

## **The Legal Position of the Anglican Church in New Zealand and Australia – quasi-establishment and the consensual compact**

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### **Abstract**

The legal position of the Anglican Church in Australia and New Zealand followed parallel but distinct routes, from the foundation of the church in the countries in the eighteenth and nineteenth centuries. In Australia it began as an established church – essentially through the military chaplaincies of the early colonial government. In New Zealand it commenced through the unregulated (by Government) missionary activities of the Church of England. By the twentieth century the church in Australia was dis-established, but the situation remained more complex than this in both countries. In New Zealand the reliance of the Church upon secular legal systems and processes meant that its legal status was more akin to the quasi-established than non-established, even though the basis of the church’s own rules was the voluntary consensual compact of its members.

### **Introduction**

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

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

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

The Australian Church enjoyed a similar but distinct development.

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

The respective role of church and State in modern society is markedly different to what has often been the historic role. Today, rulers (at least in liberal democracies) protect individual freedom of choice. The ruler is not the arbiter and defender of his or her people’s particular faith,<sup>7</sup> though he or she may be a defender of faith in the abstract.<sup>8</sup> Secular State laws usually assert ecclesiastical autonomy, and generally are based on the premise of the freedom and equality of religions.<sup>9</sup> This leaves the relationship between church and State at times difficult.

Churches, in their relationship with the State, may be classified as established, quasi-established,<sup>10</sup> dis-established, or non-established. All but the first are normally based on the principle of consensual compact, in which it is the voluntary membership of the church which alone imposes binding or mandatory obligations upon members.<sup>11</sup> The Church in New Zealand may be broadly regarded as non-established, yet for several reasons this fails to fully explain the true nature of the Church in that country. In part this is because the State may be still characterised – or at least was until comparatively recently – as *de facto* Christian,<sup>12</sup> in the sense that it is a “Christian Society under the aspect of legislation, public administration, legal tradition and form”.<sup>13</sup> It is, to quote from a writer on the somewhat dissimilar American situation, “a nation whose predominant institutions, including government, reflect Christian pre-suppositions and Christian morality”.<sup>14</sup> This has led to a continuing legal relationship between Church and State, as had the very forms through which the Church regulates its own affairs (such as trusts). The question of whether any State can be described as Christian – whether or not the Church is officially established – is a more difficult question, and one for which the answer depends very much upon the precise meaning of the terms used.

In this article we will examine the sources of secular authority in the Church, in particular secular legislation. We will also examine the establishment of the church in New Zealand and Australia in the nineteenth century (establishment here being used in the popular rather than technical sense), and some aspects of the nature of its relationship with the State.

### **III Dis-established and Non-Established Churches and the Doctrine of Consensual Compact**

The Church of England remains formally established by law in England.<sup>15</sup> Some of the other Churches of the British Isles,<sup>16</sup> and those of the West Indies,<sup>17</sup> and India,<sup>18</sup> have been dis-established.<sup>19</sup> In some cases this was because of changing political circumstances, in others for more overtly religious reasons. Since the Church was never formally established in New Zealand – though it played an influential part in the nineteenth century settlement of this country from the British Isles,<sup>20</sup> and there were early suggestions that it should be established,<sup>21</sup> this category need not detain us longer.

Most Churches within the Anglican Communion (and indeed beyond it) are non-established, in that they are not formally recognised or supported by the State, do not enjoy a privileged position with respect to other churches, and were never in that position, *vis-à-vis* other bodies. The Churches are, within the Commonwealth, broadly based upon the

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principles which eventually governed the status of the dissenters in England.<sup>22</sup> Thus, in the absence of formal regulation by the State, or the recognition by the State of church laws and institutions, the non-established Anglicans, like the non-conformists in earlier centuries in England, were governed on the basis of consensual compacts – or associations of co-religionists.<sup>23</sup>

This principle of consensual compact was stated in the mid-nineteenth century by Lord Romilly, M.R., in *Lord Bishop of Natal v Gladstone*, as to be as follows:

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

This constitutional principle implies that the members of the Church within such a State would be bound by the applicable ecclesiastical laws of the Church, irrespective of whether or not they had consciously assented to them. Moreover these laws were those of the “Church of England”, and this left unanswered the broader question of whether the local branch of the Church was empowered to enact any changes to the “doctrine, rites and ordinances” of the Church of England. Subject to these questions, however, the government of the Church was based upon implied assent, not the law of the land, per se; this also left answered the precise relationship between the secular and sacred laws.

