supremacy – to alter fundamental constitutional provisions (if not doctrine), which the

Article 37 of the *Thirty-Nine Articles* (enacted in 1562, and confirmed in 1571 by the Subscription (Thirty-Nine Articles) Act 1571 (13 Eliz. I c. 12) (Eng.)).

¹⁸⁸ Const. A.1.

¹⁸⁹ Const. A.2.

local Church might follow. This may probably be taken to not extend to doctrine per se, as synods, in the history of the church, were seen as not having authority to determine doctrine, and had only local authority, and the Church of England asserted no wider authority.¹⁹⁰ The qualification may, therefore, be taken to refer to the Church of England's authority to maintain order and discipline in liturgy and worship. At the 1867 Lambeth Conference it was argued that national synods (then expressed as synods of the several branches of the universal church) owed due and canonical subordination to the higher authority of a synod or synods above them.¹⁹¹ As there were no such bodies recognised by the Church of England this was essentially without meaning.¹⁹² But such a concept did have meaning for the colonial Churches, at least for a time. Mirroring the development of the political, legislative and judicial independence of the colonies,¹⁹³ the Church of England dismantled the slight structures which had existed as a consequence of colonial expansion.

The Church of England Empowering Act 1928 (N.Z.) provides for the alteration of the formularies contained in the Constitution. Section 3 provides that:

¹⁹⁰ Edward Norman, "Authority in the Anglican Communion" (1998).

¹⁹¹ Alan Stephenson, *Anglicanism and the Lambeth Conferences* (1978) 38.

¹⁹² Edward Norman, "Authority in the Anglican Communion" (1998).

¹⁹³ Cf. Noel Cox, "The control of advice to the Crown and the development of executive independence in New Zealand" (2001) 13(1) *Bond Law Review* 166-189; Noel Cox, "The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity" (2001) University of Auckland Ph.D. thesis 121-167; Noel Cox, "The abolition or retention of the Privy Council as the final Court of Appeal for New Zealand: Conflict between national identity and legal pragmatism" (2002) 20(2) *New Zealand Universities Law Review* 220-238.

It shall be lawful for the Bishops, Clergy and Laity of the Church, in General Synod assembled, from time to time in such way and to such extent as may to them seem expedient, but subject to the provisions in this Act contained, to alter, add to, or diminish the Formularies, or any one or more of them, or any part or parts thereof, or to frame or to adopt for use in the Church or in any part of the Province or in any Associated Missionary Diocese new Formularies in lieu thereof or as alternative thereto or of or to any part or parts thereof and to order or permit the use in public worship of a version or versions other than the Authorised Version of the Bible or of any part or parts thereof:

Provided that the provisions of this section shall not empower or be deemed to empower the General Synod to depart from the Doctrine and Sacraments of Christ as defined in clause one of the Constitution.¹⁹⁴

The procedures to be followed include gaining the consent of a majority of diocesan synods, a delay of at least a year,¹⁹⁵ and the holding of General Synod elections before the enactment comes into force.¹⁹⁶ This procedure is similar to the legislative process for secular legislation, yet differs because law in the Church depends for its authority upon identification of the divine will rather than the consent of the governed.¹⁹⁷ There is also an attempt at ensuring that law is truly a manifestation of the divine in human law, so far as this is possible.

¹⁹⁴ Section 3 was repealed and substituted, as from 28 September 1966, pursuant to s. 3 Church of England Empowering Amendment Act 1966 (N.Z.).

¹⁹⁵ To allow for appeals to the judicial tribunals of the Church, see C.W. Haskell, *Scripture and the ordination of women* (1979); Rosemary Neave (ed.), *The Journey and the Vision* (1990) 3, 7-8.

¹⁹⁶ s. 4.

¹⁹⁷ Hubert Box, *The Principles of Canon Law* (1949) 11.

Internally, the Church can exercise coercive power or *imperium*, as well as persuasive power or *dominium*, often derived from secular authority.¹⁹⁸ The *imperium* includes Acts of Parliament, statutory regulations, canons and synodical orders.¹⁹⁹ The *dominium* includes policy documents, regulations, directives, codes of practice, circulars, guidance, guidebooks.²⁰⁰ These have only moral or persuasive force,²⁰¹ and do not depend upon secular authority. The Church uses some secular laws, and legal procedures such as Acts of Parliament, but it is not to be inferred thereby that it has a right to do so greater than any non-public association or person.²⁰² The use of secular law by the Church is not surprising, given its frequent use in the post-Reformation history of the Church.

¹⁹⁸ Norman Doe, “Ecclesiastical Quasi-Legislation” in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (1998) 95.

¹⁹⁹ The former without qualification, the latter depending upon internal constitutional rules of legislation-making, because of the doctrine of parliamentary sovereignty. Generally, see Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth* (1957).

²⁰⁰ Norman Doe, “Ecclesiastical Quasi-Legislation” in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (1998) 95.

²⁰¹ Though a contrary view has been expressed; J. Burrows, “Judicial Review and the Church of England” (1997) University of Wales Cardiff, LL.M. dissertation.

²⁰² *Scandrett v. Dowling* [1992] 27 N.S.W.L.R. 483, 489 per Mahoney J.A.:

The Constitution of the Anglican Church ... came into existence formally on the enactment of the Church of England in Australia Constitution Act 1961 ... to an extent the Act of 1961 has given statutory force ... [but it was not the case that] the Act intended that the rule should have the force of a statute.

Although the supremacy of the State in all legal matters – for it is scarcely less than that – is not asserted over the church in New Zealand, in that the State does not interfere in religious matters, yet religion is not altogether ignored by the State. Nor is the position of the State ignored by the Church. This is most clearly seen in the established Church of England in the Preface to the Thirty-Nine Articles of 1562 is a royal declaration. It states that:

Being by God's Ordinance, according to Our just Title, Defender of the Faith and Supreme Governor of the Church, within these Our Dominions, We hold it most agreeable to this Our Kingly Office, and Our own religious zeal, to conserve and maintain the Church committed to Our Charge, in Unity of true Religion, and in the Bond of Peace ... We have therefore, upon mature Deliberation, and with the Advice of so many of Our Bishops as might conveniently be called together, thought fit to make this Declaration following ... That We are Supreme Governor of the Church of England ...²⁰³

Article 37 makes this claim to royal supremacy more explicit:

The King's majesty hath the chief power in this Realm of England, and other of his Dominions, unto whom the chief Government of all Estates of this Realm, whether they be Ecclesiastical or Civil, in all causes doth appertain, and is not, nor ought to be, subject to any foreign jurisdiction ... We give not to our Princes the ministering either of God's Word, or of the Sacraments ... but that only prerogative, which we see to have been given always to all Godly Princes in holy Scriptures by God himself; that is, that they should rule all estates and degrees committed to their charge by God, whether they be Ecclesiastical or Temporal, and restrain with the

²⁰³ *Thirty-Nine Articles of Religion*, enacted in 1562, and confirmed in 1571 by the Subscription (Thirty-Nine Articles) Act 1571 (13 Eliz. I c. 12) (Eng.).

civil sword the stubborn and evildoers ... The Bishop of Rome hath no jurisdiction in this Realm of England.²⁰⁴

The sixteenth century (re-)iteration of royal *imperium* over matters religious as well as secular was to have a continuing effect upon the law of the Church, effects which may still be seen in twenty-first century New Zealand,²⁰⁵ although the Church is not, and never has been, established in New Zealand. But it was not a novel concept.

The juristic theory of territorial sovereignty, with the king being supreme ruler within the confines of his kingdom, originated as two distinct concepts. These were that the king owned no superior in temporal matters, and that within his kingdom the king was emperor.²⁰⁶ The former was stated as early as the mediæval statutes regulating foreign religious houses in England, and the recognition of papal instruments. The latter was common to most of mediæval Europe.

The Holy Roman Emperor either had legal supremacy throughout the West, or he did not.²⁰⁷ If the former, theories of the sovereignty of kings were not needed, for they had merely *de facto* power. Sovereignty

²⁰⁴ *Thirty-Nine Articles of Religion*, enacted in 1562, and confirmed in 1571 by the Subscription (Thirty-Nine Articles) Act 1571 (13 Eliz. I c. 12) (Eng.).

²⁰⁵ Noel Cox, "Ecclesiastical Jurisdiction in the Church of the Province of Aotearoa, New Zealand and Polynesia" (2001) 6(2) *Deakin Law Review* 266-284.

²⁰⁶ Walter Ullmann, "This Realm of England is an Empire" (1979) 30(2) *Journal of Ecclesiastical History* 175-203.

²⁰⁷ In Roman law it was originally considered that the emperor's power had been bestowed upon him by the people (as typified by the motto "Senatus Populusque Romanus", i.e. "the Senate and People of Rome"), but by the time Rome became a Christian State his power was regarded as coming from God. Max Cary and Howard H. Scullard, *A history of Rome down to the reign of Constantine* (3rd ed., 1975).

remained essentially *de jure* authority.²⁰⁸ Some jurists argued that the Emperor did not have *de jure* sovereignty over the whole empire.

Imperium et regnum (imperial and royal power) was a favourite theme of nineteenth and early twentieth century historiography. But mediæval jurists cared not whether the emperor had jurisdiction and authority over kings and princes, but focused on his power to usurp the rights of his subjects. Whether this power was *de facto* or *de jure* was relatively unimportant.²⁰⁹

Bartolus and Baldus²¹⁰ led the way towards formulation of a concept of the legal sovereignty of kings. The emperor had a genuine *de jure* sovereignty within the *terrae imperii*, the confines of the empire alone. Other powers could obtain true sovereignty on a purely *de facto* basis. But this was not merely power without legitimacy.²¹¹ Indeed, because the monarch represented God's ministry of justice, and because he ruled as the vicegerent of Christ the king, the office of the monarch was seen as a holy office.²¹²

In the later Middle Ages it was believed that England was an independent sovereign monarchy answerable only to God – in mediæval

²⁰⁸ Joseph P. Canning, "Law, sovereignty and corporation theory, 1300-1450" in James H. Burns, *The Cambridge History of Mediæval Political Thought c.350-c.1450* (1988) 465-467. Emperor Frederick I Barbarossa saw the advantages of Roman law and legal science for his ambitions and his inception of absolutism. This led to the growth of royal absolutism, and eventually to the emergence of opposition to this, throughout Europe; See Kenneth Pennington, *The Prince and the Law, 1200-1600* (1993) 12.

²⁰⁹ Kenneth Pennington, *The Prince and the Law, 1200-1600* (1993) 30.

²¹⁰ Cecil Woolf, *Bartolus of Sassoferrato* (1913); Joseph P. Canning, *The Political Thought of Baldus de Ubaldis* (2003).

²¹¹ Joseph P. Canning, "Law, sovereignty and corporation theory, 1300-1450" in James H. Burns, *The Cambridge History of Mediæval Political Thought c.350-c.1450* (1988) 467-471.

²¹² Rousas John Rushdoony, *The Institutes of Biblical Law* (1973) 70.

parlance an empire, self-contained and sovereign.²¹³ The focusing of the Crown's activities almost exclusively on the realm of England after 1216 encouraged such thinking. Nor were the claims of the papacy especially welcome.²¹⁴

The English canonists Alanus and Ricardens Angelicus, and a Spaniard, Vincentius Hispanus, articulated unambiguous statements of royal independence from the emperor in the early thirteenth century.²¹⁵ *Regno suo est* became a commonplace in the mid-thirteenth century.²¹⁶

Sir John Fortescue remarked that “from of old English kings have reigned independently, and acknowledged no superior on earth in things temporal”.²¹⁷ This was a fundamental feature of English monarchy by the fifteenth century, based on precepts of Roman law.²¹⁸ They rejected a

²¹³ In 1485 Chief Justice Huse observed that the king was superior to the pope within his realm, and answerable directly to God: Y.B. Hil. 1 Hen. VII fo. 10 pl. 10. Appeal to the papal courts, which was only abolished by the Ecclesiastical Appeals Act 1532 (24 Hen. VIII c. 12) (Eng.) and s. 4 of the Submission of the Clergy Act 1533 (25 Hen. VIII c. 19) (Eng.), was prohibited, otherwise than with the royal assent, by the Constitutions of Clarendon 1164 (Eng.).

²¹⁴ The *Decretals* of Pope Gregory IX (1234) show that since Gratian the law of the Church had become a separate science no longer inextricably conjoined to theology. Gratian developed a science of jurisprudence, and provided the Church with a theory of sovereignty, the papacy. The *jus commune* has become the *jus pontificium*; Archbishops' Commission on Canon Law, *The Canon Law of the Church of England* (1947) 25-30.

²¹⁵ Texts cited in Brian Tierney, “Some Recent Works on the Political Theories of the Mediæval Canonists” (1954) 10 *Traditio* 615, 617.

²¹⁶ Kenneth Pennington, *The Prince and the Law, 1200-1600* (1993) 30.

²¹⁷ Sir John Fortescue, *In praise of the Laws of England (De Laudibus)* ed. Stanley B. Chrimes (1942). See generally, Norman Doe, *Fundamental Authority in late Mediæval English Law* (1990).

²¹⁸ Majesty, the sense of awe-inspiring greatness, in particular, the attribute of divine or sovereign power, was part of the legacy of Rome.

Holy Roman Empire that had been narrowly German for several centuries, and the temporal authority of the pope. Even the scope of the religious authority of the pope was challenged.

The bulk of mediæval canonists acknowledged the significance of the role of the sacred college of cardinals, but nevertheless rejected the view that the pope could not act, except in minor matters, without their approval.²¹⁹ The common opinion of the doctors of canon law was that the pope had the power to legislate for the universal Church even without the cardinals.²²⁰ However, contrary views were not unknown, and in the fifteenth century those of Johannes Monachus, himself a cardinal, were particularly powerful. These stressed the *plenitudo* of the pope, but only with the consent of the cardinals.²²¹ Monachus maintained that the

The *maiestas* of the Republic or the people of Rome had become that of the emperor, the *maiestas augustalis*.

²¹⁹ For college of cardinals see Brian Ferme, “Lyndwood and the Canon Law: The Papal *Plenitudo Potestatis* and the College of Cardinals” in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (1998) 13-22.

²²⁰ Albericus de Rosate, *Lectura super Codicem* (1518), f 47c:

Utrum papa sive cardinalibus possit leges sive decretales facere.
Laurentius tenet quod non generales ... communis opinio est in
contrarium et etiam de facto servatur.

²²¹ Andreas de Barbatia, *De prestantia cardinalium, Tractatus Universi Iuris* (1549), f 365a:

Nec obstat cum dixit dominus Domini camus non esse credendum
Ioan. Monacho cum fuerit cardinalis ... ad hoc respondeo
procedere quando solus Ioan. Monachus hoc dixisset. Sed quando
habet multos illustres doctores contestes qui illud etiam affirmant,
tunc ex confirmatione aliorum tollitur illa suspicio.

position of the pope was akin to that enjoyed by the bishop in relation to his cathedral chapter.²²²

By discrediting the claims of the papacy to universal ecclesiastical hegemony, the Reformation left the field open for the secular rulers to claim that they alone were answerable before God for the good government of their respective kingdoms, and that neither outside influences, such as the Church, nor the wishes of their subjects within their realm had any part to play in government.²²³ Thus the claim of the Kings of England that the kingdom was “an Empire governed by one supreme head and king”²²⁴ was an almost inevitable consequence of pre-Reformation thinking.

Prior to the Reformation, the Church had a parallel system of laws and its own courts. The Act of Supremacy 1558²²⁵ was enacted “for restoring to the Crown the ancient jurisdiction over the State ecclesiastical and spiritual”, and in this the sense is of ‘order’ or ‘estate’. “The supreme executive power of this kingdom”, as Blackstone stated, was vested in the King.²²⁶ He was “supreme Head in earth of the Church

²²² *Glossa Aurea (in libro sextum)* f. 366: “Papa sic se habet ad collegium cardinalium, sicut alter episcopus respectu sui collegii”. Randy M. Johannessen, “Cardinal Jean Lemoine: Curial Politics and Papal Power” (1989) University of California Los Angeles Ph.D. thesis; Ronald Steckling, “Jean le Moine as Canonist and Political Thinker” (1964) University of Wisconsin Ph.D. thesis.

²²³ Thomas Glyn Watkin, “Church and State in a changing world” in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (1998) 86.

²²⁴ Appointment of Bishops Act 1533 (25 Hen. VIII c. 20) (Eng.).

²²⁵ 1 Eliz. I c. 2 (Eng.).

²²⁶ s. 8: ‘The Queen’s excellent Majesty, acting according to the laws of the realm, is the highest power under God in the kingdom, and has supreme authority over all persons in all causes, as well ecclesiastical as civil’; see *The Canons of the Church of England. Canons ecclesiastical*

of England”.²²⁷ That he was supreme head did not mean that he had any spiritual function or status.²²⁸ The king could not be regarded as an ecclesiastical person per se.²²⁹

After the Reformation the secular Parliament made laws for the Church, and secular courts increasingly came to apply this law where applicable in secular actions. If the supreme government of the Church lay with the king, in practice it meant the subordination of Church laws to secular laws. In its most extreme form, in England, this meant Parliament made all laws, and convocation long lay dormant.²³⁰ In New Zealand, it means that much of the administrative machinery of the

promulgated by the Convocations of Canterbury and York in 1964 and 1969 (1969), Canon A7; Thirty-Nine Articles of Religion (1562, confirmed 1571 by the Subscription (Thirty-Nine Articles) Act 1571 (13 Eliz. I c. 12) (Eng.)) Art. 37.

²²⁷ Act of Supremacy 1534 (26 Hen. VIII c. 1) (Eng.), repealed by the See of Rome Act 1554 (1-2 Philip & Mary c. 8) (Eng.), confirmed by the Act of Supremacy 1558 (1 Eliz. I c. 1) (Eng.).

²²⁸ A king did, on one occasion (in 1628), pardon an ecclesiastical offence – marriage within the prohibited degrees; Conrad Earl Russell, “Whose Supremacy? King, Parliament and the Church 1530-1640” (1997) 4(21) *Ecclesiastical Law Journal* 700, 701.

²²⁹ This was expressly stated in Article 37 of the *Thirty-Nine Articles of Religion* (1562, confirmed 1571 by the Subscription (Thirty-Nine Articles) Act 1571 (13 Eliz. I c. 12) (Eng.)). The Sovereign was traditionally said to be a canon or prebend of St. David’s Cathedral, Pembrokeshire, Wales. This is clearly however the result of confusion between ownership of the temporality and personal spiritual authority. In some respects however the Sovereign remains, at least symbolically, a quasi-religious person. This is seen in the ceremonial of the coronation – particularly in the anointing, and in the royal robes and vestments; See Leopold G. Wickham Legg (ed.), *English Coronation Records* (1901) 127.

²³⁰ In 1919 the Church Assembly, now called the General Synod of the Church of England, was created. This gave a large measure of legislative authority to the Church, far greater indeed than any authority which the Convocations had ever clearly possessed; Church of England Assembly (Powers) Act 1919 (9 & 10 Geo. V c. 76) (U.K.).

Church is dependent on secular legislation. Yet it also means that the Church is unable to alter its basic theological principles without the use of restrictive procedures defined by Parliament, as it has chosen to state those principles in an Act of Parliament.²³¹

The Queen of New Zealand is not regarded in the Anglican Church in Aotearoa, New Zealand and Polynesia as Supreme Governor of the Church,²³² a position she still enjoys, as Queen of the United Kingdom, in England (though not in Wales).²³³ This reason is sometimes used to explain why prayers are no longer customarily said for the Queen and members of the royal family,²³⁴ though it might have been expected that

²³¹ Church of England Empowering Act 1928 (N.Z.), Sched. I; Fundamental Provisions, A.2; Const. B.5-6; for the historical background see William P. Morrell, *The Anglican Church in New Zealand* (1973) 96ff.

²³² The Crown has not been involved since the appointment of bishops by letters patent ceased in the nineteenth century; Sir Robert Phillimore, *The Ecclesiastical Law of the Church of England* (2nd ed., 1895) vol. II, p. 1786. See Conrad Earl Russell, “Whose Supremacy? King, Parliament and the Church 1530-1640” (1997) 4(21) *Ecclesiastical Law Journal* 700-708.

²³³ Act of Supremacy 1558 (1 Eliz. I c. 2) (Eng.); cf. Welsh Church Act 1914 (4 & 5 Geo. V c. 91) (U.K.); Suspensory Act 1914 (4 & 5 Geo. V c. 88) (U.K.); Welsh Church (Temporalities) Act 1919 (9 & 10 Geo. V c. 65) (U.K.). See also Noel Cox, “The Law of Succession to the Crown in New Zealand” (1999) 7 *Waikato Law Review* 49.

²³⁴ In England the law allows alterations in the prayers for the royal family contained in the (otherwise unalterable) *Book of Common Prayer*; Act of Uniformity 1662 (14 Chas. II c. 4) (Eng.), s. 21; cf. *A New Zealand Prayer Book* (1989). Prayers were said in accordance with the *Book of Common Prayer* when that was in regular use.

the Church would continue to show due regard for the role of the secular Sovereign of New Zealand.²³⁵

The Sovereign's office of Supreme Governor of the Church of England is to be distinguished from the mere title of Defender of the Faith, which dates from 1521. In that year Pope Leo X conferred upon King Henry VIII the title of *Fidei Defensor*. In spite of its papal origin, the title was settled on the king and his successors in perpetuity by Act of Parliament in 1543.²³⁶ The non-sectarian (though originally, and historically, Roman Catholic) style "Defender of the Faith" is used in New Zealand, though that of Supreme Governor of the Church of England is not, since the Church of England is not established.

Since 1974 the royal style in use in New Zealand has been "Elizabeth the Second, by the Grace of God, Queen of New Zealand and Her other Realms and Territories, Head of the Commonwealth, Defender of the Faith".²³⁷ The original draft of the Royal Titles Bill 1974 had omitted the style of Defender of the Faith, on the grounds that it had no historical or legal place in New Zealand, there being no established Church. However, members of Parliament of the National Party (who then formed the majority party in Parliament) had reservations about this change. They considered that the style meant much more than a mere title to some people in New Zealand, who regarded the Queen as the defender

²³⁵ When the *Book of Common Prayer* 1662 is used, the prayers are retained. They are also occasionally used on national occasions.

²³⁶ King's Style Act 1543 (35 Hen. VIII c. 2) (Eng.), repealed by the See of Rome Act 1554 (1 & 2 Philip & Mary c. 8) (Eng.), s. 4, repeal confirmed by the Act of Supremacy 1558 (1 Eliz. I c. 1) (Eng.), s. 4.

²³⁷ Royal Titles Act 1974 (N.Z.). The Bill was introduced at the State Opening of Parliament by the Queen on 4 February 1974, passed through all its stages the same day, and signed by Her Majesty in person. See *New Zealand Parliamentary Debates* (1974) vol. 389, pp. 1-3.

and upholder of the Christian faith.²³⁸ There was no understanding that the title conveyed any idea that the Sovereign has any ecclesiastical function in New Zealand, much less was head of any Church.²³⁹ The matter was discussed with the Prime Minister, and after consultation with the Queen it was decided to retain the title in New Zealand.²⁴⁰

The Sovereign remains subject to the requirement to be in communion with the Church of England, as the laws of succession in New Zealand are the same as those in the United Kingdom.²⁴¹

²³⁸ This precedes the comments by the Prince of Wales that he wished to be regarded as Defender of Faith. The original title did not mean that the king was defender of the Church of England, but rather of the Catholic Church; Thomas Glyn Watkin, “Church and State in a changing world” in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (1998) 88.

²³⁹ *New Zealand Parliamentary Debates* (1974) vol. 389 p. 3 (Rt. Hon. John Marshall).

²⁴⁰ *New Zealand Parliamentary Debates* (1974) vol. 389 p. 3 (Rt. Hon. John Marshall). Only Canada and New Zealand now use the style “Defender of the Faith”; Royal Style and Titles Act, R.S.C. 1985 (1953) (Canada); Royal Titles Act 1974 (N.Z.).

²⁴¹ Noel Cox, “The Law of Succession to the Crown in New Zealand” (1999) 7 *Waikato Law Review* 49; Act of Settlement 1700 (12 & 13 Will. III c. 2) (Eng.), s. 3; Bill of Rights 1688 (1 Will. & Mary sess. 2 c. 2) (Eng.), s. 1. See also the Accession Declaration Act 1910 (10 Edw. VII & 1 Geo. V c. 29) (U.K.).

V The treatment of the Anglican Church in statute

The New Zealand Bill of Rights Act 1990 (N.Z.) recognises that everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and hold opinions without interference.²⁴² It also provides that everyone has the right to manifest his or her religion or belief either individually or in community with others, in worship, observance, practice, or teachings, and either in public or in private.²⁴³ The effect of this Act is principally confined to the actions of public bodies,²⁴⁴ which are prevented from infringing this freedom of opinion. Thus they are both precluded from imposing its doctrine or practices upon unwilling individuals, but are equally protected against suppression.

The provisions of the laws of the church are not generally justiciable in a secular court,²⁴⁵ except to the extent that they are involved

²⁴² s. 13.

²⁴³ s. 15.

²⁴⁴

s. 3: This Bill of Rights applies only to acts done –

(a) By the legislative, executive, or judicial branches of the government of New Zealand; or

(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person by or pursuant to law.

²⁴⁵ The secular courts do not endeavour to interfere in matters of difference within a religious group, nor can they decide theological or liturgical questions; *Cecil v. Rasmussen* (unreported, High Court, Auckland, A1269/83, 9 December 1983, Baker J.); *Misa v. Congregational Christian Church of Samoa (Wainuiomata) Trust Board* [1984] 2 N.Z.L.R. 461 (C.A.); *Presbyterian Church Property Trustees v.*

in a matter concerning church property governed by statute²⁴⁶ or otherwise within the jurisdiction of secular courts – and this latter varies between jurisdictions.²⁴⁷ But there are a great number of statutes which regulate aspects of the Anglican Church’s life and work in New Zealand.²⁴⁸ Many of these are concerned with the property which the

Fuimaono (unreported, High Court, Auckland, A1595/85, 16 October 1986, Thorp J.). This is not, however, an absolute exclusion of jurisdiction, see Chapter 4 section XI.

²⁴⁶ *Dodwell v. Bishop of Wellington* (1886) N.Z.L.R. 5 S.C. 263; *Scandrett v. Dowling* (1992) 27 N.S.W.L.R. 483, 512, 554, 564 (N.S.W. C.A.).

²⁴⁷ In *Scandrett v. Dowling* (1992) 27 N.S.W.L.R. 483, 513, the Court of Appeal of New South Wales treated Church members as associated only on the basis of a shared faith without legal sanction for its enforcement; Bruce McPherson, “The Church as consensual compact, trust and corporation” (2000) 74 Australian Law Journal 159, 171.

²⁴⁸ In 2003, including the Anglican Church Trusts Act 1981 (N.Z.), Anglican Church Trusts Amendment Act 1989 (N.Z.), Anglican Trust for Women and Children Act 1962 (N.Z.), Anglican Trust for Women and Children Amendment Act 1968 (N.Z.), Anglican Trust for Women and Children Amendment Act 1975 (N.Z.), Anglican Trustees Investment (Auckland) Act 1972 (N.Z.), Cathedral-Site Parnell Leasing Act 1886 (N.Z.), Christ’s College Canterbury Act 1885 (N.Z.), Christ’s College (Canterbury) Act 1928 (N.Z.), Christ’s College, Canterbury Act 1999 (N.Z.), Christ’s College (Canterbury) Amendment Act 1929 (N.Z.), Christ’s College (Canterbury) Amendment Act 1945 (N.Z.), Church of England Empowering Act 1928 (N.Z.), Church of England Empowering Act 1934 (N.Z.), Church of England Empowering Act 1966 (N.Z.), Church of England (Missionary Dioceses) Act 1955 (N.Z.), Church of England Tribunal (Validation of Election) Act 1934 (N.Z.), Church Property Trust (Canterbury) Act 1879 (N.Z.), Church Property Trust (Canterbury) Act 1887 (N.Z.), Church Property Trust (Canterbury) Act 1879 Amendment Act 1889 (N.Z.), Church Property Trust (Canterbury) Act 1879 Amendment Act 1906 (N.Z.), Church Property Trust (Canterbury) Act 1879 Amendment Act 1915 (N.Z.), Church Property Trust (Canterbury) Amendment Act 1927 (N.Z.), Church Property Trust (Canterbury) Amendment Act 1934 (N.Z.), Church Property Trust (Canterbury) Amendment Act 1951 (N.Z.), Church Property Trust (Canterbury) Amendment Act 1962 (N.Z.), Church Property Trust (Canterbury) Amendment Act 1964 (N.Z.), Church Property Trust

Church acquired since the nineteenth century, and are similar to many others enacted for the benefit of particular churches or other organisations.²⁴⁹ In practice the secular courts will become involved in Church disputes where the interests of justice so require.²⁵⁰

Examining just a small selection of the Acts which have conferred secular legal powers upon the organs of the Anglican Church, we see several common elements. For example, Anglican Church Trusts Act 1981 (N.Z.), a private Act, is described in its long title as:

An Act to widen the powers of trustees under trusts in connection with the Church of the Province of New Zealand and the Church of

(Canterbury) Amendment Act 1990 (N.Z.), Church Property Trustees (Canterbury) Indemnity Act 1890 (N.Z.), Church Reserves (Canterbury) Act 1904 (N.Z.), College House Act 1985 (N.Z.), Dunedin Anglican Social Services (Child Welfare) Act 1978 (N.Z.), Melanesian Trusts Board 1974 (N.Z.), New Zealand Anglican Church Pensions Act 1972 (N.Z.), New Zealand Mission Trust (Port Waikato Maraetai) Empowering Act 1986 (N.Z.), Saint Mary's Guild Trust Act 1956 (N.Z.), Nelson Diocesan Trust Board Empowering Act 1937 (N.Z.), St. John's Anglican Church (Parochial District of Johnsonville) Burial Ground Act 1964 (N.Z.), St. John's College Trusts Act 1972 (N.Z.), St. Mary's Church (Karori) Burial Ground Act 1963 (N.Z.), Social Service Council of the Diocese of Christchurch Act 1952 (N.Z.), Waikato Anglican Boys College Trust Act 1987 (N.Z.), Warkworth Anglican Burial Ground Act 1968 (N.Z.), Wellington Bishopric Endowment Trust (Church of England) Act 1929 (N.Z.), Wellington Bishopric Endowment Trust (Church of England) Act 1934 (N.Z.), Wellington City Mission (Church of England) Act 1929 (N.Z.), Wellington City Mission (Church of England) Act 1965 (N.Z.), and the Wellington Diocesan Board of Trustees (Church of England) Act Repeal Act 1988 (N.Z.).

²⁴⁹ See, for example, those for the Roman Catholic Church [Roman Catholic Bishops Empowering Act 1997 (N.Z.)], Methodist Church [Methodist Church Property Trust Act 1887 (N.Z.)], Baptist Church [Auckland Baptist Tabernacle Act 1948 (N.Z.)].

²⁵⁰ See also Chapter 4.

the Province of Melanesia and to provide for the administration of such trusts ...²⁵¹

More importantly, the preamble explains the rationale for the Act:

WHEREAS there is real and personal property in New Zealand held on trusts for and in connection with the Anglican Churches in New Zealand and Melanesia: And whereas the powers of the trustees in relation to the investment of the trust assets are limited by the instruments creating the trusts: And whereas it is desirable to consolidate and extend the powers conferred on trustees by the Church of England Trusts Act 1913 and its amendments and to give greater powers of investment to the major Trust Boards holding property for the said Churches: And whereas there are trusts held for religious or charitable purposes in connection with the Anglican Church where it has become impossible or impracticable or inexpedient to carry out the trust objects or purposes, and by reason of the limited assets of the particular trusts or for reasons of expense it is desirable to provide a means for varying the trusts in addition to the means provided by the Charitable Trusts Act 1957.²⁵²

This Act is therefore to give the Church institutions greater flexibility than enjoyed by the general public in respect of trusts.²⁵³ This

²⁵¹ Anglican Church Trusts Act 1981 (N.Z.).

²⁵² Anglican Church Trusts Act 1981 (N.Z.) preamble.

²⁵³ The following Regulations were made pursuant to this Act:

Anglican Church Trust Boards Order 1982 (S.R. 1982/274); Anglican Church Trust Boards Order 1985 (S.R. 1985/110); Anglican Church Trust Boards Order 1990 (S.R. 1990/299); Anglican Church Trust Boards Order 1992 (S.R. 1992/219); Anglican Church Trust Boards Order 1994 (S.R. 1994/218); Anglican Church Trust Boards Order 1996 (S.R. 1996/310); Anglican Church Trust Boards Order 1998 (S.R. 1998/282).

is one field which is commonly the subject of secular legislation enacted for the benefit of the Church.²⁵⁴

The Church of England Tribunal (Validation of Election) Act 1934 (N.Z.) was of historical interest in that it was “An Act to validate the First Election of the Tribunal elected under the Church of England Empowering Act 1928 (N.Z.), to hear and determine Appeals under that Act”.²⁵⁵ In 1931 the first election of an appellate tribunal under the Act of 1928 was disrupted by the series of earthquakes referred to in the Hawke’s Bay Earthquake Act 1931 (N.Z.). The proceedings of the General Synod were to some extent disorganized by reason of these earthquakes, and the first election of the Tribunal was not held in accordance with the Act, but was held at the session of the General Synod which took place at Napier in 1934.²⁵⁶ The Church of England Tribunal (Validation of Election) Act 1934 (N.Z.) is purely a validating Act, to ensure that the validity of the election should not be questioned on the ground that the provisions of the Act had not been complied with.²⁵⁷ Yet, it is significant that recourse should be had to secular authorities, and shows the extent to which the Church’s procedures were influenced by (secular) legalistic concepts.²⁵⁸

The great majority of other Acts are concerned with the temporal goods of the Church, and regulate trusts and property. Invariably, as with

²⁵⁴ This legislation takes the form of private, rather than public, Acts. The difference lies in the method of passage, rather than in the effect.

²⁵⁵ Church of England Tribunal (Validation of Election) Act 1934 (N.Z.) preamble.

²⁵⁶ Church of England Tribunal (Validation of Election) Act 1934 (N.Z.) preamble.

²⁵⁷ Church of England Tribunal (Validation of Election) Act 1934 (N.Z.) preamble.

²⁵⁸ The Roman Catholic Church is also legalistic, but in a different sense, relying upon its own comprehensive internal legal and judicial structures.

the Anglican Church Trusts Act 1981 (N.Z.), they give greater flexibility than would be available under generally applicable trust and charities laws.

The Church is not however exempt from regulation by general legislation. Thus, the Church is bound by the general prohibition on discrimination on the grounds of religious belief.²⁵⁹ It is unlawful for an employer, or any person acting or purporting to act on the employer's behalf, to refuse or omit to employ a qualified applicant by reason of the applicant's religious or ethical belief.²⁶⁰ It is also unlawful to discriminate on the grounds of sex, or on a number of other grounds, in employment, the provision of goods or services, access to public facilities housing, and in education. But the Human Rights Act 1993 (N.Z.) allows for the different treatment of people based on sex, where the discrimination is for the purpose of an organised religion and is required to comply with the doctrines, rules, or established customs of the religion.²⁶¹ 'Religion' is, moreover, defined broadly.²⁶²

Some special statutory provisions are made for the personnel of the churches. "Ministers of religion"²⁶³ are prohibited by statute from

²⁵⁹ Human Rights Act 1993 (N.Z.), s. 21(c), apart from the exceptions in s. 28.

²⁶⁰ Human Rights Act 1993 (N.Z.), s. 22(1)(a); *Human Rights Commission v. Eric Sides Motor Co. Ltd.* (1981) 2 N.Z.A.R. 443.

²⁶¹ ss. 22 and 28(1).

²⁶² It includes a belief in a supernatural being, thing, or principal, and the acceptance of canons of conduct in order to give effect to that belief; *Centrepoint Community Growth Trust v. Commissioner of Inland Revenue* [1985] 1 N.Z.L.R. 673, applying *Church of the New Faith v. Commissioner for Pay-roll Tax (Victoria)* (1983) 154 C.L.R. 120; 49 A.L.R. 65 per Mason A.C.J. and Brennan J. (H.C.A.).

²⁶³ This is defined as including a person who is for the time being exercising functions analogous to those of a minister of religion; Evidence Act 1908 (N.Z.), s. 2, definition of 'minister'.

disclosing in any proceeding a confession that was made to the minister in his or her professional character, except with the consent of the person who made the confession.²⁶⁴ However any communication made for criminal purposes is not privileged.²⁶⁵

Whilst only a minority of marriages in New Zealand are today conducted in a church, the names of ministers of religion that have been sent to the Registrar-General of Births, Deaths and Marriages by any of the religious bodies referred to in the Marriage Act 1955 (N.Z.) are entered in the list of marriage celebrants.²⁶⁶ There is no requirement for separate civil and religious weddings, as the churches' own ministers will normally be authorised – as marriage celebrants – to conduct marriages.

²⁶⁴ Evidence Amendment Act (No. 2) 1980 (N.Z.), s. 31(1); *Cook v. Carroll* [1945] I.R. 515; *Francome v. Mirror Group Newspapers Ltd* [1984] 1 W.L.R. 892; [1984] 2 All E.R. 408 (C.A.). For confessions generally, see Rupert Bursell, "The Seal of the Confessional" (1990) 2 Ecclesiastical Law Journal 84.

²⁶⁵ Evidence Amendment Act (No. 2) 1980 (N.Z.), s. 31 (2); *R. v. Gruenke* [1991] 3 S.C.R. 263 [where the S.C.C. rejected a claim to privilege and confidentiality involving a confession of murder made to a pastor and counsellor]. The Church required Ministers to "keep information confidential whether imparted in confession or informally in conversation and not improperly disclose it"; Title D canon I.A.12.7; Title D canon I.A.13.1.4 (for ordained or lay ministers).

²⁶⁶ s. 8; These bodies are the Baptists, Anglican Church, Congregational Independents, Greek Orthodox, all Hebrew congregations, Lutheran churches, Methodists, Presbyterian Church, Roman Catholics, Salvation Army. Other organisations permitted to nominate celebrants may apply to the Registrar-General to be included in the list of approved bodies. To be included the objects of the organisation must be primarily to uphold or promote religious beliefs or philosophical or humanitarian convictions; s. 9.

The offence of blasphemy remains in the Crimes Act 1961.²⁶⁷ It is an offence punishable by up to one year's imprisonment for any person to publish blasphemous libel.²⁶⁸ It seems that this provision will apply only to attacks on Christian beliefs.²⁶⁹ Whether a particular published matter is or is not a blasphemous libel is a question of fact. To express in "good faith and decent language" a religious opinion of any sort is not an offence. In New Zealand, unlike England, the law regarding blasphemy is confined to published matter.²⁷⁰ In the only reported New Zealand case on the scope of the offence, the judge's direction to the jury asked whether on the basis of community standards the words had exceeded the bounds of propriety and reached contemptuousness, reviling, and insult.²⁷¹

²⁶⁷ Crimes Act 1961, s. 123. However, the consent of the Attorney-General is required for any prosecution and doubt has been expressed whether there is any particular room for application of this section. See, for the English position, Graham G. Routledge, "Blasphemy: the Report of the Archbishop of Canterbury's Working Party on Offences Against Religion and Public Worship" (1989) 1(4) Ecclesiastical Law Journal 27.

²⁶⁸ s. 123(1).

²⁶⁹ See for example *Ex parte Choudhury* [1991] 1 Q.B. 429, [1991] 1 All E.R. 306; New South Wales Law Reform Commission, *Blasphemy* (1994) Report 74.

²⁷⁰ *R. v. Glover* [1922] G.L.R. 185, 187 per Hosking J.: "The object of the law of blasphemy is to prevent disorder in the community, and, there being such large numbers of the community who have reverence and respect for certain religious and sacred subjects, it is desirable that provocation of and any outrage of those feelings should be prevented."

His Honour further observed that, "the law does not take God under its protection in these matters. That is not the object of the law of blasphemy."

²⁷¹ *R. v. Glover* [1922] G.L.R. 185 [where the offence involved publishing a poem by Siegfried Sassoon in which the slang word "bloody" was used in connection with Christ and redemption. The jury acquitted, but as a rider suggested that such words should be discouraged].

In a number of respects, while no particular religious denomination is preferred, religion as such – particularly Christianity – receives a favoured treatment. This includes direct aid, immunities, regulation of cemeteries, school and hospitals, and in the recognition of religious practices by the State.²⁷²

It can be seen from the above that the Anglican Church and (perhaps to a lesser extent) other religious denominations enjoy a special legal status in New Zealand. The Anglican Church is not an established church, but it does, often in common with other recognised churches, enjoy certain legal rights not enjoyed by other corporate bodies – though it is only special in contrast to the other churches in the scale and scope of its use of secular laws.²⁷³ Many of these owe their origins to the extensive grants of land to the Church of England during the nineteenth century, particularly in the southern province of Canterbury.²⁷⁴

²⁷² Sir Ivor Richardson, *Religion and the Law* (1962) 8; Peter Lineham, “Government Support for the Churches in the Modern Era” in Rex Ahdar and John Stenhouse (eds.), *God and Government* (2000) 41-58.

²⁷³ All faiths are equal before the law: *Centrepoin Community Growth Trust v. Commissioner of Inland Revenue* [1985] 1 N.Z.L.R. 673, 692; *Church of the New Faith v. Commissioner for Pay-roll Tax (Victoria)* (1983) 154 C.L.R. 120, 131; 49 A.L.R. 65, *Nelan v. Downes* (1917) 23 C.L.R. 546, and *Thornton v. Howe* (1862) 31 Beav. 14.

