"The Anglican Church and its decision-making structures" [2008] New Zealand Law Journal 121-124

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I Introduction

The legal position of an ecclesial body is fraught with inherent tensions. The Anglican Church in New Zealand (officially the Anglican Church in Aotearoa, New Zealand and Polynesia), may be taken to illustrate this. The Church operates under its own laws, yet is also subject to the laws of the land. But both sets of laws reflect the special position of a church.

In New Zealand the executive, legislative and judicial branches of Church government of the Anglican Church depend for their authority, at least in part, upon legislation enacted by Parliament (usually private, rather than public, Acts of Parliament), but the influence of secular law extends beyond this formal law (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). Although in recent years there has been a conscious reduction in the influence of the secular judiciary (compare, for instance, the Ecclesiastical Jurisdiction Measure 1963 (UK) and the Constitution of the Anglican Church in Aotearoa, New Zealand and Polynesia ("Const."), and the Canons made thereunder (as revised), afterwards "Cans."), it remains to be seen whether this will be effective in distancing the Church tribunals from the influence of the common law. The authority of the Church remains primarily dependent upon secular statutes, and its procedures remain legalistic. Attempts to develop more theologically-based decision-making risks "correction" by secular courts on judicial review (see, for instance, Noel Cox, "The Symbiosis of Secular and Spiritual Influences upon the Judiciary of the Anglican Church in New Zealand" (2004) 9(1) Deakin Law Review 145-182).

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 (*Gregory v Bishop of Waiapu* [1975] 1 NZLR 705). Powers may be conferred by the legislative organs of the State (as by Acts of Parliament, such as the Church of England Empowering Act 1928; Sir Robert Phillimore, *The Ecclesiastical Law of the Church of England* (2nd ed, 1895) vol II, 1786). As generally with any legal system, it is also possible to dispense with certain laws, in special cases and within certain bounds (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). The regular legislative authority in the Anglican Church in New Zealand is, however, vested in the General Synod (Const. A4, 5), both in Church law and in applicable parliamentary statutes.

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 (LC 1867, Ress. 4, 5, 8, 10; LC 1897, Res. 24; LC 1920, Ress. 14, 43; LC 1930, Res. 53), and was not a matter of concession to "fashionable theories of representation" (Stephen Sykes, "Introduction; Why Authority?" in Stephen Sykes (ed), *Authority in the Anglican Communion* (1987) 20). However, representation and participation were to remain important aspects of Church government. In 1857 William Gladstone advised Bishop Selwyn to utilise a synodical form of government, and Selwyn himself thought that strong participation was essential (JH Evans, *Churchman Militant* (1964) 138-141, 146-147, 163-164). 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 for 1847 (William Sachs, *The Transformation of Anglicanism* (1993) 191-193). This was because of the absence of the regular constitutional authority of convocations and Parliament, as found in England. This necessitated a return to ancient forms of church government (as then understood), as had been required in the American colonies after 1777 (*Terrett v Taylor*, 13 US (9 Cranch) 43, 47 (1815)). The model of synodical government subsequently adopted in New Zealand became a model elsewhere (for the theological basis of synods see KS Chittleborough, 'Towards a Theology and Practice of the Bishop-in-Synod' in Stephen Sykes (ed), *Authority in the Anglican Communion* (1987) 144-162). In common with the practice of most Anglican churches today, the national synod was to have three houses – bishops, clergy, and laity (as proposed by Governor Grey to Bishop Selwyn in 1850; (1852) V *Colonial Church Chronicle* 161). It now departs from the norm however in having separate governmental structures for Maori and Polynesians.

The circumstances of the church in New Zealand have led to a unique bi-focal government. The underlying reasons are expressed in detail in the Constitution of the Church (with its emphasis upon separateness of missionary and regular hierarchies and histories, and on the political consequences of colonisation).