It might be argued that “implied agreement”, or consensual compact, is not markedly dissimilar to establishment, in that individual members of the Church of England in England are bound by the laws of the Church – insofar as they are bound – only because they have assented to them by adhering to the Church. Non-members are not so bound. It is perhaps more useful to concentrate upon the other aspect of the distinction; a non-member of the Church of England is not bound by the laws of the Church in New Zealand or in England, but only in the latter country are the “doctrine, rites and ordinances” of the Church of England enforceable as a matter of secular as well as sacred law. However even here the jurisdiction of sacred and secular laws are distinct, and generally do not overlap.

The sacred and the secular are distinct, as was reflected in the separation of the ecclesiastical and temporal personnel of the courts as early as the first decades after the Norman Conquest. The degree to which the secular law recognises ecclesiastical actions did vary, however, and (at least until the early years of the twenty-first century) the archbishops and some diocesan bishops in England remained members of the House of Lords, and until 2001 clergy of the Church of England could not be elected to membership of the House of Commons.

A more useful distinction is that, as a consequence of establishment in England, the canons and laws of the Church of England were not made exclusively by organs of the Church, but were subject to the overriding sovereignty of Parliament. In a non-established

regime, as in New Zealand, the Church might make whatever laws it wished – provided these did not conflict with general laws. The Parliament might enact such laws as it wished to apply to the Church – it undoubtedly has this power – but refrains from doing so. Only laws of general application apply to the Church, except where the Church itself sought the passage of laws. Whether this self-denying should be matched by a reciprocal abstention of the Church from matters within secular jurisdiction is yet undecided.

There were three implications of the consensual nature of the non-established Church. Firstly, the secular courts would not intervene in any internal dispute unless a justiciable right was involved,<sup>25</sup> that is, a matter which is properly capable of being decided by a court.<sup>26</sup> Secondly, a trust for a religious body was enforceable as any charitable trust,<sup>27</sup> and not as a special category of trust. Thirdly, members of such a Church were bound by contract to one another,<sup>28</sup> though the concept of contract is difficult to reconcile with the nature of a church. In such a situation internal rules have, under secular law, the status of terms of a contract, enforceable as a matter of private law.<sup>29</sup> These churches are not subject to statutory regulation, as such.<sup>30</sup> But as argued above it is perhaps unhelpful to exaggerate the distinction between established and non-established (or dis-established), in relation to the day-to-day life of the Church.

The doctrine of consensual compact was refined in *Forbes v Eden*,<sup>31</sup> though in that case Lord Colonsay applied a narrower definition, and Lord Cranworth a wider definition, to the doctrine. The emphasis is upon justiciability, though it might be noted that the subsequent development of the law of judicial review has opened further the scope for secular courts to intervene in ecclesiastical disputes. In some circumstances the courts will only intervene where a strict property issue is involved, and where a wider civil right is involved. To these principles a fourth was added. This was that if a Church was at one time established, and its affairs regulated by law, its members and the trustees of its property would be deemed to have agreed to use the applicable legal rules among themselves when the Church was dis-established or carried into a new country.<sup>32</sup>

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

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

However, the relationship between church and State has been two-way, with the church influencing secular law, and the secular law influencing, in some degree, the law of the church.<sup>39</sup> Churches have in turn influenced the form of secular laws, especially (though not exclusively) where the Church has been established. This is despite the fact that secular laws are created for the temporal welfare of society, rather than for supernatural ends.<sup>40</sup> For these reasons the churches are not simply in the same position as voluntary associations, such as unincorporated clubs, or incorporated societies.<sup>41</sup> Yet not all churches are the same. Those which retain in large measure the historic canon law, and forms of governance, preserve also

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some of the historic nexus with the secular State – or at least some of the consequences of that nexus (such as reliance upon secular legal forms). This is ironic given that the canon law was the product of a clear assertion of church independence of the State. The nexus is also more noticeable in some legal systems than in others.<sup>42</sup>

We shall now look at the circumstances in which the ecclesiastical law became a concern of the secular authorities in New Zealand – the arrival of the Church in New Zealand. The legal basis of the country is typical of nineteenth century British imperial settlement. The laws of New Zealand are based upon the reception of English laws in the middle of the nineteenth century, when New Zealand was first settled as a colony.<sup>43</sup> It had been early established as a principle of imperial constitutional law that settled colonies took English law.<sup>44</sup> The English Laws Act 1858 (N.Z.)<sup>45</sup> specifically provided that the laws of England, as existing on 14<sup>th</sup> January 1840, were deemed to be in force in New Zealand,<sup>46</sup> so far as they were applicable to the circumstances of the colony.<sup>47</sup> This Act was passed, in the words of the long title of the Act, “to declare the Laws of England, so far as applicable to the circumstances of the Colony, to have been in force on and after the Fourteenth day of January, one thousand eight hundred and forty”. The purpose of the statute was really to clarify some previous uncertainty as to whether or not all Imperial Acts passed prior to 1840 were in force in New Zealand (provided they were otherwise applicable).<sup>48</sup> Although the uncertainty had been with respect to parliamentary statutes alone, the 1858 Act went further and in s. 1 expressly stated that:

