

Ecclesiastical Jurisdiction in the Church of the Province of Aotearoa, New Zealand and Polynesia

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Abstract

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Abstract

This paper is an exploration of the legal relationship between Church and State in twenty-first century New Zealand, taking as its example the Anglican Church.

We begin with a look at 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, in its original English setting. The internal governance of the Church of England is then reviewed. The next step is an examination of the possible models, of disestablished Churches, and non-established Churches, which might be said to describe the situation of the Church in New Zealand. The doctrine of consensual compact, the secular legal basis for Church law, is then examined, along with the applicability of pre-existing canonical systems. Some aspects of secular legislation impinging on the Church is then reviewed.

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 this separation is alien to both the secular and spiritual laws. The true situation is an imperfect separation, but one which reflects the historical evolution of the English Church, particularly but not exclusively post-Reformation.

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

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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.

I Introduction

The Church of the Province of Aotearoa, New Zealand and Polynesia, is a provincial Church of the world-wide 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.

The framework within which the Church operates may be characterised by two factors. Firstly, it is non-established in that it is not formally recognised or supported by the State, do not does it enjoy a privileged position.² Secondly, although it has adopted the principal of partnership between Maori and non-Maori (so that parallel hierarchies have been established), the Church is as a constituent member of the Anglican Communion, with the continuity which that implies.³

As a basic principle within the Anglican Communion, the exercise of legislative power is confined to 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 but mutual loyalty sustained through the common counsel of bishops in conference.⁴ But the Churches vary in the degree to which they have adopted, or preserved, the 'establishment', or nexus of Church and State. The Anglican Church in New Zealand occupies a unique position in New Zealand society, in part because of the close links between Church and Maori. This in turn had its effect upon the 'establishment' of the Church.

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 and Pakeha.⁵ Orthodox theory holds that the Treaty of Waitangi has socio-political, not

²Though Doe prefers to categorise it as quasi-established; Norman Doe, *Canon Law in the Anglican Communion* (1998).

³'[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.

⁴LC 1930, Ress. 48, 49.

⁵A 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, 11 November 1998.

legal force, as it was not a treaty recognised by international law.⁶ It therefore has effect only so far as legal recognition has been specifically accorded it.⁷ 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.⁸ 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'.⁹ The Church at least has emphasised it, though not at the expense of losing its apostolic and catholic character.

The legal, jurisdictional form of the Anglican Church is less apparent than it is in the Roman Catholic Church. But it is no less certain that the legal form 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- the canon law of the Church. Yet much of the law governing the Church is to be found in secular statutes and court decisions, in accordance with the relationship between Church and State since the Reformation in England.

II Fundamental Authority: Church Law, Theology, and Divine Law

God, in creating mankind, ordered it to subdue the earth and to exercise dominion over the earth.¹⁰ Mankind, in attempting to establish separate dominion and autonomous jurisdiction over the earth,¹¹ fell into sin and death. Biblical law is a covenant, a plan for dominion under God,¹² and is based on revelation. 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. Even laws made by secular authorities are in a sense laws of God.

Law is 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. Accordingly, a fundamental and necessary premise in any and every study of law must be, first, a recognition of this religious nature of law. Second, in any culture the source of law is the god of that society. Modern humanism, the religion of the State,

⁶Anthony Molloy, 'The Non-Treaty of Waitangi' [1971] NZLJ 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, *Sovereignty and indigenous rights: The Treaty of Waitangi in international contexts* (1991).

⁷Generally, see Wayne Attrill, 'Aspects of the Treaty of Waitangi in the Law and Constitution of New Zealand' (1989) Harvard University LLM thesis.

⁸John Fogarty, [1993] *New Zealand Law Journal* 212.

⁹Interview with Sir Douglas Graham, 24 November 1999.

¹⁰Gen. 1:28.

¹¹Gen. 3:5.

¹²Rousas John Rushdoony, *The Institutes of Biblical Law* (1973) 6-7.

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.¹³

Third, 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.¹⁴ This means that the laws enacted by secular authorities can only with difficulty be seen as truly being the laws of God.

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 is a fallacy to define law simply as compulsion or coercion, it is also a serious 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.¹⁵

Power is a religious concept, and the god or gods of any system of thought have been the sources of power for that system. The monarch or ruler has a religious significance precisely because of his power. When the democratic State gains power, it too arrogates to itself religious claims and prerogatives. Power is jealously guarded in the anti-Christian State, and any division of powers in the State, designed to limit its power and prevent its concentration, is bitterly contested.¹⁶ It is not a coincidence that the conflict between Church and State came to a head in the sixteenth century, at a time when the modern State began to succeed in its claims to a monopoly of mans' allegiance.¹⁷

The law, both criminal and civil, claims to be able to speak about morality and immorality generally. Where does it get its authority to do this and how does it settle the moral principles which it enforces? Undoubtedly, as a matter of history, it derives both from Christian teaching. But the law can no longer rely on doctrine in which citizens are entitled to disbelieve. It is necessary therefore to look for some other source.¹⁸

The legal crisis is due to the fact that 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.¹⁹ 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

¹³See, for example, John Locke, *Two Treatises of Government* (1960).

¹⁴Rousas John Rushdoony, *The Institutes of Biblical Law* (1973) 5.

¹⁵Norman 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.

¹⁶Rousas John Rushdoony, *The Institutes of Biblical Law* (1973) 58-9.

¹⁷This conflict dates, of course, from the original linkage of Church and State under Constantine the Great, and has parallels in the paganism of (particularly) imperial Rome.

¹⁸Sir Patrick Devlin, *The Enforcement of Morals* (1959) 9.

¹⁹Rousas John Rushdoony, *The Institutes of Biblical Law* (1973) 69.

(or existence) of unalterable tenets or laws are disputed.²⁰ 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.²¹

IV History and Origins of Canon Law

Just what, then, are the laws which govern the Church? Ecclesiastical law may be defined as so much of the laws of New Zealand as are concerned with the regulation of the affairs of the Church of England, and the internal or domestic laws of the Church, inapplicable to non-members. The sources of this law may be found first, in theology (the *Bible*, patristic writings, opinions of other authors, pronouncements of Lambeth Conferences, liturgical formularies); secondly, the canons of the Church; thirdly, the common law; fourthly, the statute law so far as it impinges on ecclesiastical governance; and fifthly, subordinate legislation, whether by secular or spiritual agency.²²

This is consistent with a long tradition. 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.²³ Both theology and history demonstrate the ecclesiological nature of canon law. Ombres argues, from the Roman Catholic point of view, that canon law issuing from an ecumenically minded ecclesiology will be both convergent and provisional.²⁴

Sources of ecclesiastical regulation in the Anglican Communion is normally defined and found in a single document.²⁵ Ecclesiastical law is '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'.²⁶ 'Ecclesiastical law is not foreign law. It is part of the general law of England'.²⁷

²⁰See, however, the dispute regarding the ordination of woman priest. 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.