²⁷⁴ Based on the City of Christchurch. See the Church Property Trust (Canterbury) Act 1879 (N.Z.), Church Property Trust (Canterbury) Act 1887 (N.Z.), Church Property Trust (Canterbury) Act 1879 Amendment Act 1889 (N.Z.), Church Property Trust (Canterbury) Act 1879 Amendment Act 1906 (N.Z.), Church Property Trust (Canterbury) Act 1879 Amendment Act 1915 (N.Z.), Church Property Trust (Canterbury) Amendment Act 1927 (N.Z.), Church Property Trust (Canterbury) Amendment Act 1934 (N.Z.), Church Property Trust (Canterbury) Amendment Act 1951 (N.Z.), Church Property Trust (Canterbury) Amendment Act 1962 (N.Z.), Church Property Trust (Canterbury) Amendment Act 1964 (N.Z.), Church Property Trust (Canterbury) Amendment Act 1990 (N.Z.), Church Property Trustees (Canterbury)

VI Conclusions

The concept of the deliberate and complete separation of Church and State, so influential in many parts of the world,²⁷⁵ was never dominant in New Zealand, since the two developed together during the colonial period. Belief in this full separation is alien to both the secular laws and Church practice. Civil law cannot be separated from Biblical law, for the Biblical doctrine of law includes all law, civil, ecclesiastical, societal, familial, and all other forms of law. The law of Western civilisation has historically been Christian law, and the links remain important, for both Church and State. The ecclesiastical law of the Church of the Province of Aotearoa, New Zealand and Polynesia is partly created by the State.

The Church is neither established nor dis-established, but rather the Anglican Church in New Zealand may be classified broadly as quasi-established in the sense that whilst having the status of contractual societies, there are close legal links between the Church and State. The authority of internal Church law rests at least in part upon the existence of secular legislation, and secular legislation expressly and directly regulates some of the temporal affairs of the Church.

The laws of the Church are made by the Church itself, and its members are bound to one another by consensual compact. But several parliamentary statutes 'declare and define the Powers of the General Synod of the Church of the Province of New Zealand',²⁷⁶ and they

Indemnity Act 1890 (N.Z.), Church Reserves (Canterbury) Act 1904 (N.Z.).

²⁷⁵ In the modern world governments have generally sought either to be entirely separate from churches or to manipulate them to their own purposes; James Coriden, *An Introduction to Canon Law* (1991) 24.

²⁷⁶ The Anglican Church in Aotearoa, New Zealand and Polynesia in the canons of the Church since 1992: "This Church, which in the Fundamental

govern the alteration of the formularies of the Church.²⁷⁷ To be spiritually autonomous, the Church must show that, as the organic body of Christ, it has the capacity to determine truth from error, that it is possessed of a Doctrine of the Church.²⁷⁸ The freedom of the Church to conform to the universality of the whole church is at once limited by the dependence, in form if not substance, on secular statutory provisions for altering fundamental provisions of the Constitution, and by an assertion that General Synod can “develop doctrine”.²⁷⁹

The result is that, although the Church is free to regulate its own doctrinal and liturgical laws, and is a purely a voluntary association, it is not unknown to the law.²⁸⁰ While this means that certain of the formularies of the Church may not be altered without parliamentary approval, this is not necessarily wrong, per se, for it imposes upon the Church an external check. This prevents precipitate changes, and encourages mature deliberation and consideration.

Provisions of the Constitution/te Pouhere, is designated as a “Branch of the United Church of England and Ireland”, shall be referred to and designated in English as *The Anglican Church in Aotearoa, New Zealand and Polynesia*, and shall be referred to and designated in te reo Maori, as *Te Hahi Mihinare ki Aotearoa ki Niu Tirenī, ki nga Moutere o Te Moana Nui a Kiwa*” (Title G canon I.1.5).

²⁷⁷ Church of England Enabling Act 1928 (N.Z.).

²⁷⁸ Edward Norman, “Authority in the Anglican Communion” (1998).

²⁷⁹ Const. Preamble.

²⁸⁰ The suggestion that they exist solely as voluntary associations, and that although they may be recognised in statute, they are otherwise treated as voluntary associations, is not sufficient to explain the nature of the relationship of church and State; *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, and see *Lord Bishop of Natal v. Green* (1868) 18 L.T. 112; [1868] N.L.R. 138 cf. Bruce McPherson, “The Church as consensual compact, trust and corporation” (2000) 74 Australian Law Journal 159-174.

CHAPTER 3 – THE NATURE OF LEGISLATIVE POWER

I Distribution and Control

We saw in the last Chapter how the authority of the Church derives in part from secular legislation, though the Church itself assigns divine authority to at least the fundamental provisions of its law. This Chapter considers the secular influences upon the legislative branch of the Church. In particular, it assesses the effect that the political and social history of New Zealand has had upon the composition and procedures of the general synod.

The origins of legislative power within the Church are both secular and religious, yet both may be seen as reflections of the will of God. Legislative competence, or the legal power to alter and amend laws, may be conferred by the secular power, recognised by the secular power, or independent of the secular power. This depends upon the particular church's relationship with the State. If certain laws affect property, or where the church wishes to avail itself of powers additional to those enjoyed by other voluntary associations, recourse may be made to the State.²⁸¹ Powers may be conferred by the legislative organs of the State²⁸² (as by Acts of Parliament²⁸³), or (in much more circumscribed situations

²⁸¹ *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705.

²⁸² Church of England Empowering Act 1928 (N.Z.).

²⁸³ Victoria Church Act 1854 (18 Vict. No. 45) (Vict.) (for a voluntary compact Church); see also Sir Robert Phillimore, *The Ecclesiastical Law of the Church of England* (2nd ed., 1895) vol. II, p. 1786 (for the English established Church).

– now obsolete) by royal licence.²⁸⁴ As generally with any legal system, it is also possible to dispense with legislation, in special cases and within certain bounds.²⁸⁵ The regular legislative authority in the Anglican Church in New Zealand is, however, vested in the General Synod.²⁸⁶

Although the Church is episcopally led, in that the bishops retain the collegial and individual leadership role, the Church is synodically governed. This is to facilitate the full participation of the laity in the government of the Church,²⁸⁷ and was not a matter of concession to “fashionable theories of representation”,²⁸⁸ though this may have

²⁸⁴ If “a Licence be granted by the Crown to this Branch of the Church of England to frame new and modify existing rules ... with the view of meeting the peculiar circumstances of this Colony and native people, it shall be lawful for this Branch of the said Church to avail itself of that liberty”; Const. A.3.

²⁸⁵

It would appear that a Bishop may dispense in the following cases:
1. If the breach of positive law is a very small thing; 2. In cases of frequent occurrence; 3. In extraordinary and pressing cases for the church is mother not mistress; 4. Where it is doubtful whether any dispensation is needed at all; 5. By custom; 6. In cases where the canon law so provides.

– Report of the Canon Law Commission, *Canon Law in Australia* (c.1977) 57. See also Noel Cox, “Dispensation, Privileges, and the Conferment of Graduate Status: With Special Reference to Lambeth Degrees” (2002-2003) 18(1) *Journal of Law and Religion* 101-126; Robert Heuston, *Essays in Constitutional Law* (2nd ed., 1964).

²⁸⁶ Const. A4, 5.

²⁸⁷ L.C. 1867, Res. 4, 5, 8, 10; L.C. 1897, Res. 24; L.C. 1920, Res. 14, 43; L.C. 1930, Res. 53. Synods were utilised in the Anglican Communion from 1785; Edward Norman, “Authority in the Anglican Communion” (1998).

²⁸⁸ Stephen Sykes, “Introduction; Why Authority?” in Stephen Sykes (ed.), *Authority in the Anglican Communion* (1987) 20; John Howe, *Highways and Hedges* (1985) 50f.

influenced the choice of synodical government. However, representation and participation were to remain important aspects of Church government. In 1857 William Gladstone (the former Chancellor of the Exchequer and later Prime Minister of the United Kingdom)²⁸⁹ advised Bishop Selwyn (the first bishop of New Zealand) to utilise a synodical form of government,²⁹⁰ and Selwyn himself thought that strong lay participation was essential.²⁹¹ Indeed, the earliest movement towards a colonial church synod occurred in New Zealand. Selwyn had promoted a conciliar process for governance in 1844, and called a synod of clergy and laity (but not Maori laity) for 1857.²⁹² This was because of the absence of the regular (or established) constitutional authority of convocations and Parliament, as found in England. This necessitated a consideration of ancient forms of church government (as then understood), as had been required in the American colonies after 1777.²⁹³ The model of synodical government subsequently adopted in New Zealand became a model elsewhere.²⁹⁴ In common with the practice of most Anglican churches today, the national synod was to have three

²⁸⁹ In 1838 he published a book *The State in its Relations with the Church*, and was a non-conformist.

²⁹⁰ Stephen Sykes, "Introduction; Why Authority?" in Stephen Sykes (ed.), *Authority in the Anglican Communion* (1987) 20.

²⁹¹ John H. Evans, *Churchman Militant* (1964) 138-141, 146-147, 163-164.

²⁹² William Sachs, *The Transformation of Anglicanism* (1993) 191-193; See also Fred Schneider, "The Anglican Quest for Authority: Convocations and the Imperial Factor, 1850-60" (1976) 9(2) *Journal of Religious History* 141.

²⁹³ *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 47 (1815).

²⁹⁴ For the theological basis of synods see Keith S. Chittleborough, "Towards a Theology and Practice of the Bishop-in-Synod" in Stephen Sykes (ed.), *Authority in the Anglican Communion* (1987) 144-162.

houses – bishops, clergy, and laity.²⁹⁵ It now departs from the norm however in having separate governmental structures for Pakeha, Maori, and Polynesian cultures. The Diocese of Polynesia covers many independent Pacific nations. Many Anglicans in that Tikanga are not “Polynesians”, but Indians, Melanesians, Europeans, amongst others.

The circumstances of the church in New Zealand have led to a unique bi-focal government, one which emphasises the cultural traditions of the Church as well as the unity of the Church derived from its doctrine and formularies. The underlying reasons are expressed in detail in the preamble to the Constitution of the Church (with its emphasis upon the separateness of missionary and settler hierarchies and histories, and on the political consequences of colonisation):

This Church has developed in New Zealand from its beginnings when Ruatara introduced Samuel Marsden to his people at Oihi in the Bay of Islands in 1814, first in expanding missionary activity as Te Hahi Mihinare in the medium of the Maori language and in the context of Tikanga Maori, initially under the guidance of the Church Missionary Society, and secondly after the arrival of George Augustus Selwyn in 1842 as a Bishop of the United Church of England and Ireland spreading amongst the settlers in the medium of the English language and in the context of their heritage and customs and being known as the Church of England, so leading to a development along two pathways which found expression within Tikanga Maori and Tikanga Pakeha;

AND WHEREAS (6) by the Treaty of Waitangi, signed in 1840, the basis for future government and settlement of New Zealand was

²⁹⁵ As proposed by Governor Grey to Bishop Selwyn in 1850; (1852) V Colonial Church Chronicle 161.

agreed, which Treaty implies partnership between Maori and settlers and bicultural development within one nation;²⁹⁶

The principles of partnership and bicultural development require the Church to organise its affairs within each of the Tikanga²⁹⁷ of each partner to the Treaty of Waitangi.²⁹⁸ Although missionary activities long existed among the Maori, the first bishop with a specific ministry to Maori was only appointed when the first Bishop of Aotearoa was consecrated in 1928 (though he served as a bishop only in one diocese, the Diocese of Waiapu). A measure of autonomy as “te Pihopatanga o Aotearoa” (the Bishopric of Aotearoa) was provided in 1978, and new forms of mission and ministry have since emerged. The Anglican Church in Aotearoa, New Zealand and Polynesia currently comprises the Maori dioceses (te Pihopatanga o Aotearoa), seven dioceses in New Zealand, and the Diocese of Polynesia.

Thus God’s people are perceived as belonging to three separate, yet linked, traditions. The executive and legislative authority is divided amongst them, so that no group alone may prevail over the others. This is a unique division of authority along might be seen as racial grounds, for

²⁹⁶ Const. Preamble. This “implied partnership and bicultural development” has been recognised only since the late twentieth century, particularly by the Church and the courts.

²⁹⁷ These might be described as racial, or more accurately ethno-cultural groupings (social organisations, with aspects of language, laws, principles, and procedures in common). Generally, see Bruce Briggs, *English-Maori: Maori-English Dictionary* (1990).

²⁹⁸ These are the Crown and Maori, though it is taken now to imply Pakeha society and the national Government, and those Maori people; see Hayward, Janine, “In search of a treaty partner: who, or what, is ‘the Crown?’” (1995) Victoria University of Wellington Ph.D. thesis.

the Maori and Pakeha hierarchies are parallel.²⁹⁹ The 1992 Constitution does not draw “racial” distinctions, per se. Rather it speaks of the “provision of ministry to those who wish to be ministered to within Tikanga Maori” or “within Tikanga Pakeha” or “within the Tikanga of the Diocese of Polynesia”. Thus ministry is a matter of cultural preference and territoriality, not a “racial” definition.³⁰⁰ This is a reflection of the political and social foundations of the secular State in New Zealand, as much as of any narrower theological considerations. The reasons for this arrangement will be considered later.

²⁹⁹ That of Polynesia comprises various islands of the South Pacific, centred on Fiji.

³⁰⁰ There are Pakeha who opt for Tikanga Maori ministry and vice versa.

II The Institution and its Composition

The composition of General Synod is in conformity with the principle of lay participation in church government,³⁰¹ which itself is grounded in the theological belief that every member of the laos, God's people, is an ecclesiastical person, having been admitted into the family of God and to the membership of the Church at baptism.³⁰² Membership is held for a fixed period of two years,³⁰³ and the assembly meets at least every two years. Each diocese, whether Maori, Pakeha or Polynesian. The seven dioceses of Tikanga Pakeha are, is entitled to be represented by three clergy and four laity, as well as one or more bishops.³⁰⁴ The other two Tikanga decide upon the numbers of their own representatives.³⁰⁵

As the Constitution Part C states:

3. In accordance with Clause 5 of the Fundamental Provisions of this Constitution, each Diocese in New Zealand shall be entitled to be represented in the General Synod/te Hinota Whanui in each of the Orders of Bishops, Clergy and Laity. The representatives of

³⁰¹ The power of governance was reserved exclusively to the ordained members of the church, but now the Roman Catholic Church too has expressly recognised lay participation in leadership; James Coriden, *An Introduction to Canon Law* (1991) 156.

³⁰² Const. C.4; cf. *The Code of Canon Law: in English Translation* prepared by the Canon Law Society of Great Britain and Ireland (1983) Canon 204.

³⁰³ "At some time in the month of February in each alternate year, dating from the year of our Lord 1981, the Primate/te Pihopa Mātāmua shall issue to the bishop of each diocese in New Zealand a writ for the election of the clerical and lay representatives for each diocese"; Canon B.I.1.1.8.

³⁰⁴ Canon B.I.2.1.

³⁰⁵ There are many fewer Maori than Pakeha synod members, and there are a very few representatives from the Diocese of Polynesia.

each Order shall be elected by their respective Orders in each Diocese in such manner as that Diocese may determine. Each Diocese shall be entitled to be represented by one or more bishops, three members of the Clergy and four members of the Laity. An additional number of representatives of one or more of the three Orders may be elected by some dioceses as may be determined by the General Synod/te Hinota Whanui from time to time.

4. In accordance with Clause 5 of the Fundamental Provisions of this Constitution, Te Pihopatanga o Aotearoa shall be entitled to be represented in the General Synod/te Hinota Whanui in each of the Orders of Bishops, Clergy and Laity. The representatives of each Order shall be elected by their respective Orders in Te Pihopatanga in such manner as Te Pihopatanga may determine.

Te Pihopa o Aotearoa shall in the calendar year preceding each ordinary session of the General Synod/te Hinota Whanui advise the Primate/te Pihopa Matamua of the number of members of each Order who shall represent Te Pihopatanga o Aotearoa at the next ensuing session of the General Synod/te Hinota Whanui.

5. In accordance with Clause 5 of the Fundamental Provisions of this Constitution, the Diocese of Polynesia shall be entitled to be represented in the General Synod/te Hinota Whanui in each of the Orders of Bishops, Clergy and Laity. The representatives of each Order shall be elected by their respective Orders in the Diocese of Polynesia in such manner as that Diocese may determine.

The Bishop in Polynesia shall in the calendar year preceding each ordinary session of the General Synod/te Hinota Whanui advise the Primate/te Pihopa Matamua of the number of members of each Order who shall represent that Diocese at the next ensuing session of the General Synod/te Hinota Whanui.

There are elected representatives from each group and tradition. Their role is to make laws for the Church, subject to the Constitution, and to the secular laws of the land. The authority of the legislature is derived

from the will of God, made manifest through the actions of man,³⁰⁶ both secular and religious – namely in the Constitution,³⁰⁷ subject to the limitations imposed by the Constitution itself and the applicable secular laws.

But, as shall be seen, the choice to represent cultural or racial groups within the Church reflect political rather than narrowly theological considerations. This reflects the degree to which the laws of the Church are dominated by secular considerations and influences, rather than narrowly theological.³⁰⁸

³⁰⁶ The ecclesiastical legislation of General Synod in England is also, of course, made from theological as well as practical motives; J. David C. Harte, “Doctrine, conservation and aesthetic judgments in the Court of Ecclesiastical Causes Reserved” (1987) 1(2) *Ecclesiastical Law Journal* 22, 25.

³⁰⁷ Which itself is alterable by General Synod, subject to certain limitations; Church of England Empowering Act 1928 (N.Z.).

³⁰⁸ A counterpart in the Roman Catholic Church may be seen in the place of so-called liberation theology, predominantly in Latin America; David Tombs, *Latin American Liberation Theology* (2002); Deane William Ferm, *Third World Liberation Theology* (1986).

III Legislative Power: Synodical Acts

The Constitution and canons of the Church base relationships within the Church on a principle of partnership and co-operation³⁰⁹ – not only of culturally defined groups but also of all sections or communities within the Church. The Constitution provides that General Synod shall make regulations which are necessary for the “order, good government and efficiency” of the Church:

C.9. The General Synod/te Hinota Whanui shall have full power to make all such regulations, not inconsistent with this Constitution, as it shall consider necessary for the order, good government and efficiency of this Church, and it may frame such regulations, not inconsistent with this Constitution, as shall be found necessary from time to time for the management of property, for the government of people holding office or receiving emoluments, for the administration of trusts and such other purposes generally as may seem expedient.

The “order, good government and efficiency” qualification resembles a similar provision in the New Zealand Constitution Act 1852,³¹⁰ which conferred upon the General Assembly of New Zealand³¹¹

³⁰⁹ The common life of the church is based on “a partnership and covenant relationship between the constituent parts of the Church as expressed in the Constitution ... and regulations of general application”; “Each partner and its constituent parts shall seek to ensure adequate provision and support is available to the other partners to assist in the effective proclamation and communication of the Gospel of Jesus Christ and the provision of ministry amongst the people whom each seeks to serve, recognising that in partnership there is common responsibility and mutual interdependence; Title B canon XX.1, and Title B canon XX.4.

³¹⁰ 15 & 16 Vict. c. 72 (U.K.).

the authority to make laws for the “peace order and good government”³¹² of the country. This provision survived until 1973,³¹³ and has now been replaced by “full power”.³¹⁴ The expression used by the Church can be seen as a limitation upon legislative competence, so a brief review of the contemporary secular analogy (from which it may indeed have been deliberately borrowed) is instructive. On 16 November 1840 a Legislative Council was appointed by royal charter, with powers to make laws for the peace, order, and good government of the country.³¹⁵ The Charter was promulgated pursuant to an Imperial statute authorising the establishment of separate colonies from the territory of the colony of

³¹¹ The Governor, the Legislative Council and the House of Representatives, now the Parliament of New Zealand (The Sovereign and the House of Representatives); Constitution Act 1986 (N.Z.), s. 14(1).

³¹² s. 53 The New Zealand Constitution Act 1852 (15 & 16 Vict. c. 72) (U.K.). The New Zealand Constitution Act 1852 (15 & 16 Vict. c. 72) (U.K.) provided a statutory basis for the legislative power. It was not clear whether “peace, order and good government of New Zealand” was a limited power, but *Semple v. O’Donovan* [1917] N.Z.L.R. 273; [1917] G.L.R. 137 held that s. 53 included the power to provide for the peace of New Zealand, and that power was not confined within the territorial limits of New Zealand. The uncertainty survived after 1947 (*R. v. Fineburg (No. 2)* [1968] N.Z.L.R. 443 (C.A.) and *R. v. Fineburg* [1968] N.Z.L.R. 119). See also *Trustees Executors and Agency Co. Ltd. v. Federal Commissioner of Taxation* (1933) 49 C.L.R. 220, 237; 39 A.L.R. 367.

³¹³ In 1973 Parliament provided that the General Assembly was to have full power to make laws having effect in, or in respect of, New Zealand or any part of it, and to make laws having effect outside New Zealand; New Zealand Constitution Amendment Act 1973 (N.Z.) (repealed), s. 2, which substituted a new s. 53(1) into the New Zealand Constitution Act 1852 (15 & 16 Vict. c. 72) (U.K.).

³¹⁴ Constitution Act 1986 (N.Z.), s. 15.

³¹⁵ “Charter for erecting the Colony of New Zealand, and for creating and establishing a Legislative Council and an Executive Council”; *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, pp. 153-155.

New South Wales.³¹⁶ The Charter erected New Zealand into a separate colony and conferred on the Governor authority to constitute a Legislative Council with power:

to make and ordain all such Laws and Ordinances as may be required for the *Peace, Order, and good Government* [writer's italics] of the colony and to constitute and appoint judges, and, in cases requisite, commissioners of oyer and terminer, justices of the peace, and other necessary officers and ministers in our said colony, for the due and impartial administration of justice, and for putting the laws into execution, and to administer or cause to be administered unto them such oath or oaths as are usually given for the due execution and performance of these offices and places, and for the clearing of truth in judicial matters.³¹⁷

This, and the later wording in the New Zealand Constitution Act 1852 (U.K.),³¹⁸ was taken to limit the authority of the General Assembly to internal matters, and possibly to limit its extraterritorial authority.³¹⁹

The Church did not have the same requirements for extraterritorial legislation. However, the expression “order, good government and efficiency” can be read to confer only a qualified legislative

³¹⁶ New South Wales and Van Diemen's Land Act 1840 (3 & 4 Vict. c. 62) (U.K.).

³¹⁷ “Charter for erecting the Colony of New Zealand, and for creating and establishing a Legislative Council and an Executive Council”; *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, pp. 153-155.

³¹⁸ 15 & 16 Vict. c. 72 (U.K.).

³¹⁹ *R. v. Fineburg (No. 2)* [1968] N.Z.L.R. 443 (C.A.) and *R. v. Fineburg* [1968] N.Z.L.R. 119. See also *Trustees Executors and Agency Co. Ltd. v. Federal Commissioner of Taxation* (1933) 49 C.L.R. 220 at 237; 39 A.L.R. 367; *Semple v. O'Donovan* [1917] N.Z.L.R. 273; [1917] G.L.R. 137, where it was held that s. 53 included the power to provide for the peace of New Zealand, and that power was not confined within the territorial limits of New Zealand.

competence.³²⁰ If narrowly interpreted, it might, for instance, be doubted that it confers an authority to alter doctrine – which indeed may be consistent with the existence of specific provisions with respect to alterations of the formularies.³²¹

In respect of those laws which the Church may undoubtedly change (as distinct from those which are classified as fundamental provisions), the right to propose enact legislation which changes the Constitution is confined to the legislature, the General Synod, provided it is first proposed in one General Synod and assented to by Te Runanga o Te Pihopatanga o Aotearoa, the Synod of Polynesia and a majority of the Diocesan Synods in New Zealand, and finally agreed to in a subsequent meeting of the General Synod.³²²

The process for the alteration of any non-fundamental provision of the Constitution is dealt with in the same as in respect to Bills.³²³ The process begins with the proposition of new regulations in the form of a Bill to enact a Statute. The second part of the legislative process (after proposition) is ratification or adoption in three readings by the synod.³²⁴ The third stage is referral to all the dioceses. The next stage is a Bill to enact a Statute to confirmation the Bill passed by the previous synod on notice. The last stage is promulgation by the assent of the Primate. A

³²⁰ See, in particular, R.O. McGechan, “Status and Legislative Inability” in J.C. Beaglehole (ed.), *New Zealand and the Statute of Westminster* (1944) 65, 100-102. See also the Interpretation Act 1999 (N.Z.), and the Local Government Act 2002 (N.Z.), which contains a similar – though more limited – power of general competence (s 12).

³²¹ Church of England Empowering Act 1928 (N.Z.).

³²² Const. G.4.

³²³ Title C canon I.1.

³²⁴ Title C canon I.1; Title C canon I.2.1. Title C, Canon I deals with constitutional amendments. Title C, Canon II deals with Standing Orders. Ordinary canon law reform is carried out under Title C, Canon III.

simple majority is required from a majority of the dioceses,³²⁵ from all three orders, and the three races or cultural traditions, the Te Runanga o Te Pihopatanga o Aotearoa, and the Synod of Polynesia.³²⁶

The ordinary legislative processes of the synod are formally conducted in the manner described by the Constitution, which provides that:

C.6. Every act of the General Synod/te Hinota Whanui shall be assented to by a majority of the members of each of the three orders; it having been previously assented to by a majority of the representatives of Te Pihopatanga o Aotearoa, by a majority of the representatives of the Diocese of Polynesia and by a majority of the representatives of the Dioceses in New Zealand who in each case were present in person and voting at a duly constituted meeting, if so requested by any member of the General Synod/te Hinota Whanui. If all the representatives of Te Pihopatanga o Aotearoa, or all the representatives of the Diocese of Polynesia, or all the representatives of the Dioceses in New Zealand shall abstain from voting the act in question shall be deemed to have been assented to by a majority of those representatives.

As a matter of practice, there are virtually no votes in the synod according to these rules. Matters are passed on voices normally, and if there is no consensus on an important issue then it is not put to the vote at all.

This legislative process with respect to constitutional amendment is a copy, apparently deliberate or subconscious, of the secular parliamentary process, except that for constitutional amendments there must be a greater degree of unanimity (in that there must also be majority support from the dioceses of New Zealand, the Diocese of Polynesia, and

³²⁵ Const. G.4.

³²⁶ Const. G.4.

the Maori dioceses).³²⁷ Specific provisions are made for altering the Church's Constitution, including formularies (the key sources of authority on doctrine and sacraments).³²⁸ The Constitution provides that, in respect of alterations to the constitution:

B.6 (a) The General Synod/te Hinota Whanui shall at any session have adopted a specific proposal for such alteration, addition, diminution, framing, adoption, ordering, or permitting with a view to making the same known to the several Diocesan Synods and to Te Runanga o Te Pihopatanga o Aotearoa; and thereafter

(b) Te Runanga o Te Pihopatanga o Aotearoa, the Diocese of Polynesia and a majority of the Diocesan Synods in New Zealand shall have assented to the proposal so made known to them; and thereafter

(c) The General Synod/te Hinota Whanui at a session after there shall have been a fresh General Election of its members subsequent to such proposal having been adopted, shall have confirmed the same by a majority of two-thirds of the members in each order. Provided that not less than one year nor more than five years shall have elapsed between the first adoption of the proposal in the General Synod/te Hinota Whanui and its final confirmation therein; and

(d) Such of the provisions of Title C, Canon I, of the Canons of the General Synod now in force (or any provisions hereafter made by the General Synod/te Hinota Whanui in amendment thereof or in substitution thereof) as are applicable to the circumstances, mutatis mutandis, shall have been observed; ...³²⁹

This adds the requirement for a General Election of General Synod after the majority of (Pakeha) dioceses, and Te Runanga O Te

³²⁷ For details of the secular legislative process see, David McGee, *Parliamentary Practice in New Zealand* (2nd ed., 1994).

³²⁸ Const. B.6.

³²⁹ Const. B.6.

Pihopatanga, and the Diocese of Polynesia, had approved the proposal. Two-thirds of members in each order must also approve the measure. The whole process is to take between one and five years – which is clearly intended to ensure time for mature reflection.

It was also provided that such new legislation would not come into force for one year, or longer if there were an appeal to the Tribunal on the grounds that the proposal involved a departure from the “Doctrine and Sacraments of Christ as defined in the Fundamental Provisions”³³⁰ which had been initiated within the year:

(e) Either –

(i) A period of one year (from the day on which the General Synod/te Hinota Whanui shall under paragraph (c) of this section have confirmed the proposal) shall have elapsed without an appeal from the said proposal having been made in accordance with section five of the said Act to the Tribunal referred to in that section upon the ground that the proposal involves a departure from the Doctrine and Sacraments of Christ as defined in the Fundamental Provisions of this Constitution; or

(ii) If such an appeal shall have been made within such period, the same shall have been dismissed.

The process for constitutional change is restrictive – more so than for changes to the secular constitution of New Zealand, which generally does not require specific procedures of this type.³³¹ It is possible to make

³³⁰ See Chapter 5, and the ordination of women, which led to just such an action; C.W. Haskell, *Scripture and the ordination of women* (1979).

³³¹ The exception being certain provisions protected by s. 268 of the Electoral Act 1993 (N.Z.): s. 17(1) of the Constitution Act 1986 (N.Z.), relating to the term of Parliament; and the following sections of the principal Act: s. 28, relating to the Representation Commission; s. 35,

significant changes to the secular constitution without special procedures, and to do so quickly.³³²

The diocesan synods have similar legislative processes to those for General Synod. In Te Pihopatanga o Aotearoa there is a representative Governing Body or Te Runanga o Te Pihopatanga o Aotearoa, consisting of representatives of the three Orders within Te Pihopatanga o Aotearoa.³³³ Any decision of the Governing Body must be assented to by a majority in each Order including Te Pihopa.³³⁴ Similar provisions exist for Polynesia,³³⁵ and for the dioceses of New Zealand.³³⁶

The legislative competence of the diocesan synods is strictly limited, as the Constitution makes clear:

The General Synod/te Hinota Whanui may delegate to Te Runanga o Te Pihopatanga o Aotearoa, or to any other appropriate body within Te Pihopatanga o Aotearoa either specifically or generally as the case may require or under such general regulations as shall from time to time be laid down, any of the powers conferred upon General Synod/te Hinota Whanui by this Constitution.³³⁷

and the definition of the term “General electoral population” in s. 3(1), relating to the division of New Zealand into electoral districts after each census; s. 36, relating to the allowance for the adjustment of the quota; s. 74, and the definition of the term “adult” in s. 3(1), and s. 60(f), so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote; s. 168, relating to the method of voting.

³³² For a comparative insignificant example, in August 2003 a Bill was passed in one day to restore to the House of Representatives a member of Parliament who had inadvertently relinquished his seat by obtaining foreign citizenship; Electoral (Vacancies) Amendment Act 2003 (N.Z.).

³³³ Const. D.4, 5.

³³⁴ Const. D.4, 5.

³³⁵ Const. F.5.

³³⁶ Const. E.5.

³³⁷ Const. D.6.

Similar provisions are made for Pakeha dioceses, and Polynesia.³³⁸ However, there is also a limited general jurisdiction, here as described for the Pakeha dioceses, as follows:

Every Diocesan Synod may within the limits of such Diocese, exercise all such powers and make all such Regulations, not inconsistent with this Constitution or with any Canon or Regulation of the General Synod/te Hinota Whanui, as may be necessary for the order and good government of the Church in such Diocese.³³⁹

Whether “order and good government” is meant to be more limited than “order, good government and efficiency” is unclear. But the jurisdiction of diocesan synods is clearly limited to matters delegated to the diocesan synods by General Synod, and those relating to the administration of a diocese and not inconsistent with any higher Church law. Perhaps to provide for resolving potential conflict without recourse to the courts (secular or ecclesiastical), the Constitution specifically provides for General Synod to alter offending diocesan laws:

The General Synod/te Hinota Whanui shall have power to make any Regulation controlling altering repealing or superseding any Regulation which may have been made by Te Runanga o Te Pihopatanga o Aotearoa or by any Hui Amorangi.³⁴⁰

The legislative process at both general synod and diocesan synod level is consistent with the objects of the constitution, both with respect

³³⁸ Const. E.6, F.6.

³³⁹ Const. E.7. Similar provisions are also given for Maori and Polynesian dioceses.

³⁴⁰ Const. D.8.

to the involvement of laity, clergy, and bishops, and in the inclusion of the three cultural traditions or Tikanga.³⁴¹ But it is also, to some extent, derived from secular models (though the Church does not rely unduly on secular notions of democracy or consent), which continue to influence its structure and deliberative processes.³⁴²

Procedural influences are seen in the way in which synods enact legislation. Structural influences include the single most significant secular influence on the Church – the Treaty of Waitangi. Indeed, many people, especially Maori, would not see the Treaty of Waitangi as a secular instrument; it is commonly referred to as “he kawenata tapu”, a “sacred covenant” and attributed with the characteristics of biblical covenant theology. It is not, however, a part of the doctrine of the Church, nor can it be described as being one of the formularies.

³⁴¹ Const. A.5, B.6. See Cathie Bell, “Anglicans to split into three racial groups”, *Dominion* (Wellington), 19 November 1990, p. 1; Cathie Bell, “Cultural choices within the Church”, *Dominion* (Wellington), 19 November 1990, p. 12.

³⁴² Through representation, deliberation, and a considerable measure of legal formalism.

IV The effect of the Treaty of Waitangi

The legislative authority of the Church in New Zealand is vested in a General Synod which reflects the historical development of New Zealand society and government. Central to this is the Treaty of Waitangi, which has been seen as the cornerstone of political and social (and increasingly economic) life in the country. Within the Church adherence to the principles of the Treaty has had more far-reaching constitutional implications than it has in the constitution of New Zealand, which still reflects a majoritarian and hegemonic nature.³⁴³ The reasons for the changes within the Church are found in the origins of European settlement of New Zealand, and the accompanying political arrangements.³⁴⁴ This section will consider the place of indigenous peoples and the Crown. This will evaluate the nature of the relationship established with the Crown during the course of colonial expansion, and its relevance for the native people today, and the way in which this historical background has influenced the evolution of the Church's relevance for the native people today, and for the Church since then.

The Treaty of Waitangi, signed in 1840 by emissaries of the Queen of Great Britain³⁴⁵ and many of the indigenous Maori chiefs of New

³⁴³ Sovereignty vested in the Crown-in-Parliament. For evidence of strong opposition to certain aspects of the Treaty see Paul Perry and Alan Webster, *New Zealand Politics at the Turn of the Millennium* (1999).

³⁴⁴ The settlement of New Zealand also took place at a time of a paradigm shift in international law; Ian Brownlie, *Treaties and Indigenous Peoples* ed. F.M. Brookfield (1992).

³⁴⁵ Led by Captain William Hobson, Royal Navy, Lieutenant-Governor and Consul under the authority of the Governor of New South Wales, and acting upon the instructions of the Colonial Office; Proclamation by His Excellency Sir George Gipps, Knight, Captain-General and Governor-in-

Zealand, has been regarded as this country's founding document.³⁴⁶ Since its signing it has been seen variously as an unqualified cession of sovereignty to the Imperial government, or as permitting the settler population to administer their own affairs in consultation with Maori.³⁴⁷ Its exact legal significance was uncertain.³⁴⁸ But politically it seems that the Crown gave implicit recognition to Maori as the indigenous inhabitants of the country,³⁴⁹ both in the Treaty and in its prior and subsequent conduct towards Maori. The acquisition of sovereignty implicit in the Treaty was not acquired in a legal or political vacuum, yet the strict legal effect of the treaty was not as important as its political function. Both the nineteenth century British Government and apparently

Chief, reprinted in *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, pp. 123-125; Marquess of Normanby to Captain William Hobson, 14 August 1839; *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1844, 16/37. The text of the Treaty refers, inaccurately, to the “Queen of England”.

³⁴⁶ See Richard Epstein, “Property rights claims of indigenous populations: The view from the common law” (1999) 31 *Toledo Law Review* 3.

³⁴⁷ David Williams, “The Constitutional Status of the Treaty of Waitangi: an historical perspective” (1990) 14(1) *New Zealand Universities Law Review* 9; Moana Jackson, “Maori Law” in Ramari Young (ed.), *Mana Tiriti* (1991) 19.

³⁴⁸ Anthony Molloy, “The Non-Treaty of Waitangi” [1971] *New Zealand Law Journal* 193; *Wi Parata v. Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S.) S.C. 72. Cf. *R. v. Symonds* (1847) N.Z.P.C.C. 387 (S.C.).

³⁴⁹ At least, such has been the widespread view, now given the backing of both politicians and courts; see for example, *New Zealand Maori Council v. Attorney-General* [1987] 1 N.Z.L.R. 641 (C.A.); Interview with Sir Douglas Graham, 24 November 1999. Cf. however, *New Zealand Maori Council v. Attorney-General* [1992] 2 N.Z.L.R. 576 (C.A.), which could be seen as a partial reversal of the first *Maori Council* case, though only in respect to some dicta of Cooke P., not in respect of the decision, which was followed by the Privy Council

also the majority of Maori chiefs knew that it was the culmination of a process which had begun some decades earlier.³⁵⁰

In the course of the latter part of the nineteenth century, and well into the twentieth century, the secular authorities in New Zealand often placed little weight upon the Treaty of Waitangi as a document which had continuing relevance. Subsequently, and particularly since the 1970s, governments have increasingly sought to apply the concept of partnership which the Treaty has been said to require.³⁵¹ In New Zealand (and in Canada, where parallel developments occurred) this relationship has not always been smooth, but the courts have recognised its importance. New Zealand Governments have followed the direction indicated by the courts,³⁵² as has happened in Canada³⁵³ and the United States of America.³⁵⁴

In both New Zealand and Canada the Crown made treaties regulating its relations with the aboriginal inhabitants of the new colonies. These treaties, and the circumstances of settlement, created an ongoing duty on the part of the Crown towards the native peoples of the

³⁵⁰ Noel Cox, "The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity" (2001) University of Auckland Ph.D. thesis 78.

³⁵¹ See *New Zealand Maori Council v. Attorney-General* [1987] 1 N.Z.L.R. 641 per Cooke P. (C.A.).

³⁵² Interview with Sir Douglas Graham, 24 November 1999.

³⁵³ John Borrows, "A Genealogy of Law" (1991) University of Toronto LL.M. thesis; Richard Bartlett, "The fiduciary obligation of the Crown to the Indians" (1989) 53 *Saskatchewan Law Review* 301; Bruce Clark, *Native liberty, Crown Supremacy* (1990).

³⁵⁴ Janis Searles, "Another Supreme Court move away from recognition of tribal sovereignty" (1995) 25(1) *Environmental Law* 209.

country.³⁵⁵ The Church in New Zealand has, of its own volition, assumed a parallel obligation.

The Crown has a special role as trustee for the indigenous peoples of Canada, New Zealand, and (to a lesser degree) Australia. In each country the Crown assumed, and still discharges, certain responsibilities for what, in New Zealand, are called the tangata whenua, the “people of the land”.³⁵⁶ As such the Crown occupies a symbolic place distinct from, yet linked with, the government of the day.³⁵⁷ Though the Maori and European populations have become increasingly intermingled, the role of the Crown has remained important as guarantor of Maori property.³⁵⁸ This has in turn influenced the Church, and altered the structure of decision-making within the Church, even if it has not altered the basis of authority, which remains the divine law. Maori and Pakeha now share equal power within General Synod, and there are parallel territorial hierarchies.³⁵⁹

³⁵⁵ *New Zealand Maori Council v. Attorney-General* [1987] 1 N.Z.L.R. 641 (C.A.); *Calder v. Attorney-General for British Columbia* [1973] S.C.R. 313 (S.C.C.). See also *Northern Land Council v. Commonwealth (No. 2)* (1987) 61 A.L.J.R. 616 (Australia).

³⁵⁶ A phrase that has strong parallels with that of autochthony. Autochthony is the status of being based solely on local sources and not dependent upon the continuing legal or other authority of an outside source; Peter W. Hogg, *Constitutional Law of Canada* (3rd ed., 1992) 44-49.

³⁵⁷ It has been said that the Crown is increasingly seen by Maori in this light; Janine Hayward, “Commentary” in Alan Simpson (ed.), *Constitutional Implications of MMP* (1998) 233-234.

³⁵⁸ Shown in the significant number of instances where the Crown has been held by the Waitangi Tribunal to have not done so, and therefore been liable to compensate the Maori tribe concerned; see, for one instance, Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaitunga River Claim* (1984) Wai. 4.

³⁵⁹ For example, Const. C.4.

The Treaty of Waitangi

Orthodox theory holds that the Treaty of Waitangi has socio-political, not legal force, as it was not a treaty recognised by international law,³⁶⁰ Nor was it accorded constitutional status in domestic law. It therefore has effect only so far as legal recognition has been specifically accorded it.³⁶¹ However, at some time either the courts or Parliament may have to give the Treaty legal recognition as part of the constitution of New Zealand.³⁶² But already the Treaty of Waitangi, as a principle of the constitution, is now all but entrenched, if only because it is regarded by Maori generally as a sort of “holy writ”.³⁶³ Government agencies therefore apply the Treaty, wherever possible, as if it were legally binding upon them.³⁶⁴ In this, the growth in what has been called the “myth” of Crown-Maori partnership has been particularly important.³⁶⁵

³⁶⁰ Anthony Molloy, “The Non-Treaty of Waitangi” [1971] *New Zealand Law Journal* 193. For a contrary view, based on the changing precepts of modern international law, see Klaus Bosselmann, “Two cultures will become one only on equal terms” *New Zealand Herald* (Auckland), 1 March 1999. However, if the Treaty was not a treaty in 1840, it is difficult to see how it could be one now. It would be preferable to see its importance in domestic constitutional terms. See William Renwick (ed.), *Sovereignty and indigenous rights* (1991).