The principles of partnership and bicultural development require the Church to organise its affairs within each of the Tikanga (racial or ethno-cultural groupings (social organisations, language, laws, principles, and procedure); B Briggs, *English-Maori: Maori-English Dictionary* (1990)) of each partner to the Treaty of Waitangi. Although missionary activities long existed among the Maori, the first bishop was only appointed when the first Bishop of Aotearoa was consecrated in 1928. A measure of autonomy as "te Pihopatanga o 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), 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 racial grounds, for the Maori and Pakeha hierarchies are parallel (that of Polynesia comprises various islands of the South Pacific, centred on Fiji). 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.

II The Institution and its Composition

The composition of General Synod is in conformity with the principle of lay participation in church government (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), 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 (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).Membership is held for a fixed period of two years ("At some time in the month of February in each alternate year, dating from the year of our Lord 1981, the Primate/te Pïhopa Mätämua 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), and the assembly meets at least every two years. Each diocese, whether Maori, Pakeha or Polynesian, is entitled to be represented by three clergy and four laity, as well as one or more bishops (Canon B.I.2.1). This means that the numerically much more numerous Tikanga Pakeha potentially has the same number of representatives as the comparatively small Polynesian Church.

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 (the ecclesiastical legislation of General Synod in England is also, of course, made from theological as well as practical motives; JDC Harte, 'Doctrine, conservation and aesthetic judgments in the Court of Ecclesiastical Causes Reserved' (1987) 1(2) *Ecclesiastical Law Journal* 22, 25),both secular and religious – namely in the Constitution (which itself is alterable by General Synod, subject to certain limitations; Church of England Empowering Act 1928), 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 social and 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 (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)).

III Legislative Power: Synodical Acts

The Constitution and canons of the Church base relationships within the Church on a principle of partnership and co-operation (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) – not only of races 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 "order, good government and efficiency" qualification resembles a similar provision in the New Zealand Constitution Act 1852 (15 & 16 Vict c 72 (UK)), which conferred upon the General Assembly of New Zealand (the Governor, the Legislative Council and the House of Representatives, now the Parliament of New Zealand (The Queen and the House of Representatives); Constitution Act 1986) the authority to make laws for the "peace order and good government" of the country. This provision survived until 1973, and has now been replaced by "full power" (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 (repealed), s 2, which substituted a new s 53(1) into the New Zealand Constitution Act 1852 (15 & 16 Vict c 72) (UK); Constitution Act 1986 s 15).

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 competence (see, in particular, RO McGechan, 'Status and Legislative Inability' in JC Beaglehole (ed), *New Zealand and the Statute of Westminster* (1944) 65, 100-102). 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 (Church of England Empowering Act 1928).

In respect of those laws which the Church may undoubtedly change, the right to propose legislation is confined to the legislature (Const. G.4). The process begins with the proposition of new regulations. The second part of the legislative process (after proposition) is ratification or adoption by the assembly (Title C canon I.1; Title C canon I.2.1). The third stage is referral to the diocese. The next stage is confirmation on notice. The last stage is promulgation. A simple majority is required from the dioceses (Const. G.4), from all three orders, and the three races or cultural traditions.

The legislative process is a copy, deliberate or subconscious, of the secular parliamentary process, except that 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 the Maori dioceses; for details of the secular legislative process see, David McGee, *Parliamentary Practice in New Zealand* (2nd ed, 1994)). Specific provisions are made for altering the Church's Constitution, including formularies (Const. B.6).

The Constitution adds the requirement for a General Election of General Synod after the majority of (Pakeha) dioceses, and Te Runanga O Te 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" (see the debate over the ordination of women, which led to just such an action; CW Haskell, *Scripture and the ordination of women* (1979)) which had been initiated within the year.

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. It is possible to make significant changes to the secular constitution without special procedures, and to do so quickly.

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 (Const. D.4, 5). Any decision of the Governing Body must be assented to by a majority in each Order including Te Pihopa (Const. D.4, 5). Similar provisions exist for Polynesia (Const. F.6), and for the dioceses of New Zealand (Const. E.5). The legislative competence of the diocesan synods is strictly limited, as the Constitution makes clear (Const. D.6). Similar provisions are made for Pakeha dioceses, and Polynesia (Const. E.6, F.6). However, there is also a limited general jurisdiction (Const. F.7. Similar provisions are also given for Maori and Polynesian dioceses).