²¹Thomas Glyn Watkin, 'Vestiges of Establishment: The Ecclesiastical and Canon Law of the Church in Wales' (1990) 2 *Ecclesiastical Law Journal* 110.

²²After Revd E Garth Moore, *An Introduction to English Canon Law* (1967) 8, as modified for New Zealand circumstances.

²³Eric Kemp, *An Introduction to Canon Law in the Church of England, being the Lichfield Cathedral Divinity Lectures for 1956* (1957) 62. Bishop Kemp pointed 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.

²⁴Robert Ombres, 'Ecclesiology, Ecumenism and Canon Law' in Norman Doe, Mark Hill and Robert Ombres (eds), *English Canon Law* (1998) 49.

²⁵The exceptions being England and Scotland.

²⁶*Attorney-General v Dean and Chapter of Ripon Cathedral* [1945] Ch 238.

²⁷*Mackonochie v Lord Penzance* (1881) 6 App Cas 424, 446.

Formal laws 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: customs or traditions,²⁸ decisions of Church courts, 'principles of canon law',²⁹ for some, the English canons ecclesiastical 1603, or pre-Reformation Roman Catholic canon law. 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'.³⁰

Historically, canon law meant something very different to what it now represents.³¹ 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 is made for the Church by the State,³² canon law is made for the Church by the Church itself.³³ More accurately perhaps, ecclesiastical law may be taken to include both canon law, laws made by the Church which are not canon laws, and laws made by the State for the Church.

Canon law has validity only within the framework of its principal and parent, the divine law. Thus the Church can only make rules relating to the details, not the essential nature, of the law.³⁴ Other laws may be informed with theological principles, but are not bound by the limitations imposed by divine law.

It is important whether the theological root of the canon law is sound. The canonist can never be simply a lawyer, he or she must always be in some measure a theologian, and will frequently require the assistance of historians.³⁵ One of the fundamental tasks of the canonist is to subject the rules of canon law to a rigorous examination against the basic Christian theological doctrines.³⁶

The history of the canon law is beyond the scope of this study, but a brief outline may prove instructive. 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 application and, with the growth of papal

²⁸'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.

²⁹'The principles of partnership'; Const. Preamble, 12.

³⁰Can. B.5.6: the parish must have 'proper regard for such guidelines as may be laid down ... by the Archives Committee'. These will be binding in certain circumstances; Norman Doe, 'Non-Legal rules and the courts: enforceability' (1987) 9 *Liverpool Law Review* 173-88; R Baldwin and J Houghton, 'Circular Arguments: The Status and Legitimacy of Administrative Rules' (1986) *Public Law* 239.

³¹RH Helmholz, *Canon Law and the Law of England* (1987); Norman Doe, *The Legal Framework of the Church of England* (1996).

³²Can. A.II.3: clergy undertake to be 'obedient to the ecclesiastical laws' in force in the diocese. These include the constitution and code of canons.

³³Thomas Glyn Watkin, 'Vestiges of Establishment: The Ecclesiastical and Canon Law of the Church in Wales' (1990) 2 *Ecclesiastical Law Journal* 110.

³⁴Revd E Garth Moore, *An Introduction to English Canon Law* (1967) 2.

³⁵Revd E Garth Moore, *An Introduction to English Canon Law* (1967) 1.

³⁶Norman Doe, *The Legal Framework of the Church of England* (1996).

authority, the decretals of popes assumed an ever-growing importance. These decretals were later incorporated into codes.³⁷

Canon law drew from Roman civil law for the training of its lawyers, and its procedure, and for much of its jurisprudential concepts and language. For its substantive law, however, it looked to the general codes and canons and decretals and to the ordinances of provinces and of dioceses.³⁸

The late twentieth century was a time of codification for the Roman Catholic Church. The Latin Church obtained first the 1917 and then the 1983 Codes of Canon Law. A Code of Canons for the Eastern Churches was granted in 1990 for the twenty-one Churches in full communion with Rome. 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.³⁹ 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.⁴⁰

The decree on ecumenism of the Second Vatican Council (1962-65) taught that those who believe in Christ and have been truly baptized are in some kind of communion with the Roman Catholic Church, even though this communion is imperfect.⁴¹ The ecumenical hope being expressed is not that one standardized canonical system will emerge from the reunion of Christians. It is likely and desirable that each Christian denomination would retain some of its canonical traditions after reunion.⁴² Canonists must be comparatively minded.⁴³ The laws of the Church of the Province of New Zealand include ecclesiastical laws and canon laws, the latter of which at least reflect a joint and common legal and theological heritage with Rome.

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, and practised in specifically Christian ways.⁴⁴

³⁷Revd E Garth Moore, *An Introduction to English Canon Law* (1967) 3.

³⁸Revd E Garth Moore, *An Introduction to English Canon Law* (1967) 4.

³⁹Robert Ombres, 'Ecclesiology, Ecumenism and Canon Law' in Norman Doe, Mark Hill and Robert Ombres (eds), *English Canon Law* (1998) 50-1.

⁴⁰Robert Ombres, 'Ecclesiology, Ecumenism and Canon Law' in Norman Doe, Mark Hill and Robert Ombres (eds), *English Canon Law* (1998) 52.

⁴¹'Unitatis Redintegratio,' in *Decrees of the Ecumenical Councils* ed Norman P Tanner (1990) Vol 2, 910.

⁴²Robert Ombres, 'Ecclesiology, Ecumenism and Canon Law' in Norman Doe, Mark Hill and Robert Ombres (eds), *English Canon Law* (1998) 54.

⁴³Robert Ombres, 'Ecclesiology, Ecumenism and Canon Law' in Norman Doe, Mark Hill and Robert Ombres (eds), *English Canon Law* (1998) 55.

⁴⁴Robert 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* 200-12;

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.⁴⁵ Indeed, with the triumph of secular Parliament over the spiritual Convocation as a consequence of the Reformation in England, and the resultant legislative weakness of the English Church, this is hardly surprising. The Anglican Communion has only slowly emerged from the shadow cast by the royal supremacy, and still suffers from a relative jurisprudential weakness compared to the fullness of the Roman Catholic canon law.

V The Legal Position of the Church

It was early established as a principle of imperial constitutional law that settled colonies took English law.⁴⁶ The laws of New Zealand are based upon the reception of English laws in the middle of the last century, when it was first settled as a colony.⁴⁷ The *English Laws Act 1858* (NZ)⁴⁸ provided that the laws of England as existing on 14 January 1840 were deemed to be in force in New Zealand.⁴⁹ They were however only to be in force so far as applicable to the circumstances of the colony. The principle of this Act has been followed in all relevant legislation passed by the New Zealand Parliament since then.