³⁶¹ Generally, see Wayne Attrill, “Aspects of the Treaty of Waitangi in the Law and Constitution of New Zealand” (1989) Harvard University LL.M. thesis.

³⁶² John Fogarty, [1993] *New Zealand Law Journal* 212, reviewing Philip Joseph, *Constitutional and Administrative Law in New Zealand*.

³⁶³ Interview with Sir Douglas Graham, 24 November 1999.

³⁶⁴ Interview with Sir Douglas Graham, 24 November 1999.

³⁶⁵ Guy Chapman, “The Treaty of Waitangi – Fertile Ground for Judicial (and Academic) Myth-making” [1991] *New Zealand Law Journal* 228

This section will look at the events which led to the assumption of British authority in New Zealand and the process by which this was achieved, the legal basis for this assumption, and the legitimacy derived from the Treaty. This legitimacy has been central to the development of legal structures within the Anglican Church, particularly in the last several decades,³⁶⁶ in particular the development of separate and parallel Maori and Pakeha diocesan structures. This has, in its turn, led to calls for the State to copy the Church model of constitutional government based on the concept of division of responsibility.³⁶⁷

Assumption of sovereignty

Scholars continue to differ as to the date of assumption of British sovereignty over New Zealand.³⁶⁸ The actual means of obtaining

and the rejoinders – Paul McHugh, “Constitutional Myths and the Treaty of Waitangi” [1991] *New Zealand Law Journal* 316 and David Williams, “Chapman is Wrong” [1991] *New Zealand Law Journal* 373.

³⁶⁶ Douglas Pratt, “From missionary paternalism to bicultural partnership: aspects of Anglican and Methodist experience in Aotearoa-New Zealand” (1993) 82(327) *International Review of Mission* 305.

³⁶⁷ A paper, written by Professor Whatarangi Winiata and presented to the Government by the Anglican Church-led ‘Hikoi of Hope’ march on Wellington in late 1998, called for separate social, economic and political structures for Maori, on the model adopted by the Church; Interview with Sir Paul Reeves, former Archbishop of New Zealand and later Governor-General, 11 November 1998.

³⁶⁸ David Williams, “The Use of Law in the Process of Colonialisation” (1985) University of Dar es Salaam Ph.D. thesis 67ff. There have been many works covering the events both prior to and immediately after the signing of the Treaty of Waitangi. For an overview of the subsequent constitutional implications see Sonia L. Cheyne, “Search for a constitution” (1975) University of Otago Ph.D. thesis; David Williams, “The Annexation of New Zealand to New South Wales in 1840” [1985] *Australian Journal of Law and Society* 41, David Williams, “The

sovereignty is also disputed. Swainson, the Attorney-General of New Zealand in the immediate aftermath of the signing of the Treaty, thought that sovereignty was partly by cession, and that conquest had not occurred, nor usurpation.³⁶⁹ The Colonial Office, in rejecting Swainson's view, held that the New South Wales Charter of 16 November 1840 was the legal basis of sovereignty.³⁷⁰ At least the legal foundation of New Zealand as a separate colony can be ascertained with some certainty.³⁷¹

Captain James Cook, Royal Navy, had taken possession of the North Island on 15 November 1769, and the South Island on 16 January 1770.³⁷² New Zealand had been held to have been constituted a part of the Colony of New South Wales by an Order in Council in 1786 and the

Foundation of Colonial Rule in New Zealand" (1988) 13(1) *New Zealand Universities Law Review* 54.

³⁶⁹ Whether the sovereignty of the United Kingdom Parliament was legally and/or politically grounded in the Treaty of Waitangi has been answered in the affirmative by Paul McHugh, "Constitutional Theory and Maori Claims" in Sir Hugh Kawharu (ed.), *Waitangi* (1989) 25, 42, 47. See also Dame Sian Elias, "The Treaty of Waitangi and Separation of Powers in New Zealand" in Bruce D. Gray and Robert B. McClintock (eds.), *Courts and Policy* (1995) 206, 222-224.

³⁷⁰ "Charter for erecting the Colony of New Zealand, and for creating and establishing a Legislative Council and an Executive Council"; *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, pp. 153-155.

³⁷¹ In modern popular mythology (and to some degree officially), the Treaty of Waitangi is taken to be the foundation of New Zealand. The legal significance of 6 February 1840 is, however, rather less according to the general and settled imperial law of the mid-nineteenth century: *Wi Parata v. Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S.) S.C. 72. Cf. *R. v. Symonds* (1847) N.Z.P.C.C. 387 (S.C.).

³⁷² British courts have held that an unequivocal assertion of sovereignty by the Crown must be accepted by a domestic court, even where the claim would not be recognised under international law: *Sobhuza II v. Miller* [1926] A.C. 518, 522-525 (P.C.).

first Governor's Commission for that colony,³⁷³ although this is a rather strained interpretation of the actual authority enjoyed by the colonial government in Sydney.³⁷⁴

The Government and General Order Proclamation issued in 1813 by Lachlan Macquarie, Governor of New South Wales, declared that the aboriginal natives of New Zealand were “under the protection of His Majesty and entitled to all good offices of his subjects”.³⁷⁵ However, the formal jurisdiction of New South Wales over the islands of New Zealand was expressly denied by an imperial statute, the Murder Abroad Act 1817.³⁷⁶ Subsequent enactments reiterated that New Zealand was “not within His Majesty's Dominions”,³⁷⁷ but from 1823 did allow the courts of New South Wales to try offences committed in New Zealand by

³⁷³ Issued 12 October 1786 to Captain Arthur Phillip, Royal Navy, and appointing him “Captain-General and Governor-in-Chief in and over our territory called New South Wales ... “. The commission, which was amplified on 2 April 1787, was publicly read at Sydney Cove on 26 January 1788.

³⁷⁴ John L. Robson (ed.), *New Zealand: The Development of its Laws and its Constitution* (2nd ed., 1967) 2; Alexander H. McLintock, *Crown Colony Government in New Zealand* (1958) 9. New Zealand was generally regarded as being included in the territory of the Colony of New South Wales in the early years of the development of that colony; Proclamation by His Excellency Sir George Gipps, Knight, Captain-General and Governor-in-Chief, reprinted in *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, pp. 123; Noel Cox, “The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity” (2001) University of Auckland Ph.D. thesis 90.

³⁷⁵ Robert McNab, *Historical Records of New Zealand* (1908) vol. 1, pp. 316-318.

³⁷⁶ 57 Geo. III c. 53 (U.K.).

³⁷⁷ Australian Courts Act 1828 (9 Geo. IV c. 83) (U.K.).

British subjects.³⁷⁸ Extra-territorial judicial processes were at this time not uncommon, particularly where British trade was conducted in countries with “non-Christian or barbaric laws”, or no laws at all.³⁷⁹ It is likely that nothing more than extra-territorial jurisdiction was in fact intended, and no claim to sovereignty or suzerainty was being asserted or implied.³⁸⁰ That there was reason for this extraterritorial jurisdiction was clear. The number of settlers and itinerant visitors to the shores of New Zealand continued to increase. The absence of a regular government to which these individuals and groups were prepared to defer resulted, at times, in serious disturbances.

Missionaries were also active by this time in a country which remained for some years in a parlous state.³⁸¹ This was later to lead to tensions in the Church, often over the precise relationship between Church and State, and the Church’s relationship with the Maori people.³⁸²

Circumstances were soon to require greater official British involvement in New Zealand. In 1831 thirteen chiefs from Kerikeri

³⁷⁸ An Act for the better administration of justice in New South Wales and Van Diemen’s Land 1823 (4 Geo. IV c. 83) (U.K.).

³⁷⁹ Such a jurisdiction survived in the Trucal States, now the United Arab Emirates, until 1971; “Exchange of Notes concerning the termination of special treaty relations between the United Kingdom and the Trucal States”, 1 December 1971, Cmnd. 4941, U.K. Treaty Series 34 (1972).

³⁸⁰ Noel Cox, “The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity” (2001) University of Auckland Ph.D. thesis 91.

³⁸¹ Christina Thompson, “A dangerous people whose only occupation is war: Maori and Pakeha in 19th century New Zealand” (1997) 32(1) *Journal of Pacific History* 109.

³⁸² John Stenhouse, “Religion, Politics, and the New Zealand wars 1860-1872” in Rex Ahdar and John Stenhouse (eds.), *God and Government* (2000) 21-40.

petitioned King William IV for protection against the French. As a result of this, and to curb the conduct of visiting ships' crews and round up runaway convicts from Australia, in 1833 Major James Busby was appointed British Resident in Waitangi, with the local rank of vice-consul.³⁸³ No magisterial powers were conferred upon him. Imperial legislation to increase his powers was contemplated but never passed.³⁸⁴ Busby's authority was limited, in effect, to the European population.

Maori chiefs enjoyed autonomy, as there was no central government. This rendered them vulnerable to outside interference of one sort or another. Busby encouraged the Declaration of Independence by 35 northern chiefs in 1835, in an attempt to thwart the move by Charles de Thierry, the self-styled "Sovereign Chief of New Zealand and King of Nuhuhia", to set up his own government.³⁸⁵ The ostensible purpose of the declaration was to create a Maori government over part of the country. The Declaration of Independence of the United Tribes of Aotearoa in 1835 may have been "politically unsustainable, practically unworkable, and culturally inconceivable".³⁸⁶ But for those tribes who signed, the Declaration meant that henceforth the British king (or his Ministers – a distinction which long caused difficulties³⁸⁷) was in the eyes of many

³⁸³ Alexander H. McLintock, *Crown Colony Government in New Zealand* (1958) 22-23.

³⁸⁴ Alexander H. McLintock, *Crown Colony Government in New Zealand* (1958) 25.

³⁸⁵ Alexander H. McLintock, *Crown Colony Government in New Zealand* (1958) 24; James D. Raeside, *Sovereign Chief* (1977).

³⁸⁶ Jane Kelsey, "Restructuring the Nation" in Peter Fitzpatrick (ed.), *Nationalism, Racism and the Rule of Law* (1995) 178-179. It was "laughed at" in many circles: *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, 1838/680, p. 11, evidence of J.L. Nicholson.

³⁸⁷ Janine Hayward, "In search of a treaty partner: who, or what, is 'the Crown?'" (1995) Victoria University of Wellington Ph.D. thesis.

Maori honour-bound to recognise and protect their independence.³⁸⁸ This independence – if it ever existed in a tangible form – was not destined to last.³⁸⁹

In 1838 a House of Lords committee favoured the extension of British sovereignty over New Zealand, though it did not expressly advocate it.³⁹⁰ The Colonial Office however decided in 1839 to annex New Zealand to New South Wales.³⁹¹ On 15 June letters patent were signed which enlarged the jurisdiction of the Governor of New South Wales by amending his commission to include the New Zealand islands.³⁹² On 14 January 1840 Sir George Gipps, Governor of New South Wales, swore Captain William Hobson, Royal Navy, as his lieutenant-governor and consul, and signed proclamations relating to title to land in New Zealand.³⁹³ These were published in Sydney on 19 January 1840, and in New Zealand 30 January 1840.³⁹⁴

The Treaty of Waitangi, inspired as much by internal Colonial Office politics as by a genuine regard for native rights, followed this

³⁸⁸ Jane Kelsey, “Restructuring the Nation” in Peter Fitzpatrick (ed.), *Nationalism, Racism and the Rule of Law* (1995) 179; Interview with Sir Douglas Graham, 24 November 1999.

³⁸⁹ Notwithstanding that, there have more recently been various groups promoting themselves as successors to the 1835 United Tribes.

³⁹⁰ *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, 1838/680, p. iii.

³⁹¹ Peter Adams, *Fatal Necessity* (1977) part I.

³⁹² Proclamation by His Excellency Sir George Gipps, Knight, Captain-General and Governor-in-Chief, reprinted in *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, pp. 123.

³⁹³ Proclamation by His Excellency Sir George Gipps, Knight, Captain-General and Governor-in-Chief, reprinted in *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, pp. 123-125.

³⁹⁴ *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, pp. 123-125.

step.³⁹⁵ It was in some respects an inevitable move, as imperial policy at this time favoured the extension of sovereignty only with the express consent of the local populations.

The Colonial Office view of sovereignty was based on the New South Wales Charter rather than the Treaty of Waitangi, though this was not always so. Lord Glenelg, in a memorandum of 15 December 1837, made clear the British Government's recognition of New Zealand's independence (even without acknowledging the United Tribes which had formed a proto-government under the Declaration of 1835):

They are not savages living by the Chase, but Tribes who have apportioned the country between them, having fixed Abode, with an acknowledged Property in the Soil, and with some rude approaches to a regular System of national Government It may therefore be assumed as a basis for all Reasoning and all Conduct on this Subject, that Great Britain has no legal or moral right to establish a Colony in New Zealand, without the free consent of the Natives, deliberately given, without Compulsion, and without Fraud.³⁹⁶

It was only with great reluctance that the Colonial Office changed its policy in the face of overwhelming necessity, to one of British annexation,³⁹⁷ or at the least, cession. The second draft of the

³⁹⁵ Interview with Sir Douglas Graham, 24 November 1999. Marquess of Normanby to Captain William Hobson, 14 August 1839 in *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1844, 16/37.

³⁹⁶ Lord Glenelg, memorandum 15 December 1837 in *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1844, Colonial Office papers 209/2: 409.

³⁹⁷ Paul McHugh, "Constitutional Theory and Maori Claims" in Sir Hugh Kawharu (ed.), *Waitangi* (1989) 125.

consular instructions to Captain Hobson, dated 8 March 1839, shows this change of approach:

Her Majesty's Government acknowledges in the Natives of New Zealand, an independence and national character as far as it is possible that such a character should be attributed to a collection of separate Tribes occupying so extensive a Territory, without any definite union between the different Tribes or by possession by any of them of the Civil Polity, or social Institutions of civilised Communities. With men in such a state of Society no international treaties can be formed which will not differ widely from those which subsist between nations properly so called. Yet as far as it is possible to establish such connexion with them, it is right that their title be regarded as one independent community should be observed in fact as well as acknowledged in theory. The Queen disclaims any pretension to regard their land as vacant Territory open to the first future occupant, or to establish within any part of New Zealand a sovereignty to the erection of which the free consent of the Natives shall not have been previously given.³⁹⁸

The acknowledgement of an independent status was grudgingly acknowledged in the final instructions to Hobson:³⁹⁹

We acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed and petty tribes, who possess few political relations to each other and are incompetent to act, or even to deliberate, in concert. But the admission of their rights though inevitably qualified by this consideration, is binding on the faith of the British Government. The Queen, in common with Her Majesty's immediate predecessor, disclaims, for Herself and for Her Subjects, every pretension to seize on the islands of New Zealand, or to govern them as part of the dominion of Great Britain, unless the free and intelligent

³⁹⁸ *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1844/556, Colonial Office papers 209/4: 221, 226-227.

³⁹⁹ Lord McNair, *The Law of Treaties* (1961) vol. i, p. 729.

consent of the natives, expressed according to their established uses, shall first be obtained.⁴⁰⁰

The Marquess of Normanby, Secretary of State for the Colonies, felt that colonisation was not only unjust but

certainly fraught with calamity to a numerous and inoffensive people, whose title to the soil and sovereignty of New Zealand is indisputable, and has been solemnly recognised by the British Government.⁴⁰¹

He was however prepared to depart from the former policy with extreme reluctance. The practical reason for this was that:

an extensive settlement of British subjects will be rapidly established in New Zealand; and that, unless protected and restrained by necessary laws and institutions, they will repeat, unchecked in that quarter of the globe, the same process of war and spoliation, under which uncivilized tribes have almost invariably disappeared as often as they have been brought into the immediate vicinity of emigrants from the nations of Christendom.⁴⁰²

The reality of colonisation could not be disguised, nor was recognition of native independence necessarily in the best interests of the

⁴⁰⁰ Marquess of Normanby to Captain William Hobson, 14 August 1839 in *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1844, 16/37.

⁴⁰¹ Marquess of Normanby to Captain William Hobson, 14 August 1839 in *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1844, 16/37.

⁴⁰² Marquess of Normanby to Captain William Hobson, 14 August 1839 in *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1844, 16/37.

natives. Normanby felt that annexation with the consent of the natives would be their best protection:

Believing, however, that their own welfare would, under the circumstances I have mentioned, be best promoted by the surrender to Her Majesty of a right now so precarious, and little more than nominal, and persuaded that the benefits of British protection, and of laws administered by British judges, would far more than compensate for the sacrifice by the natives of a national independence, which they are no longer able to maintain, Her Majesty's Government have resolved to authorize you to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any parts of those islands which they may be willing to place under Her Majesty's dominion. I am not unaware of the difficulty by which such a treaty may be encountered. The motives by which it is recommended are, of course, open to suspicion. The natives may, probably, regard with distrust a proposal which may carry on the face of it the appearance of humiliation on their side, and of a formidable encroachment on ours; and their ignorance even of the technical terms in which that proposal must be conveyed, may enhance their aversion to an arrangement of which they may be made to comprehend the exact meaning, or the probable results.⁴⁰³

Normanby, in response to Hobson's question respecting the basis of sovereignty over the South Island, explained that his original remarks as to independence were intended to refer to what was seen at the time as the more civilised northern island, and not to the southern:

Our information respecting the southern island is too imperfect to allow me to address to you any definite instructions as to the course to be pursued there. If the country is really, as you suppose, uninhabited, except but by a very small number of persons in a

⁴⁰³ Marquess of Normanby to Captain William Hobson, 14 August 1839 in *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1844, 16/37.

savage state, incapable from their ignorance of entering intelligently into any treaties with the Crown, I agree with you that the ceremonial of making such engagements with them would be a mere illusion and pretence which ought to be avoided. The circumstances noticed in my instructions, may perhaps render the occupation of the southern island a matter of necessity, or of duty to the natives. The only chance of an effective protection will probably be found in the establishment by treaty, if that be possible, or if not, then in the assertion, on the ground of discovery, of Her Majesty's sovereign rights over the island.⁴⁰⁴

Captain William Hobson sought elucidation as to the precise meaning of Normanby's instructions, particularly in respect of the acquisition of sovereign rights by the Queen over the islands of New Zealand. Hobson wrote that:

no distinction is made [in Normanby's instructions] between the northern and southern islands of New Zealand, although their relations with this country, and their respective advancement towards civilization are essentially different. The declaration of the independence of New Zealand was signed by the united chiefs of the northern island only (in fact, only of the northern part of that island), and it was to them alone that His late Majesty's letter was addressed on the presentation of their flag; and neither of these instruments had any application whatever to the southern islands. It may be of vast importance to keep this distinction in view. Not as regards the natives, towards whom the same measure of justice must be dispensed, however their allegiance may have been obtained; but as it may apply to British settlers, who claim a title to property in New Zealand, as in a free and independent state. I need not exemplify here the uses that may hereafter be made of this difference in their condition; but it is obvious that the power of the Crown may be exercised with much greater freedom in a country over which it possesses all the rights that are usually assumed by first discoverers, than in an adjoining state, which has been

⁴⁰⁴ Marquess of Normanby to Captain Hobson, 15 August 1839 in *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1844, 18/44.

recognized as free and independent With the wild savages in the southern islands, it appears scarcely possible to observe even the form of a treaty, and there I might be permitted to plant the British flag in virtue of those rights of the Crown to which I have alluded.⁴⁰⁵

Though Hobson may have been under a misapprehension as to the relative state of the natives of the South Island, it is reasonably clear from this comment that he conceived his instructions as to require a genuine treaty with the natives.⁴⁰⁶

This was important for the future of Church relations with the Maori, as it was for the future of Maori-Government relations. Normanby and many of his contemporaries were influenced by evangelical Christianity, and saw their responsibilities in this light as an imperial mission.⁴⁰⁷ This had important implications which were reflected in Hobson's instructions.

⁴⁰⁵ Captain William Hobson to the Under Secretary of the Colonial Department (Mr. Labouchere), 15 August 1839 in *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1844, 17/42.

⁴⁰⁶ As the *Report of the Waitangi Tribunal on the Orakei Claim* (1987) Wai. 009 records:

In his discussions with the Maori, Hobson is urged by Lord Normanby to be frank in explaining why they should cede sovereignty to the Queen. "Especially" Lord Normanby directs, "you will point out to them the dangers to which they may be exposed by residence amongst them of settlers amenable to no laws or tribunals of their own, and the impossibility of Her Majesty's extending to them any effectual protection unless the Queen be acknowledged as the sovereign of their country." (para 11.9.5)

⁴⁰⁷ Peter Adams, *Fatal Necessity* (1977).

Hobson had been instructed to take possession of the country only with the consent of the Maori chiefs.⁴⁰⁸ The Treaty of Waitangi was the immediate instrument by which this was to be achieved.⁴⁰⁹ This was written by Hobson, with the assistance of James Busby and Maori-speaking missionaries.⁴¹⁰ The initial signing of the Treaty was on 6 February 1840, although the process of signing copies was not completed till 3 September 1840.⁴¹¹ As chiefs signed – often at the instigation of members of the Church Missionary Society,⁴¹² which was the Anglican body that created Te Hahi Mihinare, the Missionary Church, mentioned above in the preamble to the 1992 Constitution – so local proclamations of British sovereignty were issued. However, although formal proclamations of sovereignty were issued over the northernmost districts, no further local proclamations that were given effect in other districts were ever issued, as Hobson had to leave for the south in order to control the New Zealand Company settlers in Wellington. The New Zealand Company itself was opposed to the Treaty process.⁴¹³ In the North Island

⁴⁰⁸ Marquess of Normanby to Captain William Hobson, 14 August 1839; *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1844, 16/37.

⁴⁰⁹ Alexander H. McLintock, *Crown Colony Government in New Zealand* (1958) 61, 62, 146.

⁴¹⁰ Paul Moon, *Te Ara Ki Te Tiriti* (2002).

⁴¹¹ Claudia Orange, *Treaty of Waitangi* (1987) 84-86; see also James Rutherford, *The Treaty of Waitangi and the Acquisition of British Sovereignty in New Zealand* (1949) 63.

⁴¹² Eugene Stock, *The History of the Church Missionary Society in New Zealand* (1935).

⁴¹³ “2 – Manukau-Kawhia Treaty copy”, NZHistory.net.nz at <<http://www.nzhistory.net.nz/gallery/treaty-sigs/manukau.htm>>

And these believed that that there were

there was substantial non-adherence to the Treaty by Maori leaders, who were well aware of the implications of the Treaty of Waitangi for their future independence.⁴¹⁴ Non-adherence was particularly noticeable in the central North Island.⁴¹⁵

As a result of reports that the New Zealand Company settlers in Wellington (then called Port Nicholson) had issued their own constitution, and had set up a government, Hobson on 21 May 1840 issued two proclamations of full sovereignty over all of New Zealand. These were published in the London Gazette on 2 October 1840.⁴¹⁶ The first was in respect of the North Island, and was based on cession by

very serious doubts whether the Treaty of Waitangi, made with naked savages by a Consul invested with no plenipotentiary powers, without ratification by the Crown, could be treated by lawyers as anything but a praiseworthy device for amusing and pacifying savages for the moment.

– Letter dated 24 January 1843 from Joseph Soames to Lord Stanley, Minister for the Colonies, promoting the Company’s claim to twenty million acres of New Zealand. Cited in Anon, “The Effect of the Treaty of Waitangi on Subsequent Legislation” [1934] 10 *New Zealand Law Journal* 13, 15.

The New Zealand Company was not disinterested in this matter, and it was incorrect in that Hobson was Lieutenant-Governor and was instructed to treat with the natives. Nor was ratification by the Crown necessary. But the essence of the argument remained the Treaty of Waitangi’s status at international law; William Renwick, *Sovereignty and indigenous rights* (1991).

⁴¹⁴ *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, 1841/311, p 15.

⁴¹⁵ *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, 1841/311, p 15.

⁴¹⁶ *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, pp. 140-141.

virtue of the Treaty of Waitangi.⁴¹⁷ The second proclamation related to the South Island (then called Middle Island) and Stewart Island.⁴¹⁸

On 15 October 1840 Hobson sent a despatch to London which collated all the copies of the Treaty,⁴¹⁹ and this despatch was approved by the Colonial Office 30 March 1841.⁴²⁰ In it, Hobson indicated that the second proclamation of 21 May 1840 relied on the right of discovery, rather than the Treaty.⁴²¹ In this he was acting in conformity with his instructions to extend British sovereignty over the South Island “by treaty, if that be possible, or if not, then in the assertion, on the ground of discovery, of Her Majesty’s sovereign rights over the island”.⁴²²

⁴¹⁷ Carter and Keith however argue that the Treaty was a legally valid treaty of cession: Betty Carter, “The Incorporation of the Treaty of Waitangi into Municipal Law” (1980) 4 Auckland University Law Review 1; Sir Kenneth Keith, “International Law and New Zealand Municipal Law” in John F. Northey, (ed.) *The A.G. Davis Essays in Law* (1965) 130-148.

⁴¹⁸ Proclamation In the Name of Her Majesty Victoria, Queen of the United Kingdom of Great Britain and Ireland, by William Hobson, Esquire (May 21, 1840) [“The Northern Island”], *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, p. 140; Proclamation In the Name of Her Majesty Victoria, Queen of the United Kingdom of Great Britain and Ireland, by William Hobson, Esquire (May 21, 1840) [“The Southern Islands of New Zealand”], *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, p. 141.

⁴¹⁹ *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, p. 220.

⁴²⁰ *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, p. 234.

⁴²¹ *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, p. 138.

⁴²² Captain William Hobson to the Under Secretary of the Colonial Department (Mr. Labouchere), 15 August 1839; *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1844, 17/42; Marquess of Normanby to Captain Hobson, 15 August 1839; *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1844, 18/44.

In the meantime, Major Bunbury, on behalf of Governor Hobson, proclaimed sovereignty by cession over the South Island on 17 June 1840, but this was of no legal effect as unbeknown to him, his superior, Hobson, had already issued the 21 May Proclamation. The proclamations of 21 May 1840 were effective according to international law in showing that New Zealand was a colony by act of State,⁴²³ though they may not have been efficacious in most of the country in extending the Queen's writ. An act of State must be accepted as legally effective,⁴²⁴ and no additional special formality was required for annexation.⁴²⁵

Meanwhile, the government of New South Wales purported to annex New Zealand by the Act 3 Vict. No. 28, in force on 16 June 1840.⁴²⁶ This Act, promoted by Gipps, was in entire conformity with Lord Normanby's Instructions to annex New Zealand, or parts thereof, as a dependency of New South Wales in the first instance. New Zealand remained a dependency of New South Wales until letters patent, in the

⁴²³ Robson thought it was by occupation, but Foden (in the minority viewpoint), thought settlement was the legal basis of the colony; John L. Robson (ed.), *New Zealand: The Development of its Laws and its Constitution* (2nd ed., 1967) 4-5; Norman A. Foden, *The Constitutional Development of New Zealand in the First Decade* (1938) 38. In Foden's view, the letters patent of 15 June 1839 are the *fons et onjo* of British sovereignty. He would reject the humanitarian and idealism prevalent in earlier interpretation of events of 1839-40. Cf. James Rutherford, *The Treaty of Waitangi and the Acquisition of British Sovereignty in New Zealand* (1949).

⁴²⁴ *Salaman v. Secretary of State for India* [1906] 1 K.B. 613.

⁴²⁵ *In re Southern Rhodesia* [1919] A.C. 211, 238.

⁴²⁶ An Act to Annex to Her Majesty's Dominions, in the Islands of New Zealand, to the Government of New South Wales 1840 (3 Vict. c. 28) (U.K.); David Williams, "The Foundation of Colonial Rule in New Zealand" (1988) 13 *New Zealand Universities Law Review* 54, 56.

form of a Royal Charter, was signed on 16 November 1840.⁴²⁷ The letters patent, and a Governor's commission, were published in the London Gazette on 24 November 1840,⁴²⁸ and proclaimed in New Zealand on 3 May 1841.⁴²⁹ The Royal Instructions to the Governor were issued 5 December 1840.⁴³⁰ The Charter was based solely on the authority of New South Wales and Van Diemen's Land Act 1840, passed 7 August 1840, by which separate colonies were to be established in the territories of the Colony New South Wales and Van Diemen's Land.⁴³¹ This was an empowering statute, and did not as such constitute or erect any colony.

The assumption of British rule over New Zealand may in some ways have been politically inevitable, though it was fiercely debated within English Church circles and within many Maori communities. The attitudes of the British Government and Parliament were also often uncertain. But it came at a time when modern notions of international law

⁴²⁷ "Charter for erecting the Colony of New Zealand, and for creating and establishing a Legislative Council and an Executive Council"; *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, pp. 153-155.

⁴²⁸ *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, pp. 153-164.

⁴²⁹ Peter Adams, *Fatal Necessity* (1977) 162.

⁴³⁰ Instructions to ... William Hobson, Esq. our Governor and Commander-in-Chief in and Over Our Colony of New Zealand (5 December 1840), *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1835-42, pp. 165-162.

⁴³¹ This statute of course presupposed that New Zealand was by 1840 a part of the Colony of New South Wales, a fact which was sufficiently clear after 15 June 1839. Van Diemen's Land (renamed Tasmania 1856) itself was, under the same Act, constituted a colony independent of New South Wales, by letters patent 14 June 1845.

were evolving.⁴³² But it was clear that the Crown was acting, at least partly, for the good of the Maori. In this they assumed an obligation towards the native peoples which was to outlast the imperial authority, and became a legacy for post-colonial governments – and the Church.⁴³³

The Church was involved throughout the early years of the settlement of New Zealand.⁴³⁴ Both as individual missionaries, and as part of missionary societies, clergymen and lay workers were present in New Zealand from 1814.⁴³⁵ After the institution of a Bishopric of New Zealand in 1841, the Church was of a territorial nature, yet not fundamentally dissimilar in many respects to that in England. Concerns for the position of the Maori people were not predominant in the minds of most clergymen, with the notable – and critical – exception of Bishop Selwyn himself.⁴³⁶ The missionary clergy, and the (settlers’) diocesan clergy, were to remain separate and distinct, to the possible detriment of both. Only from the 1980s was Church government to reflect the principles of the Treaty of Waitangi – principally those of consultation

⁴³² Ian Brownlie, *Treaties and Indigenous Peoples* ed. F.M. Brookfield (1992).

⁴³³ See, for example, Cathie Bell, “Cultural choices within the Church”, *Dominion* (Wellington), 19 November 1990, p. 12.

⁴³⁴ Noticeably, from a political perspective, in the translation of the Treaty of Waitangi; See, for instance, Paul Moon, *Te Ara Ki Te Tiriti* (2002).

⁴³⁵ Following the meeting of Ruatara and the Rev’d. Samuel Marsden; William Sachs, *The Transformation of Anglicanism* (1993) 55-56.

⁴³⁶ For example, he was criticised by the Secretary of State for the Colonies (the Duke of Newcastle), and by the Colonial Secretary (Edward Stafford), for his “interference”, and for his “advocacy of Native rights”; E.W. Stafford to G.A. Selwyn, 3 May 1861, in Aborigines Protection Society, *Occasional Papers* (1861) 29-30.

and power sharing.⁴³⁷ The Treaty had lain dormant in non-Maori discourse for much of the century, but the Church was in the forefront of efforts to reappraise its role in contemporary society.⁴³⁸ The reasons for this revival in the Church lay in concerns for fairness, reconciliation, and legitimacy.⁴³⁹ The liberal post-colonial ethic also required these to be reassessed.⁴⁴⁰ While not perhaps grounded in Biblical doctrine, these may be seen as consistent with the wider church's concern with social justice.⁴⁴¹

⁴³⁷ These principles are based largely upon the judgment in *New Zealand Maori Council v. Attorney-General* [1987] 1 N.Z.L.R. 641 (C.A.).

⁴³⁸ David Williams, "The annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi" [1985] *Australian Journal of Law and Society* 41. However, Erastian notions of the Church were to prevail in the decades immediately following the Treaty; John Stenhouse, "Religion, Politics, and the New Zealand wars 1860-1872" in Rex Ahdar and John Stenhouse (eds), *God and Government* (2000) 21-40; Philip Culbertson, "Pastoral theology and multiculturalism" (1997) 79(2) *Anglican Theological Review* 163. This has not, however, gone uncriticised: Denis Hampton, "Church's focus on biculturalism not upheld by Treaty" *Otago Daily Times*, 8 March 2001, p 15.

⁴³⁹ David Williams, "The annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi" [1985] *Australian Journal of Law and Society* 41. However, Erastian notions of the Church were to prevail in the decades immediately following the Treaty; John Stenhouse, "Religion, Politics, and the New Zealand wars 1860-1872" in Rex Ahdar and John Stenhouse (eds.), *God and Government* (2000) 21-40.

⁴⁴⁰ Jane Kelsey, "Restructuring the Nation: The Decline of the Colonial Nation-State and Competing Nationalisms in Aotearoa/New Zealand" in Peter Fitzpatrick (ed.), *Nationalism, Racism and the Rule of Law* (1995) 177-194 [Kelsey fundamentally disagrees with the notions of post-colonialism].

⁴⁴¹ In seeking "to transform unjust structures of society, caring for God's creation, and establishing the values of the Kingdom"; Const. Preamble, drawn from the work of the Anglican Consultative Council.

Legitimacy derived from the Treaty of Waitangi

Legally the Crown acquired authority over New Zealand by discovery and settlement, as well as by cession.⁴⁴² But this acquisition of authority was intended by the imperial government to be with the consent of the Maori chiefs, and the chiefs generally accepted it on that basis. This was in conformity with prior colonial practice,⁴⁴³ and consistent with the practice of the previous several decades.⁴⁴⁴

Unfortunately for the Maori, the practice of the colonial government, to whom the Imperial authorities increasingly sought to transfer responsibility,⁴⁴⁵ was after 1840 frequently one of widespread disregard for the spirit, if not the terms, of the Treaty.⁴⁴⁶ To a great extent this was due to differing perceptions of what the Treaty meant. The British side thought that the chiefs were making a meaningful recognition of the Queen and of the concept of national sovereignty, in return for the

⁴⁴² Noel Cox, “The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity” (2001) University of Auckland Ph.D. thesis 89-102.

⁴⁴³ Sir Mark Lindley, *The Acquisition and Government of Backward Territories in International Law* (1969, reprint of 1926 edition).

⁴⁴⁴ Interview with Georgina te Heuheu, former Associate Minister in Charge of Treaty of Waitangi Negotiations, 7 December 1999.

⁴⁴⁵ Maori deputations to the Sovereign, in 1882 and 1884 to Queen Victoria, and in 1914 and 1924 to George V, to seek redress of grievances under the Treaty, must be seen in this context; Ranganui Walker, *Ka Whawhai Tonu Matou* (1990) 160-165, 183-184; Noel Cox, “The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity” (2001) University of Auckland Ph.D. thesis 109-110.

⁴⁴⁶ Amounting to what Brookfield calls a revolutionary seizure of power; F.M. Brookfield, *Waitangi and Indigenous Rights* (1999).

recognition of their rights of property.⁴⁴⁷ In contrast, Williams has argued that the Maori text connoted a covenant partnership between the Crown and Maori, rather than an absolute cession of sovereignty,⁴⁴⁸ though this may be a strained interpretation. But it is likely that the chiefs did not anticipate that the Treaty would have such far-reaching consequences for them.⁴⁴⁹ After the treaty the extent of the chiefs' loss became apparent, but too late.

Claims of legitimacy founded in a completely different value system will be so unclear as to be nearly impossible to distinguish.⁴⁵⁰ In the absence of a voluntary cession of full sovereignty the legitimacy of colonial rule could only be validated over time through the habit of obedience,⁴⁵¹ or legal sovereignty.⁴⁵² This approach is based upon European legal concepts, something which has been criticised by some Maori academics.⁴⁵³ However, legitimisation by effectiveness and

⁴⁴⁷ Dame Catherine Tizard, *Colonial Chiefs, 1840-1889* (1995) 14.

⁴⁴⁸ David Williams, "The Constitutional Status of the Treaty of Waitangi: an historical perspective" (1990) 14(1) *New Zealand Universities Law Review* 9. The *contra proferentem* principle leads to the conclusion that the Maori version is definitive. See, for instance, *Report of the Waitangi Tribunal on the Orakei Claim* (Waitangi Tribunal, Wellington, 1987) Wai 009.

⁴⁴⁹ Noel Cox, "The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity" (2001) University of Auckland Ph.D. thesis 103.

⁴⁵⁰ Dame Catherine Tizard, *Colonial Chiefs, 1840-1889* (1995) 10.

⁴⁵¹ F.M. Brookfield, "The New Zealand Constitution: The Search for Legitimacy" in Sir Hugh Kawharu (ed.), *Waitangi* (1989) 1-4.

⁴⁵² Paul McHugh, "Constitutional Theory and Maori Claims" in Sir Hugh Kawharu (ed.), *Waitangi* (1989) 25-63.

⁴⁵³ Annie Mikaere, Review of *Waitangi* (1990) 14 *New Zealand Universities Law Review* 97, 98.

durability of even a revolutionary assumption of power is a well-understood principle of law,⁴⁵⁴ even amongst the early Maori.⁴⁵⁵

Whether or not it had been intended by the signatories, it is now widely assumed that Maori have, under the first article, accepted the sovereignty of the Crown,⁴⁵⁶ and therefore the legitimacy of the present government and legal system.⁴⁵⁷ Indeed, most Maori leaders accept this, and concentrate on the Crown's failure to keep its part of the Treaty as a failure to protect property rights.⁴⁵⁸ It might be said that the government's view of the Treaty has always been that it gave authority to

⁴⁵⁴ Reginald W.M. Dias, "Legal Politics" [1968] Cambridge Law Journal 233, 237.

⁴⁵⁵ Moana Jackson, *The Maori and the Criminal Justice System* (Part 2) (1988) 35-44; Moana Jackson, "Maori Law" in Ramari Young (ed.), *Mana Tiriti* (1991) 15-16.

⁴⁵⁶ There is a substantial body of case law that Maori are subject to the sovereignty of Crown, and to legislation passed by Parliament, irrespective of the Treaty. See, for example, *Ngati Apa v. Attorney-General*, Court of Appeal, Elias CJ, Gault P, Keith, Tipping and Anderson J.J., C.A. 173/01,75/02, 19 June 2003, [2003] B.C.L. 699; *R v. Ransfield*, High Court, Rotorua, Williams J., T.030059, 20 February 2004 [2004] B.C.L. 280 [the sovereignty of the New Zealand Parliament to pass laws binding all those within the boundaries of the country is absolute]. For a political perspective of this, see the edited transcript of an address by the Rt. Hon. Jenny Shipley, Eden Park, Auckland, 31 October 1999. For general discussions of perceptions of Maori sovereignty, see Hineani Melbourne, *Maori Sovereignty* (1995); Carol Archie, *Maori Sovereignty* (1995).

⁴⁵⁷ Indeed, it has been said that it is unrealistic to maintain any contrary argument; Interview with Sir Douglas Graham, 24 November 1999.

⁴⁵⁸ Richard Mulgan, "Can the Treaty of Waitangi provide a constitutional basis for New Zealand's political future?" (1989) 41(2) Political Science 51-68. Though there are some who, whilst decrying alleged Crown breaches of the Treaty, deny that the Treaty conveyed anything more than permission for European settlement; a case of "having their cake and eating it too"; Interview with Sir Douglas Graham, 24 November 1999.

it,⁴⁵⁹ whereas in the common Maori view the Crown's protection of Maori property⁴⁶⁰ was more important.⁴⁶¹ This pragmatic position has proved most effective, and has led to the successful conclusion of numerous claims for compensation for past wrongs.⁴⁶²

The Church was also involved in this process, particularly where land was given to the Church by Maori, and later used for other purposes.⁴⁶³ The conflicting interests of economic necessity and moral responsibility was more readily resolved within the Church. In part this was because of the consistent adoption of the principle of equality between Maori and Pakeha traditions and interests.⁴⁶⁴ The degree to which Maori and Pakeha liturgical practices diverge would appear to be no greater than the (considerable) degree of divergence noticeable in the (Pakeha) dioceses.⁴⁶⁵ But the Church recognises the principles of the Treaty⁴⁶⁶ – including the need for partnership in governance with Maori, more fully perhaps than secular government does.

The Treaty at least partially justifies or legitimates the Crown and Parliament's claims to power, though in Jackson's view only in respect

⁴⁵⁹ Article 1.

⁴⁶⁰ Article 3.

⁴⁶¹ See David Williams, "Te Tiriti o Waitangi" in Arapera Blank et al (eds.), *He Korero Mo Waitangi 1984* (1985) 159-170.

⁴⁶² Sir Douglas Graham, *Trick or Treaty?* (1997).

⁴⁶³ See, for example, David Mitchell, "Finders keepers", *New Outlook*, July/August 1986, pp. 27-31.

⁴⁶⁴ Which is also shown, for example, in the new *A New Zealand Prayer Book* (1989), which is multi-lingual – though English dominates.

⁴⁶⁵ Interview with Rev'd. Richard Girdwood, clerk in holy orders, 18 September 1999.

⁴⁶⁶ As developed in *New Zealand Maori Council v. Attorney-General* [1987] 1 N.Z.L.R. 641 (C.A.).

of Pakeha.⁴⁶⁷ However, such an approach presupposes that the original assumption of sovereignty was in some way illegal or incomplete, itself a proposition open to argument.⁴⁶⁸ It is becoming clear that traditional views of the Treaty must be reassessed, and that the concept (or myth as Chapman called it⁴⁶⁹) of the Treaty as a living document is symbolically important.