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

“The laws”, not simply the statute law, were deemed to be in force. The principle of this Act has been followed in all relevant legislation passed by the New Zealand Parliament, and by courts when considering the common law, since then. However, it is not always easy to decide what law is applicable.<sup>50</sup> Indeed, Blackstone’s statement that “colonists carry with them only so much of the English Law as is applicable to their own situation and the condition of the infant colony” (that is, a settled colony) is, like so many generalisations, somewhat misleading. It would perhaps have been more accurate if he had written that “colonists carry with them the mass of English law, both common law and statute, except those parts which are inapplicable to their own situation and the conditions of the infant colony”. The test requires an evaluation of the applicability of laws at the time the colony was settled, and not at the time the court considers the question.<sup>51</sup> What became applicable was far greater in content and importance than that which had to be rejected as inapplicable.<sup>52</sup> As a general rule, English laws which were to be explained merely by English social or political conditions had no application in a colony.<sup>53</sup>

In practice, few areas of the laws of England have been found to be inapplicable.<sup>54</sup> These were principally those with only local effect,<sup>55</sup> or which governed aspects of life which had no equivalent in a new country.<sup>56</sup> However, the courts have generally applied the land law,

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though this had a feudal and territorial origin.<sup>57</sup> The ecclesiastical law has generally been regarded as one which was deemed to be inapplicable, largely because:

[i]t 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.<sup>58</sup>

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

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

The ecclesiastical law is a part of the laws of England, but not part of the common law.<sup>60</sup> The common law courts might therefore be able to recognise the existence of a rule of ecclesiastical law, but not determine whether it had been correctly applied.<sup>61</sup> The ecclesiastical law of England consists of the general principles of the *ius commune ecclesiasticum*;<sup>62</sup> foreign particular constitutions received by English councils or so recognised by English courts (secular or spiritual) as to become part of the ecclesiastical custom of the realm; and the constitutions and canons of English synods. The Submission of the Clergy Act 1533 (Eng.)<sup>63</sup> provided that only the canon law as it then stood was to bind the clergy and laity, and this only so far as it was not contrary to common and statute law. This was excepting only the papal authority to alter the canon law, a power which ended later in 1533, when it was enacted by Parliament that England was “an Empire governed by one supreme head and king”.<sup>64</sup> But this did not necessarily mean that the Church in New Zealand was in the same position. The courts have held (perhaps not entirely convincingly),<sup>65</sup> that an established Church is, by its very essence, of a territorial nature, and requires to be expressly transplanted from its native soil.<sup>66</sup>

It is perhaps overly simplistic to categorise the church in the antipodes<sup>67</sup> as necessarily non-established, despite the general acceptance of the doctrine of consensus. Indeed, it was once assumed that the church was established in the colonies.<sup>68</sup> King Charles I, by Order-in-Council in 1634, placed all British subjects overseas under the ecclesiastical jurisdiction of the Bishop of London. The bishop was to retain this exclusive jurisdiction for 160 years.<sup>69</sup> Indeed, the first overseas diocese or bishopric only dated from 1787.<sup>70</sup> The East India Company was responsible for the payment of salaries to a bishop and any archdeacons, if the

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Government appointed any,<sup>71</sup> under the Bishop of London. By letters patent of 2<sup>nd</sup> May 1814 the Bishop of Calcutta was appointed, and granted full power and authority to exercise a bishop’s spiritual and ecclesiastical functions as prescribed by ecclesiastical laws in England.<sup>72</sup> On 27<sup>th</sup> May 1824 this jurisdiction was extended to those lands under the Charter (rather than the Government) of the Company – then including Australia and Van Diemen’s Land.<sup>73</sup> In 1835 these lands were no longer mentioned in the letters patent of the bishop, and so presumably passed back to the inherent jurisdiction of the Bishop of London.<sup>74</sup>