It has been established that New Zealand acquired English law as it existed at the time of settlement. But it was only those laws which were applicable to their new situation and

Christopher Hill, 'Bishops: Anglican and Catholic' in Norman Doe, Mark Hill and Robert Ombres (eds), *English Canon Law* (1998).

⁴⁵Consistent too with the liberal theology of the times.

⁴⁶Scots 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 711-9.

⁴⁷*R v Symonds* (1847) NZ PCC 387; *Veale v Brown* (1866) 1 CA 152, 157; *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72; *R v Joyce* (1906) 25 NZLR 78, 89, 112; *Re the Ninety Mile Beach* [1963] NZLR 461, 475-6. It is a general rule that common law applies to a colony unless it is shown to be unsuitable, but English statutes do not apply unless shown to be applicable- *Uniacke v Dickinson* (1848) 2 NSR 287 (Nova Scotia); *Wallace v R* (1887) 20 NSR 283 (Nova Scotia); *R v Crown Zellerbach Canada Ltd* (1954) 14 WWR 433 (British Columbia).

⁴⁸21 and 22 Vict no 2 (NZ). Considered in *King v Johnston* (1859) 3 NZ Jur (NS) SC 94.

⁴⁹This Act was passed, in the words of the long title, '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 the uncertainty as to whether or not all Imperial acts passed prior to 1840 were in force in New Zealand, if applicable. Although the uncertainty had really been about statutes, 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.

to the condition of a new colony.⁵⁰ It is not always easy to apply the test.⁵¹ English laws which are to be explained merely by English social or political conditions have no application in a colony,⁵² yet the courts have generally applied the land law, which has a feudal origin.

The test of course 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. In practice few areas of the laws of England have been found to be inapplicable. The ecclesiastical law is however one, largely because:

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.

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.⁵³

The ecclesiastical law is a part of the laws of England, but not part of the common law.⁵⁴ More importantly, an established Church is, by its very essence, of a territorial nature, and requires to be expressly transplanted from its native soil.

⁵⁰*Kielley v Carson* (1824) 4 Moo PCC 63; 13 ER 225; *Lyons Corp v East India Co* (1836) 1 Moo PCC 175; 12 ER 782; *Phillips v Eyre* (1870) LR 6 QB 1; *Sammut v Strickland* [1938] AC 678 (PC); *Sabally and N'Jie v Attorney-General* [1965] 1 WLR 273. 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' is, like so many of his generalisations, misleading. It would have been nearer the truth if he had said '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'. What became applicable was far greater in content and importance than what had to be rejected; Sir William Blackstone, *Commentaries on the Laws of England* ed E Christian (first published 1765, 12th ed, 1978) Book I, para 107.

⁵¹*Whicker v Hume* (1858) 7 HLC 124, 161; 11 ER 50 (Lord Carnworth).

⁵²*Lawal v Younan* [1961] All Nigeria LR 245, 254 (Nigeria Federal SC). In *Highett v McDonald* (1878) 3 NZ Jur (NS) SC 102, Johnston J observed, in finding that the *Tippling Act 1751* (24 Geo II c 40) (GB) 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 NZLR 491 held that the gaming statutes were applicable.

⁵³*In re Lord Bishop of Natal* (1864) 3 Moo PCC NS 115, 148, 152; 16 ER 43, 57; approved in *Baldwin v Pascoe* (1889) 7 NZLR 759, 769-70.

⁵⁴The ecclesiastical law of England consists of the general principles of the *ius commune ecclesiasticum* (*Ever v Owen* Godbolt's Report 432 (Whitlock J)); foreign particular constitutions received by English councils or so recognised by English courts (secular or

The law of the Church in New Zealand defines its nature as a constituent member of the Anglican Communion, a Fellowship within the One, Holy, Catholic, and Apostolic Church.⁵⁵ A secular court in 1857 decided that a bishop in New Zealand was a bishop in the Church of God, but not a bishop of the Church of England.⁵⁶ It is a regional rather than a purely national Church, with a strong sense of mission.

The constitution of the Church in New Zealand is highly programmatic, presenting probably the most comprehensive statement embracing all of these ideas. 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'; the Church must advance its mission, safeguard and develop its doctrine and order its affairs.⁵⁷

In order to carry out its mission on earth, the Church requires rules, codes and laws for its members. Further laws regulate its relations with the State and with non-members. The sources of these laws are markedly different in countries which have established Churches, yet even in New Zealand the Church and State are not completely separated.

The respective roles of Church and State in modern society is markedly different to the historic roles. Today, rulers protect individual freedom of choice. No longer is the ruler the arbiter and defender of his or her people's faith, he or she is more a defender of faith in the abstract.⁵⁸ This leaves the relationship between Church and State at times difficult.

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 in 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 and 10 Geo V c 76) (UK). Any canon is binding on clergy in ecclesiastical matters; *Matthew v Burdett* (1703) 2 Salk 412.

⁵⁵[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.

⁵⁶The effect being that the prerogative rule allowing the Crown to fill a benefice vacated by the incumbent becoming a bishop did not apply where the bishopric was abroad; *R v Eton College* (1857) 8 El and Bl 610; 120 ER 228.

⁵⁷Const. Preamble.

⁵⁸As suggested by the Prince of Wales, in a remark which appears as bizarre to an English audience as it must 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.

Internal law usually claim ecclesiastical autonomy, and generally based on principle of freedom and equality of religions. Churches may be classified as established, quasi-established,⁵⁹ dis-established, or non-established. All but the first are based on the almost global principle of consensual compact. Though the Church in New Zealand may be broadly regarded as non-established, yet for several reasons this fails to explain the true nature of the Church in this country.

VI The Church of England: Law and Quasi-Legislation

The 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.⁶⁰

Several parliamentary statutes 'declare and define the Powers of the General Synod of the Church of the Province of New Zealand', they govern the alteration of the formularies of the Church, and they regulate its trust property, its missionary diocese and its clergy pensions funds. The Church exists as a consensual society and the secular courts may intervene to effect compliance by the Church with its own internal law and with State law applicable to the Church.⁶¹

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'.⁶² In New Zealand this law is fundamental in the sense that it is unalterable by the Church acting alone.

In respect of those laws which the Church may change, the right to propose legislation is confined to the legislature.⁶³ The second part of the legislative process is ratification or adoption by the assembly.⁶⁴ The third stage is referral to the diocese. The next stage is confirmation on notice. A simple majority of diocese is required.⁶⁵ The last stage is promulgation, in a legislative process which is a copy, deliberate or subconscious, of the secular parliamentary process.