The Treaty occupies an uncertain place in the New Zealand secular constitution.⁴⁷⁰ Although ostensibly no Maori law was recognised by the colonial legal system⁴⁷¹ – indeed there was little Maori law as the term is now generally understood⁴⁷² – there were a significant number of Acts that partially recognised Maori customs and usages,⁴⁷³ and the *New Zealand Constitution Act 1852*⁴⁷⁴ did provide for the recognition of tribal reserves, where Maori laws would continue to operate. The New Zealand

⁴⁶⁷ Moana Jackson, “Maori Law” in Ramari Young (ed.), *Mana Tiriti* (1991) 19.

⁴⁶⁸ F.M. Brookfield, “Parliament, the Treaty, and Freedom” in Parliament, the Treaty, and Freedom – Millennial Hopes and Speculations” in Philip Joseph (ed.), *Essays on the Constitution* (1995) 41, 43-46.

⁴⁶⁹ Guy Chapman, “The Treaty of Waitangi – Fertile Ground for Judicial (and Academic) Myth-making” [1991] *New Zealand Law Journal* 228.

⁴⁷⁰ For the general background to the Treaty, see Lindsay Buick, *The Treaty of Waitangi* (1933); Paul Moon, *The Origins of the Treaty of Waitangi* (1994); James Rutherford, *The Treaty of Waitangi and the Acquisition of British Sovereignty in New Zealand* (1949).

⁴⁷¹ *Wi Parata v. Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S.) SC 72.

⁴⁷² Tapu, customs and lore fulfilled the functions of formal laws found in more complex societies; Peter Sack and Jonathan Aleck (eds.), *Law and anthropology* (1992); Sir Henry Sumner Maine, *Early Law and Custom* (1890).

⁴⁷³ As was pointed out in subsequent Privy Council opinions, such as *Te Heuheu Tukino v. Aotea District Maori Land Board* [1941] N.Z.L.R. 590, 596-597; [1941] A.C. 308, 324 (P.C.).

⁴⁷⁴ 15 & 16 Vict. c. 72 (U.K.), s. 71.

Parliament has never doubted that it has full authority irrespective of the Treaty. There have been some signs that this orthodoxy may be challenged,⁴⁷⁵ but it is difficult to see how this could be achieved in the absence of an entrenched Constitution and a Supreme Court on the American model.⁴⁷⁶

Lord Woolf, in his 1994 Mann lecture, subscribed to the opinion, gradually gaining ground, that there are some fundamentals which even the Westminster Parliament cannot abolish, though the traditional doctrine of supremacy of Parliament holds that there is nothing that Parliament cannot do.⁴⁷⁷ The time may have come for the courts to give judicial recognition to the Treaty of Waitangi, as they have been called upon to do by, among others, Professor Whatarangi Winiata.⁴⁷⁸ There have been clear signs that Lord Cooke of Thorndon, while President of the Court of Appeal, was inclined to reconsider the position of the Treaty.⁴⁷⁹ But such a significant step remains unlikely.⁴⁸⁰ In the meantime Crown and Maori remain in a form of political or legal symbiosis through their Treaty relationship.

⁴⁷⁵ *Te Runanga o Wharekauri Rekohu Inc v. Attorney-General* [1993] 2 NZLR 301, 305; FM Brookfield, “Kelsen, the Constitution and the Treaty” [1992] 15 New Zealand Universities Law Review 163, 175.

⁴⁷⁶ F.M. Brookfield, “A New Zealand Republic?” (1994) 8 Legislative Studies 5.

⁴⁷⁷ See, for instance, T.R.S. Allen, “Legislative supremacy and the rule of law – Democracy and Constitutionalism” (1985) 44 Cambridge Law Journal 111.

⁴⁷⁸ “Revolution by Lawful Means” 1993 New Zealand Law Conference Papers, *Law and Politics* (1993) vol. ii, pp. 16-18.

⁴⁷⁹ *Te Runanga o Wharekauri Rekohu Inc v. Attorney-General* [1993] 2 N.Z.L.R. 301, 305 (C.A.).

⁴⁸⁰ Interview with Georgina te Heuheu, 7 December 1999.

Although Parliament has not relinquished part of its authority – indeed there are doubts as to whether it could legally do so – the Church may have done so,⁴⁸¹ or at least provided for different and more inclusive processes of decision-making within its legislature. More specifically, it has redesigned General Synod as a working multi-cultural forum. It now shares authority between Pakeha, Maori (and Polynesia), not solely because the Treaty has been interpreted to require this, but because of a desire for inclusivity.⁴⁸² The theological underpinning of such a view is not perhaps as apparent as the political and social aspects. The Church applies the principles of the Treaty more consistently, both in its Constitution and in its practice,⁴⁸³ though it has not always done so.⁴⁸⁴ The difficulty which this raises however is that political legitimacy and historical concerns for the “numerous and inoffensive people”⁴⁸⁵ of New Zealand are not concepts which necessarily sit comfortably with ecclesiological notions of governance as narrowly understood. Synodical (and episcopal) government does not derive its authority from democracy

⁴⁸¹ Or, at least, redefined the form of this authority.

⁴⁸² The Church was itself heavily involved in the negotiations leading to the signing of the Treaty of Waitangi, and the Maori version of the Treaty was written by a missionary, the Rev'd. Henry Williams; Paul Moon, *Te ara ki te Tiriti* (2002).

⁴⁸³ For example, in conformity with the principle of partnership, General Synod Standing Resolutions 1986 require that a candidate for ordination must have competence in the Maori language.

⁴⁸⁴ For example, from the initial missionary efforts among Maori, using lay converts, through the ordination of Maori priests after 1853, for long Maori had a marginal role within ecclesiastical government; Raeburn Lange, “Ordained Ministry in Maori Christianity, 1853–1900” (2003) 27(1) *Journal of Religious History* 47.

⁴⁸⁵ Marquess of Normanby to Captain William Hobson, 14 August 1839 in *British Parliamentary Papers – Colonies, New Zealand* (1970) Sessions 1844, 16/37.

or ethnicity.⁴⁸⁶ But it does allow the participation of communities, and the indigenous peoples, rather than merely individuals, in that governance.

The perceived emphasis on the Treaty of Waitangi engendered within the Church not only a belief in an inclusivity and shared governance with Maori, but also with Polynesia. They were not only representative of another cultural tradition within New Zealand society, but also part of the trans-national Province of Aotearoa, New Zealand and Polynesia.

⁴⁸⁶ Stephen Sykes, "Introduction; Why Authority?" in Stephen Sykes (ed.), *Authority in the Anglican Communion* (1987) 20; John Howe, *Highways and Hedges* (1985) 50f.

V Conclusions

Within the Church in New Zealand legislative authority is vested in the General Synod. This is subject to episcopal dispensation, and the sovereignty of the State (leading to the reviewability of ecclesiastical courts and proceedings). Authority within General Synod is also diffused, as a result of the Treaty of Waitangi and a search for post-colonial legitimacy. But the theological arguments and assumptions which might be thought to underpin the reforms are subordinate to political and social theory. This is expressed most clearly in the Preamble to the Constitution.

Thus although the legislative authority of the General Synod derives from the Constitution and canons, this authority is heavily influenced by the socio-political environment in which the Church finds itself. The authority of the General Synod derives from the Constitution and canons whose origins are in secular, or quasi-secular law as much as divine law. It also owes much to the settlement of the Church of England, in the forms of its legislative basis, though based on synodical government at a time when this was absent in England.

Orthodox theory held that the Treaty of Waitangi had socio-political, not legal force, as it was not a treaty recognised by international law (though it would seem that this interpretation would seem to be overly influenced by later nineteenth and twentieth century understanding of treaty-making capacity). Even if it were a treaty at international law, domestic law New Zealand law does not generally recognise treaties as having automatic force in New Zealand. It therefore has effect only so far as legal recognition has been specifically accorded it. However, the Anglican Church has chosen to apply the principles of

the Treaty to its own Constitution. As a consequence, legislative authority is shared by Maori and non-Maori hierarchies within the Church.

CHAPTER 4 – THE NATURE OF JUDICIAL POWER

I Introduction

Wherever legislative or executive authority is based in any legal system, it is necessary for some provision to be made for the administration of a judicial function, for the interpretation of legislation and for the judging of disputes.¹ Within the Christian church this role is assigned to the church courts,² which are special courts administering the ecclesiastical law.³ In a general sense ecclesiastical law means the law relating to any matter concerning the church administered and enforced in any court,⁴ but for the purposes of this thesis, however, we are concerned primarily with laws as administered by ecclesiastical courts, specifically those of the Anglican Church in New Zealand.⁵

¹ See Charles de Secondat Baron de Montesquieu, “The Spirit of the Laws”, in Arend Lijphart (ed.), *Parliamentary versus Presidential Government* (1992) 48-51.

² Also called Courts Christian (*curiae christianitatis*).

³ This is of predominantly canon and civil law origin, though not uninfluenced, even in the earliest times, by the developing common law in the king’s courts: *Caudrey’s Case* (1591) 5 Co. Rep. 1a; Ecclesiastical Licences Act 1533 (24 Hen. VIII c. 21) (Eng.), preamble (now largely repealed); *Attorney-General v. Dean and Chapter of Ripon Cathedral* [1945] Ch. 239; 1 All E.R. 479.

⁴ In a narrower technical sense ecclesiastical law is the law administered by ecclesiastical courts and persons; Alfred Denning, “The meaning of ‘Ecclesiastical Law’” (1944) 60 *Law Quarterly Review* 236. The end of the temporal law is to punish the outward man; that of the ecclesiastical law, being spiritual, is to reform the inward man; *Caudrey’s Case* (1591) 5 Co. Rep. 1a, 6.

⁵ Formally, the “Anglican Church of Aotearoa, New Zealand and Polynesia”; Constitution, preamble and Part A, as amended 1992.

It is no accident that much of the discussion which follows is concerned largely with the development of the ecclesiastical courts in the Church of England. For the Anglican Church courts have, in New Zealand, inherited the tradition of the English church courts. The New Zealand courts have always had but a narrow jurisdiction, as a consequence of the comparative weakness of the English church courts chartered below, as well as in consequence of the non-established nature of the Church,⁶ and of the transfer of the faculty jurisdiction to the bishops. The New Zealand church courts must also be seen in the wider context of the church courts in the Anglican Communion, which are exemplified, though not necessarily typified, by those of the Church of England.

The aim of this Chapter is to show that the structures and procedures of church courts have been as much influenced by the secular laws as are organs of the legislative and executive arms of the Church.⁷ Just as the general synod and diocesan synods reflect contemporary secular viewpoints, so do the church courts. But both can reflect the will

⁶ See Chapter 2, and Norman Doe, *Canon Law in the Anglican Communion* (1998).

⁷ For which see Noel Cox, "Dispensation, Privileges, and the Conferment of Graduate Status: With Special Reference to Lambeth Degrees" (2002-2003) 18(1) *Journal of Law and Religion* 249-274; Noel Cox, "The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England" (2001-2002) 3(1) *Rutgers Journal of Law and Religion* 1-45 <<http://www-camlaw.rutgers.edu/publications/law-religion/cox1.pdf>>; Noel Cox, "Ecclesiastical Jurisdiction in the Church of the Province of Aotearoa, New Zealand and Polynesia" (2001) 6(2) *Deakin Law Review* 266-284.

of God made manifest through mankind.⁸ The authority of the church courts however derives directly from ecclesiastical legislation.⁹ Explicit processes for the resolution of disputes or offences within the Christian community are found in St. Matthew's gospel.¹⁰ But the church courts administer laws derived from both ecclesiastical and secular legal system, and the secular legal system has an important ongoing effect upon the church courts, even though the Church is not established in New Zealand.¹¹

Equally importantly, the very structure of the church courts reflect a pre-occupation with the secular legal system, though, as will be seen, this is perhaps less pronounced in New Zealand than it is in England. The Ecclesiastical Jurisdiction Measure 1963¹² established the present judicial hierarchy for the provinces of Canterbury and York of the Church of England. This hierarchy comprises church courts at diocesan and

⁸ In that the actions of both secular and religious institutions, lay people and ordained, may be inspired by the divine.

⁹ Including Constitution and canons, as well as the formularies of the Church, and the *Bible*.

¹⁰ Matthew 18.15:

Moreover if thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother.

¹¹ See Norman Doe, *Canon Law in the Anglican Communion* (1998), for a description of the meaning of establishment.

¹² The long title of the Measure is "A Measure passed by The National Assembly of the Church of England to reform and reconstruct the system of ecclesiastical courts of the Church of England, to replace with new provisions the existing enactments relating to ecclesiastical discipline, to abolish certain obsolete jurisdictions and fees, and for purposes connected therewith;" Ecclesiastical Jurisdiction Measure 1963 (U.K.).

provincial levels,¹³ with further appeals heard by the Court for Ecclesiastical Causes Reserved¹⁴ and, in some instances only, the Judicial Committee of the Privy Council.¹⁵ Final appeal from the Court for Ecclesiastical Causes Reserved, and from *ad hoc* Commissions of Convocation,¹⁶ are heard by Commissions of Review appointed by the Queen in Council.¹⁷

¹³ Consistory Courts in each diocese (under Chancellors, who may serve in more than one see), and the Arches Court and the Chancery Court of York (under the Dean of the Arches and the Auditor respectively, offices which are, however, held concurrently by the one individual). The Arches Court and the Chancery Court of York have four other judicial officers, two in holy orders appointed by the prolocutor of the Lower House of Convocation of the relevant province, and two lay persons appointed by the Chairman of the House of Laity after consultation with the Lord Chancellor with respect, *inter alia*, to their judicial experience; See the Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 3(2)(b)-(c).

¹⁴ Two of the five judges appointed by Her Majesty the Queen must hold or have held high judicial office and be communicants of the Church of England; Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 5; Appellate Jurisdiction Act 1876 (39 & 40 Vict. c. 59) (U.K.), s. 25(9) (defining the requirements for judicial appointees to the court for Ecclesiastical Causes Reserved). Three must be, or have been, diocesan bishops; Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 45(2).

¹⁵ Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 1(3)(d). This is the permanent committee of the Queen's Most Honourable Privy Council, to which appeals to the Queen are referred for hearing and judgment. It was established on a permanent footing in 1833; See the Judicial Committee Appeals Act 1833 (3 & 4 Will. IV c. 41) (U.K.), s. 1; The Ecclesiastical Jurisdiction Measure 1963 makes the theoretical nature of such appeals clear. "Her Majesty in Council shall have such appellate jurisdiction as is conferred on Her by this Measure"; Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 1(3)(d).

¹⁶ These would comprise four diocesan bishops and the Dean of the Arches; Ecclesiastical Jurisdiction Measure 1963 (U.K.), ss. 35, 36(a).

¹⁷ Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 1(3)(c); Revised Canons Ecclesiastical, Canon G1 para. 4. The Commissions of Review would comprise three Lords of Appeal (being communicants), and two

The changes made to the judicial structure of the Church of England in 1963 were widespread, and were especially significant at the appellate level. One of the most notable change was the reduction in the role of the Judicial Committee of the Privy Council.¹⁸ This would seem to have been largely motivated by long-standing opposition from within the Church to the perceived subordination of the ecclesiastical courts to secular tribunals.¹⁹ This opposition was fuelled by the nineteenth century controversy over ritual and ceremonial and the legality of ornaments, most of which disputes had doctrinal implications, yet were decided in courts which were essentially secular in composition, if not in nature.²⁰

Lords Spiritual sitting as Lords of Parliament. See the Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 11(4).

¹⁸ The Judicial Committee being that tribunal which assumed the jurisdiction of the Court of Delegates, in 1833, but which has a much longer informal existence, being indeed one of the oldest institutions in the United Kingdom. See the Judicial Committee Act 1833 (3 & 4 Will. IV c. 41) (U.K.); Appellate Jurisdiction Act 1876 (39 & 40 Vict. c. 59) (U.K.); Appellate Jurisdiction Act 1887 (50 & 51 Vict. c. 70) (U.K.).

¹⁹ This opposition found expression in a succession of commissions which advocated a new joint appeal court to replace the Judicial Committee of the Privy Council; Archbishop of Canterbury and York's Commission on Ecclesiastical Courts, *Report of the Archbishops' Commission* (1883) lvi-lviii; Royal Commission Ecclesiastical Discipline, *Report of the Royal Commission on Ecclesiastical Discipline* (1906), Cd. 3040, para. 67, 77-78; Archbishop of Canterbury and York's Commission on Ecclesiastical Courts, *Report of the Archbishops' Commission on Ecclesiastical Courts* (1926), s. 26-46; Archbishop of Canterbury and York's Commission on Church and State, *Report of the Archbishops' Commission on Church and State* (1935) 68-71; Archbishops' Commission on Canon Law, *The Canon Law of the Church of England* (1947).

²⁰ Examples include *Ridsdale v. Clifton* (1877) 2 P.D. 276 (P.C.); *Liddell v. Westerton* (1856) 5 W.R. 470 (P.C.). After *Ridsdale*, the correctness of the decision of the Judicial Committee was challenged in light of subsequent historical research; Royal Commission Ecclesiastical Discipline, *Report of the Royal Commission on Ecclesiastical Discipline* (1906), Cd. 3040, para. 41. See also George Broderick and William

The courts were emphatic that they were there to apply ecclesiastic laws, and not determine doctrine²¹ – much as the role of common law courts is to discover the law rather than to make it – but both arguments are liable to criticism as mere semantics.²²

It has been customary to distinguish between ecclesiastical courts proper, and secular courts hearing Church appeals.²³ But, to some extent this has been to make an artificial distinction.²⁴ In England the new Court for Ecclesiastical Causes Reserved, and the Commissions of Review, may be classified as church courts proper also, although they may

Freemantle, *Ecclesiastical Cases, collection of the Judgments of the Judicial Committee of the Privy Council in Ecclesiastical Cases relating to Doctrine and Discipline* (1865), which describes fifteen cases between 1840 and 1864 in which doctrinal questions were involved.

²¹ The Rt. Hon. Dr. Stephen Lushington, Dean of the Arches, wrote that of the Arches Court that: “This is not a court of Divinity, it is a court of ecclesiastical law”; *Essays and Reviews* (1861), cited in S.M. Waddams, *Law, Politics and the Church of England: The Career of Stephen Lushington, 1782-1873* (1992) 274.

²² Traditionally, law finding (rather than law-making) is a peculiar feature of the common law system. Under a common law system judges find laws by interpreting decided cases; Oliver Wendell Holmes, Jr., *The Common Law* (1882).

²³ As, for example, the consistory courts and the Judicial Committee of the Privy Council.

²⁴ The consistory courts, the Arches Court, and the Chancery Court of York may be classified as the former. The Chancellor of a diocese is appointed by letters patent of the bishop (who may himself sit if he so wishes), although the Lord Chancellor must be consulted before any appointment is made; Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 2(1)-(2). The archbishops of Canterbury and York appoint the Dean of the Arches acting jointly, with the Queen’s approval signified by warrant under the sign manual. Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 3(2)(a); Revised Canons Ecclesiastical, Canon G3 para. 2a.

include secular members,²⁵ since they do not have a role in the secular legal system. Only the Commissions of Convocation would not normally include secular judges.²⁶ However, since none of these courts hear causes on matters not within the jurisdiction of the ecclesiastical law, they may be loosely classified as ecclesiastical rather than secular courts, though the members of the Judicial Committee of the Privy Council are appointed by secular authority. Even the Judicial Committee of the Privy Council will transform itself into a quasi-ecclesiastical court to hear Church causes,²⁷ although it is properly a secular court, or rather tribunal.²⁸ Nor must lay membership necessarily be equated to secular membership, since the people of God include lay persons.²⁹ In the case of

²⁵ Court for Ecclesiastical Causes Reserved – Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 5. Commissions of Review – Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 11(4).

²⁶ Ecclesiastical Jurisdiction Measure 1963 (U.K.), ss. 35, 36(a).

²⁷ In a similar way to that in which the Judicial Committee of the Privy Council would become a New Zealand tribunal for the purposes of hearing an appeal from the Court of Appeal of New Zealand. See the Judicial Committee Act 1833 (3 & 4 Will. IV c. 41) (U.K.); Appellate Jurisdiction Act 1876 (39 & 40 Vict. c. 59) (U.K.); Appellate Jurisdiction Act 1887 (50 & 51 Vict. c. 70) (U.K.); New Zealand (Appeals to the Privy Council) Order 1910, No. 70 (L. 3) (S.R. & O. and S.I. Rev. 1948 vol. XI, 409; S.R. 1973/181); Privy Council (Judicial Committee) Rules, Notice of 1973 (S.R. 1973/181) (N.Z.).

²⁸ The transformation being that the court is called upon to hear an appeal as a part of the ecclesiastical courts hierarchy, rather than as a secular court, and in that there is provision for clerical members.

²⁹ The laos (λαοσ). The courts of the Roman Catholic Church include lay persons. Diocesan judges are to be clerics, but the Episcopal Conference can permit the appointment of lay persons; *The Code of Canon Law: in English Translation* prepared by the Canon Law Society of Great Britain and Ireland (1983) Canon 1421 ss. 1, 2. In any trial a sole judge can associate with himself two assessors as advisers. These may be lay persons; *The Code of Canon Law: in English Translation* prepared by the Canon Law Society of Great Britain and Ireland (1983) Canon 1424.

New Zealand church courts, all will be ecclesiastical in that they are not the Queen's courts, though they may include lay persons.

But this preoccupation with a perceived subordination in England to secular authorities³⁰ distracted, it will be argued, attention from a more subtle weakness in the judicial apparatus of the Church – and one which is also present in New Zealand. Although the Church had largely freed itself from subordination to secular tribunals,³¹ it was not free from the continuing influence of the parallel secular legal system. This seems to have been due to two major factors that influenced, and continue to influence, the ecclesiastical courts. The first is that, because the general law of the country establishes the Church of England as the official State Church,³² the church courts in England are the Queen's courts.³³ The

³⁰ This may perhaps be categorised as a perception of Erastianism.

³¹ A formal subordination which never existed in New Zealand. The jurisdiction of the Supreme Court, established 1841, was said to include the jurisdiction of “Her Majesty's Courts of Queen's Bench, Common Pleas, and Exchequer, at Westminster”. No ecclesiastical jurisdiction is specified. The primary source of the jurisdiction of the High Court is statutory, now found in the Judicature Act 1908 (N.Z.), especially s. 16. This general jurisdiction can be traced through a series of statutes, from the original conferral of prerogative authority in 1840, and the first statutory authority, in 1841; Royal Charter 16 November 1840, “Charter for erecting the Colony of New Zealand, and for creating and establishing a Legislative Council and an Executive Council”; *British Parliamentary Papers* 153-155 (1970); Supreme Court Ordinance session 2, No. 1 (1841), ss. 2-7; Supreme Court Ordinance session 3, No. 1 (1844) (N.Z.), ss. 2-3; Supreme Court Act 1860 (N.Z.), ss. 4-6; Supreme Court Act 1882 (46 Vict. No. 29) (N.Z.), s. 16.

³² The combined effect of the Act of Uniformity 1662 (14 Chas. II c. 4) (Eng.); *Thirty-Nine Articles of Religion* (1562, confirmed 1571 by the Subscription (Thirty-Nine Articles) Act 1571 (13 Eliz. I c. 12) (Eng.)), Ecclesiastical licences Act 1533 (25 Hen. VIII c. 21) (Eng.); Submission of the Clergy Act 1533 (25 Hen. VIII c. 19) (Eng.); Appointment of Bishops Act 1533 (25 Hen. VIII c. 20) (Eng.); Ecclesiastical Appeals Act 1532 (24 Hen. VIII c. 12) (Eng.) and similar legislation.

second and arguably much more important factor – and one which has added relevance in New Zealand where the church courts are not the Queen’s courts – is the influence of the common law and of its practitioners upon the jurisprudence of the church courts, particularly those who have practised in the ecclesiastical courts since the middle of the nineteenth century, and who have profoundly affected the way in which the church courts have operated.³⁴ Both of these influences will be examined in the course of this Chapter, though the emphasis will be upon the second, as being more pertinent to the New Zealand situation.³⁵ It will be shown that the very structure of the courts reflect an obsession with limiting formal secular influences, while at the same time unconsciously fostering other forms of secular influences.

Although the Church law was based on canon law, rather than Roman civil law or the secular common law, in the absence of formal

³³ The combined effect of the Supremacy of the Crown Act 1534 (26 Hen. VIII c. 1) (Eng.); Ecclesiastical licences Act 1533 (25 Hen. VIII c. 21) (Eng.); Ecclesiastical Appeals Act 1532 (24 Hen. VIII c. 12) (Eng.) and later legislation. Once appointed, an ecclesiastical judge derives his or her authority not from their bishop, but from the law, and is charged, like in all manner to all the Queen’s judges, with hearing and determining impartially causes in which the bishop himself or the Crown may have an interest. *Ex parte Medwin* (1853) 1 El. & Bl. 609 (K.B.); *Lord Bishop of Lincoln v. Smith* (1668) 1 Vent. 3 (K.B.).

³⁴ See Noel Cox, “The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England” (2001-2002) 3(2) Rutgers Journal of Law and Religion 1-45 <http://www-camlaw.rutgers.edu/publications/law-religion/cox1.pdf>.

³⁵ Much of the following is taken from Noel Cox, “The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England” (2001-2002) 3(2) Rutgers Journal of Law and Religion 1-45 <http://www-camlaw.rutgers.edu/publications/law-religion/cox1.pdf>.

education for canonists in England after 1535,³⁶ the civilians, or practitioners in the civil law,³⁷ were, to some extent at least, the guardians of the learning of the church courts.³⁸ They were the sole practitioners in the ecclesiastical courts until the late nineteenth century.³⁹ Some clerical judges were also to sit in ecclesiastical courts until at least the nineteenth century, but they may have lacked effective legal training, and their influence upon the development of the law was proportionately less.⁴⁰

³⁶ A strict injunction issued by Henry VIII in October 1535 forbade the study of canon law in the universities; See Richard Helmholz, *Roman Canon Law in Reformation England* (1990) 152-153; Philip Hughes, *The Reformation in England* (1963) 239; D.R. Leader (ed.), *The History of the University of Cambridge* (1988) vol. i, 332-333.

³⁷ As a consequence of the injunction even the civil law faculties suffered a decline; See J.L. Barton, "The Faculty of Law" in James McConica (ed.), *The History of the University of Oxford* (1986) vol. iii, 271-272; Thomas Fuller, *The History of the University of Cambridge* eds. Marmaduke Prickett and Thomas Wright (1840) 225.

³⁸ It has also been said that the civil and canon laws were so interdependent by 1600 that they could scarcely be separated: "Ius canonicum et civile sunt adeo connexa, ut unum sine altero vix intelligi possit" – Petrus Rebuffus, "Tractatus de nominationibus", Quaest 5, no. 15, in *Tractatus univerti iuris* (1584-1600) xv, part 2, fols. 301-339.

³⁹ Proctors also served the ecclesiastical courts. Like the attorneys, they were domini litis rather than merely spokesmen; *Obicini v. Bligh* (1832) 8 Bing. 335, 352 (per Tindal, C.J.). They were ultimately housed in Doctors' Commons. Prior to 1570, when membership of Doctors' Commons was made compulsory for advocates alone, some proctors had been members; Sir John Baker, "The English Legal Profession 1450-1550" in Wilfred Prest (ed.), *Lawyers in Early Modern Europe and America* (1981) 24.

⁴⁰ In the early nineteenth century many judges were clerics, arguably lacking the experience and training necessary for judicial office – though until the Ecclesiastical Jurisdiction Measure 1963 (U.K.) judges had to be "learned in the civil and ecclesiastical laws and at least a master of arts or bachelor of law, and reasonably well practised in the course thereof;" Canons Ecclesiastical, 127 (1603) (revoked). See the Archbishop of

If there is one lesson which may be learnt from the experience of the church courts in England since the Reformation, it is that their strength depended not just upon retaining the confidence of the bishops, clergy and laity. Without a strong cadre of professional judges and counsel “learned in the ecclesiastical law” they fell under the increasing influence of the common law.⁴¹ Without these personnel, and an understanding that secular judicial procedures are not necessarily appropriate to decide religious disputes,⁴² the ecclesiastical courts were condemned to satisfy few when they were called upon to decide contentious issues.⁴³

The first part of this Chapter will examine the provision for pre-Reformation appeals from the provincial courts, and the nature and effect of the Reformation settlement. The settlement at the Restoration of the monarchy in 1660 will be assessed. The common law influences on the ecclesiastical courts are then reviewed. An assessment is then made of the influence of counsel in the ecclesiastical courts. The relevance in New Zealand of this tradition, and its effect upon the authority of the

Canterbury and York’s Commission on the Ecclesiastical Courts, *Report of the Archbishops’ Commission on the Ecclesiastical Courts* (1954) 9-13.

⁴¹ Noel Cox, “The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England” (2001-2002) 3(2) *Rutgers Journal of Law and Religion* 1-45 <http://www-camlaw.rutgers.edu/publications/law-religion/cox1.pdf>.

⁴² This may be a reason why in New Zealand ecclesiastical judicial bodies are styled tribunals rather than courts, and mediation plays a major role.

⁴³ See Noel Cox, “The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England” (2001-2002) 3(2) *Rutgers Journal of Law and Religion* 1-45 <http://www-camlaw.rutgers.edu/publications/law-religion/cox1.pdf>. See also George Broderick and William Freemantle, *Ecclesiastical Cases, collection of the Judgments of the Judicial Committee of the Privy Council in Ecclesiastical Cases relating to Doctrine and Discipline* (1865).

church courts, is then examined. In the fifth and subsequent parts the application in New Zealand of the tradition of English church courts will be evaluated.

II The Settlement of Disputes

Spiritual courts, separate from the secular, existed in England from shortly after the Norman Conquest in 1066.⁴⁴ This process of separation seems to have occurred around 1072-76,⁴⁵ although it seems to have not been a deliberate move but rather the effect of the increasing sophistication of the legal system in late Saxon England.⁴⁶ The precise identification of courts was still not easy, even at the end of Henry I's reign. *Leges Henrici Primi* (c.1118) does not distinguish between a tribunal to try lay and a tribunal to try ecclesiastical cases.⁴⁷ However, as a general rule, ecclesiastical jurisdiction in the immediate post-Conquest period was primarily over moral offences.⁴⁸ In subsequent centuries the

⁴⁴ Sir William Blackstone, *Commentaries on the Laws of England* ed. Richard Burn (first published 1765, 9th ed., reprint 1978) Book 3, pp. 64-65.

⁴⁵ Archbishop of Canterbury and York's Commission on the Ecclesiastical Courts, *Report of the Archbishops' Commission on the Ecclesiastical Courts* (1954) 1.

⁴⁶ Archbishop of Canterbury and York's Commission on the Ecclesiastical Courts, *Report of the Archbishops' Commission on the Ecclesiastical Courts* (1954) 1-22; Felix Makower, *Constitutional History and Constitution of the Church of England* (1895) 384. The late Saxon legal and fiscal systems were comparatively sophisticated, and their efficiency was one of the principal reasons for the strength of the Norman kingship which was to follow; Emma Mason, *Norman Kingship* (1991).

⁴⁷ Gillian R. Evans, "Lanfranc, Anselm and a New Consciousness of Canon Law in England" in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (1998); *Leges Henrici Primi* ed. & trans. Leslie J. Downer (1972).

⁴⁸ Colin Morris, "William I and the Church Courts" (1967) 324 *English Historical Review* 449-463, 451.

jurisdiction of the ecclesiastical courts was gradually enlarged,⁴⁹ and was eventually to cover important aspects of what is now predominantly secular law. These included marriage,⁵⁰ divorce,⁵¹ and succession to property.⁵² Although the church courts were to lose most of this jurisdiction to the secular courts in the nineteenth century, the influence of the Courts-Christian upon the development of the law in these areas is significant⁵³ – and this influence extends to the laws of New Zealand.⁵⁴

At least in theory, both the Courts-Christian and the king's (secular) courts were supreme within their own fields. This was in an era which saw an ongoing contest throughout Christendom between the church and secular princes.⁵⁵ Mediæval jurists were accustomed to what

⁴⁹ See Sir William Holdsworth, *History of English Law* eds. Arthur L. Goodhart and Harold G. Hanbury (7th ed., 1972) vol. i, 614 ff.

⁵⁰ Until the Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85) (U.K.). In Ireland, ecclesiastical courts lost their matrimonial jurisdiction only under the Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870 (33 & 34 Vict. c. 110) (U.K.), and the jurisdiction survived until 1884 in the Isle of Man; the Diocese of the Bishop of Sodor and Man Ecclesiastical Judicature Transfer Act 1884 (Statutes, vol. V, pp. 352-373).

⁵¹ Until the Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85) (U.K.).

⁵² Until the Court of Probate Act 1857 (20 & 21 Vict. c. 77) (U.K.). The Poor (Burials) Act 1855 (18 & 19 Vict. c. 79) (U.K.), had the same effect in Ireland.

⁵³ This leads to the civil law, and to some extent the canon law also, having a continuing influence upon the development of the common law (and even statute law) in these areas; Thomas Scrutton, *The influence of the Roman Law on the Law of England* 163-169 (1884, reprinted 1985).

⁵⁴ Which were those of England as of 1840; English Laws Act 1858 (21 & 22 Vict. No. 2) (N.Z.), considered in *King v. Johnston* (1859) 3 N.Z. Jur. (N.S.) S.C. 94.

⁵⁵ See, for instance, the conflict between the papacy and the empire over the right of investiture; Uta-Renate Blumenthal, *The investiture controversy: church and monarchy from the ninth to the twelfth century* (1988).

we might call shared sovereignty, and saw nothing amiss with the pope having a concurrent jurisdiction with temporal sovereigns,⁵⁶ nor with the Church exercising concurrent jurisdiction with the king. In accordance with this principle, espoused in particular by the Bologna school of canonists,⁵⁷ the Church courts were as unfettered within their jurisdiction as the secular courts within theirs.⁵⁸ As a corollary, as a general principle no appeal lay from an ecclesiastical court to a secular court.⁵⁹ Appeals from the courts of the archbishops lay to the patriarch, in the west the bishop of Rome.⁶⁰

The right of English litigants to appeal to the pope dates from at least the time of king Stephen,⁶¹ and probably before.⁶² Such appeals

⁵⁶ In practice, many matters are dealt with through the administrative hierarchy of the Church, rather than through that of Vatican City State, the residual part of the Papal States.

⁵⁷ Bologna began as a law school but widened its scope to become a true *universitas litterarum*. The University of Bologna remains probably the oldest still extant; Rashdall Hastings, *The Universities of Europe in the Middle Ages* new ed. Frederick M. Powicke and Alfred B. Emden (1936).

⁵⁸ *R. v. Chancellor of St. Edmundsbury and Ipswich Diocese* [1947] 2 All E.R. 604 (K.B.), affirmed [1948] 2 All E.R. 170 (C.A.).

⁵⁹ Sir William Holdsworth, *History of English Law* eds. Arthur L. Goodhart and Harold G. Hanbury (7th ed., 1972) vol. i, 9. Cf. Richard Burn, *Ecclesiastical Law* (4th ed., 1781) vol. i, p. 57, in which he claims there was appeal for failure of justice to the king in his court of nobles. It is instructive that the king's courts copied the hierarchical system from the ecclesiastical courts. Theodore Plucknett, *A Concise History of the Common Law* (1956) 387-388.

⁶⁰ Patriarchs were located in Rome in the west, and Jerusalem, Alexandria, Antioch, and Constantinople in the east. There were also, and remain, other examples of the style patriarch in use, as for the archbishops of some prominent sees (such as Venice), and the heads of some Churches which separated from Rome during the first millennium.

⁶¹ Richard Burn, *Ecclesiastical Law* (4th ed., 1781) 58. These were at the instigation of Henri de Blois, bishop of Winchester and papal legate. George Duncan, *The High Court of Delegates* (1971) 2.

were heard either by the pope himself, from the time of pope Gregory VII by his permanent legates, or by special delegates appointed by the pope to hear a particular cause.⁶³ An appeal to the papacy might omit some preliminary steps, *omisso medio*.⁶⁴ Any appeal heard by a subordinate could be appealed to the pope himself, and even appealed from the pope to the pope “better informed.”⁶⁵

Partly because the *omisso medio* had political implications, but also due to the increasing jealousy of the common law, the right to appeal to Rome was long subject in England to restrictions imposed by the king or Parliament.⁶⁶ For, although the church courts were supreme within their jurisdiction, precisely what that jurisdiction was could be the subject of dispute, and the common law courts assumed the role of deciding these limits.⁶⁷ Nor were the courts immune from contemporary political controversies, particularly those concerned with the respective roles of church and State.⁶⁸ Attempts were made from time to time to limit appeals to Rome, as well as the original trial jurisdiction of papal

⁶² Felix Makower, *Constitutional History and Constitution of the Church of England* (1895) 225-227.

⁶³ Such as that of King Henry VIII and Queen Catherine of Aragon; See Garrett Mattingly, *Catherine of Aragon* (1950).

⁶⁴ Z.B. van Espen, *Jus ecclesiasticum universum* (1720), pars. iii, tit. x. c. 2, 5.

⁶⁵ Felix Makower, *Constitutional History and Constitution of the Church of England* (1895) 225-227.

⁶⁶ There were similar restrictions elsewhere, as in France.

⁶⁷ As they did with the royal prerogative; See the *Case of Proclamations* (1611) 12 Co. Rep. 74; 77 E.R. 1352 (K.B.); *Council of Civil Service Unions v. Minister for the Civil Service* (1985) A.C. 374.

⁶⁸ Indeed, until the Reformation, the Church and State were essentially indivisible, or, rather, each was an aspect of the whole. See e.g. Thomas Glyn Watkin, “Vestiges of Establishment: The Ecclesiastical and Canon Law of the Church in Wales” (1990) 2 Ecclesiastical Law Journal 110.

delegates.⁶⁹ But appeals continued nevertheless, perhaps with the king's licence.

One attempt of many to limit further appeals to Rome was in the Constitution of Clarendon 1164, which gave an additional right of appeal from the primate to the king:

If the archbishop shall have failed in doing justice recourse is to be had in the last resort to our Lord the king that by his writ the controversy may be ended in the court of the archbishop, because there must be no further process without the assent of our Lord the king.⁷⁰

But the king did not hear the cause by proxy, nor adjudicate upon it in person.⁷¹ He merely corrected slackness or the failure to do justice, *si archiepiscopus defecerit in justitia exhibenda*, and by his writ⁷² directed that the controversy be decided in the metropolitan's court. There would then be a rehearing before the archbishop as metropolitan.⁷³ The most

⁶⁹ For example, by legislation of Edward III and Richard II; *Suing in Foreign Courts Act 1352* (27 Edw. III st. 1 c. 1) (Eng.); *Suits in Spiritual Courts Act 1377* (1 Ric. II c. 13) (Eng.).

⁷⁰ Constitution VIII, in William Stubbs, *Select Charters and other illustrations of English constitutional history* (1913) 133.

⁷¹ It was later to be held that he could not even hear common law cases in person, having delegated the judicial role to the judges; *Prohibitions del Roy* (1607) 12 Co. Rep. 63.

⁷² *Precepto*.

⁷³ See the Archbishop of Canterbury and York's Commission on Ecclesiastical Courts, *Report of the Archbishops' Commission* (1883) i. The archbishop of Canterbury was metropolitan of the province of Canterbury and primate of All England, and the archbishop of York was metropolitan of the province of York and primate of England. Anglican Communion News Service, "Archbishop of Canterbury will have rich and varied ministry", 13 November 2002, available at <<http://www.anglicancommunion.org/acns/articles/32/00/acns3200.htm>>

common reason for recourse to the king⁷⁴ was delay by the Courts-Christian.

The secular power did not, as a general rule, purport itself to decide ecclesiastical questions. These were a matter for the Church, subject to correction if there was a complaint of undue delay.⁷⁵ Otherwise, the jurisprudence of the Church was in the hands of church courts, presided over by ecclesiastical judges, and whose advocates were trained in canon and civil law rather than the secular common law of the king's courts.⁷⁶ As such, the pre-Reformation church courts were, at least to a significant degree, an intellectual island largely isolated from mainstream English common law developments,⁷⁷ while yet attuned to wider canon law developments on the Continent.⁷⁸ This was to undergo a radical and fundamental change in the sixteenth century – one which still has consequences for New Zealand church courts. For it cannot be said that the church courts in New Zealand now occupy the position of the pre-Reformation courts. The Reformation changed the balance of the courts,

⁷⁴ *Recursus ad principem*.

⁷⁵ A situation today covered by the writ of *mandamus*, available from the Queen's Bench Division; Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 83(2)(c).

⁷⁶ The advocates were trained at Oxford or Cambridge, obtaining the degrees of D.C.L. or LL.D. respectively; *R. v. Archbishop of Canterbury* (1807) 8 East. 213.

⁷⁷ The precise nature of the legal relationship between pre-Reformation canon and common law is disputed. It is not certain, in particular, whether the canon law was binding in England *ipso facto*, or only if admitted by domestic councils or similar means. See J.W. Gray, *Canon Law in England: some Reflections on the Stubbs-Maitland Controversy* in *Studies in Church History* (1964) vol. iii, 48-68.

⁷⁸ It was not unusual for would-be practitioners to study civil law at the University of Paris for two years, followed by a similar period studying canon law at the University of Bologna. *The Laws of England* (1910) vol. xi, 503n.

and the situation in even a non-established Church, as in New Zealand, reflects that.

The Statute of Appeals 1532⁷⁹ ended the right to appeal to the papacy in causes testamentary and matrimonial, and in regard to the right to tithes and oblations. A final appeal was given to the archbishops of the two English provinces, Canterbury and York, but in causes concerning the king a further appeal was given to the Upper House of Convocation in each province.⁸⁰ After 1534 neither the king nor his successors, nor any subject, could sue for licences, dispensations, to the see of Rome. The archbishop of Canterbury had exercised the *legatus natus*⁸¹ of the pope throughout all England before the Reformation. Since then the archbishop has been empowered by the Ecclesiastical Licences Act 1533⁸² to exercise certain powers of dispensation in causes formerly sued for in the court of Rome.⁸³ The archbishop of Canterbury has the power to grant licences, dispensations and faculties⁸⁴, subject always to the

⁷⁹ Restraint of Appeals Act 1532 (24 Hen. VIII c. 12) (Eng.); *Parham v. Templar* (1821) 3 Phill. Ecc. 223, 241.