## **Australia**

In the early years of the Australian colonies the Church of England was locally constituted as a military chaplaincy, subject to the direction of the governors.<sup>75</sup> At this time it was believed that troops impliedly carried ecclesiastical law with them, which thereby became part of the law of the land.<sup>76</sup> This could arguably apply to New South Wales, the earliest colony in Australia.<sup>77</sup> By letters patent of 13<sup>th</sup> October 1823, passed under the authority of the New South Wales Act 1823 (U.K.),<sup>78</sup> the Supreme Court of New South Wales exercised an ecclesiastical jurisdiction.<sup>79</sup> The Church was widely regarded there as established by 1826,<sup>80</sup> though this establishment was to be rapidly dismantled after 1829, especially under Lieutenant-General Sir Richard Bourke, Governor 1831-1837.<sup>81</sup>

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

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

The new bishop was to be subject to the authority of the Archbishop of Canterbury, in the same manner as any bishop within the province of Canterbury, and the Crown retained the power of revoking the letters patent. The letters patent assumed, and stated, that the Church concerned was the Church of England, and that the laws of that Church applied in the colony – though it was accepted that only part of the law could be applied.<sup>84</sup> The letters patent purported to give the bishop the same jurisdiction as an English bishop, though in practice he could not exercise this full jurisdiction.<sup>85</sup> It was partly this practical difficulty – relating particularly to discipline – that led the local legislature to enact the Church Act 1837 (N.S.W.),<sup>86</sup> which regulated the relationship between the bishop and his clergy. But this was still regulation of Church government by Parliament, and not Church self-government.

From 1836, at least until 1850, the question of the nature and extent of the authority and jurisdiction of the bishop was widely discussed.<sup>87</sup> But the Australian Church never, during this period, clearly defined where authority in the Church lay.<sup>88</sup> Similar doubts were present in New Zealand, but these did not have the same practical affect. Bishop Selwyn had summoned synods in his diocese of New Zealand in 1844 and 1847.<sup>89</sup> However, doubts were expressed by the metropolitan and bishops at an 1850 conference in Australia, as to “how far we are inhibited by the Queen’s supremacy from exercising the powers of an ecclesiastical synod”.<sup>90</sup> It was felt at this time by many in Australia that authority lay not in the royal supremacy, bishops or clergy, or laity, but in the Church as a whole.<sup>91</sup> The problem became a

practical one with respect to patronage, as the local State officers claimed patronage for the Crown. But the Secretary of State for the Colonies declined that claim, and left patronage entirely to the bishop, on the grounds (arguably incorrect in respect of certain colonies<sup>92</sup>) that the Church of England was not established outside England and Wales.<sup>93</sup>

In the case of *Long v Lord Bishop of Cape Town*,<sup>94</sup> the Judicial Committee of the Privy Council confirmed that the Crown had power to appoint bishops in colonies, but that it had no power to introduce any portion of the ecclesiastical law of England that the common law did not already acknowledge.<sup>95</sup> This could be seen as leaving episcopal authority with a statutory basis – or consensual – since the Crown acting alone could not invest bishops with coercive powers of discipline.<sup>96</sup> Whether the episcopacy ever relied upon coercive powers was another question, since the conditions of the new colony rendered the maintenance of discipline difficult.

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

Bishop Tyrrell of New South Wales was led by the judgment of the Judicial Committee of the Privy Council, in the case of *Lord Bishop of Natal v Gladstone*,<sup>101</sup> to believe that an enabling Act was unnecessary to give the Church sufficient powers of governance.<sup>102</sup> But that case showed the practical difficulties inherent in relying on a consensual compact, where the churches were partially established.<sup>103</sup> Afterwards the Crown gradually ceased to issue letters patent for the appointment of colonial bishops, and in 1873 the remaining letters patent were officially suspended.<sup>104</sup> More importantly, the position of the Church in New Zealand had already been settled by this time, through the declaration of a consensual compact and the establishment of synodical government.<sup>105</sup>

## **New Zealand**

New Zealand was not expressly included in Broughton’s letters patent as Bishop of Australia, but Samuel Marsden (of Australia) had been active there.<sup>106</sup> George Augustus Selwyn was appointed the first Bishop in New Zealand in 1841.<sup>107</sup> After the establishment of a colonial government in New Zealand in 1840,<sup>108</sup> letters patent, modelled upon those of the Bishop of Australia, of which New Zealand had been a suffragan,<sup>109</sup> erected the latter country into a see on 14<sup>th</sup> October 1842.<sup>110</sup>