⁵⁹Nova Scotia [32 Geo II c 5 (1758) (GB)], New Brunswick [26 Geo III c 4 (1786) (GB)], and Prince Edward Island [43 Geo III c 6 (1802) (UK)] enjoy certain statutory privileges over the other Churches. Australia rests in a fundamental way upon secular legislation; *Church of England Constitution Act 1961* (Austr); *Scandrett v Dowling* [1992] 27 NSWLR 483, 489 (Mahoney JA) (NSW).

⁶⁰Norman Doe, *Canon Law in the Anglican Communion* (1998) 14.

⁶¹*Church of England Empowering Act 1928* (NZ) (as amended); *Anglican Church Trusts Act 1981* (NZ); *New Zealand Anglican Church Pension Fund Act 1972* (NZ); *Church of England (Missionary Dioceses) Act 1955* (NZ); see also *St John's College Trusts Act 1972* (NZ); for historical material see WP Morrell, *The Anglican Church in New Zealand* (1973).

⁶²Const. A.6.

⁶³Const. G.4

⁶⁴Cans. C.I.1 and 2.1.

⁶⁵Const G.4.

Internally, the Church can exercise co-ercive power or *imperium*, as well as persuasive power or *dominium*, often derived from secular authority. The *imperium* includes Acts of Parliament, statutory regulations, canons and synodical orders. The *dominium* includes policy documents, regulations, directives, codes of practice, circulars, guidance, guidebooks.⁶⁶ These have only moral or persuasive force,⁶⁷ and do not depend upon secular authority.

Courts have three basic principles to determine whether any quasi-legislation enacted by the Church has legal force. Firstly, its legitimacy. If a line of authority extending back to Parliament can be traced the courts are liable to give it greater weight or authority, particularly if it is published. Secondly, if the issuing body intended it to bind that body or its addressee, it will be held by the Courts to bind; intention to bind may be presumed from the language used, if for example it is expressed in clear and mandatory terms. Thirdly, it will bind if capable of enforcement.⁶⁸ These courts are of course the royal courts, the secular courts of general jurisdiction. Their involvement in ecclesiastical law derives from the history of the Church in England, and in particular, the Reformation.

The Preface to the Thirty-Nine Articles of 1562 is a royal declaration. This 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 ...

Article 37 makes this claim to royal supremacy clearer:

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

The Queen is not now regarded in the Church of the Province of Aotearoa, New Zealand and Polynesia as Supreme Governor of the Church of England, a position she

⁶⁶Norman Doe, 'Ecclesiastical Quasi-Legislation' in Norman Doe, Mark Hill and Robert Ombres (eds), *English Canon Law* (1998) 95.

⁶⁷Though a contrary view has been expressed; J Burrows, *Judicial Review and the Church of England* (LLM dissertation, University of Wales, Cardiff, 1997).

⁶⁸R Baldwin and J Houghton, 'Circular Arguments: The Status and Legitimacy of Administrative Rules' (1986) *Public Law* 239.

still enjoys in England (though not in Wales).⁶⁹ For this reason prayers are no longer customarily said for the Queen and members of the royal family,⁷⁰ though it might have been expected that the Church would continue to show due regard for the secular Sovereign of New Zealand.⁷¹ Yet the sixteenth century reiteration 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.

The Sovereign's office of Supreme Governor of the Church of England is to be distinguished from the 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 1543.⁷²

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'.⁷³

The original draft of the Royal Titles Bill 1974 removed of 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, the National Party caucus had reservations, and considered that the style meant much more to some people in New Zealand, who regarded the Queen as the defender and upholder of the Christian faith. The matter was discussed with the Prime Minister, and after consultation with the Queen it was decided to retain the title in New Zealand.⁷⁴

The juristic theory of territorial sovereignty, with the King being supreme ruler within the confines of his kingdom, originated as two distinct concepts. The King owned no superior in temporal matters, and within his kingdom the King was emperor.⁷⁵ The Holy Roman Emperor had legal supremacy throughout the West, or he did not.⁷⁶ If the former,

⁶⁹ *Act of Supremacy 1558* (1 Eliz c 2) (Eng).

⁷⁰ In England the law allows alterations in the prayers for the royal family contained in the *Book of Common Prayer*; *Act of Uniformity 1662* (14 Chas II c 4) (Eng) s 21

⁷¹ Though when The *Book of Common Prayer 1662* is used, these are retained and used.

⁷² *King's Style Act 1543* (35 Hen VIII c 2) (Eng), repealed *See of Rome Act 1554* (1-2 Philip and Mary c 8) (Eng) s 4, repeal confirmed by *Act of Supremacy 1558* (1 Eliz I c 1) (Eng) s 4.

⁷³ *Royal Titles Act 1974* (NZ). The Bill was introduced at the State Opening of Parliament by the Queen in person on 4 February, passed through all its stages the same day, and signed by Her Majesty. See *New Zealand Parliamentary Debates 1974* vol 389 pp 1-3.

⁷⁴ *New Zealand Parliamentary Debates 1974* vol 389 p 3 (Rt Hon J Marshall). Since 1953 Mauritius and Papua New Guinea have removed 'by the Grace of God'. Only Canada and New Zealand now use 'Defender of the Faith'.

⁷⁵ Walter Ullmann, 'This Realm of England is an Empire' (1979) 30(2) *Journal of Ecclesiastical History* 175-203.

⁷⁶ In Roman law it was originally considered that the emperor's power had been bestowed upon him by the people, but when Rome became a Christian State his power was regarded as coming from God. In America also God had been recognised as the source of government, although it is commonly thought in a republican or democratic government 'all power is inherent in the people'.

theories of the sovereignty of kings were not needed, for they had merely *de facto* power. Sovereignty remained essentially *de jure* authority.⁷⁷

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 unimportant.⁷⁸

Bartolus and Baldus led the way towards recognition of a 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.⁷⁹ 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.⁸⁰

In the later Middle Ages it was believed that England was an independent sovereign monarchy answerable only to God- in mediæval parlance an empire, self-contained and sovereign.⁸¹ 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.⁸²

Sir John Fortescue remarked that 'from of old English kings have reigned independently, and acknowledged no superior on earth in things temporal'.⁸³ This was a fundamental feature of English monarchy by the fifteenth century, based on precepts of

⁷⁷JP Canning, 'Law, sovereignty and corporation theory, 1300-1450' in JH Burns, *The Cambridge History of Medieval Political Thought c.350-c.1450* (1988) 465-7. 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; Sovereignty and rights in the Western legal tradition* (1993) 12.

⁷⁸Kenneth Pennington, *The Prince and the Law, 1200-1600; Sovereignty and rights in the Western legal tradition* (1993) 30.