⁸⁰ Restraint of Appeals Act 1532 (24 Hen. VIII c. 12) (Eng.).

⁸¹ Thereby having a concurrent jurisdiction with that of all bishops within his province.

⁸² 25 Hen. VIII c. 21 (Eng.).

⁸³ Diocesan bishops also retained whatever rights they possessed, which then covered such diverse matters as residence, ordination outside the diocese of birth, fasting, and the public reading of banns; s. 4. These dispensations are but rarely invoked today, if at all; Timothy Briden and Brian Hanson, *Moore's Introduction to English Canon Law* (3rd ed., 1992) 135-136.

⁸⁴ The faculty is, in ecclesiastical law, a privilege or special dispensation, granted to a person by favour and indulgence to do that which by the common law he could not do. This includes marrying without banns, or erecting a monument in a church. The Master of the Faculties (Magister

authority of the Crown.⁸⁵ These powers were confirmed by another Act of 1536.⁸⁶

The ending of appeals to Rome was confirmed by the Act of Submission of the Clergy 1533,⁸⁷ which ended all appeals to Rome, and gave a further appeal “for lack of justice” from several courts of the archbishops to the king in chancery.⁸⁸ But, unlike the mediæval *recursus ad principem*, these latter appeals were heard not by the archbishops’ courts by way of rehearing, but by the king in person or his deputies.⁸⁹

ad Facultates) grants these in the Court of Faculties, under the Ecclesiastical Licences Act 1533 (25 Hen. VIII c. 21) (Eng.). Consistory Courts may also grant certain faculties; George H. Newsom, *Faculty Jurisdiction of the Church of England* (2nd ed., 1993).

⁸⁵ E.F. Churchill, “Dispensations under the Tudors and Stuarts” (1919) 34 *English Historical Review* 409-415.

⁸⁶ The Ecclesiastical Licences Act 1536 (28 Hen. VIII c. 16) (Eng.).

⁸⁷ 25 Hen. VIII c. 19 (Eng.).

⁸⁸ This Act did however assert the partial continuance of the authority of the canon law; Act of Submission of the Clergy 1533 (25 Hen. VIII c. 19) (Eng.). Petitions for default of justice originally lay to the king. But, being unable to hear all causes in person, he usually left the Council to hear and determine the matter and advise him. The Chancellor, as the principal officer, and one originally versed in the laws spiritual and temporal, later undertook this delegated task alone. See Sir William Holdsworth, *History of English Law* eds. Arthur L. Goodhart and Harold G. Hanbury (7th ed., 1972) vol. i, 395-476; Sir William Holdsworth, *History of English Law* eds. Arthur L. Goodhart and Harold G. Hanbury (7th ed., 1972) vol. v, 215-338; Sir William Holdsworth, *History of English Law* eds. Arthur L. Goodhart and Harold G. Hanbury (7th ed., 1972) vol. ix, 335-408; Sir William Holdsworth, *History of English Law* eds. Arthur L. Goodhart and Harold G. Hanbury (7th ed., 1972) vol. xii, 178-330, 583-605.

⁸⁹ *Re Gorham, Bishop of Exeter, ex parte Lord Bishop of Exeter* (1850) 10 C.B. 102 (C.P.). Blackstone noted that the “grand rupture” was “when all the jurisdiction usurped by the pope in matters ecclesiastical was restored to the Crown, to which it originally belonged: so that the statute 25 Hen. VIII was but declaratory of the ancient law of the realm”; Sir

For the first time appeals from church courts would be heard, not by Church dignitaries or the pope, but by a secular judge, the king or his lay servants. Under King Henry VIII his vicar-general, Thomas Cromwell, heard these appeals.⁹⁰ Commissioners heard appeals under King Edward VI.⁹¹ Since then the Privy Council has been, in many causes, the highest appellate court in England, though it is not strictly an ecclesiastical court.⁹²

The judges of the post-Reformation church courts were still appointed by the Church hierarchy, but as the Church now was required to acknowledge that the king was “supreme Head in earth of the Church of England,”⁹³ they were also the king’s judges. The judges of the new

William Blackstone, *Commentaries on the Laws of England* ed. Richard Burn (first published 1765, 9th ed., reprint 1978) Book 3, p. 67.

⁹⁰ For his appointment as vicegerent, see “From Edmund Bonner’s commission as bishop of London, 1538”, reprinted in Sir Geoffrey Elton, *The Tudor Constitution* (2nd ed., 1982) 367-368.

⁹⁰ Act of Supremacy 1534 (26 Hen. VIII c. 1) (Eng.).

⁹¹ Established under the Submission of the Clergy Act 1533 (25 Hen. VIII c. 19) (Eng.). For the history of the Court of Delegates, see Sir William Blackstone, *Commentaries on the Laws of England* ed. Richard Burn (first published 1765, 9th ed., reprint 1978) Book 3, p. 66; Sir William Holdsworth, *History of English Law* eds. Arthur L. Goodhart and Harold G. Hanbury (7th ed., 1972) vol. i, pp. 603-605; George Duncan, *The High Court of Delegates* (1971).

⁹² The Judicial Committee of the Privy Council (formally Her Majesty in Council), is the Court of Final Appeal, and replaced the Court of Delegates in the Judicial Committee Appeal Act 1833 (3 & 4 Will. IV c. 41) (U.K.). By the Appellate Jurisdiction Act 1876 (39 & 40 Vict. c. 59) (U.K.) all archbishop and bishops were eligible to be members of the Judicial Committee, but they were not ex officio members; Order in Council dated 11 December 1865, Rules for Appeals in Ecclesiastical and Maritime Causes, rule 3.

⁹³ Act of Supremacy 1534 (26 Hen. VIII c. 1) (Eng.). This was repealed by the See of Rome Act 1554 (1 & 2 Phil. & Mary c. 8) (Eng.), and was revived and confirmed by the Act of Supremacy 1558 (1 Eliz. I c. 1) (Eng.).

church courts were lay persons,⁹⁴ recruited from the practitioners of the ecclesiastical law Bar, the civilians.⁹⁵ Now, for the first time, the Courts-Christian were also the king's courts. Where once the pope or his delegates might hear appeals, of necessity the pope now gave way to the king and his council, supreme in all questions spiritual as well as secular. The abolition of the papal jurisdiction in itself had little direct effect on the substantive law applied in the courts,⁹⁶ and even upon the structure of the courts.⁹⁷ Overall, however, the Reformation in England may be characterised as relentlessly juridical in nature.⁹⁸ The effects of the legalism remains with the Anglican Church in New Zealand, and the subsequent history of the courts has been one of efforts to reduce the consequences of the royal supremacy.

At the Reformation, some common lawyers advocated the abolition of ecclesiastical courts altogether. This would have required the fusion of common and canon law, a truly monumental task. The option of abrogating the ecclesiastical laws altogether was not seriously

⁹⁴ Men in holy orders (even deacons) were ineligible for admission as advocates; *R. v. Archbishop of Canterbury* (1807) 8 East. 213.

⁹⁵ Trained in the civil law, as well as the ecclesiastical or canon law, they were normally recruited from the Advocates of Doctors' Commons; George Squibb, *Doctors' Commons* (1977) 31.

⁹⁶ Richard Helmholz, *Roman Canon Law in Reformation England* (1990) 38.

⁹⁷ For example, the archdeacons' courts remained active to the late eighteenth century and were only finally abolished in 1963; Ecclesiastical Jurisdiction Measure 1963 (U.K.), ss. 82(2)(a), 83. Hughie Jones, "Omnis Gallia ... Or, The Roles of the Archdeacon" (1990-92) 2 Ecclesiastical Law Journal 236; R.L. Ravenscroft, "The Role of the Archdeacon Today" (1993-95) 3 Ecclesiastical Law Journal 379-392.

⁹⁸ This was, of course, an ironic development given that papal authority had been extended and reinforced throughout Western Christendom through the work of the great lawyer-popes and the canonists and civilians; see, for example, Brian Tierney, *Church law and constitutional thought in the Middle Ages* (1979).

considered. A commission was appointed to prepare a code of “the king’s ecclesiastical laws of the Church of England,”⁹⁹ which they proceeded to do, but the report was not implemented.¹⁰⁰ The canon law therefore was to continue in force, except where it was contrary to the common or statute law, or the king’s prerogative,¹⁰¹ and subject to amendment.¹⁰²

The two jurisdictions thus existed side by side, but with the balance now weighted in favour of the common law.¹⁰³ The ecclesiastical law was now fully a part of the laws of England, even if it was not part of the common law.¹⁰⁴ The law reports of relevant cases in either jurisdiction

⁹⁹ For a modern edition, see *The Reformation of the Ecclesiastical Laws as attempted in the reigns of King Henry VIII, King Edward VI, and Queen Elizabeth* ed. Edward Cardwell (1850).

¹⁰⁰ Generally, see James Spalding (ed.), *The reformation of the ecclesiastical laws of England, 1552* (1992).

¹⁰¹ Act of Submission of the Clergy 1533 (25 Hen. VIII c. 19) (Eng.).

¹⁰² By Convocation or by Crown-in-Parliament.

¹⁰³ Particularly with the common lawyers led by Sir Edward Coke, Chief Justice of Common Pleas and later King’s Bench; Conrad Earl Russell, “Whose Supremacy? King, Parliament and the Church 1530-1640” (1997) 4(21) *Ecclesiastical Law Journal* 700, 701.

¹⁰⁴ The ecclesiastical law of England consists of the general principles of the *ius commune ecclesiasticum*. Foreign particular constitutions received by English councils or so recognised by English courts (secular or spiritual) as to become part of the ecclesiastical custom of the realm; and the constitutions and canons of English synods. The Submission of the Clergy Act 1533 (25 Hen. VIII c. 19) (Eng.), provided that only the canon law as it then stood was to bind the clergy and laity, and only so far as it was not contrary to common and statute law, excepting only the papal authority to alter the canon law, a power which ended later in 1533, when it was enacted that England was “an Empire governed by one supreme head and king;” Appointment of Bishops Act 1533 (25 Hen. VIII c. 20) (Eng.). New canon law could only be created by Act of Parliament, and now by Measure, under the Church of England Assembly (Powers) Act 1919 (9 & 10 Geo. V c. 76) (U.K.).

were cited in the courts exercising the other jurisdiction.¹⁰⁵ The ecclesiastical courts were now overtly influenced by developments in the common law courts, and not merely obliged to consider the political or secular consequences of spiritual judgments, as before the Reformation. The church courts were no longer separate and equal – they were subject to the sovereignty of the Crown and of Parliament. This was to have important consequences for the development of the ecclesiastical law, because after the Reformation the supremacy of the Crown gradually became the supremacy of Parliament, and the supremacy of the common law,¹⁰⁶ which meant that the church courts gradually lost their independence. New Zealand church courts were not separate and equal, but subject to the sovereignty of the Crown and of Parliament, as well as the supervision of the common law courts. Yet they remained non-established.

The specialised nature of the jurisdiction and the survival of the civilians preserved the separate church courts in the face of the jealousy

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Ecclesiastical law is part of the law of the land. The law is one, but jurisdiction as to its enforcement is divided between the ecclesiastical courts and the temporal courts. When a matter of general law arises incidentally for consideration in a case before an ecclesiastical court, that court is bound to ascertain the general law and order itself accordingly; and where a matter depending on ecclesiastical law finds a place in a cause properly before the temporal courts those courts similarly will ascertain for themselves the ecclesiastical law and apply it as part of the law they administer.

– *Attorney-General v. Dean and Chapter of Ripon Cathedral* [1945] 1 All E.R. 479 (Ch. D.), citing *Mackonochie v. Lord Penzance* (1881) 6 App. Cas. 424, 446 (H.C.).

¹⁰⁶ See Norman Doe, *Canon Law in the Anglican Communion* (1998) 13-15.

of the common lawyers and the common law judges.¹⁰⁷ The settlement did not however survive intact for long, and it was that element most closely associated with the royal prerogative which was to suffer first in the seventeenth century struggle between king and commons¹⁰⁸ – the Star Chamber.

The Civil Wars of the seventeenth century ended with a general acceptance of Erastian ideology by Restoration prelates and their allies.¹⁰⁹ This approach, which stressed the interdependence of church and State in England, was not inconsistent with the traditional lay perception of the Church, nor was it entirely novel in clerical circles,¹¹⁰ but over time it was to undermine the intellectual vigour of the church courts. The desirability of a liturgical and doctrinal uniformity after a period of upheaval was expressed in the new *Prayer Book*,¹¹¹ and was for

¹⁰⁷ The influence of Erastian thought was less pronounced than the belief of the common lawyers in their own correctness and ability to settle all matters spiritual and lay. See Sir John Baker, *Introduction to English Legal History* (1979) 92-95.

¹⁰⁸ This also was reflected in the history of the Star Chamber; Cora L. Scofield, *A study of the Court of Star Chamber largely based on manuscripts in the British Museum and the Public Record Office* (reprint of 1900 ed., 1969).

¹⁰⁹ For the politics of the Restoration see Robert Bosher, *The Making of the Restoration Church Settlement* (1951) 143-217; A. Whiteman, "The Re-establishment of the Church of England, 1660-1663" (1955) 5 *Transactions of the Royal Historical Society* (5th series) 111.

¹¹⁰ See Edward Stillingfleet, *Irenicum – A Weapon-Salve for the Church's Wounds or the Divine Right of Particular Forms of Church Government* (2nd ed., 1662) vol. ii.

¹¹¹ *The Book of Common Prayer* (1662), backed by the Act of Uniformity, 1662 (14 Chas. II c. 4) (Eng.).

a time achieved, to a degree unmatched since,¹¹² and the church courts contributed to this homogeneity. But it was an Erastian homogeneity.

With the coming of king William III and queen Mary II, the High Church understanding of the royal supremacy suffered a serious setback. Erastians now saw the supremacy as that of the whole apparatus of government, carried out in the name of the Sovereign.¹¹³ No longer could it be seen as the supremacy of the Sovereign personally – still less could this be true under the Roman Catholic king James II. The ecclesiastical law was seen as being as much a part of the law of the land as the common law itself.¹¹⁴ The spirit of the age was very much in favour of the church courts and the common law courts working as part of a unified system of laws.¹¹⁵

Till the Civil Wars of the seventeenth century the two systems, ecclesiastical and secular,¹¹⁶ had operated largely independently, now they were motivated by a sense of common purpose.¹¹⁷ Before the Reformation the ecclesiastical courts had paid little or no attention to either common law or statute, and had accepted writs of prohibition from

¹¹² The good inherent in uniformity, in distinction to the good in any liturgical or doctrinal uniformity, was stressed in Hugh Davis, *De Jure Uniformitatis Ecclesisticae* (1669).

¹¹³ Robert Rodes, *Law and Modernisation in the Church of England* (1991) 5.

¹¹⁴ Sir Lewis Dibdin, *Establishment in England* (1932) 51-52.

¹¹⁵ Judges and counsel were at pains to adjust their various precedents to this end, see e.g., *Slater v. Smalebrooke* (1665) 1 Sid. 27.

¹¹⁶ The secular courts being predominantly common law courts, though the Court of Chancery administered the laws of equity, which were more strongly influenced by ecclesiastical notions; A.H. Marsh, *History of the Court of Chancery and of the rise and development of the doctrines of equity* (originally published 1890, reprinted 1985).

¹¹⁷ Robert Rodes, *Law and Modernisation in the Church of England* (1991) 10-14.

the Court of King's Bench only as *force majeure*.¹¹⁸ The period 1533-1660 had been one of adjustment. After 1660 an intellectual rapprochement occurred.¹¹⁹ Canonists made greater use of common law precedents and statutes,¹²⁰ and even the common lawyers were less inclined to deny the canonists their jurisdiction – though it was by now largely limited to testamentary and matrimonial matters.¹²¹

The bishops and clergy were estranged from their courts from the seventeenth century. This estrangement was in part attributable to the integration of the latter into the unified Erastian structure. But it may have had its roots in Elizabethan ecclesiastical judicial administration. The first generation after the Reformation was less legalist, and perhaps more efficient, than the mediæval canonists were. That after the Restoration was more legalist, but perhaps less central to Church life.¹²²

¹¹⁸ By 1753 the Court of Arches could recognise it as *res judicata*; *Pattern v. Castleman* (1753) 1 Lee 387 (Arches). The Court of King's Bench also decided that ecclesiastical courts would try customs according to common law rules.

¹¹⁹ The Restoration ecclesiastical judiciary was marked by an intellectual rapprochement between church and State. Robert Rodes, *Law and Modernisation in the Church of England* (1991) 13.

¹²⁰ See, for illustration, the writings of ecclesiastical lawyers of the post-Restoration period (the term canonists is probably a misnomer). John Aylliffe, *Parergon Juris Canonici Anglicani, or, a commentary, by way of supplement to the Canons and Constitutions of the Church of England, etc.* (1727); Richard Burn, *Ecclesiastical Law* (4th ed., 1781); Edmund Gibson, *Codex Juris Ecclesiae Anglicanae* (1713). Within the courts themselves, a similar broad-minded approach was also clear. See *DaCosta v. Villareal* (1753) 2 Strange 961; *Phillips v. Crawley* (1673) 1 Freeman 83.

¹²¹ These were ended in the nineteenth century; e.g. the Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85) (U.K.); Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870 (33 & 34 Vict. c. 110) (U.K.).

¹²² Robert Rodes, *Law and Modernisation in the Church of England* (1991) 14. Parallels may be drawn with the history of the Court of

Rather than strengthening the position of the church courts, this had the effect of emphasising their increasingly marginal role within the Church, and their weakness when compared to the secular courts. This jurisprudential weakness and marginalisation is even more apparent in New Zealand, where the church courts lack the authority of the secular State – because of the separation of church and State¹²³ – and yet are liable to correction by secular courts for error. But it was a position which the church courts in New Zealand inherited in the nineteenth century; an attitude based on an Erastian notion which was inapplicable to a non-established Church.

III The Jealousy of the common law

Not only were the church courts weakened by lack of use by the Church itself, they were also weakened by the jealousy, and at times the outright hostility, of the common law.

Only with the reign of king Henry VIII did the ecclesiastical courts become the king's courts. But applicants could always sue for writs of prohibition¹²⁴ or *mandamus*¹²⁵ from the king's common law courts.

Chivalry during the seventeenth and eighteenth centuries; See George Squibb, *Doctors' Commons* (1977).

¹²³ See Norman Doe, *Canon Law in the Anglican Communion* (1998) 13-15.

¹²⁴ Prohibition to spiritual courts Act 1285 (13 Edw. I Stat. Circumspecte Agatis) (Eng.). Prohibition is an order to forbid an inferior court from proceeding in a cause there pending, suggesting that the cognisance of it does not belong to that court.

¹²⁵ Though not certiorari, as the courts are unfettered within their jurisdiction; *R. v. Chancellor of St. Edmundsbury and Ipswich Diocese* [1947] 2 All E.R. 604 (K.B.), affirmed [1948] 2 All E.R. 170 (C.A.). *Mandamus* commanded that proceedings be removed from an inferior court into a superior court for review. In this respect the ecclesiastical

These may still issue out of the Queen's Bench Division – and in New Zealand the High Court – to restrain ecclesiastical courts from exceeding their jurisdiction, or to compel them to cease delaying hearing any matter.¹²⁶ For the enforcement of their own judgments, and the maintenance of order, contempt of a consistory court (or episcopal tribunal) would be dealt with by the High Court.¹²⁷ There is no recorded instance of a writ being issued to papal legates, though there are instances of suitors being prohibited from appealing to the pope.¹²⁸ But with the church courts in England now the King's (or Queen's) courts, the degree of jealousy felt by the common law courts increased – and remains in modern times, even, apparently in New Zealand where the church courts are not the Queen's courts. Thus the secular courts did not relax their oversight, but rather increased it as the scope of administrative law grew.

The secular courts constrained excesses of jurisdiction by the church courts even before the Reformation. The influence of these writs

courts were not inferior to the High Court. When an application is made to review all or part of the determination of an inferior Court, a tribunal, a person exercising a statutory or prerogative power, or a person exercising a power that affects the public interest, the Court may make an order for certiorari, any other order that it thinks just, or both; High Court Rules, Rule 626(1) and (2).

¹²⁶ *Gregory v. Bishop of Waiapu* (1975) 1 N.Z.L.R. 705, 713 per Beattie J., following *R. v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co. (1920) Ltd* [1924] 1 K.B. 171, 205 per Atkins L.J. This indirect control of the ecclesiastical courts was expressly preserved in England by the Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 83(2)(c).

¹²⁷ Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 81(2); *R. v. Daily Herald ex parte Lord Bishop of Norwich* [1932] 2 K.B. 402. The High Court enjoyed inherent jurisdiction to correct errors in lower courts – and this has included tribunals which are not part of the judicial system; *Taylor v. Attorney-General* [1975] 2 N.Z.L.R. 675, 682 per Richmond J.; *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705 (H.C.).

¹²⁸ *Mayor of London v. Cox* (1867) L.R. 2 H.L. 239, 280 per Willes J.

and orders since that time upon the development of the substantive ecclesiastical law has probably not been as significant as they were in the common law.¹²⁹ What was significant in the church courts was the influence of the principles and procedures of the common law.

The common law was hostile at once to the royal prerogative and the ecclesiastical law.¹³⁰ Both limited the scope of actions possible in the post-Reformation common law courts. The criminal jurisdiction of the ecclesiastical courts included, at various times, heresy, adultery, incest, fornication, simony, brawling in church, defamation,¹³¹ and others. Some Tudor and Stuart legislation made secular offences of conduct that had formerly fallen within the Church's exclusive jurisdiction.¹³² This led to a shared jurisdiction, which in the long term proved harmful to the ecclesiastical courts, in the face of the jealousy of the common law, and the allegedly more efficient processes of the common law courts.¹³³ The

¹²⁹ See, for example, Raoul C. van Caenegem, *Royal writs in England from the Conquest to Glanvill* (1959).

¹³⁰ Noel Cox, "The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England" (2001-2002) 3(2) *Rutgers Journal of Law and Religion* 1-45 <http://www-camlaw.rutgers.edu/publications/law-religion/cox1.pdf>. None was more active in the assertion of the rights of the common law than Sir Edward Coke, Chief Justice successively of the Common Pleas and King's Bench; See Caroline Bowen, *The lion and the throne* (1957).

¹³¹ This was lost in 1855; Ecclesiastical Courts Act 1855 (18 & 19 Vict. c. 41) (U.K.), s. 1. In Ireland the same effect was achieved by the Ecclesiastical Courts Jurisdiction Act 1860 (23 & 24 Vict. c. 32) (U.K.).

¹³² Witchcraft Act 1562 (5 Eliz. I c. 16) (Eng.); Sodomy Act 1562 (5 Eliz. I c. 17) (Eng.); Fraudulent Conveyances Act 1571 (13 Eliz. I c. 5) (Eng.); Bankruptcy Act 1571 (13 Eliz. I c. 7) (Eng.); Poor Act 1575 (18 Eliz. I c. 3) (Eng.); Bigamy Act 1603 (1 Jac. I c. 11) (Eng.); Plays Act 1605 (3 Jac. I c. 21) (Eng.).

¹³³ Perceived as more efficient, in part because common law courts procedures had been subject to a series of rigorous reforms in the course

settlement of the Church after the disruption of the civil wars of the seventeenth century may have led to an intellectual rapprochement between Church courts and secular courts, but this encouraged intellectual borrowing from the common law, which was to help to erode still further the distinct identity of the ecclesiastical law.¹³⁴

Although the ecclesiastical jurisdiction was further confined in the course of the nineteenth century, this was more a symptom than a cause of this decline. The ecclesiastical courts in England lost their power to punish lay persons for brawling in 1860,¹³⁵ though the residual criminal jurisdiction over the laity was only finally abolished in 1963.¹³⁶ They retained a power to discipline clergy, and (it would seem) lay persons holding office in the Church, to determine questions of doctrine and ritual,¹³⁷ to protect Church property, and to decide civil disputes relating to ecclesiastical matters.¹³⁸ The church courts in New Zealand have a similar, though slightly more restricted, jurisdiction – particularly in respect of the faculty jurisdiction.

of the nineteenth century; e.g. see Alan Harding, *A Social History of English Law* (1966) 330-358.

¹³⁴ The very term ecclesiastical law has been used to describe the laws of the Church, including those enacted by the secular State, in contrast to the canon law, which is purely ecclesiastical in nature. See Thomas Glyn Watkin, “Vestiges of Establishment: The Ecclesiastical and Canon Law of the Church in Wales” (1990) 2 *Ecclesiastical Law Journal* 110.

¹³⁵ Ecclesiastical Courts Jurisdiction Act 1860 (23 & 24 Vict. c. 32) (U.K.), s. 1.

¹³⁶ Ecclesiastical Jurisdiction Measure 1963 (U.K.).

¹³⁷ At least so far as the former was justiciable – given the difficulty in determining doctrinal questions in the absence of a clear doctrinal authority in Anglicanism; Edward Norman, “Authority in the Anglican Communion” (1998).

¹³⁸ The principal activity of the Church courts in England is in the faculty jurisdiction; George H. Newsom, *Faculty Jurisdiction of the Church of England* (2nd ed., 1993). This is absent in New Zealand, at once depriving the Church tribunals of the bulk of their potential work.

IV Ignorance of the nature of ecclesiastical jurisprudence

It would seem that the jurisdiction of the ecclesiastical courts was reduced in England in the nineteenth century in part as a result of a lack of understanding of the procedure of the ecclesiastical law.¹³⁹ The ecclesiastical courts were criticised in an 1830 report for failing to give reasons for their decisions, and for not following a system of precedent.¹⁴⁰ Yet theirs was a canon law-based system, and in no way bound to follow the principles or procedures of the common law courts.¹⁴¹ The criticism shows a lack of understanding of the nature of the judicial process in church courts by those entrusted with its

¹³⁹ Though dissatisfaction with ecclesiastical courts appears to have been fairly general at that time; *Knight v. Jones* (1821) Records of the Court of Delegates 8/79 (for a letter of complaint contained within the cause papers).

¹⁴⁰ Report of the Archbishop of Canterbury and York's Commission on the Practice and Jurisdiction of the Ecclesiastical Courts of England and Wales, *The Practice and Jurisdiction of the Ecclesiastical Courts of England and Wales* (1831-32) cmd. 199, part xxiv, 1. For the question of adjusting common law and ecclesiastical precedents see *Burgoyne v. Free* (1825) 2 Add. 405 (Arches); *Burgoyne v. Free* (1830) 2 Hag. Ecc. 663 (Delegates); Robert Rodes, *Law and Modernisation in the Church of England* (1991) 11-12.

¹⁴¹ If there is a conflict between ecclesiastical common law and secular common law, ecclesiastical courts are not strictly bound by the latter; *In Re St. Mary's, Banbury* [1985] 2 All E.R. 611, 615, per Boydell, Ch. (Oxford Consistory Court); *R. v. Chancellor of St. Edmundsbury and Ipswich Diocese* [1947] 2 All E.R. 604 (K.B.), affirmed [1948] 2 All E.R. 170, per Wrottesley L.J. (C.A.). However, ecclesiastical courts were citing common law cases from the seventeenth century; Richard Helmholz, *Roman Canon Law in Reformation England* (1990) 188-195.

administration. It is therefore not surprising that church courts became increasingly marginalised.¹⁴²

The church courts in England – though not those in New Zealand – are still the Queen’s courts.¹⁴³ The significance of this has altered as the balance of the settlement has changed in England, and the Church has become more independent. The role of purely secular courts in ecclesiastical causes has declined.¹⁴⁴ The changes made in 1963 to the judiciary of the Church of England saw a reduction in the ecclesiastical jurisdiction of the Judicial Committee of the Privy Council,¹⁴⁵ but this was merely the latest stage in a process begun in the nineteenth century. But while the Church may have weakened one consequence of the establishment, it has permitted, indeed encouraged, a more serious undermining of their independence.

It was inevitable that the church courts in England were themselves to change under this pressure. In 1854 oral evidence in open court was

¹⁴² Though, on formation, each new diocese received its own bishop’s court, and provision was made at provincial level for appellate courts.

¹⁴³ In Erastian terminological understanding, dominant since the Revolution of 1688, this supremacy was of the monarch as head of State, rather than personally. The idea that it was a personal supremacy of the monarch was not even mooted again till the time of Victoria; Sir Lewis Dibdin, *Church Courts* (1881), Sir Lewis Dibdin *Establishment in England* (1932) 51-52.

¹⁴⁴ Strictly speaking, no secular court was part of the hierarchy at any stage, the Judicial Committee of the Privy Council being merely advisers to the Queen in Counsel. See the Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 1(3)(d).

¹⁴⁵ Ironically, perhaps, the Judicial Committee retained an important part of the secular judiciary in New Zealand until recently; Supreme Court Act 2003 (N.Z.); Noel Cox, “A New Supreme Court of New Zealand” (2003) 12(3) *The Commonwealth Lawyer* 25-28.

allowed.¹⁴⁶ The courts were still forbidden to cite anyone outside the diocese where he or she lived, and it was not clear that the courts could even hear legal arguments in London (where many cases were heard) unless the litigants lived there.¹⁴⁷ The inadequacy of powers to punish for contempt was also obvious to all who used the courts,¹⁴⁸ despite the inherent jurisdiction of the High Court to exercise this role,¹⁴⁹ because this still meant recourse to secular courts.

The clergy and laity were as much responsible as anyone for this situation; as many called for certainty, for precedents to be cited and followed.¹⁵⁰ The influence of the common law compelled the ecclesiastical courts to adopt principles of binding precedent.¹⁵¹ The binding force of precedent was accepted by the ecclesiastical judges in England in the course of the nineteenth century,¹⁵² and received statutory

¹⁴⁶ Ecclesiastical Courts Jurisdiction Act 1854 (17 & 18 Vict. c. 47) (U.K.).

¹⁴⁷ *Noble v. Ahier* (1886) 11 P.D. 158 (Ch. York); but see Robert Rodes, *Law and Modernisation in the Church of England* (1991) 463, note 81.

¹⁴⁸ The writ *de contumace capiendo* was obsolete. Robert Rodes, *Law and Modernisation in the Church of England* (1991) 360. Imprisonment for contumacy was eliminated by repealing the Ecclesiastical Courts Act 1813 (53 Geo. III c. 127) (U.K.).

¹⁴⁹ *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, 713 per Beattie J., following *R. v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co. (1920) Ltd* [1924] 1 K.B. 171, 205 per Atkins L.J.

¹⁵⁰ Possibly through increased familiarity with common law procedures, coupled with less exposure to ecclesiastical court procedures.

¹⁵¹ Both provincial courts are bound by decisions of the Judicial Committee of the Privy Council, though the Court for Ecclesiastical Causes Reserved and Commissions of Review are not bound by decisions of the Judicial Committee on matters of doctrine, ritual, and ceremonial; Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 48(6).

¹⁵² Report of the Archbishops' Commission on Canon Law, *The Canon Law of the Church of England* (1947) 58; Archbishop of Canterbury and

recognition in the Ecclesiastical Jurisdiction Measure 1963.¹⁵³ However, the Court of the Arches is still not bound by decisions of the Chancery Court of York, and vice-versa, though both are bound by their own decisions.¹⁵⁴ The Consistory Courts are bound by their own decisions,¹⁵⁵ but not by decisions of a consistory court in another diocese.¹⁵⁶ The substance of the canon law administered by the ecclesiastical courts of the Church of England was strongly influenced by the civil law, which continued to be studied at Oxford and Cambridge, and the Vice-Chancellor's Court of the University of Oxford followed civil law procedures until 1854,¹⁵⁷ when it too gave way in the face of the inexorable advance of the common law. Yet the church courts, attacked for adhering to the procedures of the civil law (of which clerics and lay persons alike were increasingly ignorant¹⁵⁸), were compelled to adopt

York's Commission on the Ecclesiastical Courts, *Report of the Archbishops' Commission on the Ecclesiastical Courts* (1954) 13, 27, 28. This was due, in no small part, to the influence of Sir William Scott (later Lord Stowell), as well as to the growing influence of the common lawyers.

¹⁵³ Ecclesiastical Jurisdiction Measure 1963 (U.K.), ss. 45(3), 48(5), (6).

¹⁵⁴ *In Re Lapford (Devon) Parish Church* [1955] 3 All E.R. 484; *Stephenson v. Langston* (1804) 1 Hag. Con. 379, 387 per Sir William Scott; *Re St. Mary, Tyne Dock (No. 2)* [1958] 1 All E.R. 1, 8-9 per Deputy Chancellor Wigglesworth.

¹⁵⁵ *Rector and Churchwardens of Bishopwearmouth v. Adey* [1958] 3 All E.R. 441. This is similar to the rule of precedent as applied in common law courts.

¹⁵⁶ *Re Rector and Churchwardens of St. Nicholas, Plumstead* [1961] 1 All E.R. 298.

¹⁵⁷ *Statutes, Decrees and Regulations of the University of Oxford* (1973) tit. IV s. xiii, 4.

¹⁵⁸ The strict injunction issued by Henry VIII in October 1535 forbade the study of canon law in the universities; See Richard Helmholz, *Roman Canon Law in Reformation England* (1990) 152-153; Philip Hughes, *The Reformation in England* (1963) 239; D.R. Leader (ed.), *The History of the University of Cambridge* (1988) vol. i, 332-333. As a consequence of

many of the procedures of the common law courts. The common law courts no longer fought to wrest jurisdictional victories from the ecclesiastical courts, but the latter were required by statute to surrender much of their jurisdiction to the supposedly more modern and efficient common law courts.¹⁵⁹ As a consequence, the church courts began to lose something of their intellectual connection with their canon law heritage. This loss was encouraged by the decline of the civil law profession in the late nineteenth century,¹⁶⁰ with the decline of Doctors' Commons (the civil and canon lawyers' society).

This latter decline was caused by a reduction in business in civil and canon law courts, and itself contributed to a further decline in an appreciation of the intellectual separateness of the church courts.¹⁶¹ The lack of a separate profession increased the tendency for the law and practice of lay and spiritual courts to approximate more closely, and this, in turn, has tended still more to differentiate English ecclesiastical law from ecclesiastical law in other parts of Christendom, particularly the Roman Catholic.¹⁶² This effect was even more pronounced in New

the injunction even the civil law faculties suffered a decline; See J.L. Barton, "The Faculty of Law" in James McConica (ed.), *The History of the University of Oxford* (1986) vol. iii, 271-272; Thomas Fuller, *The History of the University of Cambridge* eds. Marmaduke Prickett and Thomas Wright (1840) 225.

¹⁵⁹ Noel Cox, "The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England" (2001-2002) 3(2) Rutgers Journal of Law and Religion 1-45 <http://www-camlaw.rutgers.edu/publications/law-religion/cox1.pdf>.

¹⁶⁰ See George Squibb, *Doctors' Commons* (1977).

¹⁶¹ There were relatively few civilians in any case. With them also went their learning, and the valuable library of Doctors' Commons was sold and dispersed in 1861; George Squibb, *Doctors' Commons* (1977) 96-97.

¹⁶² Noel Cox, "The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England" (2001-2002) 3(2) Rutgers Journal of Law and Religion 1-45 <http://www-camlaw.rutgers.edu/publications/law-religion/cox1.pdf>.

Zealand, where there were few if any ecclesiastical lawyers, and any necessary litigation was conducted by lay counsel.

The influence of the common law has had an increasingly significant effect, which has accelerated since the decline of the civilians in the middle of the nineteenth century. Concentrating on the perceived misfortune of lay courts deciding church causes obscured the arguably more insidious influence of the common law.¹⁶³

The influence of the common law on the ecclesiastical courts stemmed in part from the nature of the judicial personnel. At times in the early nineteenth century many ecclesiastical judges were clerics, who may have been lacking the legal experience and training necessary for judicial office. But they were perhaps surer in their theological knowledge. The ecclesiastical judges in England are now required to have legal qualifications,¹⁶⁴ though not specifically knowledge of canon

camlaw.rutgers.edu/publications/law-religion/cox1.pdf. Roman Catholic canon lawyers require a formal training. In order to be a canonist one must have earned at least a Licence (Juris Canonici Licentia, or J.C.L.) in the study of canon law. Most seminaries require that their students take prescribed courses in canon law, but the licence can be acquired only at a university with a faculty of canon law.

¹⁶³ Noel Cox, "The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England" (2001-2002) 3(2) Rutgers Journal of Law and Religion 1-45 <http://www-camlaw.rutgers.edu/publications/law-religion/cox1.pdf>.

¹⁶⁴ The Chancellor must be over 30 years of age, a lawyer (previously a barrister) of seven years' standing or one who has held high judicial office, and a communicant of the Church. Appointment is only after consultation with the Lord Chancellor, and the Dean of the Arches and Auditor. Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 2(1)-(2). The Chancellor is *oculus episcopi* and has second rank in the diocese, save for the precedence of the Dean within his or her cathedral. See John Godolphin, *Repertorium Canonicum, or an abridgement of the*

or ecclesiastical law,¹⁶⁵ and until recently most had solely the standard common law training. It is only natural that their secular training and experience should influence their decision-making. It is equally natural that the common law experience and training should influence any reforms undertaken on the advice of the Church's legal advisers.

The loss of jurisdiction in the course of the nineteenth century seems to have been largely a consequence of the intellectual weakness into which the ecclesiastical law had sunk. This was encouraged by the common law. This was not, as in the sixteenth century, by directly confronting the church courts, but was rather by working in conjunction with the church courts. Until the Civil Wars the two systems had operated largely independently, now they were motivated by a sense of common purpose. Co-operation led to the intellectual assimilation of the jurisprudence of church courts and common law courts. This, and the increasingly limited jurisdiction for the courts, was to contribute to the loss of a professional Bar,¹⁶⁶ and further intellectual weakness.

ecclesiastical law of the Realm, consistent with the Temporal, etc. (1678) 85.

¹⁶⁵ Ecclesiastical judges were required to have a degree in canon law until 1545, though canon law had not been taught in English universities since 1535. Thereafter they only had the doctorate in civil law; Ecclesiastical Jurisdiction Act 1545 (37 Hen. VIII c. 17) (Eng.); Report of the Archbishops' Commission on Canon Law, *The Canon Law of the Church of England* (1947) 52.

¹⁶⁶ In the Roman Catholic Church, priests study canon law for a year, as part of their training; for priestly formation generally, see *The Code of Canon Law: in English Translation* prepared by the Canon Law Society of Great Britain and Ireland (1983) Canons 232-264, particularly 250 and 252 s. 3. The canon law (and the wider ecclesiastical law) in the Church of England has a narrower scope and coverage, and therefore it is perhaps not surprising that it rarely found a significant place in vocational training. But, even allowing for this, there was, until quite recently, little effort taken to produce a body of trained canonists or ecclesiastical lawyers since the demise of Doctors' Commons.

With the revision of the canons of the Church of England in the twentieth century,¹⁶⁷ new judicial and legislative machinery, and the example of the Roman Catholic canon law – which has recently undergone a major revision and consolidation¹⁶⁸ – there is a need for a new profession of ecclesiastical lawyers, trained in the common law, but able to apply their skills in the church courts. There is evidence that this is occurring. The new Ecclesiastical Law Society seems well able to encourage the revival of ecclesiastical law in the Church of England in particular.¹⁶⁹ In the early 1990s the Anglican Church in New Zealand also revised its constitution and canons – and some of these changes were motivated by a desire to reform the ecclesiastical courts. Unfortunately, with the relative inactivity of church courts in New Zealand, and the smallness of the jurisdiction, there is little scope for a developed legal profession. The reforms to the ecclesiastical courts in New Zealand – slight as they were – seem to have been influenced by secular notions as much as religious, though the motivation may have been to strengthen the latter.

The dis-establishment of the Church in Wales led to a reappraisal of the place of law within the Church; such a reappraisal seems possible in England without dis-establishment. It was not the Reformation subordination of the church courts to the authority of the Crown which

¹⁶⁷ *The Canons of the Church of England. Canons ecclesiastical promulgated by the Convocations of Canterbury and York in 1964 and 1969* (1969).

¹⁶⁸ *The Code of Canon Law: in English Translation* prepared by the Canon Law Society of Great Britain and Ireland (1983); *Code of Canons of the Eastern Churches. Latin-English Edition* (1992).

¹⁶⁹ There has been much recent work towards a systematic jurisprudence, notably including Norman Doe, *Canon Law in the Anglican Communion* (1998). An LL.M. in canon law is also offered by the University of Wales Cardiff.

weakened them, but the subsequent loss of intellectual vigour and independence. This independence was recently been re-asserted in the judgment of the Court of Ecclesiastical Causes Reserved in *In re St. Stephen's, Walbrook*,¹⁷⁰ not in its being any less an element of the establishment, but in its less legalist, more theological approach to decision-making.¹⁷¹ Such a reappraisal seems unlikely in New Zealand, for the reasons given above, but a renaissance in England may have indirect effects in New Zealand.

¹⁷⁰ Fam. 146 (1987).

¹⁷¹ It is important that canon law and theology are distinct, though interrelated; Teodoro Jiménez Urresti, “Canon Law and Theology: Two Different Sciences” (1967) 8(3) *Concilium* 10.

V The Courts in New Zealand

The Church is not established in New Zealand, but its courts have not been strengthened thereby, because in the course of the nineteenth century the English tendency had been to weaken the church courts, linked as they were to the establishment of the Church. Although the Church in New Zealand was founded in 1857, later developments in England continued to influence the church courts in this country. Additional complications included the lack of establishment itself – with the enforcement advantages which this would have brought – and the lack of a faculty jurisdiction, thereby greatly reducing the number of cases which could be heard.