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

Although we are bound together by a common faith, and have common duties to perform, we are united by but a few of the usual ties of long and familiar acquaintance, whilst there is no system of local organisation which might tend to draw us together as members of the same Church ... it is our earnest conviction that a peculiar necessity exists for the speedy establishment of some system of Church Government amongst us,



which, by assigning to each order in the Church its appropriate duties, might call forth the energies of all, and thus enable the whole body of the Church most efficiently to perform its functions ... Actuated by these views and wishes, we beg to submit for your Lordship’s consideration, and we trust, for your approval, the outline of a plan of Church Government, resembling in many points that which we are informed has proved so beneficial to our brethren in America.<sup>111</sup>

Grey proposed a General Convention of bishops, in an Upper House, and elected deputies of clergy and laity in a Lower House. Neither house would be empowered to alter the doctrines or ritual of the Church of England, or the Authorised Version of the *Bible*.<sup>112</sup> It was important to note that this petition was to the bishop, rather than to the governor, perhaps showing that a broader view of church authority may have existed in New Zealand than in Australia at that time.<sup>113</sup> Because of the continuing, though diminished, partial establishment of the Church in Australia, dating from the days of the military chaplaincy, it was perhaps inevitable that the Church in Australia would continue to be influenced by a need to show secular legal authority for its actions. But in New Zealand the Church had arrived independently of the secular authorities, and time and circumstance had not encouraged the development of the closer inter-dependence which existed across the Tasman Sea.

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

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

The reservation in favour of the royal supremacy was significant, in view of the concept of consensual compact vis-à-vis establishment. In order to maintain the Queen’s supremacy, and the unity of the Church, Selwyn foresaw a constitution which would be submitted to the Secretary of State for the Colonies, and to the Archbishop of Canterbury, with a petition to Her Majesty either by Act of Parliament or by Royal Charter, to permit the Church to have self-government in New Zealand.<sup>116</sup> The instrument by which the broad aim was to be achieved was the 1857 Constitution, which was not however enacted by Parliament or expressly consented to by the Crown.<sup>117</sup>

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

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

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

Finally, by 1960 all Australian dioceses had obtained enabling legislation for new constitutions, and from 1<sup>st</sup> January 1962, the “Church of England in the Dioceses of Australia and Tasmania”, became the “Church of England in Australia”.<sup>128</sup> Constitutional focus is upon the Fundamental Declaration:

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

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

Meanwhile, on 13<sup>th</sup> June 1857, at a General Conference held at Auckland, the bishops,<sup>133</sup> and many of the clergy and laity of the Church in New Zealand, including missionary clergy, agreed to a Constitution for the purpose of associating together by voluntary compact as a branch of the “United Church of England and Ireland”.<sup>134</sup> The Constitution declared the Doctrine and Sacraments, which the Church held and maintained,<sup>135</sup> and provided for a General Synod.<sup>136</sup>

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

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

## Conclusion

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

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

A consequence of this was that the Church in Australia was bound by the constitutional rules of the Church of England, though the 1603 canons do not now apply in the Australian Church, unless the dioceses adopt them.<sup>142</sup> The potential danger of this arrangement was shown in South Africa. In 1870 the synod of the Province of South Africa had declared, in its constitution, that the decisions of English ecclesiastical courts were no longer binding, and that in the future its formularies would be interpreted by its own courts.<sup>143</sup> This was challenged in 1882 in the Privy Council, and the Church was declared to have forfeited its rights to the property of the “Church of England”.<sup>144</sup> Thereafter the Church was divided between the Church of England in South Africa, and the Church of the Province of South Africa.<sup>145</sup>

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

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

<sup>2</sup> “[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.

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

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

<sup>5</sup> Const. Preamble.

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

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

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

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

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

<sup>11</sup> Though *Scandrett v. Dowling* [1992] 27 N.S.W.L.R. 483 (N.S.W.) would appear to support the proposition that church members are associated only on the basis of a shared faith without legal sanction for its enforcement; Bruce McPherson, “The Church as consensual compact, trust and corporation” (2000) 74 *Australian L.J.* 159, 171.

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

<sup>13</sup> Thomas S. Eliot, *The Idea of a Christian Society* (1939), 26.

<sup>14</sup> David Smolin, “Regulating Religious and Cultural Conflict in Postmodern America: A Reply to Professor Perry” (1991) 76 *Iowa L.R.* 1067-104, 1097. See also Ivanica Vodanovitch, “Religion and legitimation in New Zealand: redefining the relationship between church and state” (1990) 3 *British Review of New Zealand Studies* 52-62, 52 [“non-specific and non-sectarian Christianity”]. However, Stout C.J., a freethinker, characterised New Zealand as a secular state; *Doyle v. Whitehead* [1917] N.Z.L.R. 308, 314; Peter Lineham, “Freethinkers in Nineteenth-Century New Zealand” (1985) 19 *New Zealand Journal of History* 61-81, 71.