⁷⁹JP Canning, 'Law, sovereignty and corporation theory, 1300-1450' in JH Burns, *The Cambridge History of Medieval Political Thought c.350-c.1450* (1988) 467-71.

⁸⁰Rousas John Rushdoony, *The Institutes of Biblical Law* (1973) 70.

⁸¹In 1485 Chief Justice Huse observed that the King was superior to the pope within his realm, and answerable directly to God- YB 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).

⁸²The *Decretals* of Pope Gregory IX (1234) show that since Gratian the law of the Church had become a separate science no longer mixed up with 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.

⁸³Sir John Fortescue, *In praise of the Laws of England (De Laudibus)* ed SB Chrimes (1942).

Roman law.⁸⁴ They rejected a Holy Roman Empire that had been narrowly German for several centuries, and the temporal authority of the Pope. The French had asserted their own empire for very similar reasons by 1200.

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.⁸⁵ *Regno suo est* became a commonplace in the mid-thirteenth century.⁸⁶

Spiritual courts, separate from the secular, existed in England from shortly after the Norman Conquest.⁸⁷ This process of separation seems to have occurred around 1072-76,⁸⁸ 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.⁸⁹ But 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.⁹⁰ However, ecclesiastical jurisdiction in the immediate post-Conquest period was primarily over moral offences.⁹¹ In subsequent centuries the jurisdiction of the ecclesiastical courts was gradually enlarged,⁹² and was eventually to cover such important aspects of what is now predominantly secular law as marriage,⁹³ divorce,⁹⁴ and succession.⁹⁵ Although the Church courts were to lose most of this

⁸⁴ Majesty, the sense of awe-inspiring greatness, in particular, the attribute of divine or sovereign power, was part of the legacy of Rome. The *maiestas* of the Republic or the people of Rome had become that of the emperor, the *maiestas augustalis*.

⁸⁵ Texts cited in Brian Tierney, 'Some Recent Works on the Political Theories of the Mediæval Canonists' (1954) 10 *Traditio* 615, 617.

⁸⁶ Kenneth Pennington, *The Prince and the Law, 1200-1600; Sovereignty and rights in the Western legal tradition* (1993) 30.

⁸⁷ Sir William Blackstone, *Commentaries on the laws of England* E Christian (ed) (first published 1765, 12th ed, 1978) Book 3, 64, 65.

⁸⁸ Report of the Archbishops' Commission, *The Ecclesiastical Courts* (1954) 1.

⁸⁹ Felix Makower, *Constitutional History and Constitution of the Church of England* (1895) 384; Report of the Archbishops' Commission, *The Ecclesiastical Courts* (1954) 1-22.

⁹⁰ Gillian 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) 11.

⁹¹ C Morris, 'William I and the Church Courts' (1967) 324 *English Historical Review* 449, 451.

⁹² See William Holdsworth, *History of English Law* (1972) Vol 1, 614ff.

⁹³ Until the *Matrimonial Causes Act 1857* (20 and 21 Vict c 85) (UK). In Ireland, ecclesiastical courts lost their matrimonial jurisdiction only under the *Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870* (33 and 34 Vict c 110) (UK), and the jurisdiction survived until 1884 in the Isle of Man, the diocese of the bishop of Sodor and Man.

⁹⁴ Until the *Matrimonial Causes Act 1857* (20 and 21 Vict c 85) (UK).

⁹⁵ Until the *Court of Probate Act 1857* (20 and 21 Vict c 77) (UK). The *Poor (Burials) Act 1855* (18 and 19 Vict c 79) (UK) had the same effect in Ireland.

jurisdiction to the secular courts in the nineteenth century, the influence of the Courts-Christian upon the development of the law in these areas cannot easily be exaggerated.⁹⁶

In theory at least the Courts-Christian and the king's courts were supreme within their own fields. Medieval jurists were accustomed to what we might call shared sovereignty, and saw nothing amiss with the pope having a concurrent jurisdiction with temporal sovereigns,⁹⁷ nor with the Church exercising concurrent jurisdiction with the king. In accordance with this principle, espoused in particular by the Bologna school of canonists,⁹⁸ the Church courts were, and remain, as unfettered within their jurisdiction as the temporal courts within theirs.⁹⁹ As a general principle, no appeals lay from an ecclesiastical court to a secular court.¹⁰⁰ Appeal from the courts of the archbishops lay to the patriarch, in the west the bishop of Rome. The right of English litigants to appeal to the pope dates from at least the time of king Stephen,¹⁰¹ and probably before.¹⁰²

Such appeals were heard either by the pope himself, from the time of pope Gregory VII by his permanent legates, or by special delegates appointed to hear a particular cause.¹⁰³ An appeal to the papacy might omit some preliminary steps, *omisso medio*. Any appeal heard by a subordinate could be appealed to the pope himself, and even appealed from the pope to the pope 'better informed'.¹⁰⁴

Partly because of the *omisso medio*, but also due to the increasing jealousy of the common law courts, the right to appeal to Rome was in England long subject to restrictions by the king. For, although the Church courts were supreme within their jurisdiction, precisely what that jurisdiction was could be the subject of dispute. Nor were

⁹⁶This 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 of law; Thomas Scrutton, *The influence of the Roman Law on the Law of England* (1885) 163-9.

⁹⁷The pope's powers as a temporal sovereign are recognised in the Roman Catholic Code of Canon Law 1983. In practice matters of education 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.

⁹⁸Bologna 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.

⁹⁹*R v Chancellor of St Edmundsbury and Ipswich Diocese, ex parte White* [1947] KB 263, [1946] 2 All ER 604, affirmed [1948] 1 KB 195, [1947] 2 All ER 170 (CA).

¹⁰⁰William Holdsworth, *History of English Law* (1972), 9. Cf Richard Burn, *Ecclesiastical Law* (1781), Vol 1, 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 hierarchical system was copied by the king's courts from the ecclesiastical courts; Theodore Plucknett, *A Concise History of the Common Law* (1956) 387-8.

¹⁰¹Richard Burn, *Ecclesiastical Law* (1781) 58. These were at the instigation of Henri de Blois, bishop of Winchester and papal legate; GIO Duncan, *The High Court of Delegates* (1971) 2.

¹⁰²Felix Makower, *Constitutional History and Constitution of the Church of England* (1895) 225-7.

¹⁰³Such as that of King Henry VIII and Queen Catherine of Aragon.

¹⁰⁴Felix Makower, *Constitutional History and Constitution of the Church of England* (1895) 225-7.

the courts immune from contemporary political controversies, particularly those concerned with the respective roles of Church and State.¹⁰⁵ Attempts were made to limit appeals to Rome, as well as original trials by papal delegates.¹⁰⁶ But appeals continued nevertheless, perhaps with the king's licence.