The Church in New Zealand sought to avoid the ecclesiastical perils of secular courts, but in so doing they minimised the importance of the courts and the judicial function within the Church. Indeed, lacking the secular authority which the church courts have in England, they have been reluctant to act, lest they incur the jealous wrath of the secular courts.¹⁷² Whilst moves continued in England in the nineteenth and twentieth centuries to remove, or at least limit, secular involvement in church jurisprudence, this was unnecessary in New Zealand. The church courts were entirely separate from the secular courts.¹⁷³ However, they rarely sat, and the resulting jurisprudential weakness was noticeable.

In the Anglican Church in New Zealand there is a two-tier system of ecclesiastical courts, with a tribunal in each of the dioceses and an

¹⁷² Though this was never a serious threat, see *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, 708 per Beattie J.

¹⁷³ Though they might still utilise secular judges and counsel.

appeal tribunal.¹⁷⁴ In the Episcopal Tribunal the bishop appoints members from a list of qualified persons drawn up by the Diocesan Synod.¹⁷⁵ The Episcopal Tribunals enjoy original jurisdiction over the “criminal” side of ecclesiastical discipline concerning priests and deacons, and over the laity.¹⁷⁶ The Episcopal Tribunal has original jurisdiction over the whole spectrum of ecclesiastical offences, and this includes those offences involving doctrine and liturgy.¹⁷⁷ The two-tier structure is simpler than that existing in England – at least before 1963 – but it also reflects the simpler New Zealand secular judiciary.¹⁷⁸

Although not the Queen’s courts – indeed the term “court” has recently been eschewed in favour of tribunal – these ecclesiastical tribunals are not immune from the influence of the common law. Equally importantly, their jurisdiction is comparatively limited. Of offences of

¹⁷⁴ Episcopal Tribunal and appeal tribunal; Title D canon I.D.I.1; Title D canon I.E.3.

¹⁷⁵ It would be a breach of the principle of separation of powers for the bishop to try cases personally; *Re St. Mary’s, Barnes* [1982] 1 W.L.R. 531, 532 per Moore Ch. Reservations were expressed about this practice – albeit rarely found – by the Court of Appeal in *R. v. Tristram* [1902] 1 K.B. 816. The common law courts, led by Coke, had much earlier declared that the king himself might not try a case in his own, having delegated that function to the judges; *Prohibitions del Roy* (1607) 12 Co. Rep. 63.

¹⁷⁶ The Episcopal Tribunal has jurisdiction “to mediate or to otherwise inquire into complaints or any matters that are referred to it by the Licensing Bishop”; Title D canon D.I.1 (the “licensing bishop” including the Diocesan bishops, Hiu Amorangi Pihopa and bishops with delegated episcopal responsibility for a region; Title D interpretation).

¹⁷⁷ Unlike the situation in England, where doctrine is heard separately, largely as a consequence of jurisdictional disputes over the role of the Judicial Committee of the Privy Council.

¹⁷⁸ This comprises (excluding specialist courts and tribunals) the District Court, High Court, Court of Appeal, and Supreme Court of New Zealand (formerly the Judicial Committee of the Privy Council); Judicature Act 1908 (N.Z.); Supreme Court Act 2003 (N.Z.).

morality, the canon law of New Zealand includes “[a]ny culpable disregard of the obligations recognised by law in reference to family relationships”.¹⁷⁹ Violation of the law of the Church is also an offence.¹⁸⁰ Violation of ordination vows is an offence,¹⁸¹ as is neglect of duty,¹⁸² and disobedience of any lawful command of the ordinary.¹⁸³ Specific conduct deemed inappropriate or unbecoming to the office and work of a minister or office bearer is enumerated. This includes adultery,¹⁸⁴ “any act or habit of corruption or immorality”,¹⁸⁵ and “any knowing and wilful contravention of canons or regulations of General Synod/te Hinota Whanui or of any Diocesan Synod, te Runangaanui or Hui Amorangi”.¹⁸⁶ Priests, deacons, and licensed lay persons¹⁸⁷ also owe a duty of obedience to the bishop and those in positions of authority,¹⁸⁸ and all such ministers shall obey the lawful instructions from the licensing bishop.¹⁸⁹

Ministers (including licensed lay persons) are enjoined to “teach only doctrine and interpretation of the Faith that are in conformity with

¹⁷⁹ Title D canon I.C2.3.1.3, Title D canon I.C2.3.1.6.

¹⁸⁰ Wilful and knowing contravention of “any law or regulation” of the General Synod; uniquely in the Anglican Communion, trustees may also be proceeded against for contravening terms of a trust deed; Title D canon III.6.1.

¹⁸¹ Title D canon I.C2.3.5.

¹⁸² Title D canon I.C2.3.7.

¹⁸³ It is an offence to “refus[e] or neglect by an Ordained Minister to obey the lawful directions of the Bishop and to submit to the godly admonitions of the Bishop”; Title D canon I.C2.3.6.

¹⁸⁴ Title D canon I.C2.3.1.2.

¹⁸⁵ Title D canon I.C2.3.1.3.

¹⁸⁶ Title D canon I.C2.3.2.

¹⁸⁷ Anyone who holds a licence from a bishop, for certain purposes also including a trustee; interpretation, Title D.

¹⁸⁸ Title D canon I.A.3.

¹⁸⁹ Title D canon I.A.11.2.

the Formularies of this Church, and not teach private or esoteric doctrine or interpretation in contradiction of those Formularies”.¹⁹⁰ Ordained ministers shall “proclaim God’s word and take their part in Christ’s prophetic work, declare forgiveness through Jesus Christ, baptise, preside at the Eucharist and administer Christ’s holy Sacrament”.¹⁹¹ Failure to adhere to these canons could result in proceedings being instigated. These arrangements largely mirror those in England. However, proceedings are rarely instigated, possibly for fear of this being perceived as undue legalism.¹⁹² There may also be a fear of establishmentarianism, though the Roman Catholic Church has a more active judiciary. This fear of the Anglican Church being seen as “established” had also lead to the removal of prayers for the Sovereign and the Royal Family.

Perhaps in a conscious avoidance of secular legal forms – but also in a way which copies secular models¹⁹³ – the church courts in New Zealand use mediation and determination proceedings. If they fail to adhere to the norms of the secular legal processes (such as the rules of administrative law),¹⁹⁴ they are liable to correction by the secular courts.¹⁹⁵

¹⁹⁰ Title D canon I.A.11.6.

¹⁹¹ Title D canon I.A.12.3.

¹⁹² Interview with Richard Girdwood, 18 September 1999.

¹⁹³ In particular, from family and employment law proceedings; Allison Morris and Gabrielle Maxwell (eds.), *Restorative justice for juveniles: conferencing, mediation and circles* (2001); Robin Arthur, “The Employment Relations Authority: aspects of the introduction, role and powers of a new institution” (2001) University of Auckland LL.B.(Hons.) dissertation.

¹⁹⁴ Philip A. Joseph, *Constitutional and administrative law in New Zealand* (2nd ed., 2001).

¹⁹⁵ For the inherent jurisdiction of the High Court, see *Taylor v. Attorney-General* [1975] 2 N.Z.L.R. 675.

VI Mediation proceedings

In New Zealand, the recent revisions of the canons have served to de-emphasise the legal formalism of the judicial procedures. Bishop's Courts have been renamed Episcopal Tribunals, and the final stage of the process is styled an "outcome" rather than a sentence. The accused are now styled "persons against whom a complaint is made".¹⁹⁶ Yet the disciplinary – and legal – nature of the process remains clear. The basis of the judicial process, if it may still be so termed, is mediation and determination (what was formerly styled the "trial").

Given the centrality of episcopal authority in Anglican ecclesiology, it is not surprising that laws channel instances of conflict to the bishop. The "bishops are the primary guardians of discipline in the Church",¹⁹⁷ and have jurisdiction over standards of ministry in an episcopal unit.¹⁹⁸ The means by which this jurisdiction is exercised has varied over time, but disagreements arising from the application of Church laws are normally settled by administrative processes, which often necessitates the making of quasi-judicial decisions.

The use of visitation, an ancient institution preserved in the laws of the majority of churches, was an important means by which quasi-judicial power might be applied to ecclesiastical conflict.¹⁹⁹ The judicial

¹⁹⁶ Title D canon I.D.

¹⁹⁷ Title D canon I.C.1.

¹⁹⁸ Title D canon I.C.1.1.

¹⁹⁹ In England the right of an archbishop, bishop or archdeacon to conduct visitations is expressly stated in the canons; *The Canons of the Church of England. Canons ecclesiastical promulgated by the Convocations of Canterbury and York in 1964 and 1969* (1969) Canon G.5 (1).

character of visitation has given way in recent years to a more pastoral understanding of its purpose.²⁰⁰ Its main object is to provide a first hand assessment of the condition of ecclesiastical property and the fulfilment of duties placed on clergy and lay officers. Primates, archbishops, or bishops within the Anglican Communion may exercise visitorial powers, as can the archdeacons in the churches which have that office²⁰¹ – including New Zealand.

A bishop may delegate the investigation of a complaint, except that the outcomes must be approved by the bishop in all cases.²⁰² The bishops have a duty to reconcile.²⁰³ To achieve this they appoint a mediation member of a Panel of qualified tribunal members²⁰⁴ to conduct mediation.²⁰⁵ The purpose of the mediation is to seek to reconcile the parties to achieve an acceptable settlement of the complaint and an appropriate pastoral solution to the issues.²⁰⁶ The bishop determines the

²⁰⁰ P. Smith, “Points of law and practice concerning ecclesiastical visitation” (1990-92) 2(9) *Ecclesiastical Law Journal* 189; Richard Helmholz, *Roman Canon Law in Reformation England* (1990) 105-109, 165.

²⁰¹ Norman Doe, *Canon Law in the Anglican Communion* (1998) 74. The Sovereign is also, in England (though presumably not in New Zealand), supreme ordinary and visitor, and is entitled to visit archbishops and receives their resignations; Archbishop of Canterbury and York’s Commission on Church and State, *Report of the Archbishops’ Commission on Church and State* (1970) 94.

²⁰² Title D canon I.C.1.1.1.

²⁰³ Title D canon I.B.1.

²⁰⁴ Title D canon I.D2.4.1. Title D canon I.D.I.1.1.2: “a sufficient panel of ordained and lay persons with appropriate qualifications to be available to be appointed by the bishop to a particular tribunal having a particular complaint or matter referred to it”.

²⁰⁵ Title D canon I.D2.4.2.

²⁰⁶ Title D canon I.D2.4.4.

length of time that the mediation process shall be allowed.²⁰⁷ The duty to reconcile derives from ecclesiastical law, but the manner of its achievement owes more to secular examples of alternative dispute resolution.²⁰⁸

The tribunal shall, if required by the bishop, provide mediation assistance in order to facilitate agreed settlements of complaints referred by the bishop.²⁰⁹ The mediation process may take place in private or in public, according to the Tikanga (or cultural tradition – Pakeha,²¹⁰ Maori or Polynesian) of the licensing bishop.²¹¹ After a successful mediation, the bishop may suspend the licence or impose other conditions as the bishop may deem appropriate.²¹²

The mediation process may also be seen as largely secular in origin. The process of mediation is borrowed, not only from the Church – which used other, analogous processes²¹³ – but from secular models of mediation, such as used in the Youth Court, Family Court, Employment Court, and Environment Court.²¹⁴ It may be that these latter, secular models, formed the basis for the current Church procedures, rather than the more ancient Church precedents. Attempts to reduce the legalism of the Church may have had the effect of increasing (through broadening) the secular influence upon its judiciary.

²⁰⁷ Title D canon I.D2.4.6.

²⁰⁸ See, for instance, Tania Sourdin, *Alternative dispute resolution* (2001).

²⁰⁹ Title D canon I.D.I.3.1.

²¹⁰ New Zealander of European descent.

²¹¹ Title D canon I.D2.4.8.

²¹² Title D canon I.D2.4.13.

²¹³ Such as derived from the principle of canonical obedience.

²¹⁴ See Peter Spiller (ed.), *Dispute Resolution in New Zealand* (1999).

VII Determination proceedings

Not all matters can be resolved by mediation, and it is sometimes necessary to utilise judicial processes to make a conclusive determination. In most churches the ecclesiastical courts enjoy “criminal” jurisdiction only over ecclesiastical offences involving clergy, and, in some churches, lay officers and ordinary members of the laity. Some courts also have “civil” jurisdiction over church property.²¹⁵

In New Zealand the bishop may require the Episcopal Tribunal to inquire into and determine the matter.²¹⁶ The tribunal shall, if required, hear and determine differences between complainants and respondents on behalf of the bishop.²¹⁷ Proceedings continue with an allegation,²¹⁸ and notice of all allegations with particulars, and the time, place and circumstances of the alleged commission, must be given to the accused.²¹⁹ A bishop may treat an issue regarding misconduct, coming to his or her knowledge, as a complaint.²²⁰ Otherwise, complaints are made to the licensing bishop.²²¹ This appears to be an attempt to deal fairly with all situations which might lead to legal consequences, but in so doing a relatively complex and legalistic process has been established.

²¹⁵ See Norman Doe, *Canon Law in the Anglican Communion* (1998).

²¹⁶ Title D canon I.D.3.5.

²¹⁷ Title D canon I.D.I.3.2.

²¹⁸ “Any person may complain against a Minister or Office Bearer of this Church for any misconduct under this Title D”; Title D canon I.C3.4.1.

²¹⁹ “Persons against whom allegations are made shall be hold according to the Tikanga what the allegations are and know who made the allegation”; Title D canon I.B.9.3.

²²⁰ Title D canon I.C3.4.1.1.

²²¹ Title D canon I.C3.4.1.

The bishop may choose to inquire into a complaint, or to not do so.²²² The decision may be taken to veto further proceedings.²²³ The primate may also suspend a minister pending a determination.²²⁴ The complaint may be dismissed if frivolous or if it is clear on the evidence that the facts do not constitute an offence.²²⁵ This, and many of the other procedures, is borrowed from secular court procedures. If the complaint is deemed by the bishop to be serious or significant, it may be referred to the tribunal for determination without the preliminary step of mediation.²²⁶ A decision of the bishop to take no further action may be appealed.²²⁷ In any case the bishop's first responsibility is to seek to reconcile the parties.²²⁸ Thereafter the bishop may send the matter to mediation or determination.²²⁹ If the former, there is no trial, if otherwise the proceeding passes to the tribunal. Despite attempts to reduce the legal formalism, a proceeding may still proceed to a trial.

The Episcopal Tribunal called upon to hear a case will have at least three determination members or members who are both mediation and determination members.²³⁰ At least one must be a clerical member and

²²² Title D canon I.C3.4.4. For bishops, the primate enquires; Title D canon II.3.1.1.

²²³ Title D canon I.C3.4.5.

²²⁴ Title D canon I.C3.5.2.

²²⁵ Title D canon I.C3.4.5.

²²⁶ Title D canon I.D2.4.11.

²²⁷ Title D canon I.C3.4.4.1; Title D canon I.D5.

²²⁸ Title D canon I.C3.4.6.

²²⁹ Title D canon I.C3.4.7.

²³⁰ Title D canon I.D.I.1.4 – Title D canon I.D.I.1.6; Title D canon I.D.I.2.1.1 – Title D canon I.D.I.2.1.3. “A panel may be drawn from both

one a lay member.²³¹ The tribunal selects its own chairman.²³² Where possible one member is to be a barrister and solicitor of the High Court of New Zealand of at least seven years standing, or similarly qualified and experienced in any legal jurisdiction in the Diocese of Polynesia.²³³ The bishop may take part in the Tribunal only if it is the custom of the Tikanga.²³⁴ This latter provision raises legal issues of its own, involving notions of the separation of powers,²³⁵ which could potentially lead to successful judicial review by the High Court.

The tribunal regulates its own proceedings.²³⁶ However, the same persons cannot both mediate and determine in the same matter,²³⁷ and the proceeding must adhere to secular standards for quasi-judicial and

lay and ordained persons from within or outside of the Episcopal Unit, or of this Church” (Title D canon I.D.I.1.3).

²³¹ Title D canon I.D3.5.1.

²³² Title D canon I.D3.5.1.1.

²³³ Title D canon I.D3.5.2. cf. Chancellors of consistory courts in England are required to have a seven-year general qualification within the meaning of s. 71 of the Courts and Legal Services Act 1990 (U.K.) or a person who has held high judicial office; *The Canons of the Church of England. Canons ecclesiastical promulgated by the Convocations of Canterbury and York in 1964 and 1969* (1969) Canon G.2 (2).

²³⁴ Title D canon I.D.I.2.1.4.

²³⁵ It would be a breach of the principle of separation of powers for the bishop to try cases personally; *Re St. Mary's, Barnes* [1982] 1 W.L.R. 531, 532 per Moore Ch. Reservations were expressed about this practice – albeit rarely found – by the Court of Appeal in *R. v. Tristram* [1902] 1 K.B. 816. The common law courts, led by Coke, had much earlier declared that the king himself might not try a case in his own, having delegated that function to the judges; *Prohibitions del Roy* (1607) 12 Co. Rep. 63.

²³⁶ Title D canon I.D3.6.2.

²³⁷ Title D canon I.D.I.1.7.

judicial bodies, to avoid successful judicial review by secular courts.²³⁸ Thus the tribunal is not truly free to regulate its own proceedings, since the rules of administrative law apply to all bodies exercising, or purporting to exercise, quasi-judicial powers.²³⁹ Failure to adhere to the norms of administrative law could also lead to successful judicial review by a secular court.

Tribunal proceedings may be in private or in public, having regard in each case to the competing needs for openness and the protection of the parties where appropriate.²⁴⁰ The accused has a right to silence,²⁴¹ and to legal representation.²⁴² Evidence would not necessarily be on oath,²⁴³

²³⁸ For example, in *Burt v. Governor-General* [1992] 3 N.Z.L.R. 672 (C.A.) and *Council of Civil Service Unions v. Minister for the Civil Service* [1985] 1 A.C. 374.

²³⁹ Philip A. Joseph, *Constitutional and administrative law in New Zealand* (2nd ed., 2001).

²⁴⁰ Title D canon I.D4.8.2.

²⁴¹ “Persons against whom a complaint is made under this Title D have the right to remain silent ...”; Title D canon I.B.10. This is a common law presumption, though not one of great antiquity; James Wood and Adam Crawford, *The Right of Silence* (1989); David J. Harvey, “The Right to Silence and the Presumption of Innocence” [1995] *New Zealand Law Journal* 181; Stephen Odgers, “Police Interrogation and the Right to Silence” (1985) 59 *Australian Law Journal* 78; Charles R. Williams, “Silence in Australia: Probative Force and Rights in the Law of Evidence” (1994) 110 *Law Quarterly Review* 629.

²⁴² Title D canon I.D3.6.1.4.

²⁴³ Where an oath has been duly administered and taken, the fact that the person to whom it was administered had at the time of taking the oath no religious belief does not affect the validity of the oath; Oaths and Declarations Act 1957 (N.Z.), s. 5. People are entitled as of right to make affirmations instead of taking an oath without inquiry as to religious belief; s. 4 cf. *R. v. Clara* [1962] Cr. App. R. 113; 1 All E.R. 428, where a person is only permitted to affirm if the judge is satisfied that the person bases his or her objection to the taking of the oath on the ground that it is contrary to religious belief, or that he or she had no religious belief.

and evidence is admissible whether or not it would be admissible in a court of law²⁴⁴ – though this again raises the possibility of a successful review by a secular court. In some respects this reflects a desire for a less legalistic process. Yet, in seeking to differentiate the church tribunals from the secular courts, the canons resort to secular terminology and assumptions – possibly in the absence of a developed legal procedure to serve as a model, except for the common law.

The Episcopal Tribunal may refer any question of doctrine or orthodoxy of theology to the bishop for a ruling and may for that purpose defer determination or adjourn the proceedings subject to receiving that ruling.²⁴⁵ This may be a consequence of the legacy of the nineteenth century Privy Council cases (which were bitterly disputed), but it is equally likely to be deferring to the teaching authority of the bishops.²⁴⁶ This, at least, is an ecclesiastical provision, with no direct secular counterpart. It also recognises the teaching role of the bishop.

The findings of a tribunal are reported to the bishop and to the parties.²⁴⁷ The tribunal may also make recommendations to the bishop. These are not, however, binding,²⁴⁸ for it is the bishop who imposes any sanction,²⁴⁹ which itself could potentially be challenged through judicial review, since the bishop must act in a quasi-judicial capacity.²⁵⁰

²⁴⁴ Title D canon I.D3.6.3.

²⁴⁵ Title D canon D2.7.

²⁴⁶ The charges to preach and teach were presented clearly and forcefully in the pastoral epistles; 1 Timothy 4; 2 Timothy 4.

²⁴⁷ Title D canon D3.8.

²⁴⁸ Title D canon D3.8.1.

²⁴⁹ Title D canon D3.8.1.

²⁵⁰ *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 708.

Perhaps not surprisingly, given their leadership role, proceedings against bishops require a special procedure.²⁵¹ For the trial of a bishop all bishops would be involved, and all lay members of the Judicial Committee²⁵² are members of the Panel.²⁵³ Membership of the Judicial Committee includes any bishop, any ordained minister holding a bishop's licence or authorisation for any ministry, and any lay member of the Church who is a barrister and solicitor of the High Court of New Zealand of seven years standing, or equivalent in any jurisdiction in the Diocese of Polynesia.²⁵⁴ Every Bishop's Determination Tribunal shall consist of not less than three members, of whom there shall be at least two bishops chosen by the House of Bishops and one lay member appointed by the Judicial Committee from the Panel.²⁵⁵ This tribunal combines representation of the membership of the Church with formally qualified judges – though again the latter are comparatively few in proportion.

These determination proceedings are argued by barristers and solicitors of the High Court of New Zealand, or equivalents from the civil jurisdictions contained within the diocese of Polynesia.²⁵⁶ Perhaps it is not surprising that there is no specific requirement that they be learned in

²⁵¹ At least two priests must bring a complaint; Title D canon II.3.1.

²⁵² Not, of course, the Judicial Committee of the Privy Council, but the Judicial Committee established by canon.

²⁵³ Title D canon II.7.1.

²⁵⁴ Title c. canon IV.2.

²⁵⁵ Title D canon II.7.2.

²⁵⁶ Fiji, Tonga, Samoa, and the Cook Islands – the latter an associated state of New Zealand.

the ecclesiastical law.²⁵⁷ The advocates of Doctors' Commons never practised in New Zealand,²⁵⁸ and there has never been a domestic ecclesiastical law bar.²⁵⁹ The law of the church perhaps cannot be properly understood and properly administered without something more than a perfunctory knowledge of theology and church history.²⁶⁰ The result is that the church courts, or tribunals as they are now styled, rely on lay counsel and, in many cases, judges (both secular and religious)²⁶¹ who are also comparatively unacquainted with ecclesiastical law and practise,²⁶² and the tribunals themselves are but rarely resorted to.

²⁵⁷ Cf. "learned in the civil and ecclesiastical laws and at least a master of arts or bachelor of law, and reasonably well practised in the course thereof." Canons Ecclesiastical, 127 (1603) (revoked).

²⁵⁸ Therefore, in England, barristers may do so on the basis of the doctrine *ex necessitate rei*, as explained *In the matter of the Serjeants at Law* (1840) 4 Bing. (N.C.) 235, 239 per Tindal C.J., approving *Parton v. Genny* (1462) Y.B. 2 Edw. IV Trin. f. 2 p. 14, per Littleton J. (barristers would be allowed to practise in the Court of Common Pleas if all the serjeants were dead). A similar application of the doctrine was given in the Court of Chivalry in 1954; *Manchester Corporation v. Manchester Palace of Varieties Ltd* (1955) W.L.R. 440, 449 per Lord Goddard.

²⁵⁹ Each diocese does however have a Church Advocate, who is a senior barrister with an interest in ecclesiastical law. They have been known to take cases before the tribunals, when such arise.

²⁶⁰ Eric Kemp, "The Spirit of the canon law and its application in England" (1989) 1(5) *Ecclesiastical Law Journal* 5, 14.

²⁶¹ Where these latter are utilised.

²⁶² The current diocesan chancellors and legal advisers include barristers and solicitors of the High Court of New Zealand, but none with formal qualifications in canon or ecclesiastical law, or civil law.

VIII Outcomes

As noted above, the church tribunals may only recommend a sentence, which is imposed by the bishop,²⁶³ in accordance with the latter's disciplinary role. There are no automatic penalties as in England, where a priest or deacon might find himself or herself liable to ecclesiastical penalties upon conviction in a secular court, without further trial²⁶⁴ – this being a consequence of establishment which perhaps enhanced efficiency. The bishop's determination is given in writing to complainant and respondent.²⁶⁵ The authority of this determination is based on canonical obedience,²⁶⁶ as the tribunals are not the Queen's courts and do not have independent powers of enforcement. The enforceability of their judgments, if disputed, is therefore problematic,²⁶⁷ and for that, and other reasons,²⁶⁸ the courts are rarely used.

²⁶³ Title D canon I.D.I.1.1.2; Title D canon I.D3.8.1; Title D canon I.D3.9.1 – canon I.D3.9.5.

²⁶⁴ These include conviction for treason or felony, or conviction on indictment for a misdemeanour followed by a sentence of imprisonment or greater punishment. They also include an affiliation order; a decree of divorce or judicial separation on the ground of adultery, rape, sodomy, or bestiality; a finding of adultery in a divorce or matrimonial cause; an order made under the Matrimonial Proceedings (Magistrates' Courts) Act 1960 (8 & 9 Eliz. II c. 48) (U.K.), in respect certain assaults upon his wife, or in respect of certain sexual offences, or for adultery, or for intercourse while the accused was knowingly suffering from a venereal disease, or for being an habitual drunkard or drug addict, or for compelling his wife to submit to prostitution; Ecclesiastical Jurisdiction (Amendment) Measure, 1974 (U.K.).

²⁶⁵ Title D canon I.D4.9.

²⁶⁶ Or, for lay office-holders, a declaration of adherence and submission to the authority of the General Synod; Const. C.15.

²⁶⁷ As it now is in the High Court of Chivalry; *Manchester Corporation v. Manchester Palace of Varieties Ltd* [1955] W.L.R. 440, since the loss

If the tribunal determines and reports to the bishop that there has been misconduct under Part C2 of the canons, the bishop may decide to take no further action, or impose the sentence, or outcome as it is called.²⁶⁹ These may include admonition,²⁷⁰ suspension from the exercise of ministry or office,²⁷¹ deprivation of office or ministry,²⁷² or deposition from the exercise of ordained ministry.²⁷³ These are similar to the English equivalents.

Admonition, or monition, may be “a formal written order or injunction”.²⁷⁴ This is an order to do or not do a specified act, and is also available in England. The bishop may reverse admonition.²⁷⁵ Suspension is the suspension from the exercise of ministry or office.²⁷⁶ In English

of the right to imprison in the Marshalsea Prison ended with the closure of that prison.

²⁶⁸ Which may include an unwillingness to enforce Church laws where there is scope for legitimate disagreement in interpretation.

²⁶⁹ Title canon I.D4.9.1.

²⁷⁰ Title D canon I.D4.9.2.

²⁷¹ Title D canon I.D4.9.3.

²⁷² Title D canon I.D4.9.4.

²⁷³ Title D canon I.D4.9.5.

²⁷⁴ Title D canon I.D4.9.2.

²⁷⁵ Title D canon I.D4.10.4: “Persons who have imposed upon them an outcome under clause 9.2 may at any time while the outcome is operative apply to the Bishop who imposed the outcome or the successor of that Bishop for removal of the outcome on the grounds that since the commission of the misconduct they have given evidence to satisfy the Bishop of such complete reformation, and fitness for restoration to their former status, as to make it just, having regard to the welfare and interests of this Church, that further continuance of the outcome should be dispensed with, and the Bishop may thereupon declare that the misconduct has been completely expiated, and may determine that, from a date to be specified, every ineligibility arising from such outcome shall be removed”.

²⁷⁶ Title D canon I.D4.9.3.2.

this practice is divided into two, called inhibition and suspension respectively. Any person subject to deprivation is incapable of holding any office or performing any function in any episcopal unit of the Church until restored.²⁷⁷ This is also available to an English consistory court, where it involves removal from preferment, and disqualification from holding further preferment without the express consent of the diocesan bishop with the consent of the archbishop and of the bishop of the diocese where the censure was imposed.²⁷⁸ Deposition is “the permanent taking away of the right to perform the duties of every office for which Holy Orders is required”.²⁷⁹ These provisions have been borrowed largely unchanged from England, and have no secular equivalent.

Although lay people may be subject to the sanctions of the tribunals, these are but rarely imposed. Again there are potential difficulties of enforcement, even where an oath of canonical obedience has been taken. Failure to recognise the authority of an ecclesiastical court in England can be treated as contempt, and the High Court has jurisdiction in such instances.²⁸⁰ In New Zealand there is no such equivalent express authority,²⁸¹ and there are no formal automatic

²⁷⁷ Title D canon I.D4.9.4.1. They may be restored under Title D canon I.D4.9.4.2.

²⁷⁸ Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 55.

²⁷⁹ Title D canon I.D4.9.5.

²⁸⁰ Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 81(2); *R. v. Daily Herald ex parte Lord Bishop of Norwich* [1932] 2 K.B. 402.

²⁸¹ However, see *Baldwin v. Pascoe* (1889) 7 N.Z.L.R. 759, citing *Long v. Lord Bishop of Cape Town* (1863) 1 Moo. N.S. 411 (P.C.):

[s]uch tribunals are not Courts, but their decisions will be binding if they have acted within the scope of their authority. They must also have either observed the prescribed procedure

contempt proceedings for an ecclesiastical tribunal – though failure to recognise an outcome of admonition, for instance, could potentially be subject to judicial review, or contempt proceedings in the High Court.

Jurisdiction is limited to what are strictly ecclesiastical offences, but trials are conducted by tribunals which derive at least part of their procedure if not their substantive rules from common law and statutes, yet without the backing of the apparatus of the secular judicial system.

or, if there is none,

have proceeded in a manner consonant with the principles of justice, and the Civil Courts will enforce the decision if necessary.

IX Grounds of Appeal

There is a right of appeal from a determination by an Episcopal Tribunal to the Appeal Tribunal,²⁸² which must be exercised within 28 days.²⁸³ The grounds for appeal must be specified.²⁸⁴ The right of appeal from the judgments of spiritual courts in mediæval times in general arose if there was a procedural flaw or a suspicion of bias,²⁸⁵ and modern tribunals must also be given due evidence of a valid ground of appeal. The Appeal Tribunal may confirm, modify, or reverse the findings appealed against.²⁸⁶ This procedure is also equivalent to the secular judicial appeal process.²⁸⁷

The Appeal Tribunal consists of five members – the Primate, and the Co-Presiding Bishops, and if there is any vacancy in these offices the Senior Bishop, and one lay member and one clerical member of the Judicial Committee appointed by the chairman of the Appeal Tribunal for the particular case.²⁸⁸ The Primate is chairman, unless a party to the appeal, in which case the Co-Presiding Bishops shall choose which of

²⁸² Title D canon I.D5.11.

²⁸³ Title D canon I.D5.11.1.

²⁸⁴ Title D canon I.D5.11.2.

²⁸⁵ *Leges Henrici Primi*, Ch. 5.3 a: “Si in testibus et iudicibus et personis satisfactum sit ei, si iudicibus consentiat [si iudice suspectos habeat] advocet aut contradicat”; *Leges Henrici Primi* ed. & trans. by L.J. Downer (1972).

²⁸⁶ Title D canon I.D5.11.3.1.

²⁸⁷ Which, historically, was comparatively rarely provided. Indeed the Church appeal procedures had long been more elaborate than their secular equivalents.

²⁸⁸ Title D canon I.E.1.

them shall be the chairman.²⁸⁹ This arrangement is equivalent to that for the (secular) Court of Appeal – or, indeed, that of the Court of Arches, though it may be noted that there is a clear majority of clerical members.

The Judicial Committee itself hears disputes with respect to the interpretation of the Constitution.²⁹⁰ This also hears appeals from acts or decisions of Te Runanga o Te Pihopatanga o Aotearoa or any diocesan synod, or of the Synod of the Diocese of Polynesia.²⁹¹ The nine members include at least two from each Tikanga, one bishop, one ordained minister, and three lay persons,²⁹² and a quorum is five.²⁹³ General Synod elects the members.²⁹⁴ The Judicial Committee selects its own chairman and deputy chairman.²⁹⁵ The composition is designed to represent all elements in the Church, including lay. But it is not equivalent to the English Court of Ecclesiastical Causes Reserved, or even of the Judicial Committee of the Privy Council, as the lay members are not necessarily senior judges, nor are clerical members exclusively – or even predominantly – bishops. It has no equivalent in the secular courts, except in those jurisdictions where a constitutional court exists.²⁹⁶ The

²⁸⁹ Title D canon I.E.2.

²⁹⁰ Title c. canon IV.1.

²⁹¹ Title c. canon IV.1.

²⁹² Title c. canon IV.2.2.

²⁹³ Title c. canon IV.3.2.

²⁹⁴ Title c. canon IV.2.3.1 – Title c. canon IV.2.10.

²⁹⁵ Title c. canon IV.3.1.

²⁹⁶ The Judicial Committee of the Privy Council has jurisdiction to hear and determine “devolution issues”, that is questions relating to the powers and functions of the legislative and executive authorities established in Scotland and Northern Ireland by the Scotland Act 1998 (U.K.) and the Northern Ireland Act 1998 (U.K.), respectively, and questions as to the competence and functions of the Assembly established by the Government of Wales Act 1998 (U.K.).

comparatively scarcity of episcopal members may be questioned, but they are better represented in the next tribunal.

This is the Tribunal on Doctrine, established for the purpose of deciding all questions of doctrine referred to it.²⁹⁷ As might be expected, bishops are better represented in a tribunal to deal with doctrine than they are in the Judicial Committee, whose jurisdiction is limited to constitutional interpretation. Episcopal membership comprises three bishops (including retired bishops) elected by the bishops in full-time active and constant episcopal ministry in the dioceses in New Zealand, a bishop elected by the bishops in Te Pihopatanga o Aotearoa, and a bishop representing the Diocese of Polynesia.²⁹⁸ There are also an equal number of priests or deacons,²⁹⁹ and lay persons duly qualified to be members of General Synod.³⁰⁰ This is approximately equivalent to the Court of Ecclesiastical Causes Reserved in England,³⁰¹ except that the membership is exclusively episcopal.

Only applications for appeal supported by seven people, one of whom must be a bishop, one a licensed priest or minister, and one a lay member of the Church,³⁰² are entertained.³⁰³ The tribunal shall specify in its judgment, advice or opinion, the matters in respect of which it finds

²⁹⁷ Title c. canon V.1.

²⁹⁸ Title c. canon V.2.

²⁹⁹ Title c. canon V.2.2. These are elected by the clergy in General Synod; Title c. canon V.3.1.

³⁰⁰ Title c. canon V.2.3. These are elected by the lay members of General Synod; Title c. canon V.3.1. Qualification for membership of General Synod Qualification includes baptism and a minimum age of 16 years; Title B canon I.1.7.

³⁰¹ Ecclesiastical Jurisdiction Measure 1963 (U.K.), s. 10.

³⁰² Title c. canon V.4.0.

³⁰³ This appears to allow for the possibility of an application supported by a majority of non-members of the Church.

that there is involved a departure from the doctrine and sacraments, or a matter of doctrine requiring its advice and opinion.³⁰⁴ This tribunal has a greater prospect of use, in that there is no equivalent secular court, and its jurisdiction is one which no secular court would normally entertain.

These judicial mechanisms and procedures are modelled in part on the structure of the ecclesiastical courts in the Church of England. The influence of secular legal procedures, the absence of ecclesiastical law specialists, and the comparative rarity of actions help to reduce the judicial arm of the Church in New Zealand to a mere shadow of what it is in England. The separation of normal appeals and those relating to doctrine appears to be a consequence of the delicacy of questions of doctrine, and its historic entrustment to the hands of the bishops as teachers.³⁰⁵

The jealousy of the common law is not the main problem facing the church courts – though this has resulted in a diminished jurisdiction. The legacy of the courts as part of the establishment, or to a fear of legalism³⁰⁶ seems to have contributed to a weakening of their role. Attempts to strengthen the courts by reducing their obvious parallels with secular courts have yet to be proven successful, but in so acting the Church may have introduced further secular ideas and concepts.³⁰⁷

³⁰⁴ Title c. canon V.11.

³⁰⁵ See also Edward Norman, “Authority in the Anglican Communion” (1998).

³⁰⁶ Perhaps “popish” legalism.

³⁰⁷ In an interesting parallel, Blackstone, commenting on the decline of the Court of Chivalry, attributed this to “the feebleness of it’s [sic] jurisdiction, and want of power to enforce it’s judgments; as it can neither fine nor imprison, not being a court of record”; Sir William Blackstone, *Commentaries on the Laws of England* ed. E. Christian (1978) book 3, 67.

X Faculty Cases

Mediation and determination by tribunals are not the only judicial or quasi-judicial processes in the church. In England, no alteration may be made to the fabric or decoration of a church or in respect of its ornaments and furnishings, whether permanent or temporary, movable or fixed, without the authority of a faculty.³⁰⁸ Without such authority new ornaments and furnishings may not be introduced into the church, nor those already there removed (even though they were introduced illegally).³⁰⁹ In practice an exception is made in respect of trivial matters,³¹⁰ while the doctrine of necessity can justify, and indeed demand, the immediate carrying out of urgent repairs without further authority.³¹¹ The judge of the consistory court of the diocese, the chancellor, exercises this general faculty jurisdiction.³¹²

In contrast to the English position, an episcopal faculty system is employed in New Zealand.³¹³ For the erection or addition to church

³⁰⁸ George H. Newsom, *Faculty Jurisdiction of the Church of England* (1993).

³⁰⁹ George H. Newsom, *Faculty Jurisdiction of the Church of England* (1993).

³¹⁰ Such as flowers, footstool, literature, new washers, and electric light bulbs.

³¹¹ The doctrine of necessity is found in ecclesiastical and secular law alike; See Benjamin L. Berger, "A Choice Among Values: Theoretical and Historical Perspectives on the Defence of Necessity" (2002) 39 *Alberta Law Review* 848.

³¹² Generally, see George H. Newsom, *Faculty Jurisdiction of the Church of England* (1993).

³¹³ "No. alteration of an important kind, affecting the stability and general plan of the church, and no new arrangement of seats or erection of monuments shall take place without the written consent of the Trustees, the Minister and Churchwardens", "A Faculty for such alteration ... may

buildings the consent of the bishop is required.³¹⁴ No alteration of a significant kind, affecting the stability and general plan of a church building and no erection of monuments, shall take place without the written consent of the Trustees, the Ordained Minister, and authorised lay officers of the local ministry and mission unit.³¹⁵ The bishop may issue a faculty for such alterations if satisfied that any conditions laid down have been complied with, and no alteration is permitted without a faculty having been issued.³¹⁶

The result is that a major element of English ecclesiastical law is entrusted to the bishop – and dealt with in an administrative or quasi-judicial manner. Again, this can be seen as possibly being evidence of a certain distrust of courts, perhaps because of nineteenth century English experience. Yet this attitude – if it is indeed present – may be misconceived. The courts in the pre-Reformation church – and in the Roman Catholic Church today, had a wider and more important role than the tribunals of the Anglican Church in New Zealand.³¹⁷ Nor should the

be issued by the Bishop” if satisfied inter alia that there is adequate insurance: No alteration may occur until the faculty is issued and any questions arising between trustees and the ministers or officers of the parish “shall be decided by the Bishop and the Standing Committee of the Diocese”; Title F canon III, 15-17. A faculty “confers liberty on a person to do something; it does not command him to do anything”; *Re St. Mary, Tyne Dock (No. 2)* [1958] P. 156, 166 per Wigglesworth, Dep. Ch. But faculty procedures may be used for remedial purposes.

³¹⁴ “No. building shall be erected on any Church site until plans thereof have been submitted to the Bishop of the Diocese/Pihopa of the Hui Amorangi, or the Commissary authorised to preside at the meetings of the Standing Committee/Amorangi Whaiti, or a Commission specially authorised for the purpose, and to the Trustees”; Title F canon III.13.

³¹⁵ Title F canon III.15.

³¹⁶ Title F canon III.16.

³¹⁷ Though even here its jurisdiction is largely confined to the determination of marriage laws.

difficulties with the Privy Council be relevant in the New Zealand situation, where no secular court is authorised to hear ecclesiastical cases. Whatever the reasons for this use of an episcopal faculty system, it appears to be a reasonably efficient process. In ecclesiological terms this is perhaps ultimately a sufficient justification.³¹⁸

³¹⁸ In the Eastern Orthodox Churches the concept of economy (οικονομία) is generally equated with dispensation, though there are important differences, both in theory and practise; J.A. Douglas, “The Orthodox Principle of Economy, and Its Exercise” (1932) 13:3(4) *The Christian East* 91-98. For dispensations generally, see the Report of a Commission appointed by the Archbishop of Canterbury, *Dispensation in Practice and Theory* (1944).