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

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

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England, being more a national church than a legally established one; Gordon Donaldson, *The Scottish Reformation* (1960).

<sup>17</sup> Barbados – Anglican Church Act 1969 (Barbados) [see *Blades v. Jaggars* [1961] 4 W.I.R. 207, 210]; Bermuda – Church of England in Bermuda Act 1975 (Bermuda); Dominica – Laws of Dominica 1961, Ordinance 1878 (Dominica); Grenada – Church of England Dis-establishment Act 1959 (Grenada); Jamaica – Church of England Dis-establishment Law 1938 (Jamaica).

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

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

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

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

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

<sup>23</sup> The dissenters were, however, long subject to persecution on account of their non-conformity; Sir William Blackstone, *Commentaries on the Laws of England* ed. Richard Burn (first published 1765, 9<sup>th</sup> ed., reprint 1978), Book IV, p. 53.

<sup>24</sup> *Lord Bishop of Natal v. Gladstone* (1866) L.R. 3 Eq. 1, 35-6 per Lord Romilly, M.R. The Privy Council adjudged Bishop Gray’s letters patent, as metropolitan of Cape Town, to be powerless to enable him “to exercise any coercive jurisdiction, or hold any court or tribunal for that purpose,” since the Cape colony already possessed legislative institutions when they were issued; and his deposition of Bishop Colenso was declared to be “null and void in law”. With the exception of Colenso the South African bishops forthwith surrendered their patents, and formally accepted Bishop Gray as their metropolitan. Generally, see Hermitage Day, *Robert Gray, First Bishop of Cape Town* (1930).

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

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

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

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

<sup>29</sup> *Long v. Lord Bishop of Cape Town* (1863) 1 Moo. N.S. 411, 461-2 (Lord Kingdown) (P.C.); *In re Lord Bishop of Natal* (1864) 3 Moo. P.C.C. N.S. 115 (P.C.); *Lord Bishop of Natal v. Gladstone* (1866) L.R. 3 Eq. 1. See also Anthony Ive, *The Church of England in South Africa: A Study of Its History, Principles and Status* (1966).

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

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

<sup>32</sup> *Halsbury's Laws of England* (4<sup>th</sup> ed., 1975), vol. 14, “Ecclesiastical Law” 157-63; Robert Rodes, *Law and Modernisation in the Church of England* (1991), 321-2.

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

<sup>34</sup> The author is indebted to Professor Norman Doe for this suggestion.

<sup>35</sup> See, for example, Thomas Glyn Watkin, “Vestiges of Establishment: The Ecclesiastical and Canon Law of the Church in Wales” (1990) 2 *Ecclesiastical L.J.* 110.

<sup>36</sup> *Baldwin v. Pascoe* (1889) 7 N.Z.L.R. 759; applied in *Gregory v. Bishop of Waiapu* [1975] 1 N.Z.L.R. 705, 708 [though this was based, in argument in the latter case, solely upon the wording of the Constitution]; *Carrigan v. Redwood* (1910) 30 N.Z.L.R. 244, 252. Generally see Sir James Hight and Harry Bamford, *Constitutional History of New Zealand* (1914) 76-7, 130-1, 162-3, 378-80. It has also been applied in Australia: *Gent v. Robin* (1958) S.A.S.R. 328 (S.C.) [English ecclesiastical law preserved established customs through a consensual compact].

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

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

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

<sup>40</sup> Ladislav Örsy, *Theology and Canon Law* (1992), 133.

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

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

<sup>43</sup> *R. v. Symonds* (1847) N.Z. P.C.C. 387 (P.C.); *Veale v. Brown* (1868) 1 N.Z.C.A.152, 157; *Wi Parata v. Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S.) S.C. 72; *R. v. Joyce* (1906) 25 N.Z.L.R. 78, 89, 112; *Re the Ninety Mile Beach* [1963] N.Z.L.R. 461, 475-6. It is a general rule that common law applies to a colony unless it is shown to be inapplicable, but English statutes do not apply unless shown to be applicable – *Uniacke v. Dickinson* (1848) 2 N.S.R. 287 (Nova Scotia); *Wallace v. R* (1887) 20 N.S.R. 283 (Nova Scotia); *R. v. Crown Zellerbach Canada Ltd* (1954) 14 W.W.R. 433 (British Columbia).