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. 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.¹⁰⁷

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.¹⁰⁸ Monachus maintained that the position of the pope was akin to that enjoyed by the bishop in relation to his cathedral chapter.¹⁰⁹

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.¹¹⁰

Prior to the Reformation, the Church had a parallel system of laws and its own courts. The *Act of Supremacy 1558* (Eng) 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.¹¹¹ He was 'supreme Head in earth of the Church of England'.¹¹² That

¹⁰⁵Indeed, 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.

¹⁰⁶For example, legislation of Edward III and Richard II; *Suing in foreign courts Act 1352* (27 Edw III st 1 c1) (Eng); *Suits in spiritual courts Act 1377* (1 Ric II c 13) (Eng).

¹⁰⁷Albericus de Rosate, *Lectura super Codicem* (Lyons, 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'.

¹⁰⁸Andreas de Barbatia, *De prestantia cardinalium, Tractatus Universi Iuris* (Lyons: 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'.

¹⁰⁹*Glossa Aurea*, f. 366: 'Papa sic se habet ad collegium cardinalium, sicut alter episcopus respectu sui collegii'.

¹¹⁰Thomas Glyn Watkin, 'Church and State in a changing world' in Norman Doe, Mark Hill and Robert Ombres (eds), *English Canon Law* (1998) 86.

¹¹¹s 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

they were supreme head did not mean that they had any spiritual function or status. The king could not be regarded as an ecclesiastical person *per se*.¹¹³

After the Reformation the secular Parliament made laws for the Church, and secular courts increasingly came to apply the law. 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.¹¹⁴

In New Zealand, it means that much of the administrative machinery of the Church is dependent on secular legislation, for practical, technical reasons. Yet it also means that

all causes, as well ecclesiastical as civil'; see *The Canons of the Church of England* (1969), Canon A7; *Thirty-Nine Articles of Religion* (1562) Art 37.

¹¹²*Act of Supremacy 1534* (26 Hen VIII c 1) (Eng), repealed by the *See of Rome Act 1554* (1-2 Philip and Mary c 8) (Eng), confirmed by the *Act of Supremacy 1558* (1 Eliz I c 1) (Eng).

¹¹³The Sovereign has been held to be a canon or prebendary 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 a quasi-religious person. This is seen in the ceremonial of the coronation- particularly the anointing, and in the royal robes and vestments.

The *colobium sindonis*, a loose, sleeveless gown of white linen-lawn cambric, is symbolic of the derivation of royal authority from the people, being once worn by all classes of people, and is in form similar to a cleric's alb or surplice, or a bishop's rochet. It is thought to be derived from the robes of the Church rather than from those of the emperors, although they also wore the *colobium sindonis*.

The royal stole was derived from the *λοροσ*, (*loros*) a jewelled scarf of the eastern emperors. This originated as the *stola* worn by noble ladies in the early Roman Empire. Senators and consuls were required to wear a coloured pall or scarf over the alb and *paenula* by the sumptuary Codex of Theodosius (382). Shortly afterwards it became a distinctive badge of episcopal status. The *Liber Regalis* (1307) requires its use although it has only been used since James I.

The *supertunica* is a long coat of cloth-of-gold, reaching to the ankles, and lined with rose-coloured silk, having wide flowing sleeves. The *supertunica* is derived from the full dress uniform of a consul, and the later *σακκος* (*sakkos*) of the Byzantine emperors. However, as it has been worn since at least the time of Edward the Confessor, and the *σακκος* was only appropriated by the patriarchs in the twelfth century, the extent to which it was in origin a sacerdotal robe is disputed. The *σακκος* was originally a penitential garment, and became a peculiarly solemn vestment for patriarchs in the thirteenth century, and for all archbishops by the fifteenth century.

¹¹⁴In 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 possessed; *Church of England Assembly (Powers) Act 1919* (9 and 10 Geo V c 76) (UK).

the Church is unable to alter its basic theological principles without the approval of Parliament, as it has chosen to state those principles in an Act of Parliament.¹¹⁵

VII Disestablished and Non-Established Churches and the Doctrine of Consensual Compact

The Church of England remains established in England. Some of the Churches of the British Isles,¹¹⁶ and those of the West Indies,¹¹⁷ and India¹¹⁸ have been dis-established. Since the Church was never formally established in New Zealand- though it was influential in the early settlement movement¹¹⁹ - this category need not detain us longer.

Most Churches are non-established, in that they are not formally recognised or supported by the State, do not enjoy a privileged position, and were never in that position. This is based upon the principles which governed the status of the dissenters in England. The courts would not intervene unless a justiciable right was at stake. Secondly, a trust for a religious body was enforceable as any charitable trust. Thirdly, members of such a Church were bound by contract to one another. In such a situation internal rules have under secular law the status of terms of a contract, enforceable as a matter of private law.¹²⁰

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

¹¹⁵*Church of England Empowering Act 1928*, Sched I; Fundamental Provisions, A.2; Const. B5-6; for the historical background see WP Morrell, *The Anglican Church in New Zealand* (1973) 96ff.

¹¹⁶*Irish Church Act 1869* (32 and 33 Vict c 42) (UK), 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 and 5 Geo V c 91) (UK), though disestablishment was delayed till after the end of the war; *Suspensory Act 1914* (4 and 5 Geo V c 88) (UK); *Welsh Church (Temporalities) Act 1919* (9 and 10 Geo V c 65) (UK). The Episcopal Church of Scotland was dis-established 1689 (*Claim of Right Act 1689* c 28) (Scot).

¹¹⁷Barbados- *Anglican Church Act 1969* (Barbados); Bermuda- *Church of England in Bermuda Act 1975* (Bermuda); Dominica- *Laws of Dominica 1961, Ordinance 1878* (Dominica); Grenada- *Church of England Disestablishment Act 1959* (Grenada); Jamaica- *Church of England Disestablishment Law 1938* (Jamaica).

¹¹⁸The Church in India remained established, at least to some extent, until the *Indian Church Act 1927* (17 and 18 Geo V c 40) (UK), *Indian Church Measure 1927* (17 and 18 Geo V No 1) (UK).

¹¹⁹WP Morrell, *The Anglican Church in New Zealand* (Dunedin, 1973).

¹²⁰*Long v Lord Bishop of Cape Town* (1863) 1 Moo NS 411, 461-2; 15 ER 756 (Lord Kingdown) (PC); *In re Lord Bishop of Natal* (1864) 3 Moo PCC NS 115; 16 ER 43; *Lord Bishop of Natal v Gladstone* (1866) LR 3 Eq 1. Refined in *Forbes v Eden* (1867) LR 1 Sc and Div 568 (Lord Cranworth and Lord Colonsay). Lord Colonsay former applied a narrower definition, the latter a wider definition. So in some circumstances the courts will only intervene where a strict property issue is involved, in others where a wider civil right is involved.

to have agreed to use the applicable legal rules among themselves when the Church was disestablished or carried into a new country.¹²¹ In its purest form establishment meant mutual recognition of Church law and secular law, and equal validity within their respective spheres. This cannot apply where the Church is based on voluntary membership alone.