XI Supervision by the Secular Courts and the Interpretation of Ecclesiastical Legislation

Church tribunals may determine questions of ecclesiastical law, but secular courts may also be called upon to settle disputes within the Church. The tribunals are also subject to supervision by secular courts, particularly with respect to questions of the interpretation of constitutions.³¹⁹

In the Roman Catholic Church it is provided that, when the law of the Church remits some issue to the civil law, the latter is to be observed with the same effects in canon law, insofar as it is not contrary to divine law, and provided it is not otherwise stipulated in canon law.³²⁰ This has some echoes in the experience in England with the Privy Council. The Anglican Church in New Zealand does not expressly provide for questions to be remitted to secular courts, but procedures within the Church – including judicial and quasi-judicial actions – may be reviewed by the secular courts due to the inherent jurisdiction of the High Court.³²¹ The Church must acknowledge this reality.

³¹⁹ Or of codes or even quasi-judicial procedures, as in *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 708.

³²⁰ *The Code of Canon Law: in English Translation* prepared by the Canon Law Society of Great Britain and Ireland (1983) Canon 22.

³²¹ The High Court has “all judicial jurisdiction which may be necessary to administer the laws of New Zealand”; Judicature Act 1908 (N.Z.), s. 16. This is also recognised by the Church of England Empowering Act 1928 (N.Z.), s. 7: “Nothing in this Act contained shall annul, limit, or abridge the inherent power of the [High Court] to prohibit anything purporting to be done under this Act on the ground that it is not a bona fide exercise of the powers conferred by this Act.” (The reference to the High Court was substituted, as from 1 April 1980, for a reference to the Supreme Court pursuant to s. 12 Judicature Amendment Act 1979). In

As a voluntary association the church is competent “to constitute a tribunal ... to decide questions arising out of this association”. Moreover, “[s]uch tribunals are not Courts, but their decisions will be binding if they have acted within the scope of their authority. They must also have either observed the prescribed procedure”, or, if there is none, “have proceeded in a manner consonant with the principles of justice, and the Civil Courts will enforce the decision if necessary”.³²²

The Anglican Church in New Zealand provides for a definitive interpretation of its own laws.³²³ Disputes about the interpretation of church law may be referred to a superior tribunal, the Judicial Committee.³²⁴ But the secular courts will provide their own interpretation whenever recourse is made to them.³²⁵ The effect is that the two systems of courts cannot be said to be truly co-equal – as they arguably had been before the Reformation. This is due to the limited nature of the

Taylor v. Attorney-General [1975] 2 N.Z.L.R. 675, 682 per Richmond J., the court adopted the description of the inherent jurisdiction given by Sir Isaac H. Jacob, “The Inherent Jurisdiction of the Court” (1970) *Current Legal Problems* 27, 28:

The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.

³²² *Baldwin v. Pascoe* (1889) 7 N.Z.L.R. 759, citing *Long v. Lord Bishop of Cape Town* (1863) 1 Moo. N.S. 411 (P.C.).

³²³ The Judicial Committee; Title c. canon IV.1.

³²⁴ Title c. canon IV.1.

³²⁵ *Baldwin v. Pascoe* (1889) 7 N.Z.L.R. 759, citing *Long v. Lord Bishop of Cape Town* (1863) 1 Moo. N.S. 411 (P.C.). Also applied in *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 708.

recognition by the civil courts of the ecclesiastical courts, and to the enforceability of the judgments of secular courts, and their ancillary jurisdiction for punishment for contempt.

Even where a statute has been passed relating to a church or religious organisation and its property, this does not involve parliamentary recognition of the institutions and procedures established by the rules of the church. The institutions and procedures are still seen as private or domestic.³²⁶ This does not exclude the jurisdiction of the courts, however, as the churches remain subject to the jurisdiction of the Crown.³²⁷ A valid and strong reason to intervene could include any question of property or office³²⁸ – and thereby involve the secular courts in disputes involving doctrine or practice. However, differences within a religious group of any kind are resolved purely on a legal basis. The Court must not endeavour to interfere nor can it decide theological or liturgical differences.³²⁹ Insofar as the church tribunals and officers are subject to the supervision of the secular courts, the ecclesiastical laws may be categorised as more than merely private. They are in a limited sense part of the law of New Zealand, though for limited purposes only.

In the United States of America, the Supreme Court has prescribed the involvement of secular courts in disputes that depend for their

³²⁶ *Gray v. M.* [1988] 2 N.Z.L.R. 161 (C.A.).

³²⁷ *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, 708.

³²⁸ As in *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705.

³²⁹ *Cecil v. Rasmussen*, High Court, Auckland, A.1269/83, 9 December 1983, Barker J.; *Misa v. Congregational Christian Church of Samoa (Wainuiomata) Trust Board* [1984] 2 N.Z.L.R. 461 (C.A.), *Presbyterian Church Property Trustees v. Fuimaono*, High Court, Auckland, A.1595/85, 16 October 1986, Thorp J.

resolution on religious doctrine or practice.³³⁰ The only exception is church disputes capable of being decided by the application of neutral principles of law developed for use in all property disputes,³³¹ and perhaps also decisions of church tribunals that are vitiated by “fraud, collusion or arbitrariness”.³³² In practice the jurisdiction is somewhat wider than this might suggest.

In Australia the secular courts do hear disputes in respect of church law, at least if property or civil rights and liberties are involved.³³³ In New Zealand the secular courts will enforce the constitution and rules of churches,³³⁴ but they will be reluctant to intervene in church matters unless there are valid and strong reasons for doing so.³³⁵ In practice the courts will become involved where there is an office or property involved.

³³⁰ *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

³³¹ *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969).

³³² *Gonzales v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929); Bruce McPherson, “The Church as consensual compact, trust and corporation” (2000) 74 *Australian Law Journal* 159-174.

³³³ *Attorney-General of N.S.W. v. Grant* (1976) 135 C.L.R. 587, 600 per Gibbs C.J. (H.C.A.); *MacQueen v. Frackleton* (1909) 8 C.L.R. 673 (H.C.A.). “Civil rights and liberties”, and “property” can have wide application.

³³⁴ *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705.

³³⁵ *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, 708 per Beattie J. cf. *Barker v. O’Gorman* [1971] 1 Ch. 215; [1970] 3 All E.R. 314.

XII Conclusions

The judiciary of the Church mirrors the procedures of the secular courts, from whom they have borrowed – just as, in earlier times, the secular courts borrowed from the ecclesiastical courts.

In New Zealand, the small number of cases, and the limited jurisdiction, combined with the virtual absence of counsel with knowledge of the ecclesiastical laws, has seriously weakened the church tribunals.

Anglican jurisprudence in general is ambivalent to the question of recourse from ecclesiastical courts and tribunals to the secular courts, though in many states – including New Zealand – the latter provide a supervisory jurisdiction over the former. It was perhaps a conscious attempt to distance the Church judiciary from the secular courts that led to the former being restyled tribunals. But the jurisprudential weakness of the tribunals remains a marked feature of the Church in New Zealand, and seriously weakens the legal authority of the Church.

At the 1948 Lambeth Conference “the positive nature” of Anglican authority was identified as “moral and spiritual” rather than legal or institutional, and as resting on “charity”.³³⁶ It might be doubted whether this is a sufficiently robust foundation for the internal jurisprudence of the Anglican Church in New Zealand – or of the Anglican Communion – but a sense of spiritual freedom has coloured the whole ethos and

³³⁶ Conference of Bishops of the Anglican Communion, *The Lambeth Conference, 1948. The Encyclical Letter from the Bishops; together with Resolutions and Reports* (1948) 48 Report IV, ‘The Anglican Communion’. See also “There is only one source of authority, which is the freedom and love of the Triune God” – Stephen Sykes, *The Integrity of Anglicanism* (1978) 98.

expression of Anglicanism.³³⁷ In limiting the role of formal tribunals as much as possible, the Church has arguably sought to reduce the influence of legal formalism. But the smallness of the jurisdiction has encouraged the survival and growth of common law notions of process, whilst not encouraging the development of ecclesiastical equivalents. The Church might be better served by the use of a core of professional judges, rather than elected lay and clerical members of judicial tribunals.

³³⁷ Emmanuel Amand de Mendieta, *Anglican Vision* (1971) 63.

CHAPTER 5 – THE NATURE OF MINISTERIAL AUTHORITY

I Introduction

In the previous Chapter we saw how the judicial branch of the Church remains heavily influenced by a secular legal tradition. Both in procedures, and to an extent even in substance, the church tribunals are influenced by the common and statute law, and the legacy of a formal establishment in England.

The legislative and judicial branches of Church government of the Anglican Church also depend for their authority, at least in part, upon legislation enacted by Parliament,¹ but the influence of secular law extends beyond this formal law.² Although in recent years there has been a conscious move away from the influence of the secular judiciary, it remains to be seen whether this will be effective in distancing the church tribunals from the influence of the common law. Its authority remains primarily legislation based on secular statutes, and its procedures legalistic. Attempts to develop more theologically-based decision-making risks “correction” by secular courts on judicial review.³

The legislature of the Church remains influenced by secular models, in this case the parliamentary model. More importantly, it has been profoundly influenced by the political history of New Zealand. The

¹ Private, rather than public, Acts of Parliament.

² See, for instance, Noel Cox, “Ecclesiastical Jurisdiction in the Church of the Province of Aotearoa, New Zealand and Polynesia” (2001) 6(2) *Deakin Law Review* 266-284.

³ See, for instance, J. Burrows, “Judicial Review and the Church of England” (1997) University of Wales Cardiff LL.M. dissertation.

Treaty of Waitangi, with its implication of an on-going compact and partnership between Maori and Pakeha, has led to the Church adopting a divided legislature. This is not influenced primarily by theological considerations, but by social or political factors largely external to the Church itself. The legitimacy of the Church government – and therefore some of its authority – is derived from this social compact expressed in the Constitution of the Church.⁴

To continue to use the Montesquieuan model,⁵ the executive branch of the Church, particularly the ministry, is less obviously influenced by secular concerns. Its authority has a more traditional basis – though the trustees and other lay office-holders are, in some respects, subject to closer regulation by secular legislation.⁶

With the significant exception of the ordination of women priests, the ministry remains fairly soundly based on the historical episcopal model, with three holy orders of bishop, priest and deacon, and little affected by secular models. It is only occasionally, in their relation to their parishioners or to their ecclesiastical superiors, that the secular law has any significant impact upon the authority, responsibilities, or role of the ministry of the Church. This Chapter will consider each order in turn, and assess their authority and role, in relation to the sometimes conflicting secular and religious models. It will be shown that the law in respect of the executive branch of the Church – the ministry – is predominantly ecclesiastical. Whilst individual ministers, dignitaries, and office holders are subject to the secular laws, their authority is derived

⁴ See Chapter 3.

⁵ See Charles de Secondat Baron de Montesquieu, “The Spirit of the Laws”, in Arend Lijphart (ed.), *Parliamentary versus Presidential Government* (1992) 48-51.

⁶ These are beyond the scope of this thesis, because they are primarily secular in nature.

almost exclusively from ecclesiastical sources. These are sources which (unlike the judiciary and the legislature), have been subject to little secular influence, except in relation to the ordination of women.

II Episcopal Ministry: The Office of Bishop

Whilst the judicial aspects of the Church ecclesiology – including the effect of doctrine on judicial structures and processes – are important, they have not held the same pre-eminence as the ministerial in the life of the Church. The supreme law of the Church is the salvation of souls.⁷ This requires the Church to deploy personnel, who are ordered and directed like an army. The priesthood, whether of bishops, priests, and deacons, or in some other form, has been central to church government, as well as to sacerdotal ministry.⁸

The three historic orders are bishop, priest, and deacon.⁹ The term bishop¹⁰ is used several times in the Septuagint version of the Old Testament. It would naturally suggest itself as a title for the offices to which the early Christians accorded their leadership. However the terms priest and bishop are used almost interchangeably in Acts 1:20,¹¹ Acts 20:17,¹² Acts 20:28,¹³ and Titus 1:5-8.¹⁴ By the end of the second century

⁷ See *The Code of Canon Law: in English Translation* prepared by the Canon Law Society of Great Britain and Ireland (1983) Canon 1752.

⁸ See Kenneth Kirk (ed.), *The Apostolic Ministry* (2nd ed., 1957). Congregational churches, however, give a lesser role to the ministry, as indeed do the Presbyterian churches.

⁹ Title G canon XIII.1.1; *A New Zealand Prayer Book* (1989) 887.

¹⁰ Ἐπισκοπος (“overseer”).

¹¹ “For it is written in the book of Psalms, Let his habitation be desolate, and let no man dwell therein: and his bishoprick let another take”. This is rendered differently in other translations, so that the “bishopric” becomes “leadership” or some equivalent term.

¹² “And from Miletus he sent to Ephesus, and called the elders of the church”.

the monarchical episcopacy of apostolic origins¹⁵ was generally recognised as the legitimate heir to special powers entrusted to the apostles by Christ.¹⁶ Chief among these was the power to ordain priests and to teach and rule the clergy and laity of the diocese entrusted to them.¹⁷

The growing liberalism of much theological discourse, from the early nineteenth century in particular, added new theories about the origin and nature of the episcopacy.¹⁸ Many theologians denied that Christ intended to found any organisation to perpetuate His teachings.¹⁹ The church, therefore, was not founded by Christ, but by the apostles or

¹³ “Take heed therefore unto yourselves, and to all the flock, over the which the Holy Ghost hath made you overseers, to feed the church of God, which he hath purchased with his own blood”.

¹⁴

⁵For this cause left I thee in Crete, that thou shouldest set in order the things that are wanting, and ordain elders in every city, as I had appointed thee:

⁶If any be blameless, the husband of one wife, having faithful children not accused of riot or unruly.

⁷For a bishop must be blameless, as the steward of God; not selfwilled, not soon angry, not given to wine, no striker, not given to filthy lucre;

⁸But a lover of hospitality, a lover of good men, sober, just, holy, temperate”.

¹⁵ At least as the episcopate is generally understood in the apostolic tradition; James Coriden, *An Introduction to Canon Law* (1991) 14; Kenneth Kirk (ed.), *The Apostolic Ministry* (2nd ed., 1957).

¹⁶ Dom Gregory Dix, “The Ministry in the Early Church”, in Kenneth Kirk (ed.), *The Apostolic Ministry* (2nd ed., 1957) 201-202.

¹⁷ The charges to preach and teach were presented clearly and forcefully in the pastoral epistles; 1 Timothy 4; 2 Timothy 4.

¹⁸ See Kenneth Kirk (ed.), *The Apostolic Ministry* (2nd ed., 1957).

¹⁹ Particularly in the reformed and Protestant churches.

their successors, and the episcopal form of government is the fruit of a gradual evolution – and not the original form of the church as established by Christ.²⁰ This understanding of the formative centuries of the church saw the church as being composed of democratic groups, which naturally imitated the organisation of other contemporary societies as they grew, and which gave direction to the college of presbyters, of whom one became president.²¹

Criticism of episcopacy as the inherent leadership component of the church was not new in the nineteenth century, however. In the sixteenth century Calvin had condemned episcopacy as one of the worst corruptions which had crept into the church.²² Though this theory was not new even then – Aerius had espoused it as early as the fourth century²³ – the existence of the episcopacy was critical in the development of the church, at least until the Reformation.²⁴ Thereafter, whilst it did not survive in all Protestant churches, it has remained of great importance in the on-going œcumenical movement, particularly between the Anglican Communion and the Roman Catholic Church.²⁵ In

²⁰ For a view of this period, see Dom Gregory Dix, “The Ministry in the Early Church”, in Kenneth Kirk (ed.), *The Apostolic Ministry* (2nd ed., 1957) 183-304.

²¹ The varying understanding of these early years has also influenced the formation and structure of “schismatic or non-conforming” denominations, with episcopal (authority lodged with bishops), presbyteral (elders), or congregational (members of local congregations) models; Kenneth Kirk (ed.), *The Apostolic Ministry* (2nd ed., 1957).

²² Jean Calvin, *Institutes of the Christian Religion* ed. John McNeill, trans. Ford Lewis Battles (1960).

²³ Richard Hooker, *Of the Laws of Ecclesiastical Polity* ed. Arthur McGrade (1989) Book VII.

²⁴ Kenneth Kirk (ed.), *The Apostolic Ministry* (2nd ed., 1957).

²⁵ See R. William Franklin (ed.), *Anglican Orders* (1996).

both of these latter churches the office of bishop remained of fundamental importance.²⁶

In seeking an acceptable œcumenical understanding and practice of episcopacy, the Tractarian understanding of apostolic succession has been largely superseded.²⁷ The absolute necessity of episcopacy in the apostolic succession, understood as the very essence of the church, has been reconsidered. An emphasis on a historically provable unbroken chain of episcopal succession finds less favour today than it once did.²⁸ Continuity here is guaranteed and expressed not by way of succession from generation to generation and from individual to individual, but in and through the convocation of the church of one place, that is, through its eucharistic structure. It is a continuity of communities and churches that constitutes and expresses apostolic succession in this approach.²⁹ This ensures continuity of authority.

The Anglican Communion, being composed of episcopal churches, did not reject the historic ministry of bishops, priests and deacons.³⁰

²⁶ For example, in *The Code of Canon Law: in English Translation* prepared by the Canon Law Society of Great Britain and Ireland (1983) Canon 204 s. 2: “This Church, established and ordered in this world as a society, subsists in the catholic Church, governed by the successor of Peter and the Bishops in communion with him”.

²⁷ Christopher Hill, “Bishops: Anglican and Catholic” in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (1998) 60-70.

²⁸ Compare Kenneth Kirk (ed.), *The Apostolic Ministry* (2nd ed., 1957) and John D. Zizioulas (ed.), *Studies in Personhood and the Church* (1985).

²⁹ John D. Zizioulas (ed.), *Studies in Personhood and the Church* (1985) 177.

³⁰ “It is evident unto all men diligently reading holy Scripture and ancient Authors, that from the Apostles’ time there have been these Orders of Ministers in Christ’s Church; Bishops, Priests, and Deacons” – Preface to the Ordinal in the *Book of Common Prayer* (1662); *A New Zealand Prayer Book* (1989) 887.

However, in spite of this, its relationship with the Roman Catholic Church has not been easy.³¹ In 1896 Pope Leo XII solemnly declared all Anglican orders absolutely null and utterly void.³² The reasons for that decision – and its implications – are beyond the scope of this thesis,³³ but more recently the Anglican-Roman Catholic International Commission (ARCIC) has explored the meaning of episcopacy in an effort to move beyond this condemnation.³⁴ The theological principle of collegiality attaches to bishops collectively, that by virtue of their historic and apostolic ministry they share a collective responsibility for leadership in

³¹ Although the Bull of Pope Leo XIII *Apostolicae Curae* constitutes the final papal condemnation of the validity of Anglican Orders, it was by no means the first. In 1555, Pope Paul IV issued a Bull entitled *Praeclara Charissimi* which clarified the powers given to Cardinal Pole, sent to England to regularise the religious position after Queen Mary came to the throne; Michael Davies, *The Order of Melchisedech* (1979) 154-155.

Later in the same year, the pope clarified the matter still further by writing:

We declare that it is only those Bishops and Archbishops who were not ordained and consecrated in the form of the Church that can not be said to be duly and rightly ordained and therefore the person promoted by them to these orders have not received orders but ought and are bound to receive anew these said orders from the ordinary.

– Michael Davies, *The Order of Melchisedech* (1979) 157.

³² Pope Leo XIII, *Letters Apostolic of His Holiness Leo XIII ... concerning Anglican Orders dated: September 13, 1896* (1896).

³³ See R. William Franklin (ed.), *Anglican Orders* (1996).

³⁴ Christopher Hill, “Anglican Orders: An Ecumenical Context” in R. William Franklin (ed.), *Anglican Orders* (1996) 87.

the particular church.³⁵ On episcopal authority and synodical government the 1978 Lambeth Conference had this to say:

All authority comes from God and that which is given to the Church involves all the people of God in responsibility and obedience.³⁶

Neither bishop (nor synod) receives authority “by any succession independent of the Church”.³⁷ “The guardianship of the faith is a collegial responsibility of the episcopate.”³⁸ The authority of the bishop – and indeed the existence of his (or her) office – is primarily historical, and dependent upon the ancient custom of the Church. It bears little

³⁵ L.C. 1968, Res. 55; L.C. 1978, Res. 13; L.C. 1988, Res. 8. This is because of biblical warrant, for example, John 21.15-17:

¹⁵ So when they had dined, Jesus saith to Simon Peter, Simon, son of Jonas, lovest thou me more than these? He saith unto him, Yea, Lord; thou knowest that I love thee. He saith unto him, Feed my lambs.

¹⁶ He saith to him again the second time, Simon, son of Jonas, lovest thou me? He saith unto him, Yea, Lord; thou knowest that I love thee. He saith unto him, Feed my sheep.

¹⁷ He saith unto him the third time, Simon, son of Jonas, lovest thou me? Peter was grieved because he said unto him the third time, Lovest thou me? And he said unto him, Lord, thou knowest all things; thou knowest that I love thee. Jesus saith unto him, Feed my sheep.

Luke 22.32: “But I have prayed for thee, that thy faith fail not: and when thou Art. converted, strengthen thy brethren”. It reflects the nature of the universal church as a communion of churches, or *communio ecclesiarum*.

³⁶ “The People of God and Ministry” L.C. 1978, pp. 76-77.

³⁷ “The People of God and Ministry” L.C. 1978, pp. 76-77.

³⁸ “The People of God and Ministry” L.C. 1978, pp. 76-77.

relation to secular equivalents.³⁹ The scope of authority of a bishop is also primarily based upon doctrinal and liturgical texts.

A bishop has considerable powers, in particular the general powers of government.⁴⁰ He (or she) is also entitled to canonical obedience.⁴¹ Within the Church a bishop has a governmental position incorporating both disciplinary and controlling elements. This has been ascribed jurisdictionally, in New Zealand, to the preamble of the Constitution, which refers to the ordering of the affairs, the management of the property, and the promotion of the discipline of the members of the Church.⁴² Reference is also made in clause 1 of the Constitution to the *Book of Common Prayer* and the manner of the consecration of bishops.⁴³ The *Book of Common Prayer* (Consecration of Archbishops or Bishops) mentions the first letter of St. Paul to Timothy, chapter 3, that is, a chapter dealing with government. In the first verse there is a

³⁹ Except, perhaps, kings.

⁴⁰ *Gregory v. Bishop of Waiapu* [1975] N.Z.L.R. 705, 712 per Beattie J.: “In essence therefore, a bishop has considerable powers, being the general powers of government. He is also entitled to canonical obedience. These aspects of his high office regulate his relationship with the clergy”.

⁴¹ *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, 709 per Beattie J. This was because of the declaration of canonical obedience, but also because of the constitutional position of the bishop within the body of the Church: “each priest completes this document [the declaration of canonical obedience] on his appointment, and in my opinion such a promise and declaration creates a particular relationship between a bishop and his priests”.

The bishop also owes obedience to his canonical superiors.

⁴² *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, 708-709 per Beattie J.

⁴³ The 1662 version of which is one of the Formularies of the Church; Const. B1.

reference to the government of the church.⁴⁴ Furthermore, in the charge of the Archbishop there is a reference to the admonition to government.⁴⁵

As an apostolic church, the Anglican Church in New Zealand recognises the primary leadership role of the bishops.⁴⁶ They are also entrusted with a teaching role.⁴⁷ It is the function of a diocesan bishop to teach, sanctify, and govern his or her diocese.⁴⁸ A bishop must be at least 30 years of age,⁴⁹ and is generally much older upon appointment.⁵⁰ As elsewhere in the wider Anglican Communion, attempts are made to preserve the apostolic succession,⁵¹ but the understanding of the nature of

⁴⁴ “This is a true saying, if a man desire the office of a bishop, he desireth a good work”.

⁴⁵ *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, 708-709 per Beattie J.

⁴⁶ Title c. canon I.1; *A New Zealand Prayer Book* (1989) 913: “Bishops are to exercise godly leadership in that part of the Church committed to their care”.

⁴⁷ *A New Zealand Prayer Book* (1989) 913: “Bishops are sent to lead by their example in the total ministry and mission of the Church.”

⁴⁸ Title D canons I.A, II.

⁴⁹ Form and Manner of Making, Ordaining, and Consecrating of Bishops, Priests, and Deacons; cf. Act of Uniformity 1662 (14 Chas. II c. 4) (Eng.).

⁵⁰ However, the Bishop (or Te Pihopa) of Te Tai Tokerau (the Northern Region), the Rt. Rev’d Tai Kitohi Wiremu Pikaahu, was only 37 years old when consecrated in 2002; Newsnet, Anglican Diocese of Wellington (February 2002), available at

<http://www.wn.anglican.org.nz/news_centre/NewsNet/NewsnetFebruary2002.pdf> at 6 May 2003.

⁵¹ Title G canon XIII.1.1. Title D canons, interpretation: “‘Bishop’ shall mean persons who are ordained according to the Ordination Liturgy of Bishops in the New Zealand Prayer Book/He Karakia Mihinare o Aotearoa or consecrated according to the Form and Manner of Consecrating Bishops in the Book of Common Prayer 1662, or the 1980 Ordinal, or persons who have been ordained or consecrated Bishop in

the office is not necessarily the same as in the Roman Catholic Church⁵² – nor, indeed, that of the Tractarians.⁵³

While a bishop retains his or her personal episcopal status for life, they may relinquish office. The primate advises the other bishops of the resignation of a diocesan bishop.⁵⁴ On a vacancy episcopal supervision devolves to the primate, who appoints a commissary.⁵⁵ The terms of secular mental health law are used to determine incapacity,⁵⁶ but otherwise the Church itself regulates episcopal office.

The diocesan Electoral College is presided over by the primate.⁵⁷ It determines its own procedure as to consultation, nominations, and decision-making.⁵⁸ There is provision for consultation throughout the diocese in question, and in particular, with the most local of ecclesiastical units within it (the parishes).⁵⁹

other Provinces of the Anglican Communion and who are exercising episcopal ministry within this Church”.

⁵² R. William Franklin (ed.), *Anglican Orders* (1996).

⁵³ Christopher Hill, “Bishops: Anglican and Catholic” in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (1998) 60-70.

⁵⁴ Title A canon I.6.2.

⁵⁵ Title A canon I.2.5.

⁵⁶ Title A canon I.6.5. If the diocesan standing committee has “cause to believe” that there is incapacity, the primate must put the written opinion of three medical practitioners to all the bishops and if they are of the same opinion the diocese is declared vacant.

⁵⁷ Title A canon I.2.5.

⁵⁸ Title A canon I.2.8.

⁵⁹ The Diocesan Electoral College may delegate its right to nominate to any person or persons whom it may appoint either absolutely or subject to such conditions as it may think fit to impose; Title A canon I.2.10. This delegation must, however, be reported to the Primate.

The presiding bishop or archbishop takes responsibility for the consecration of the bishop-elect.⁶⁰ This requires three bishops including the primate⁶¹ (or a commissary). Consecration is followed by enthronement or installation in the diocese.⁶² The new bishop assents to the doctrine, liturgy, and discipline of the Church,⁶³ and undertakes to comply with the laws of the Church.⁶⁴

The bishop (or archbishop) is the chief minister in the diocese.⁶⁵ He (or she⁶⁶) has his throne or *cathedra* in his cathedral church. He alone ordains priests, makes deacons, confirms the baptised, and consecrates land and buildings.⁶⁷ In accordance with tradition common to other episcopal churches, the appointment of many diocesan officers also lies in the hands of the bishop.⁶⁸

The vicar-general acts whenever the bishop is outside the diocese or is incapacitated or resigns or dead.⁶⁹ His duties are to perform all the spiritual and temporal functions of the bishop, except as otherwise excluded by the law of the Church, and to summon and preside at the

⁶⁰ Title A canon I.5.10.

⁶¹ Title G canon XIII.2.1.

⁶² In accordance with “the Form and Manner of Making, Ordaining, and Consecrating of Bishops, Priests, and Deacons”.

⁶³ Title A canon I.5.6.9.

⁶⁴ Title A canon I schedule.

⁶⁵ Title D canon II.1.

⁶⁶ Dr Penelope Jamieson was elected 11 November 1989 and consecrated 29 June 1990 Bishop of Dunedin. Pam Darling, *“Equally Applicable:” Conscience and Women’s Ordination in the Episcopal Church, USA, 1976-1994* (1994).

⁶⁷ Generally, only in accordance with the formularies of the Church.

⁶⁸ Title A canon II.1.9.

⁶⁹ The bishop “may” appoint a vicar-general; Title A canon I.8.

Diocesan Synod.⁷⁰ In contrast to England, where the chancellor acts as vicar-general,⁷¹ in New Zealand the Vicar-General is in holy orders,⁷² and is commonly an assistant bishop.⁷³

Before the nexus with the Church of England in England was broken, and probably even now, bishops in Australia had no *ius liturgicum* and probably no power to assent to local customs and thus give them force of law.⁷⁴ The same is probably true in New Zealand. However, the bishops have the principal leadership role within the Church. This is primarily dependent upon canon law – and the Church’s interpretation of historical authority – disputed by many Protestant churches.⁷⁵ There is little secular law which directly affects the episcopal office per se. However, as they have legal personality, the bishops may sue and be sued in secular courts, for they are corporations sole.⁷⁶

Bishops in New Zealand derive their authority from a traditional apostolic understanding of episcopal ministry. The Constitution and canons have little to say about this authority.⁷⁷ Secular legislation and

⁷⁰ Title A canon I.8.

⁷¹ Thomas Coningsby, “Chancellor, Vicar-General and Official Principal – a bundle of offices” (1992) 2(10) Ecclesiastical Law Journal 273.

⁷² Canon A.1.8.

⁷³ Assistant bishops, as in England, are usually retired diocesan or suffragan bishops who continue to exercise episcopal responsibilities within the diocese.

⁷⁴ Standing Committee of the General Synod of the Church of England in Australia, *The Anglican Church of Australia, Canon Law in Australia* (c.1981) 50. See *Wylde v. Attorney-General* (1949) 78 C.L.R. 224 (H.C.A.).

⁷⁵ See, e.g. Kenneth Kirk (ed.), *The Apostolic Ministry* (2nd ed., 1957).

⁷⁶ As in *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705.

⁷⁷ See, for example, Const. A.5.

judgments are even less illuminating.⁷⁸ The High Court case of *Gregory v. Bishop of Waiapu*⁷⁹ offered an insight into the attitude of the secular courts to episcopal authority,⁸⁰ but, for the Church, it appears that the bishop is central to the Constitution and ministry, and therefore there was little need to explain his or her role and responsibilities.⁸¹

⁷⁸ There have been few reported cases in secular courts in New Zealand which have dealt with ecclesiastical laws, however broadly defined.

⁷⁹ [1975] 1 N.Z.L.R. 705.

⁸⁰ *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, 709 per Beattie J.: “each priest completes this document [the declaration of canonical obedience] on his appointment, and in my opinion such a promise and declaration creates a particular relationship between a bishop and his priests”.

His Honour also observed that

The Church structure contemplates a hierarchy and as far as ministers are concerned, that hierarchy consists of bishops, priests and deacons. A bishop has a governmental position incorporating both disciplinary and controlling elements. The constitution in its preamble refers to the ordering of the affairs, the management of the property, and the promotion of the discipline of the members thereof. Reference is also made in cl. 1 of the constitution to the Book of Common Prayer and the form and manner of the consecration of bishops. The Book of Common Prayer (Consecration of Archbishops or Bishops) mentions the first letter of St. Paul to Timothy, chapter 3, verse 1, that is, a chapter dealing with government and in the first prayer of that form there is a reference to the government of the Church. Furthermore, in the charge of the Archbishop to a bishop there is a reference to the admonition to government.

– *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, 708-709 per Beattie J.

⁸¹ Whether this is reasonable is perhaps doubtful – but it would appear to be pragmatic.

The primate also has a major role – but one which is expressly described. General Synod elects the primate.⁸² During a vacancy the primatial functions are assigned to a senior bishop.⁸³ The primate may be removed from office.⁸⁴ Previously the primate was also bishop of their own diocese.⁸⁵ From 1998 to 2004 the position of archbishop of New Zealand was discontinued, and the primate was styled presiding bishop.⁸⁶ The primate is not now a diocesan bishop.⁸⁷

Although the three Tikanga each have their own bishops – and in the case of those of the Pakeha and Maori Tikanga these may be coterminous – the authority of the episcopacy is not divided in quite the same manner as that of the legislative and judicial branches of the Church. The episcopacy has always had room for multiple bishops in the one area, particularly where there is a missionary Church, and the episcopate is a collegial body. However, it is unusual for the teaching and leadership role of the bishops to be divided in this manner in a permanent Church hierarchy.

As an episcopal church, the role of bishops, individually and collectively, is vitally important. Their historic role, however apostolic

⁸² Until 1998 the canons provided that the style should be “Archbishop”. Thereafter the title “Presiding Bishop” was the “courtesy title” of the primate; Canon A.1.7.8. The primate “shall have and may exercise all the powers functions and authorities given under the Constitution and Canons”; Canon A.1.7.7. From 2004 the style of Archbishop was restored.

⁸³ Const. C.13.

⁸⁴ Const. A.1.7.5.

⁸⁵ The current primate was Bishop of Aotearoa. The previous primate was Bishop of Auckland, and so was styled “Right Reverend”.

⁸⁶ Title A canon I.7.8.

⁸⁷ Although in earlier years diocesan bishops were known as “Lord Bishop”, this usage has gone out of favour.

succession is understood, leaves little scope for secular authority to have a significant effect upon the ministerial government of the Church. The role of the bishop, their teaching and disciplinary authority, and most aspects of their appointment and retirement, are dependent solely upon the constitution and canons, and the tradition and custom of the Church.

III The Ordained Ministry of Priests and Deacons

One of the formularies of the Church, the *New Zealand Prayer Book*, observes that “[t]he provision of an ordained ministry, to serve the local congregation in the name of Christ and the universal Church is one of the responsibilities of the apostolic Church”.⁸⁸ However, in 1896 Pope Leo XII had declared all Anglican orders null and void.⁸⁹ The main objection was the alleged deficiency of intention and of form. In the case of deficiency of intention, the pope believed that the Anglican rites of ordination revealed an intention to create a priesthood different from the “sacrificing” priesthood of the Roman Catholic Church.⁹⁰ Yet the *Book of Common Prayer* contains a strong sacrificial theology, in particular in the Preface to the 1550, 1552, 1559, and 1662 versions of the Ordinal. These were not discussed in *Apostolicae Curae*.⁹¹

Whether or not the Roman Catholic Church recognises the Anglican orders – and this is a question yet to be finally resolved despite *Apostolicae Curae*⁹² – the Anglican churches place considerable weight upon episcopal ordination.⁹³ In New Zealand this follows general

⁸⁸ *A New Zealand Prayer Book* (1989) 887.

⁸⁹ Pope Leo XIII, *Letters Apostolic of His Holiness Leo XIII ... concerning Anglican Orders dated: September 13, 1896* (1896). Nullity and voidness are distinct legal concepts, though usually conjoined.

⁹⁰ Rt. Rev’d. Hugh Montefiore, “Forward” in R. William Franklin (ed.), *Anglican Orders* (1996) 4.

⁹¹ See “Saepius Officio” in R. William Franklin (ed.), *Anglican Orders* (1996) 138-149.

⁹² See R. William Franklin (ed.), *Anglican Orders* (1996).

⁹³ Valid ordination (according to liturgical norms) takes place by the consent of the candidate and by prayer and laying on of hands by the bishop; *The Book of Common Prayer* (1662) 553f, from 1 Timothy 4.14:

Anglican Communion standards, with little or no direct secular influences apparent. Ordination requires vocation, trial, examination, and admission to Holy Orders.⁹⁴ Disqualifications are based on ecclesiastical status, spiritual and moral suitability, age, and mental or physical fitness.⁹⁵ The ancient distinction between irregularities and impediments has largely disappeared.⁹⁶ Few churches list criteria for valid ordination, but the following are generally accepted: the candidate must be baptised and confirmed,⁹⁷ and the bishop must be satisfied about the candidate's spiritual and moral qualities.⁹⁸ There is a minimum age of 23 years for the diaconate and 24 years for the priesthood.⁹⁹ Diocesan synods of the dioceses in New Zealand, and the Diocesan Synod of the Diocese of Polynesia, each make regulations to govern the appointment and authorisation of ordained ministers within their own Tikanga.¹⁰⁰

The candidate is subject to careful examination.¹⁰¹ They must have “sufficient knowledge of holy Scripture and of the doctrine, discipline, and worship” of the Church.¹⁰² There are prescribed general educational

“Neglect not the gift that is in thee, which was given thee by prophecy, with the laying on of the hands of the presbytery.”

⁹⁴ Title G canon XIII.1.1.

⁹⁵ Title F canon XIII.3-7.

⁹⁶ Norman Doe, *Canon Law in the Anglican Communion* (1998) 129. It is not found in New Zealand; see the wording of Title F canon XIII.3-7.

⁹⁷ For New Zealand, see Title G canon XIII.4.1.

⁹⁸ For New Zealand, see Title G canon XIII.4.2.

⁹⁹ Title G canon XIII.3.23.2 (deacons). Effect of Title G canon XIII.3.2 and Title G canon XIII.3.4 (priests).

¹⁰⁰ Const. D.1, E.1, F.1; Title A canon II.1.

¹⁰¹ Title G canon XIII.5.

¹⁰² Title G canon XIII.5.

qualifications.¹⁰³ Vocational training is conducted principally by St. John's Theological College, in Auckland.¹⁰⁴ Before proceeding to ordination the candidate must produce a birth certificate and testimonials.¹⁰⁵

The rule of English canon law that no person shall be ordained both priest and deacon on one and the same day is followed.¹⁰⁶ Progression to priest is not automatic, and a candidate must be a deacon for at least a year, or "good cause" must be shown.¹⁰⁷ The candidate must also provide a certificate that ecclesiastical office within the diocese is provided, from which ministry may be carried out.¹⁰⁸ If the candidate comes from another diocese, letters dimissory must be exhibited to the ordaining bishop from the bishop of the other diocese.¹⁰⁹ An announcement must be made, in a congregation in which the candidate is known, of the forthcoming ordination, in order to receive evidence of support as well as an opportunity for people to make allegations that the candidate is

¹⁰³ General Synod Standing Resolutions 1986. These include a requirement that the candidate must have competence in the Maori language.

¹⁰⁴ Title E canons II-V operate alongside the St. John's College Trusts Act 1972 (N.Z.). In accordance with the three-way division of the Church, the College has three constituent colleges, the College of the Southern Cross, Te Rau Kahikatea, and the College of the Diocese of Polynesia. Ordination training is also conducted through the Christchurch-based College House Institute of Theology, the Dunedin-based Selwyn College, and Distance Education Formation and Training Unit.

¹⁰⁵ Title G canon XIII.4.1.

¹⁰⁶ "[N]o person shall be made a deacon and a presbyter on the same day"; Title G canon XIII.3.3.

¹⁰⁷ Title G canon XIII.5.

¹⁰⁸ No bishop shall ordain "unless satisfied such person shall be licensed to an office under the Canons"; Title G canon XIII.3.5.

¹⁰⁹ Title G canon XIII.3.5.

impeded from ordination.¹¹⁰ These rules are consistent with generally accepted practice elsewhere in the Anglican Communion. Self-regulation has not meant significant departure from common standards of practice. As in the rest of the Anglican Communion this is based on consensus and voluntary adherence to traditional form, rather than compliance with strict requirements of formal law.

In order to maintain discipline within the Church, where State-enforced penal sanctions are not available, ordinands are bound by oath to various undertakings. This may be seen in light of a historic tradition and practice. But it is also consistent with the secular legal view of the Church as governed by consensual compact.¹¹¹ Prior to and at ordination, the candidate is obliged to make various undertakings, in the form of declarations, oaths or promises: assent to the doctrine of the Church; to use only the lawful services of the Church; obedience to the bishop; and compliance with the laws of the Church.¹¹² These undertakings are required to ensure some measure of orthodoxy, particularly important in the absence of an ecclesiastical law which is enforceable per se in courts able to effectively enforce their judgments.¹¹³ As a voluntary association the Church is competent “to constitute a tribunal ... to decide questions arising out of this association”. Moreover, “[s]uch tribunals are not Courts, but their decisions will be binding if they have acted within the scope of their authority. They must also have either observed the prescribed procedure”, or, if there is none, “have proceeded in a manner consonant with the principles of justice, and the Civil Courts will enforce

¹¹⁰ A certificate must be sent to the bishop; Title G canon XIII.4.3.

¹¹¹ As in *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705.

¹¹² *A New Zealand Prayer Book* (1989) 922.

¹¹³ See Chapter 4.

the decision if necessary”.¹¹⁴ But this is only because of the inherent jurisdiction of the High Court,¹¹⁵ and not because of the nature of ecclesiastical law.

In England, canon C15 (as amended) lays down the declaration of assent which every priest and deacon has to make, and it is in the following terms:

I, A B, do so affirm [loyalty to the inheritance of faith of the Church], and accordingly declare my belief in the faith which is revealed in the Holy Scriptures and set forth in the catholic creeds and to which the historic formularies of the Church of England bear witness; and in public prayer and administration of the sacraments, I will use only the forms of service which are authorised or allowed by Canon.¹¹⁶

In contrast to the form in England, the form of assent on ordination used in New Zealand includes specific declarations of allegiance to the

¹¹⁴ *Baldwin v. Pascoe* (1889) 7 N.Z.L.R. 759, citing *Long v. Lord Bishop of Cape Town* (1863) 1 Moo. N.S. 411 (P.C.).

¹¹⁵ The High Court has “all judicial jurisdiction which may be necessary to administer the laws of New Zealand”; Judicature Act 1908 (N.Z.), s. 16. This is also recognised by the Church of England Empowering Act 1928 (N.Z.), s. 7: “Nothing in this Act contained shall annul, limit, or abridge the inherent power of the [High Court] to prohibit anything purporting to be done under this Act on the ground that it is not a bona fide exercise of the powers conferred by this Act.” (The reference to the High Court was substituted, as from 1 April 1980, for a reference to the Supreme Court pursuant to s. 12 Judicature Amendment Act 1979).