<sup>44</sup> Sir William Blackstone, *Commentaries on the Laws of England* ed. Richard Burn (first published 1765, 9<sup>th</sup> ed., reprint 1978), Book I, p. 107. Scots lawyers do not necessarily agree

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however: Sir Thomas Smith, “Pretensions of English Law as ‘Imperial Law’”, in *The Laws of Scotland* (1987), vol. 5, paras. 711-719.

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

<sup>46</sup> David Williams, “The Foundation of Colonial Rule in New Zealand” (1988) 13(1) *New Zealand Universities L.R.* 54.

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

<sup>48</sup> David Williams, “The Foundation of Colonial Rule in New Zealand” (1988) 13(1) *New Zealand Universities L.R.* 54.

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

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

<sup>51</sup> David Williams, “The Foundation of Colonial Rule in New Zealand” (1988) 13(1) *New Zealand Universities L.R.* 54.

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

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

<sup>54</sup> See, for instance, Noel Cox, “The British Peerage: The Legal Standing of the Peerage and Baronetage in the Overseas Realms of the Crown with Particular Reference to New Zealand” (1997) 17(4) *New Zealand Universities L.R.* 379-401, and Noel Cox, “The Law of Arms in New Zealand” (1998) 18(2) *New Zealand Universities L.R.* 225-56.

<sup>55</sup> Such as enclosure Acts.

<sup>56</sup> The Wreak of the Sea Act 1324 (17 Edw. II st. 1 c. 11) (Eng.) (governing “royal fish”) was held to be not in force in New Zealand: *Baldick v. Jackson* (1911) 30 N.Z.L.R. 343 per Stout C.J. [it was held that a Magistrate had jurisdiction to hear and determine a claim for possession of a whale, which, although found three miles from the shore, had been brought to land].

<sup>57</sup> *Veale v. Brown* (1868) 1 N.Z.C.A.152.

<sup>58</sup> *In re Lord Bishop of Natal* (1864) 3 Moo. P.C.C. N.S. 115, 148, 152; approved in *Baldwin v. Pascoe* (1889) 7 N.Z.L.R. 759, 769-70.

<sup>59</sup> *Ibid.*

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

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

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

<sup>63</sup> 25 Hen. VIII c. 19 (Eng.).

<sup>64</sup> Appointment of Bishops Act 1533 (25 Hen. VIII c. 20) (Eng.).

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

<sup>66</sup> *In re Lord Bishop of Natal* (1864) 3 Moo. P.C.C. N.S. 115, 148, 152; approved in *Baldwin v. Pascoe* (1889) 7 N.Z.L.R. 759, 769-70.

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

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

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

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

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

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

<sup>73</sup> Robbie A. Giles, *Constitutional History of the Australian Church* (1928), Appendix C, p. 198. In the 1823 letters patent of Reginald Heber, second Bishop of Calcutta, the jurisdiction covered Australia, Van Diemen’s Land and the adjacent islands; Standing Committee of the General Synod of the Church of England in Australia, *The Anglican Church of Australia* (c.1981), 4.

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

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

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

<sup>77</sup> Standing Committee of the General Synod of the Church of England in Australia, *The Anglican Church of Australia* (c.1981), paras. 2113-7.

<sup>78</sup> 4 Geo. IV c. 96.

<sup>79</sup> Charter of Justice, passed under the authority of “An Act to provide until the first day of July One thousand eight hundred and twenty seven and until the end of the next session of Parliament for the better administration of justice in New South Wales and Van Diemen’s Land and for the more effective Government thereof and for other purposes relating thereto” (New South Wales Act 1823) (4 Geo. IV c. 96) (U.K.); Ross Border, *Church and State in Australia 1788-1872* (1962), 46.

<sup>80</sup> Ross Border, *Church and State in Australia 1788-1872* (1962), 50-57; *Wylde v. Attorney-General of New South Wales* (1949) 78 C.L.R. 224 (H.C.A.). Some elements of English



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

<sup>81</sup> Ross Border, *Church and State in Australia 1788-1872* (1962), 89.

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

<sup>83</sup> *Ibid.*

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

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

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

<sup>87</sup> Ross Border, *Church and State in Australia 1788-1872* (1962), 97-8. Cases such as that of Gregory Bateman epitomized these difficulties; Ross Border, *Church and State in Australia 1788-1872* (1962), 114-24.