The doctrine of consensual compact has been applied in New Zealand.¹²² A fundamental consequence of this doctrine is that internal Church rules are inferior to secular law in case of inconsistency.¹²³ In turn, challenges to the validity of internal Church law, on both substantive and procedural grounds, may be entertained by secular courts.¹²⁴

The relationship between Church and State has been two-way, with the Church influencing secular law. For this reason the Churches are not simply in the same position of voluntary associations such as unincorporated clubs, or incorporated societies. Yet not all Churches are the same. Those which retain in large measure the historic canon law preserve also some of the historic nexus with the secular State.

VIII The Applicability of Pre-Existing Canonical Systems

In the Episcopal Church of the United States of America (ECUSA) English ecclesiastical law continues for some purposes only,¹²⁵ but it does not generally apply in Australia.¹²⁶ Since they are consensual bodies, these laws are not automatically enforceable.

Various devices are employed by Churches to ensure the binding effect of Church laws and the rights and duties distributed by them, devices which may be applied to clergy, lay officers or the lay members generally: overriding principles containing general statements that the law of the Church is binding; 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;¹²⁷ provisions requiring compliance with executive directions (typified with the doctrine of canonical obedience).

¹²¹*Halsbury's Laws of England* (4th ed, 1975) vol 14, 'Ecclesiastical Law' 157-63; Robert Rodes, *Law and Modernization in the Church of England* (1991) 321-2.

¹²²*Baldwin v Pascoe* (1889) 7 NZLR 759.

¹²³A 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 DLR (4th) 161, 61 (2d) 737 (Ont CA).

¹²⁴The court assumed jurisdiction to inquire into the validity of a synodical measure; 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 LR 670 (CA); cf *Baker v Gough* [1963] NSWLR 1345.

¹²⁵*Town of Pawlet v Clark* 13 US (9 Cranch) 292.

¹²⁶*Ex parte The Revd George King* (1861) 2 Legge 1307; cf *R v Inhabitants of Brampton* (1808) 10 East 282; 103 ER 782 (ecclesiastical law carried by settlers).

¹²⁷For lay members see Cans. A.I., A.II.3.

Unlike in England, in most of the overseas Churches canon law is binding on the laity.¹²⁸ Though Maitland argued that the *decretals* were binding, Kemp countered that this view was anachronistic.¹²⁹ The modern view of the 1603 canons was similarly limited.¹³⁰ The starting point was *Middleton v Crofts*,¹³¹ a proceeding for marrying without banns or licence. The 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 was declaratory of ‘the ancient usage and law of the Church’.¹³² This latter point appears to conflict with contemporary views, however, and may no longer be good law.¹³³

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 worldwide Anglican Communion. At the top of it comes the Queen in Parliament, ‘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 anyone. This is a consequence of the Reformation, and it is a fact which the Church has little choice but accept, for even consensual associations are subject to the secular power, even if ‘the ... Church of England ... is not a part of the constitution in any colonial settlement’.¹³⁴

Equally importantly, the Church in this country has chosen, for pragmatic reasons, a model of government which appears to emphasise the links of Church and State on the English model. The Roman Catholic Church relies to a lesser extent upon secular legislation,¹³⁵ in part because of its post-Reformation tradition as a non-established Church in England, and in part because of its more fully developed canon law and active judiciary.

¹²⁸*Middleton v Crofts* (1736) 2 Atkins 650 (binding only if declaratory of ancient usage and law); approved in *Bishop of Exeter v Marshall* (1868) LR 3 HL 17.

¹²⁹Eric Kemp, *An Introduction to Canon Law in the Church of England, being the Lichfield Cathedral Divinity Lectures for 1956* (1957).

¹³⁰Richard Holmholz, ‘The Canons of 1603: The Contemporary Understanding’ in Norman Doe, Mark Hill and Robert Ombres (eds), *English Canon Law* (1998) 22.

¹³¹(1736) 2 Atkins 650 (KB).

¹³²*Middleton v Crofts* (1736) 2 Atkins 650, 653. 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.

¹³³Indeed, in the earlier *Prior of Leeds Case* (1441) YB Mich 20 Hen VI, pl 25 (KB), 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.

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’.

¹³⁴*In re Lord Bishop of Natal* (1864) 3 Moo PCC NS 115, 148, 152; 16 ER 43, 57; approved in *Baldwin v Pascoe* (1889) 7 NZLR 759, 769-70.

¹³⁵Important examples being the *Roman Catholic Lands Act 1876* and the *Roman Catholic Bishops Empowering Act 1997*.

The Church, however constituted, cannot avoid the consequences of the triumph of secular power. Gone are the days of parallel legal systems and courts, though ironically 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 of an Act of Parliament.¹³⁶

IX The treatment of the Anglican Church in statute

The *New Zealand Bill of Rights Act 1990* (NZ) recognises that everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and hold opinions without interference.¹³⁷ 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.¹³⁸ The Church is bound by the provision of this Act just as any natural or artificial person is. Thus it is both precluded from imposing its doctrine or practices upon unwilling subjects, but is equally protected against suppression.

The provisions of the laws of the Church are without contractual force and are not justiciable in a civil court,¹³⁹ except to the extent that they be involved in a matter concerning church property governed by statute.¹⁴⁰ But there are a great number of statutes which regulate aspects of the Church's life and work in New Zealand.¹⁴¹ Many of

¹³⁶*Church of England Assembly (Powers) Act 1919* (9 and 10 Geo V c 76) (UK).

¹³⁷s 13.

¹³⁸s 15.

¹³⁹The secular courts must not endeavour to interfere in matters of difference within a religious group, nor can they decide theological or liturgical questions; *Cecil v Rasmussen* (High Court, Auckland, A1269/83, 9 December 1983, Baker J); *Misa v Congregational Christian Church of Samoa (Wainuiomata) Trust Board* [1984] 2 NZLR 461 (CA); *Presbyterian Church Property Trustees v Fuimaono* (High Court, Auckland, A1595/85, 16 October 1986, Thorp J).

¹⁴⁰*Dodwell v Bishop of Wellington* (1886) NZLR 5 SC 263; *Scandrett v Dowling* (1992) 27 NSWLR 483, 512, 554, 564 (CA: NSW).