Taylor v. Attorney-General [1975] 2 N.Z.L.R. 675, 682 per Richmond J. adopted this description of the inherent jurisdiction by Sir Isaac H. Jacob, “The Inherent Jurisdiction of the Court” (1970) *Current Legal Problems* 27, 28: “The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.” (C.A.).

¹¹⁶ *The Canons of the Church of England. Canons ecclesiastical promulgated by the Convocations of Canterbury and York in 1964 and 1969* (1969).

supreme constitutional authority of the Church – the General Synod.¹¹⁷ This is perhaps necessary because of the different constitutional position of the Church in New Zealand to that in England. The Church’s constitutional structure is not parallel to that of the State. Although the Church is a perfect society,¹¹⁸ alongside the State, in the absence of full mutual recognition the former requires greater emphasis upon obligations based upon individual agreement and assent, for it to be fully effective. The form of the declaration of adherence and submission is:

DECLARATION OF ADHERENCE AND SUBMISSION TO THE ANGLICAN CHURCH IN AOTEAROA, NEW ZEALAND AND POLYNESIA.

I, A.B. DO DECLARE my submission to the authority of the General Synod/te Hinota Whanui of this Church established by a Constitution agreed to on the 13th day of June 1857 and as subsequently revised and amended from time to time and to all the provisions of the Constitution from time to time in force to the extent that that authority and those provisions relate to the office of /membership of and to any other office or membership I may at any time hold.

¹¹⁷ General Councils are acknowledged by the Anglican Communion to have authority, but there has not been a generally accepted Council for many centuries. There is no Communion-wide legislative body; The Act of Uniformity 1559 (1 Eliz. I c. 2) (Eng.), which enshrined the Elizabethan Settlement, endorsed the first four œcumenical councils – Nicea 325, Constantinople 381, Ephesus 431, and Chalcedon 451 as the authorities by which heresy would be defined; Stephen Platten, *Augustine’s Legacy* (1997) 29.

¹¹⁸ The church was regarded as a perfect society (*societas perfecta*), but so was the State. Each contained in itself all that its nature requires and all that is needed for the full discharge of its functions. It is not dependent upon any other earthly entity; Hubert Box, *The Principles of Canon Law* (1949) 8. There could be no conflict between church and State as each occupied a distinct field – though they were always mutually aware of one another.

AND I further consent to be bound by all the regulations which may from time to time be issued by the authority of the General Synod/te Hinota Whanui in relation to any such office or membership so long as I hold it;

AND I hereby undertake in consideration of my holding any such office or membership immediately to resign that office or membership together with all the rights and emoluments appertaining thereto whenever I shall be called upon so to do by the General Synod/te Hinota Whanui or by any person or persons lawfully acting under its authority in that behalf.

Given under my hand this day of in the presence of:¹¹⁹

This declaration does not include specific reference to the formularies, or to doctrine, and instead is limited to the Constitution and General Synod. This is what might be called a legalistic or jurisdictional form of declaration. In a constitutional arrangement based upon consent, doctrine may only be enforced if obedience to the authority and order of the Church is enforced. Though perhaps difficult in an ecclesiological sense, this is a logical arrangement in a Church which is not legally established by the State. In contrast, the declaration of canonical obedience used in New Zealand, which is taken upon appointment to office, states:

I, , being about to be licensed to the office of *[name of office]* given permission to officiate in *[name of diocese or area]* authorised for *[such a ministry]* DO SOLEMNLY MAKE THE FOLLOWING DECLARATION: – I believe in the faith, which is revealed in the Holy Scriptures and set forth in the Catholic Creeds, as this Church has received it and explained it in its Formularies and its authorised worship.

I assent to the Constitution of the Anglican Church in Aotearoa, New Zealand and Polynesia.

¹¹⁹ Const. C.15.

I affirm my allegiance to the doctrine to which clause 1 of the Fundamental Provisions and clauses 1 and 2 of Part B of that Constitution bear witness.

In public prayer and administration of the sacraments I will use only the forms of service which are authorised or allowed by lawful authority.

I will uphold the covenant and partnership expressed in the Constitution between Te Pihopatanga o Aotearoa as a whole and through its constituent parts, and the Dioceses in New Zealand together and severally and through their constituent parts, and the Diocese of Polynesia as a whole and through its constituent parts.

I will pay true and canonical obedience, in all things lawful and honest, to Te Pihopa o Aotearoa Te Pihopa ki te [*name of Hui Amorangi*] The Bishop of [*name of Diocese*] and to the successors to that Pihopa/Bishop, and will be obedient to the ecclesiastical laws and regulations in force in the said [*Pihopatanga*] [*Hui Amorangi area*] [*name of Diocese*]

The foregoing declaration was made and subscribed by the abovenamed on the day of in the year of our Lord – two thousand and –

Signed: –

in the presence of:¹²⁰

This is broadly equivalent to the English form. But it includes a further declaration of assent to the Constitution of the Church, as well as obedience to the bishop, ecclesiastical laws, and doctrine. It also contains a declaration of belief, and an undertaking to use only lawful forms of

¹²⁰ Title A canon II.3 (declaration of assent, adherence and submission to the General Synod/te Hinota Whānui). In *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, 709 per Beattie J. the Supreme Court (now High Court) held that “each priest completes this document on his appointment, and in my opinion such a promise and declaration creates a particular relationship between a bishop and his priests”.

service. As the High Court had found in *Gregory v. Bishop of Waiapu*,¹²¹ the effect of these declarations is to create a particular relationship between bishop and priest, and thereby reinforce the Church hierarchy.

Other aspects of ordination follow traditional Anglican practice. The service of ordination must take place on a day which the bishop appoints.¹²² It takes place in the presence of the congregation.¹²³ The consent of the people generally is a pre-condition to ordination.¹²⁴ Valid ordination (according to liturgical norms) takes place by the consent of the candidate and by prayer and laying on of hands by the bishop:¹²⁵ “At least some of the priests present shall join with the bishop in the laying on of hands at the ordination of a priest”.¹²⁶

It is believed that valid episcopal ordination confers the authority of the Church upon the ordained person.¹²⁷ Such a view is consistent with Roman Catholic teaching¹²⁸ – and that of the traditional churches in general (those which purport to be part of the universal Catholic Church).¹²⁹ However, in one significant particular the Anglican Communion – at least in some provinces – has departed from tradition – and thus apparently placed an additional obstacle in the path of church

¹²¹ [1975] 1 N.Z.L.R. 705.

¹²² *A New Zealand Prayer Book* (1989) 922.

¹²³ Title G canon XIII.3.1.

¹²⁴ “The assent of the people that the candidate should be ordained is an integral part of the service”; *A New Zealand Prayer Book* (1989) 887.

¹²⁵ *The Book of Common Prayer* (1662) 553f, from 1 Timothy 4.14: “Neglect not the gift that is in thee, which was given thee by prophecy, with the laying on of the hands of the presbytery.”

¹²⁶ *A New Zealand Prayer Book* (1989) 923.

¹²⁷ *The Book of Common Prayer* (1662).

¹²⁸ Leo XIII, *Letters Apostolic of His Holiness Leo XIII ... concerning Anglican Orders dated: September 13, 1896* (1896).

¹²⁹ See, e.g. Kenneth Kirk (ed.), *The Apostolic Ministry* (2nd ed., 1957).

unity. This is in the ordination of women as priests. Women were not unknown in clerical office – as deaconesses – but never as priests (and certainly not as bishops) until the twentieth century.¹³⁰

The Biblical origin of deaconesses is traditionally placed in Romans 16:1¹³¹ and Titus 2:3.¹³² They were recognised by the Councils of Nicaea (325) and Chalcedon (451).¹³³ The ordination of deaconesses resembled that of deacons, but conveyed no sacerdotal powers or authority.¹³⁴ The functions of the deaconesses were to assist at the baptism of women, to visit and minister to the needs of sick and afflicted women, to act as doorkeepers in church, and to conduct women to their seats.¹³⁵ The deacons, in contrast, might perform any sacred office except that of consecrating the elements and pronouncing absolution.¹³⁶

¹³⁰ Sara Butler, “The ordination of women: A new obstacle to the recognition of Anglican orders” in R. William Franklin (ed.), *Anglican Orders* (1996) 96-113. For the English position, see David McLean, “Women priests – the legal background” (1989) 1(5) *Ecclesiastical Law Journal* 15.

¹³¹ “I commend unto you Phebe our sister, which is a servant of the church which is at Cenchrea”.

¹³² “The aged women likewise, that they be in behaviour as becometh holiness, not false accusers, not given to much wine, teachers of good things”.

¹³³ Council of Nicea, canon 19 in *Corpus Iuris Canonici. Decretum*, Pars III, De Cone. Dist. III c. x; Council of Chalcedon, canon 15, in *Corpus Iuris Canonici*, Gratian’s *Decretum*, Pars II, Causa XXVII, Quaest. I, Canon xxij.

¹³⁴ Cecilia Robinson, *The Ministry of Deaconesses* (2nd ed., 1914) 219-229.

¹³⁵ Vincent Emmanuel Hannon, *The Question of Women and the Priesthood* (1967) 71-96.

¹³⁶ As described in the ordination service of *The Book of Common Prayer* (1662) and *A New Zealand Prayer Book* (1989).

The order of deaconesses was never particularly popular, and was condemned in the west by the Councils of Orange (441) and Epaene (517).¹³⁷ It fell into abeyance in both east and west in the middle ages.¹³⁸ In modern times the order underwent a resurgence, due to changing needs, and changing perceptions of the role of women in society generally, and in the church particularly. In 1833 Lutheran Pastor Thomas Fliedner revived the order.¹³⁹ In 1862 Miss Elizabeth Ferard was ordained – by the Bishop of London – as a deaconess in the Church of England.¹⁴⁰ The order was recognised by the Lambeth Conference of 1897.¹⁴¹

Deaconesses were not female deacons, though Hong Kong had a women deacon – as distinct from a deaconess – in the mid 1940s. In exceptional wartime conditions, Bishop Ronald Hall ordained Florence Li Tim Oi for ministry in the Portuguese colony of Macau. This action was controversial,¹⁴² and was condemned by the 1948 Lambeth Conference.¹⁴³ This resolution was strongly influenced by the Archbishop of Canterbury and York's Commission on the Ministry of Women, *Women in the Anglican Communion* (1935),¹⁴⁴ though this had found no conclusive biblical authority either for or against the ordination

¹³⁷ Canons 26-28, in Carl Joseph von Hefele, *History of the Christian Councils* trans. & ed. Henry N. Oxenham (1871-96) vol. III, pp. 163-164; and canon 21, in Mary McKenna, *Women of the Church* (1967) 131.

¹³⁸ Vincent Emmanuel Hannon, *The Question of Women and the Priesthood* (1967) 71-96.

¹³⁹ Cecilia Robinson, *The Ministry of Deaconesses* (2nd ed., 1914).

¹⁴⁰ Cecilia Robinson, *The Ministry of Deaconesses* (2nd ed., 1914).

¹⁴¹ L.C. 1897, Res. 11.

¹⁴² Mrs Oi voluntarily ceased to exercise her ministry in 1946.

¹⁴³ L.C. 1948, Res. 115.

¹⁴⁴ Archbishop of Canterbury and York's Commission on the Ministry of Women, *Women in the Anglican Communion* (1935).

of women. But the historic church had never recognised the ordination of women (except as deaconesses), and the Commission was unwilling to advocate a position which had hitherto not been advanced elsewhere in the wider church.

The ordination of women to the priesthood – with the sacerdotal authority which that implies – dates from more recent times. The ordination of women began in some Anglican provinces in the 1970s, with Hong Kong leading the way (appropriately enough perhaps) in 1971, followed by Canada 1976,¹⁴⁵ the United States of America 1977, and New Zealand in the same year.¹⁴⁶

The change to the Constitution which allowed for the ordination of women within the province of New Zealand led to a hearing in the appeal tribunal. In November of 1977 this held that the ordination was not invalid.¹⁴⁷ The Tribunal held that the traditional formularies were not a legal obstacle to the ordination of women as priests.¹⁴⁸ The ordination of

¹⁴⁵ W.J. Hemmerick, “The ordination of women: Canada” (1991) 2 Ecclesiastical Law Journal 177.

¹⁴⁶ Perry Butler, “From Early Eighteenth Century to the Present Day” in Stephen Sykes and John E. Booty (eds.), *The Study of Anglicanism* (1988) 30, 46-47. Geoffrey Haworth, *Anglican deaconesses in New Zealand* (1997). See also Glenys Lewis, *Kept by the Power* (1999).

¹⁴⁷ In 1974 General Synod approved the ordination of women by one vote, subject to the confirmation of dioceses. In 1976 the ordination of women came into effect when six out of seven dioceses agreed. But the Bill had to lie on the table for a year to allow for an appeal; C.W. Haskell, *Scripture and the ordination of women* (1979).

¹⁴⁸ In 1977, on the 363rd day, an appeal was lodged and a Tribunal hearing took place in November 1977. This held that ordination was lawful, and in December 1977 the first five women were ordained as priests, three in Auckland and two in Waiapu; C.W. Haskell, *Scripture and the ordination of women* (1979).

women priests was able to proceed.¹⁴⁹ The consecration of women bishops followed some years later. So far as the Province of New Zealand was concerned, the Church did have the authority to ordain women priests. It followed that these priests enjoyed the full authority of priesthood. Any women bishops would also enjoy full authority (including ordaining other priests, male and female). However this matter cannot be regarded as settled in other provinces.¹⁵⁰

The stated objections to the ordination of women as priests are based for the most part in ecclesiology rather than sacramental theology.¹⁵¹ The theological objections may or may not be clear enough to stand permanently in its way. A 1988 declaration on the subject, signed by more than a hundred bishops from different parts of the Anglican Communion, states:

¹⁴⁹ Had the ordination of women been found to be unlawful, but it proceed regardless in one or more dioceses, the province would have faced the prospect of schism, as occurred in South Africa in the 1870s over different issues; *Merriman v. Williams* (1882) 7 App. Cas. 484 (P.C.); see Anthony Ive, *A Candle Burns in Africa* (1992).

Such a development is also paralleled at provincial level in the more recent controversy over the election – with the approval of the American Anglican Council – of the openly homosexual Gene Robinson by the diocese of New Hampshire; James Solheim, Anglican Communion News Service, “Gene Robinson begins episcopate with call for inclusion”, 13 November 2003, available at <<http://www.anglicancommunion.org/acns/articles/36/50/acns3672.html>>.

¹⁵⁰ W.J. Hankey, “Canon Law” in Stephen Sykes and John E. Booty (eds.), *The Study of Anglicanism* (1988) 211.

¹⁵¹ See Archbishop of Canterbury and York’s Commission on the Ministry of Women, *Women in the Anglican Communion* (1935).

We do not consider that the Churches of the Anglican Communion have authority to change the historic tradition of the Church that the Christian ministerial priesthood is male.¹⁵²

According to this declaration, the ordination (or, for many opponents of women priests, purported ordination) of women will impair “the wider unity of the Church” – that is, the developing œcumenical relations with Roman Catholic and Eastern Orthodox Churches, who have both expressed official concern at the ordination of women.¹⁵³ It would deprive Anglicans of the “commonly accepted ministry” that is one of the few elements of cohesion in the midst of their prevailing diversity. It is not to be done without a “clear œcumenical consensus”.¹⁵⁴

Whether it is acceptable, œcumenically prudent, or indeed possible to validly ordain women as priests continues to be debated.¹⁵⁵ The general Anglican position may be summarised as follows. Scripture and tradition presents no fundamental objection to the ordination of women.¹⁵⁶ By itself, the witness of the New Testament does not permit a clear settlement of the question.¹⁵⁷ Tradition appears to be open to this

¹⁵² Aambit, *The Newsletter of the Association for Apostolic Ministry*, No. 3, July 1988.

¹⁵³ Jan Cardinal Willebrands, “Women Priests and Œcumenism” (9 October 1975) 5 *Origins* 241, 243-44, at 243.

¹⁵⁴ See Joseph Cardinal Bernardin, “Discouraging Unreasonable Hopes” (16 October 1975) 5 *Origins* 257, 259-260.

¹⁵⁵ Perry Butler, “From Early Eighteenth Century to the Present Day” in Stephen Sykes and John E. Booty (eds.), *The Study of Anglicanism* (1988) 30, 47.

¹⁵⁶ Archbishop of Canterbury and York’s Commission on the Ministry of Women, *Women in the Anglican Communion* (1935).

¹⁵⁷ This is consistent with the Roman Catholic Church’s view: (1 July 1976) 6 *Origins* 92-96; (3 February 1977) 6 *Origins* 517, 519-524; (1977) 69 *Acta Apostolicae Sedis* 98-116.

development because the exclusion of women from the priestly ministry cannot be proved to be by “divine law”.¹⁵⁸ Yet this position is not one which was reached without considerable uncertainty and perplexity,¹⁵⁹ not least in respect of the episcopal authority enjoyed by bishops consecrated by women bishops, or priests and deacons (and deaconesses) ordained by women bishops. After a fifty-year debate, the 1968 Lambeth Conference recognised that dissent would continue,¹⁶⁰ and although many provinces do now ordain women priests, their place in the Anglican Communion is still not settled.

The position of women priests and bishops in the Roman Catholic Church is clearer. The Pontifical Biblical Commission reviewed the attitude of the Roman Catholic Church to the ordination of women in 1976. In an internal report, which was however leaked to the press, the commission concluded that, by itself, the New Testament did not provide a clear answer one way or the other.¹⁶¹ The Congregation for the Doctrine of the Faith, in its “Declaration on the Question of the Admission of Women to the Ministerial Priesthood” (*Inter insigniores*), came to a similar conclusion.¹⁶² Thus biblical and sacramental theology did not prohibit the ordination of women.

¹⁵⁸ Archbishop Runcie of Canterbury to Cardinal Willebrands, President of the Secretariat for Promoting Christian Unity, “Women’s Ordination and the Progress of Œcumenism” (17 July 1986) 16 *Origins* 153, 155-160.

¹⁵⁹ Jacqueline Field-Bibb, *Women Toward Priesthood* (1991) 67-75.

¹⁶⁰ Res. No. 34 in Lambeth Conference 1968: Resolutions and Reports (1968) 39.

¹⁶¹ (1 July 1976) 6 *Origins* 92-96.

¹⁶² (3 February 1977) 6 *Origins* 517, 519-524; (1977) 69 *Acta Apostolicae Sedis* 98-116.

However, Pope Paul VI, writing to Archbishop Coggan in 1975, reiterated that there were three very fundamental reasons why women could not be ordained as priests – the example recorded in the sacred Scriptures of Christ choosing his apostles only from among men; the constant practice of the church, which has imitated Christ in choosing only men; and [the Roman Catholic Church’s] living teaching authority which has consistently held that the exclusion of women from the priesthood is in accordance with God’s plan for His church¹⁶³ The 1994 apostolic letter on priestly ordination, “*Ordinatio sacerdotalis*”, repeated the Roman Catholic view.¹⁶⁴

Although the two communions may have reviewed the same evidence, yet they come to quite different conclusions. Principally, this may be seen to have depended upon the differing perspective of the respective churches. The Anglican and the Roman Catholic views of tradition were markedly different. It might even be said that one allowed that which was not expressly prohibited, the other allowed only that which was expressly allowed.¹⁶⁵ One fostered diversity, the other enjoined conformity.¹⁶⁶ Another view would be that one required compliance, the other merely hoped for adherence.

¹⁶³ “Letters Exchanged by Pope and Anglican Leader” (12 August 1976) 6 *Origins* 129, 131-132.

¹⁶⁴ “Apostolic letter on ordination and women” (9 June 1994) 24 *Origins* 49, 51-52.

¹⁶⁵ See, generally, Sara Butler, “The ordination of women: A new obstacle to the recognition of Anglican orders” in R. William Franklin (ed.), *Anglican Orders* (1996) 96-113.

¹⁶⁶ Anglican encouragement of diversity again threatens the loose unity of the communion, with the present controversy which met the proposed consecration of Jeffrey John, a homosexual, as Bishop of Reading; Ruth Gledhill and Helen Rumbelow, “Archbishops urge gay bishop to stand down”, *The Times* (London), 24 June 2003.

The authority of Anglican bishops and priests in general was challenged by the Roman Catholic Church as they were not being validly ordained and consecrated – though not necessarily regarding them as laymen for all purposes – while the advent of women priests has caused dissent within the Anglican Communion itself. Whilst the Constitution of the Church gives the Anglican Church in New Zealand legal authority to ordain women priests and deacons, and to consecrate women bishops, it is clear that this is not acceptable to all the elements of the Christian church as a whole, and was unequivocally unacceptable to the Roman Catholic Church and to the orthodox churches.¹⁶⁷ Therefore, whilst the internal authority of the Church to so act may appear clear, it is actually far from being so.

If the claims of the Anglican Church in New Zealand to being part of the universal church are to mean anything, then it must be allowed that internal laws alone do not suffice to authorise significant changes to the doctrine or ecclesiology of the Church. The Anglican Communion, or the Christian church as a whole (perhaps in General Council), may have to determine that these changes are allowable. Anglican ecclesiology recognises that General Councils may pronounce doctrine,¹⁶⁸ but is sceptical of the infallibility of any institution or council.¹⁶⁹

¹⁶⁷ Which together comprise by far the greater part of world Christianity.

¹⁶⁸ The Act of Uniformity 1559 (1 Eliz. I c. 2) (Eng.), which enshrined the Elizabethan Settlement, endorsed the first four œcumenical council – Nicea 325, Constantinople 381, Ephesus 431, and Chalcedon 451 as the authorities by which heresy would be defined; Stephen Platten, *Augustine's Legacy* (1997) 29.

¹⁶⁹ Edward Norman, “Authority in the Anglican Communion” (1998); Article 21 of the *Thirty-Nine Articles of Religion*, enacted in 1562, and confirmed in 1571 by the Subscription (Thirty-Nine Articles) Act 1571 (13 Eliz. I c. 12) (Eng.).

The origins of these differing views of the same evidence can be traced, in part, to differing views of authority with the church. The reformed churches may also be more clearly influenced by notions of equal rights and equal opportunities than the Roman Catholic Church, with its stronger tradition. There is perhaps less division of opinion on the role and function of a minister, once ordained – though even here the traditional Roman Catholic perception of the sacerdotal function of the priest must be contrasted with differing perceptions in some of the later churches.¹⁷⁰

Once appointed, a priest or deacon has certain set responsibilities. The incumbent must, either himself or by his assistants, provide his parishioners with the occasional offices of the church (for example, baptism, marriage, and burial) and perform divine service on Sundays and holy days.¹⁷¹

The *Book of Common Prayer* also lays down positive injunctions upon clergy. The rubric requires that all priests and deacons say Morning and Evening Prayers daily, if not publicly then privately. The Ordinal required the bishop to address the ordinands thus: “Ye ought to forsake and set aside (as much as you may) all worldly cares and studies. We have good hope ... that you have clearly determined ... to give yourselves wholly to this office ... so that, as much as lieth in you, you will apply yourselves wholly to this one thing, and draw all your cares and studies this way ...”¹⁷²

Canon 75 of the Canons of 1604 enacted that no “ecclesiastical person” (which in this context probably means a clergyman) shall resort

¹⁷⁰ See Michael Davies, *The Order of Melchisedech* (1979); Thomas Torrance, *Royal Priesthood* (1993).

¹⁷¹ Title D canon II.A.

¹⁷² *The Book of Common Prayer* (1662).

“to any taverns or alehouses” nor board or lodge in them “other than for their honest necessities.¹⁷³ Furthermore, they shall not give themselves to any base or servile labour”.¹⁷⁴ Canon 76 forbade anyone “admitted as Deacon or Minister” to “use himself in the course of his life as a laymen, upon pain of excommunication”.¹⁷⁵ The canons made an exception of teaching.¹⁷⁶ These private regulations were not mirrored in State laws –

¹⁷³ John V. Bullard (ed.), *Constitutions and Canons Ecclesiastical 1604* (1934).

¹⁷⁴ John V. Bullard (ed.), *Constitutions and Canons Ecclesiastical 1604* (1934).

¹⁷⁵ This, perhaps the most severe penalty still remaining to church authorities, can be seen in a rudimentary form in Matthew 18.17 (“And if he shall neglect to hear them, tell it unto the church: but if he neglect to hear the church, let him be unto thee as an heathen man and a publican”); 1 Corinthians 5. 1-5:

¹It is reported commonly that there is fornication among you, and such fornication as is not so much as named among the Gentiles, that one should have his father’s wife.

²And ye are puffed up, and have not rather mourned, that he that hath done this deed might be taken away from among you.

³For I verily, as absent in body, but present in spirit, have judged already, as though I were present, concerning him that hath so done this deed,

⁴In the name of our Lord Jesus Christ, when ye are gathered together, and my spirit, with the power of our Lord Jesus Christ,

⁵To deliver such an one unto Satan for the destruction of the flesh, that the spirit may be saved in the day of the Lord Jesus.

¹⁷⁶ Canons 77 and 78 of 1604; John V. Bullard (ed.), *Constitutions and Canons Ecclesiastical 1604* (1934). Rather than being disqualified for office, college fellows at the University of Oxford were required to be in holy orders until the mid-nineteenth century; Universities Commission, *Report of the Commissioners appointed to inquire into the property and Income of the Universities of Oxford and Cambridge, and of the colleges and halls therein* (1874) C. 856.

which do not generally distinguish between clerical and lay status.¹⁷⁷ Since the adoption of the Constitution and canons of the Anglican Church in New Zealand in the nineteenth century these specific provisions have not been in force in New Zealand, but the canons do preserve some of the rules.

Within the Church, the deployment of ministers depends upon local rules. Churches either employ a system of episcopal licensing exclusively or in addition to appointment by presentation and institution. In the Church of Aotearoa, New Zealand and Polynesia, appointment is not treated by national or provincial law, but rather by diocesan law.¹⁷⁸ Informal written permission to minister may also be given.¹⁷⁹ Consistent with general theory and practice, clergymen are regarded in ecclesiastical and secular law alike as office-holders, not employees.¹⁸⁰

Priests are “called to build up Christ’s Congregation”, to strengthen the baptised and to lead them as witnesses to Christ in the world.¹⁸¹ Generally, it is their duty to preach the gospel, particularly through sermons, and to minister the sacraments and to perform other offices and rites as are authorised by the Church.¹⁸² It is also their duty to visit the members of the congregation, especially when they are sick, and to provide opportunities for them to consult him (or her) for spiritual

¹⁷⁷ Particular problems have arisen in respect of members of religious orders; see for example, *Allcard v. Skinner* (1887) All E.R. Rep. 90 [conflict of canonical obedience and the common law contractual doctrine of undue influence].

¹⁷⁸ Title A canon II.1.

¹⁷⁹ Const. C.15.

¹⁸⁰ Title A canon II.1.1; Legal Advisory Commission, *Legal Opinions Concerning the Church of England* (1994); *Mabon v. Conference of the Methodist Church of New Zealand* [1998] 3 N.Z.L.R. 513 (C.A.).

¹⁸¹ *A New Zealand Prayer Book* (1989) 901.

¹⁸² Title D canon II.A.5.

counsel and advice.¹⁸³ They must prepare candidates for baptism, confirmation, and reception, and, with respect to confirmation and reception, when satisfied of their fitness, to present them to the bishop.¹⁸⁴

Ministers must not officiate or otherwise minister in another diocese without the host bishop's permission,¹⁸⁵ nor in another parish or pastorate in their own diocese without the host minister's permission.¹⁸⁶ They must obey the directions of their bishop.¹⁸⁷ These rules are, of course, to ensure discipline and the orderly use of resources. The formularies have little impact upon the authority of the ministry except insofar as only validly ordained ministers may lawfully administer the sacraments of the Church.

One aspect of the minister's role differs in New Zealand from that in England. That is because the Church in New Zealand is not a State Church, ministering to everyone in the country who wishes to avail themselves of its services. In England, everyone living in the parish is a parishioner regardless of his or her religious persuasion. A parishioner, whether or not on the electoral roll of the parish council, and whether or not a member of the Church of England, has certain obligations and rights.¹⁸⁸ The obligations, to attend church and to communicate, are unenforced.¹⁸⁹ But the rights or privileges remain.¹⁹⁰ A parishioner has a

¹⁸³ Title D canon II.A.12.6

¹⁸⁴ Title D canon II.A.12.3.

¹⁸⁵ Title A canon II.2; cf. English Canon C.8 (2).

¹⁸⁶ Title A canon II.2.

¹⁸⁷ *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, 708-709; declaration of canonical obedience.

¹⁸⁸ See, for example, their right to burial; Burial of Persons Drowned at Sea Act 1808 (48 Geo. III c. 75) (U.K.).

¹⁸⁹ Act of Uniformity 1551 (5 & 6 Edw. VI c. 1) (Eng.); Religious Disabilities Act 1846 (9 & 10 Vict. c. 59) (U.K.) [to attend the parish

right to entry to the parish church at the time of public worship, so long as there is room for him, standing or sitting.¹⁹¹ He or she has a right to a seat if there is one available, but not a right to any particular seat (unless one has been given him by faculty).¹⁹² He has a right to the burial of his body in the burial ground of the parish, regardless of his religion – though not to the burial service if unbaptised.¹⁹³ In general, he has a right to be married in the parish church, at any rate if one of the parties to the marriage has been baptised.¹⁹⁴ This is subject however to various qualifications, including that neither party is a divorcee.¹⁹⁵ Whatever his

church on all Sundays and holy days unless he has a reasonable excuse for his absence or unless he dissents from the doctrine and worship of the Church and usually attends some place of worship other than that of the established Church]; Rubric at the end of the service for Holy Communion in the *Book of Common Prayer*; Rubric at the end of the Order of Confirmation in the *Book of Common Prayer* [to communicate at least three times a year, of which Easter shall be one – provided that he be confirmed or ready and desirous to be confirmed].

¹⁹⁰ Bishop Say believed that the important aspect of the establishment was that the Church of England's parishes "extend over every square yard of England and that every citizen resident in a parish, has, regardless of their own religious commitment or lack of it, a rightful claim upon their parish priest"; David Say, "Towards 2000: Church and State Relations" (1990-1992) 2(8) *Ecclesiastical Law Journal* 152, 153.

¹⁹¹ *Reynolds v. Monckton* (1841) 2 M. & R. 384.

¹⁹² *Reynolds v. Monckton* (1841) 2 M. & R. 384.

¹⁹³ Or suicides or excommunicates; first rubric of the Burial Office; *Cooper v. Dodd* (1850) 7 Notes of Cases 514. In practice, the former disqualification was often avoided by the expedient of a coroner finding that a suicide had taken his life whilst temporarily insane.

¹⁹⁴ General Synod, *An Honourable Estate* (1988).

¹⁹⁵ General Synod, *An Honourable Estate* (1988). See English Canons B.30-36.

religion, as a parishioner he has a right to the ministrations of the Church, so far as they are appropriate to his condition.¹⁹⁶

It might be questioned whether this is also true in New Zealand, given the different constitutional place held by the Church. However, the mission of the Church includes “proclaiming the Gospel of Jesus Christ”; teaching, baptising and nurturing believers within eucharistic communities; and responding to human needs by loving service.¹⁹⁷ These would apparently suggest that even non-members of the Church, desirous of the ministrations of the Church, may have a right to its services. This is a matter in which the relationship of church and State is important. If the Church has responsibility to non-members it might expect recompense from the State.¹⁹⁸ This relates to the establishment of the Church, rather than to the authority of its ministers – though as a consequence of non-establishment (or quasi-establishment), Church ministers do not have the benefit of formal recognition by the secular authorities, and their ministrations are consequently not State-funded.

The diaconal ministry is treated only in liturgical books.¹⁹⁹ Their role is to proclaim the Word of God; serve the presbyter; care for the poor and sick; and to baptise when requested.²⁰⁰ This supporting role is common to the major episcopal churches,²⁰¹ and is but little affected by issues of authority.

¹⁹⁶ Timothy Briden and Brian Hanson, *Moore’s Introduction to English Canon Law* (3rd ed., 1992) 35.

¹⁹⁷ Const. Preamble.

¹⁹⁸ Indeed, charitable status, and certain taxation and other financial advantages shared by churches, may be partially intended for this purpose; see Sir Ivor Richardson, *Religion and the Law* (1962).

¹⁹⁹ *A New Zealand Prayer Book* (1989) 891.

²⁰⁰ Title D canon I.A.12.3.

²⁰¹ Though there is some difference over the permanent diaconate.

There is a general duty on clergy to comply with the laws of the Church, and a particular duty to obey the lawful directions of bishops.²⁰² They undertake to submit to the rule of the Church.²⁰³ There is a duty to undertake to submit to the authority of ecclesiastical authorities.²⁰⁴ A specific promise of canonical obedience is given.²⁰⁵ Obedience to the bishop is not only specifically required,²⁰⁶ but also the “guidance and leadership of [the] bishop”.²⁰⁷ Failure to adhere to these requirements may result in deprivation of office, though this can also occur at will in certain situations.²⁰⁸ The secular courts will enforce internal Church decisions with respect to offices, but strictly only as a matter of private contractual interpretation.²⁰⁹

An ecclesiastical office is lost on the expiry of a predetermined time; on reaching the age limit defined by law; by resignation; by

²⁰² Title A canon II.3; Const. C.15.

²⁰³ “Will you accept the order and discipline of this Church?”; *A New Zealand Prayer Book* (1989) 894, 904.

²⁰⁴ They must make “a declaration of adherence and submission to the authority of the General Synod”; Const. C.15.

²⁰⁵ “I will pay true and canonical obedience in all things lawful and honest”; Title A canon II.3.

²⁰⁶ See the interpretation of Beattie J. in *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, 708-709, where the bishop’s power of government is explained in constitutional terms.

²⁰⁷ *A New Zealand Prayer Book* (1989) 894, 904.

²⁰⁸ *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, 717; applying *Ridge v. Baldwin* [1964] A.C. 40, 5; *Durayappah v. Fernando* [1967] 2 A.C. 337; *Lower Hutt City Council v. Bank* [1974] 1 N.Z.L.R. 545.

²⁰⁹ *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705.

transfer; by removal; or by deprivation,²¹⁰ all of which are subject to employment law – and the Human Rights Act 1993 insofar as it is applicable.²¹¹ Upon relinquishment and reinstatement re-ordination is neither required nor possible.²¹² Canon 76, as well as forbidding priests and deacons from using themselves as laymen, also provided that they shall not relinquish their orders.²¹³ The orders are indelible,²¹⁴ so if a clergyman does relinquish his orders²¹⁵ he does not cease to be an ordained man (or woman).²¹⁶ He may therefore resume his status without further ordination.²¹⁷ In these provisions the Church does not generally depart from Anglican Communion – or Roman Catholic²¹⁸ – norms. Nor is it affected or unduly influenced by secular legal norms or rules.

²¹⁰ *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705. Cf. *The Code of Canon Law: in English Translation* prepared by the Canon Law Society of Great Britain and Ireland (1983) Canon 184 §1.

²¹¹ Donna Buckingham, “Working for God: Contract or Calling” (1994) 24 *Victoria University of Wellington Law Review* 209.

²¹² “No. person who has been admitted to the order of Bishop, Priest, or Deacon can ever be divested of the character of that order; Title G canon XIII.8.1.

²¹³ John V. Bullard (ed.), *Constitutions and Canons Ecclesiastical 1604* (1934).

²¹⁴ *Barnes v. Shore* (1846) 8 Q.B. 640, 660, 671 per Lord Denman.

²¹⁵ Which he may do under Title G canon XIII.8.

²¹⁶ Title G canon XIII.8.1.

²¹⁷ Title G canon XIII.8.1.

²¹⁸ *The Code of Canon Law: in English Translation* prepared by the Canon Law Society of Great Britain and Ireland (1983) Canon 290.

IV Conclusions

The authority of Ministerial office in the Church has been little affected by secular influences. The principal influence has been the continuing structure of the historic church. There has been some influence from secular beliefs in respect of the ordination of women, influenced as it is by feminism and a belief in equality, rather than by narrowly ecclesiological considerations. But generally authority is that imposed by declaration and assent to the constitution and canons, themselves based upon the law of the universal church.

The status of clergy depends upon the constitution or rules of the organisation by which they are engaged and the terms of their appointment.²¹⁹ Clergymen are office-holders, not employees,²²⁰ and they cannot be deprived of office except by due process.²²¹ These principles are established in both religious as well as secular laws.²²²

As an episcopally-led church, the Anglican Church in Aotearoa, New Zealand and Polynesia emphasises the role of the bishops as teachers and leaders. This is consistent with the Church's claim to be

²¹⁹ *Mabon v. Conference of the Methodist Church of New Zealand* [1998] 3 N.Z.L.R. 513 (C.A.), where a Methodist minister, who had been dismissed from his parish, brought a personal grievance claim. The Employment Court held that the minister was not an employee and the Court of Appeal upheld that finding.

²²⁰ Legal Advisory Commission, *Legal Opinions Concerning the Church of England* (1994); *Mabon v. Conference of the Methodist Church of New Zealand* [1998] 3 N.Z.L.R. 513 (C.A.).

²²¹ *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, 711; *Dodwell v. Bishop of Wellington* (1886) 5 N.Z.L.R. 263, 266.

²²² Human Rights Act 1993 (N.Z.); Employment Relations Act 2000 (N.Z.); Donna Buckingham, "Working for God: Contract or Calling" (1994) 24 *Victoria University of Wellington Law Review* 209.

apostolic and an inheritor of the Catholic tradition. Yet social and political changes have led to a decline in the relative role of the bishop – in particular their comparative proliferation since 1992,²²³ and the temporary loss of the archbishop. Even the adoption of a three-way division into three Tikanga has not seriously undermined the role of the bishop, though it has presented some difficulties with respect to the traditional understanding of episcopal leadership and oversight within a diocese. The position of the episcopacy remains, however, central to authority in the Church, both for its teaching and its leadership role. In this respect, secular legal notions have had little effect upon the Church.

²²³ Through the separate Maori hierarchy.

CONCLUSIONS

This thesis is an exploration of the basis of the legal relationship between church and State in twenty-first century New Zealand. It takes as its example the Anglican Church in Aotearoa, New Zealand and Polynesia. The common understanding of the basis of the legal relationship between Church and State does not delve far into the relationship, except to maintain that there is a separation of church and State.¹ This thesis is an attempt to explore the accuracy of this understanding.

An examination of the sources of fundamental authority within the Church, especially divine law as a superior source of law, highlighted some of the generic features present in an episcopally-led church. The history and origins of canon law, the internal law of the Church, is also a common feature of the church, yet one which has also been subject to modification by particular churches. The legal position of the Church within the wider legal system is also strongly influenced by its original English setting.

The Church in New Zealand cannot properly be said to be a non-established Church. Such a Church was never subject to the control of secular authority, but rather relied upon an internal legal authority – itself derived in part from divine law. The foundation of the Church in the nineteenth century brought with it certain aspects more reminiscent of an established or dis-established church. For its foundation relied on certain secular legal processes and authority.

The secular legal basis for Church law is consensual compact, where the authority of the Church is derived from the agreement of its

¹ See, for example, *Gray v. M.* [1998] 2 N.Z.L.R. 161 (C.A.).

members, rather than imposed by an external authority. However, even if the Church law is based upon the consensus of the members of the Church, the laws of the State also have an important part to play. In particular, not only is the Church, as a juridical body, subject to the law of the land, it also has relied upon the State for the enactment of certain laws. This includes the very laws under which the Church constitution and canons are created and enacted. The notion of the consensual compact is a secular legal doctrine, imposed by the courts. Yet it also reflects the conscious basis of the nineteenth century establishment of the Church in New Zealand. This basis in its turn was apparently the result of the influence of secular legalism on the Church in England.

The Church is, to some extent, limited in its autonomy by this dependence upon a secular legal authority, yet this has been necessitated by the evolution of the Church in New Zealand, and is also partly a legacy of the pre-colonial Church of England. Establishment is also compatible with spiritual autonomy, which depends on the terms of association agreed by church and State. In New Zealand the State does not involve itself in religious questions, though doctrinal religious beliefs can sometimes have a significant influence on policy-making and laws.

In conclusion, the concept of formal separation of church and State, so influential in many parts of the world, may have been overstated in this country. This theoretical separation is alien to both the secular and spiritual laws and practice. It seems that there is an imperfect separation, but one which reflects the historical evolution of the English Church, particularly but not exclusively post-Reformation. Thus the legal authority of the Church also partakes of this twin basis.

The Church is neither established nor dis-established. The Anglican Church in New Zealand may be classified broadly as quasi-established in the sense that whilst having the status of contractual societies, there are

continuing legal linkages between the church and State, the authority of internal Church law rests at least in part upon the existence of secular legislation, and secular legislation expressly and directly regulates some of the temporal affairs of the Church.

There are important consequences for the Church which derives from this arrangement, particularly in terms of the authority vested in the legislative, judicial and ministerial arms of the Church. In each case the basis of authority is a mixture of human and divine law, some made manifest through secular tribunals, some through temporal tribunals. This may be more apparent in the legislative and judicial aspects of Church government, but is also to be seen in the executive – the ministry.

The ways in which the Church is administered have also been influenced by the secular legal system, and the role of the State in society. It has also been heavily influenced by the existence of the Treaty of Waitangi, an 1840 agreement between the British colonial authorities and the indigenous Maori people. As a consequence of this agreement the Church is now run on a multi-racial model, with power distributed between the non-Maori and Maori sections of the Church. This has also influenced the treatment of the former missionary diocese of Polynesia, which also shares power within the Church.

These diverging influences are each seen as a reflection of the divine within the church, and the evolution of the structure of the Church in New Zealand an ongoing attempt to reflect a Fellowship within the One, Holy, Catholic, and Apostolic Church.

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