Whether "order and good government" is meant to be more limited than "order, good government and efficiency" is unclear. But the inherent 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 (Const. D.8).

The legislative process at both general synod and diocesan synod level is consistent with the objects of the constitution, both with respect to the involvement of laity, clergy, and bishops, and in the inclusion of the three cultural traditions or Tikanga (Const. A.5, B.6. See Cathie Bell, 'Anglicans to split into three racial groups', *Dominion* (Wellington), 19 November 1990, p 1). 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 (through representation, deliberation, and a considerable measure of legal formalism).

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.

IV Executive authority

As an apostolic church, the Anglican Church in New Zealand recognises the primary leadership role of the bishops (Title C canon I.1; *A New Zealand Prayer Book* (Wellington 1989), p. 913: "Bishops are to exercise godly leadership in that part of the Church committed to their care"). They are also entrusted with a teaching role (*A New*

Zealand Prayer Book (Wellington 1989), p. 913: "Bishops are sent to lead by their example in the total ministry and mission of the Church"). It is the function of a diocesan bishop to teach, sanctify, and govern his diocese (Title D canons I.A, II). A bishop must be at least 30 years of age (Form and Manner of Making, Ordaining, and Consecrating of Bishops, Priests, and Deacons; cf. Act of Uniformity 1662 (14 Chas II c 4) (Eng)), and is generally much older upon appointment (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 11 November 2007). As elsewhere in the wider Anglican Communion, attempts are made to preserve the apostolic succession (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 other Provinces of the Anglican Communion and who are exercising episcopal ministry within this Church"), but the understanding of the nature of the office is not necessarily the same as in the Roman Catholic Church (R.W. Franklin (ed.), *Anglican Orders* (London 1996)) – nor, indeed, that of the Tractarians (Christopher Hill, "Bishops: Anglican and Catholic" in Norman Doe, Mark Hill and Robert Ombres (eds.), *English Canon Law* (Cardiff 1998), pp. 60-70).

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 (see, for example, Const. A.5). Secular legislation and judgments are even less illuminating (there have been few reported cases in secular courts in New Zealand which have dealt with ecclesiastical laws, however broadly defined). The High Court case of *Gregory* v. *Bishop of Waiapu* [1975] 1 N.Z.L.R. 705 offered an insight into the attitude of the secular courts to episcopal authority 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 role and responsibilities (whether this is reasonable is perhaps doubtful – but it would appear to be pragmatic).

V Spending decisions

There are a number of consequences of the close relationship between Church and State. Places used for public worship, together with church halls and other buildings ancillary to public worship, were traditionally exempt from rates (for an extension of this principle, see *Glasgow City Corporation v Johnstone* (1965) 1 All ER 730). Equally importantly, much Church machinery is based on Acts of Parliament. These however reflect certain key principles.

Successive Lambeth Conferences have recommended the adoption throughout the Anglican Communion of three basic principles: the "principle of financial independence" stresses the need for individual churches to be self-supporting ("the management and financial support of the Church should be theirs from the first";

Lambeth Conference [hereafter "LC"] 1897, Res. 56. "The Conference urges that the Church in every field be encouraged to become self-supporting"; LC 1958, Res. 64).

The property of the Church, like all other property, is either real or personal. As such it is essentially governed by the same rules as other property. Broadly speaking, real property is land and personal property is any other sort of property. But superimposed on the basic general law are many special incidents peculiar to ecclesiastical property. The most fundamental of these special incidents is the distinction between consecrated land and unconsecrated land.

The doctrine of stewardship is the basis for church financial management. Any trustees holding land or personalty for the General Synod, for general church purposes, or for a diocese or parish, must report annually to the Diocesan Synod showing investment, assets and liabilities as the Diocesan Synod directs, and yearly accounts must be audited (Can. F.III.4).