¹⁴¹In 2001, including the *Anglican Church Trusts Act 1981*, *Anglican Church Trusts Amendment Act 1989*, *Anglican Trust for Women and Children Act 1962*, *Anglican Trust for Women and Children Amendment Act 1968*, *Anglican Trust for Women and Children Amendment Act 1975*, *Anglican Trustees Investment (Auckland) Act 1972*, *Cathedral-Site Parnell Leading Act 1886*, *Christ's College Canterbury Act 1885*, *Christ's College (Canterbury) Act 1928*, *Christ's College, Canterbury Act 1999*, *Christ's College (Canterbury) Amendment Act 1929*, *Christ's College (Canterbury) Amendment Act 1945*, *Church of England Empowering Act 1928*, *Church of England Empowering Act 1934*, *Church of England Empowering Act 1966*, *Church of England (Missionary Dioceses) Act 1955*, *Church of England Tribunal (Validation of Election) Act 1934*, *Church Property Trust (Canterbury) Act 1879*, *Church Property Trust (Canterbury) Act 1887*, *Church Property Trust (Canterbury) Act 1879 Amendment Act 1889*, *Church Property Trust (Canterbury) Act 879 Amendment Act 1906*, *Church Property Trust (Canterbury) Act 1879 Amendment Act 1915*, *Church Property Trust (Canterbury) Amendment Act 1927*,

these are concerned with the property which the Church acquired since the nineteenth century, and are similar to many others enacted for the benefit of particular churches or other organisations.

The Church is not exempt from regulation by general legislation. Thus, the Church is bound by the prohibition on discrimination on the grounds of religious belief. 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 education. 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.¹⁴² But the *Human Rights Act 1993* (NZ) 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.¹⁴³ 'Religion' is, however, defined widely.¹⁴⁴

Ministers of religion¹⁴⁵ are prohibited by statute from disclosing in any proceeding a confession that was made to the minister in his or her professional character, except with

Church Property Trust (Canterbury) Amendment Act 1934, Church Property Trust (Canterbury) Amendment Act 1951, Church Property Trust (Canterbury) Amendment Act 1962, Church Property Trust (Canterbury) Amendment Act 1964, Church Property Trust (Canterbury) Amendment Act 1990, Church Property Trustees (Canterbury) Indemnity Act 1890, Church Reserves (Canterbury) Act 1904, College House Act 1985, Dunedin Anglican Social Services (Child Welfare) Act 1978, Melanesian Trusts Board 1974, New Zealand Anglican Church Pensions Act 1972, New Zealand Mission Trust (Port Waikato Maraetai) Empowering Act 1986, Saint Mary's Guild Trust Act 1956, Nelson Diocesan Trust Board Empowering Act 1937, St John's Anglican Church (Parochial District of Johnsonville) Burial Ground Act 1964, St John's College Trusts Act 1972, St Mary's Church (Karori) Burial Ground Act 1963, Social Service Council of the Diocese of Christchurch Act 1952, Waikato Anglican Boys College Trust Act 1987, Warkworth Anglican Burial Ground Act 1968, Wellington Bishopric Endowment Trust (Church of England) Act 1929, Wellington Bishopric Endowment Trust (Church of England) Act 1934, Wellington City Mission (Church of England) Act 1929, Wellington City Mission (Church of England) Act 1965, and the Wellington Diocesan Board of Trustees (Church of England) Act Repeal Act 1988.

¹⁴²*Human Rights Act 1993* s 22 (1) (a); *Human Rights Commission v Eric Sides Motor Co Ltd* (1981) 2 NZAR 443 (EOT).

¹⁴³ss 22 and 28 (1).

¹⁴⁴Namely a belief in a supernatural being, thing, or principal, and the acceptance of canons of conduct in order to give effect to that belief; *Centrepont Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673, applying *Church of the New Faith v Commissioner for Pay-roll Tax (Victoria)* (1983) 154 CLR 120; 49 ALR 65 per Mason ACJ and Brennan J.

¹⁴⁵Which definition includes a person who is for the time being exercising functions analogous to those of a minister of religion; *Evidence Act 1908*, s 2, definition of 'minister'.

the consent of the person who made the confession.¹⁴⁶ However any communication made for criminal purposes is not privileged.¹⁴⁷

Whilst only a minority of marriages 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 are entered in the list of marriage celebrants.¹⁴⁸

It can be seen that the Anglican Church, and to a lesser extent other religious denominations, enjoys a special legal status in New Zealand. It is not an established church- though the Church of England took a leading role in early settlement of this country, but it does, often in common with other recognised Churches, enjoy certain legal rights not enjoyed by other corporate bodies. Many of these statutes owe their origins to the extensive grants of land to the Church of England during the nineteenth century, particularly in the province of Canterbury.¹⁴⁹ More recently, provision has been made for the better management of land given by Maori, or for the benefit of Maori.

X Conclusions

The concept of separation of Church and State, so influential in many parts of the world, ever really had any relevance in this country. Belief in this separation is alien to both the secular and spiritual laws. 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 nexus remains crucial, for both Church and State. The ecclesiastical law of the

¹⁴⁶*Evidence Amendment Act (No 2) 1980*, s 31 (1); *Cook v Carroll* [1945] IR 515; *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892; [1984] 2 All ER 408 (CA).

¹⁴⁷*Evidence Amendment Act (No 2) 1980*, s 31 (2); *R v Gruenke* [1991] 3 SCR 263 [where the SCC rejected a claim to privilege and confidentiality involving a confession of murder made to a pastor and counsellor].

¹⁴⁸s 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.

¹⁴⁹*Church Property Trust (Canterbury) Act 1879*, *Church Property Trust (Canterbury) Act 1887*, *Church Property Trust (Canterbury) Act 1879 Amendment Act 1889*, *Church Property Trust (Canterbury) Act 879 Amendment Act 1906*, *Church Property Trust (Canterbury) Act 1879 Amendment Act 1915*, *Church Property Trust (Canterbury) Amendment Act 1927*, *Church Property Trust (Canterbury) Amendment Act 1934*, *Church Property Trust (Canterbury) Amendment Act 1951*, *Church Property Trust (Canterbury) Amendment Act 1962*, *Church Property Trust (Canterbury) Amendment Act 1964*, *Church Property Trust (Canterbury) Amendment Act 1990*, *Church Property Trustees (Canterbury) Indemnity Act 1890*, *Church Reserves (Canterbury) Act 1904*.

Church of the Province of Aotearoa, New Zealand and Polynesia is partly created by the State.

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', they govern the alteration of the formularies of the Church.

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 result is that although the Church is free to regulate its own doctrinal and liturgical laws, it is not purely a voluntary association, unknown to the law. While this means that certain of the formularies of the Church may not be altered without parliamentary approval, this is not necessarily a bad thing, for it imposes upon the Church an external check, something which the Anglican Communion cannot do, and which had been lacking since the Reformation.