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

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

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

<sup>91</sup> Ross Border, *Church and State in Australia 1788-1872* (1962), 180-1; For a discussion of Richard Hooker's views on this see the Stephen Platten, *Augustine's Legacy* (1997), 36-7. See also the letter from Sir George Grey, Governor of New Zealand, and many leading laymen, to Bishop Selwyn; (1852) V Colonial Church Chronicle 161.

<sup>92</sup> Such as *Barbados (Blades v. Jaggars* [1961] 4 W.I.R. 207), and possibly also New South Wales itself.

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

<sup>94</sup> (1863) 1 Moo. N.S. 411, 461-2 (Lord Kingdown) (P.C.).

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

<sup>96</sup> Generally, see Bruce McPherson, “The Church as consensual compact, trust and corporation” (2000) 74 *Australian L.J.* 159-74.

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

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

<sup>99</sup> Clergy Act 1826 (6 Geo. IV c. 17) (Jamaica); *Bowerbank v. Lord Bishop of Jamaica* (1839) 2 Moo. P.C. 449, 452-3 (P.C.).

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

<sup>101</sup> (1866) L.R. 3 Eq. 1, 35-6 per Lord Romilly, M.R.

<sup>102</sup> Ross Border, *Church and State in Australia 1788-1872* (1962) 248-9.

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<sup>103</sup> Bruce McPherson, “The Church as consensual compact, trust and corporation” (2000) 74 *Australian L.J.* 159, 165.

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

<sup>105</sup> See, for example, “Those parts of the Service for the Consecration of Bishops which relate to the King’s Mandate shall be omitted and discontinued” – Title G canon I.1.1. (1874).

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

<sup>107</sup> There was a call for a bishopric of New Zealand at the time of the formation of the Colonial Bishops Fund; William Sachs, *The Transformation of Anglicanism* (1993), 115-6.

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

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

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

<sup>111</sup> (1852) V Colonial Church Chronicle 161.

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

<sup>113</sup> Thus there was no expectation that it was for the colonial authorities to determine.

<sup>114</sup> (1852) V Colonial Church Chronicle 161.

<sup>115</sup> *Ibid*, 168f.

<sup>116</sup> *Ibid*.

<sup>117</sup> Though the role of the Crown was not altogether ignored; Const. A2, 3.

<sup>118</sup> Ross Border, *Church and State in Australia 1788-1872* (1962), 190-8.

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

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

<sup>121</sup> *Ibid*, 192-3.

<sup>122</sup> 18 Vict. No. 45 (Vict.).

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

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

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

<sup>126</sup> Ross Border, *Church and State in Australia 1788-1872* (1962), 209-10.

<sup>127</sup> *Ibid*, 209-210. See Nova Scotia [Mutiny Act 1758 (32 Geo. II c. 5) (G.B.)], New Brunswick [Trade with America Act 1786 (26 Geo. III c. 4) (G.B.)], and Prince Edward Island [Indemnity Act 1802 (43 Geo. III c. 6) (U.K.)].

<sup>128</sup> Church of England Constitution Act 1961 (Australia).

<sup>129</sup> *Ibid*.

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<sup>130</sup> With the 1857 constitution.

<sup>131</sup> Though not ousting the jurisdiction of the courts over property matters not involving the interpretation of the formularies.

<sup>132</sup> Those established by the Church of England Constitution Act 1961 (Australia).

<sup>133</sup> After the diocese of New Zealand (eventually to be renamed Auckland in 1868), dioceses were subsequently formed in Christchurch (1856), Waiapu, Wellington and Nelson (1858-59). Dunedin was added 1869 (formerly part of Christchurch), and Waikato (from the southern part of Auckland) in 1925.

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

<sup>135</sup> Const. A.1.

<sup>136</sup> Const. Preamble.

<sup>137</sup> See Jan Nunley, “Authority versus autonomy an old debate for Anglicans” Episcopal News Service 2001-47 (23<sup>rd</sup> February 2001) at <<http://www.episcopalchurch.org/ens/2001-47.html>> at 9<sup>th</sup> October 2002. See also Margaret Ogilvie, *Religious Institutions and the Law in Canada* (1996).

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

<sup>139</sup> William Sachs, *The Transformation of Anglicanism* (1993), 191; Henry W. Tucker, *Memoir of the Life and Episcopate of George Augustus Selwyn, D.D.* (1879), vol. I, p. 89f; G.A. Wood, “Church and State in New Zealand in the 1850s” (1975) 8(3) *Journal of Religious History* 255-70.

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

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

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

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

<sup>144</sup> *Merriman v. Williams* (1882) 7 App. Cas. 484 (P.C.).

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