Generally, all property is entrusted to ecclesiastical bodies for the benefit of the church. Property is held at diocesan level, with trustees acting under the direct control of the Diocesan Synod (a requirement of the Charitable Trusts Act 1957 is that freehold and leasehold property acquired by or on behalf of any religious denomination should be vested in trustees). The Diocesan Trusts Board, appointed by the Diocesan Synod, is empowered to appoint trustees to administer the property of the diocese. All property held for the use of the diocese must be transferred to the Diocesan Trusts Board and "the specific application [of land] shall be determined by the Diocesan Synod, subject to the control of the General Synod". The diocesan trustees must "carry out the objects of each Trust in such manner ... as the Diocesan Synod shall ... direct" (Cans. F.I.1, F.III, F.VIII.1; see also the Anglican Church Trusts Act 1981).

It is a general principle that day-to-day control of the church building is vested in the local parish council. Parishioners have the right to appeal to the bishop in cases of dispute (Can. B.V.5.3.1). But the minister has a right of access (Can. B.V.5.3.1).

It is a general rule that episcopal consent must be obtained for any alteration, addition, or removal. The direct consent of the bishop is required. An episcopal faculty system is employed in New Zealand (Cans. F.III.15-17). For the erection or addition to church buildings the consent of the bishop is required (Can. F.III.13). Major capital expenditure decisions are thus entrusted to diocesan level bodies, while the day-to-day control is entrusted to the individual parish. All maintain democratic decision-making processes in accordance with the principles of stewardship.

The incumbent (the minister in charge of a parish) is entitled to a residence (Can. F.III.19). No additions may be made without episcopal consent (Can. F.III.19). As in England, the incumbent's rights over the residence are strictly limited.

Each diocese must contribute a quota to the provincial church (Can. B.I.4). Similarly, the parishes must support the diocese. The quota must be set by formal procedures (Can. B.I.4). The Distribution Advisory Committee advises the standing committee on allocations with "regard to the principles of partnership and the covenant relationship" expressed in the Constitution "and the need for fair and equitable sharing and allocation of financial resources in this Church" (Can. B.I.4).

The Church Pension Board has powers of investment (Can. B.XIV.4). Investment by trustees must accord with the terms of the Anglican Church Trusts Act 1981 (Can. F.III.11).

The Anglican Church Trusts Act 1981 was originally enacted as the Church of England Trusts Act 1913. Statutory trusts had originally been instituted in New Zealand in 1858 (Bishop of New Zealand Trusts Act 1858, Bishop of New Zealand Trusts Act 1868), empowering the Bishop of New Zealand to convey certain hereditaments (which had been granted, conveyed, or assured to him and his successors, Bishops of New Zealand, in trust for certain religious, educational, charitable, and other purposes) to such trustee or trustees as the General Synod should appoint, subject to the trusts upon which the same hereditaments were held by the Bishop. By the constitution and canons of the Church of the Province of New Zealand, no sale or exchange of any land held on behalf of the General Synod might be made without the authority of the General Synod. There were, however, doubts regarding the authority of General Synod to direct the trustees. To remove such doubts a new Act was passed in 1913. Specifically, the 1913 Act empowered diocesan boards of trustees to sell, exchange, mortgage, and lease land. At parochial level also trustees must adhere to the terms of any trusts, and with the general law.

There is a general duty to insure against listed risks (Can. F.III.14).

Perhaps unsurprisingly, the major capital work in the Church is the construction of new church buildings, and the upkeep of existing buildings. Although all property held for the use of the diocese is held by the Diocesan Trusts Board, "the specific application [of land] shall be determined by the Diocesan Synod, subject to the control of the General Synod". Individual parishes are responsible for the upkeep of their property, which is thus funded both locally and through Diocesan Trust Board grants. Control of expenditure is this divided between parish – where it is assigned to parochial councils. The bulk of the membership of the parish council is elected lay representatives, the core qualification being that they are adult communicant members of the Church. The Bishop, and through her or her also the diocesan synod, retain oversight of capital work, in conjunction with the diocesan trusts board.

VI 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 law as much as divine law. It also owes much to the settlement of the Church of England, in its legislative basis. The executive and judicial bodies of the Church are also subject to laws of both Church and State.