



## Legal Aspects of Church-State Relations in New Zealand

Noel Cox<sup>1</sup>

noel.cox@aut.ac.nz

### ABSTRACT

Even though the church law of the Anglican Church in New Zealand is based upon the consensus of the members of the Church, the laws of the State also have an important part to play. In particular, not only is the Church, as a juridical body, subject to the law of the land, it has also relied upon the State for the enactment of certain laws. This has been necessitated by the evolution of the Church in New Zealand, and is also a legacy of the pre-colonial Church of England. This is also affected by the lack of an indigenous method or style of approach in the exposition of ecclesiastical law.

KEYWORDS: authority, canon law, Church-State relations, consensual compact, ecclesiastical law, establishment, New Zealand

### *Introduction*

The current law of the Church of the Province of Aotearoa, New Zealand and Polynesia defines the church's nature as a constituent member of the Anglican Communion.<sup>2</sup> At the same time, the Anglican Church's constitutional structure and laws, as well as its general laws, reflect its place in New Zealand's secular constitutional structure and history.

1. Professor of Law at the Auckland University of Technology.

2. Const. Preamble, 18: 'this Church is part of and belongs to the Anglican Communion'. 'Const.', as used hereafter, refers to the Constitution of the Anglican Church in New Zealand, as revised in 1992.

The current (1992) Constitution of the Church in New Zealand has a comprehensive statement of its reasons for existence.<sup>3</sup> The Constitution itself provides a justification for these internal laws.<sup>4</sup>

In the Anglican Communion, generally, 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 they may, at first, appear.

Churches, in their relationship with the State, may be classified as established, quasi-established,<sup>5</sup> dis-established, or non-established. All but the first are normally based on the principle of consensual compact (or 'voluntary compact' as it is called in the inaugural 1857 and the current 1992 constitutions), in which it is the voluntary membership of the Church, which alone imposes binding or mandatory obligations upon members.<sup>6</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 this country. In part, this is because the State may be still characterized — or at least was until comparatively recently — as *de facto* Christian,<sup>7</sup> in the sense that it is a 'Christian Society under the aspect of legislation, public administration, legal tradition and form'.<sup>8</sup> It is, to quote from a writer

3. Const. Preamble.

4. 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; *V Colonial Church Chronicle* (1852), p. 161.

5. Under secular legislation the Church of England in Nova Scotia (Mutiny Act 1758 [32 Geo. II c. 5] [GB]), New Brunswick (Trade with America Act 1786 [26 Geo. III c. 4] [GB]), and Prince Edward Island (Indemnity Act 1802 [43 Geo. III c. 6] [UK]) enjoyed certain statutory privileges over other churches.

6. Though *Scandrett v. Dowling* (1992) 27 N.S.W.L.R. 483 (NSW) 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; Mr Justice Bruce McPherson, 'The Church as Consensual Compact, Trust and Corporation', *Australian Law Journal* 74 (2000), pp. 159, 171.

7. In particular, see Rex Ahdar, 'New Zealand and the Idea of a Christian State', in Rex Ahdar and John Stenhouse (eds.), *God and Government* (Dunedin: University of Otago Press, 2000), pp. 59–76.

8. Thomas S. Eliot, *The Idea of a Christian Society* (London: Faber and Faber, 1939), p. 26.

on the somewhat dissimilar American situation, 'a nation whose predominant institutions, including government, reflect Christian pre-suppositions and Christian morality'.<sup>9</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 officially established — is a more difficult question, and one for which the answer depends very much upon the precise meaning of the terms used. Nor is it clear whether the influence of the State has been intrusive and unwanted, sought and desirable, or an unavoidable reflection of evolving political life.

In this article, we will examine the sources of secular authority in the church — in particular secular legislation. We will also examine the founding of the church in New Zealand in the nineteenth century, and some aspects of the nature of its relationship with the State. The example taken is the Anglican Church. This is not unique in its treatment, except insofar as the breadth and depth of legislation which has been enacted. The Roman Catholic Church in New Zealand relied to a lesser extent upon secular legislation,<sup>10</sup> in part because of its post-Reformation tradition as a non-established Church in England, and in part because of its more fully developed canon law and a comparatively active judiciary.<sup>11</sup> The importance of this study lies in the fact that most Anglican provinces, and other denominations in the Commonwealth and beyond, share the same form of reliance on State laws as does the Church of the Province of Aotearoa, New Zealand, and Polynesia.

9. David Smolin, 'Regulating Religious and Cultural Conflict in Post-modern America: A Reply to Professor Perry', *Iowa Law Review* 76 (1991), pp. 1067-1104 (1097). See also Ivanica Vodanovitch, 'Religion and Legitimation in New Zealand: Redefining the Relationship Between Church and State', *British Review of New Zealand Studies* 3 (1990), pp. 52-62 (52) ('non-specific and non-sectarian Christianity'). However, (Sir Robert) Stout C.J., a freethinker, characterized New Zealand as a secular state; *Doyle v. Whitehead* (1917) N.Z.L.R. 308, 314; Peter Lineham, 'Freethinkers in Nineteenth-Century New Zealand', *New Zealand Journal of History* 19 (1985), pp. 61-81 (71).

10. Important surviving examples being the Roman Catholic Lands Act 1876 (NZ) and the Roman Catholic Bishops Empowering Act 1997 (NZ).

11. The latter may be attributed to the survival of the faculty jurisdiction. For this, see George H. Newsom, *Faculty Jurisdiction of the Church of England* (London: Sweet & Maxwell, 2nd edn, 1993).

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

The Church of England remains formally established by law in England.<sup>12</sup> Some of the other churches of the British Isles,<sup>13</sup> and those of the West Indies,<sup>14</sup> and India,<sup>15</sup> have been dis-established.<sup>16</sup> In some cases this was because of changing political circumstances, in others for more overtly theological reasons. Since the church was never formally established in New Zealand 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 recognized

12. 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) (England); there has occasionally been talk of this status ending, a possibility which was again raised with the appointment of Rowan Williams, Archbishop of Wales (where the Anglican Church is dis-established), as Archbishop of Canterbury. For his translation, see Anglican Communion News Service, 'Announcement of the 104th Archbishop of Canterbury', July 23, 2002, available at <http://www.anglicancommunion.org/acns/articles/30/50/acns3072.htm> (accessed on July 31, 2003).

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

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

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

16. 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* (Williamsburg: Virginia 350th Anniversary Celebration Corporation, 1957), p. 14 (the Church of England was established in Virginia from 1607).

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 principles which eventually governed the status of the dissenters in England.<sup>17</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>18</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 East India Company was responsible for the payment of salaries to a bishop and any archdeacons, if the Government appointed any.<sup>19</sup> By letters patent of May 2, 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>20</sup> On May 27, 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>21</sup> In 1835, these

17. These were developed by the courts from the principles of such Acts of Parliament as the Toleration Act 1688 (1 Will. & Mary c. 18) (England), and the Nonconformist Relief Act 1779 (19 Geo. III c. 44) (GB). 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* (Toronto: Anglican Book Centre, 1987), p. 123. See also Leo Pfeffer, *Church, State and Freedom* (Boston: Beacon Press, 1953), pp. 28–62.

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

19. East India Company Act 1813 (53 Geo. III c. 155) (UK). The East India Company, as a result of the 1813 Charter renewal, also paid for a Church of Scotland minister in Calcutta.

20. By the Submission of the Clergy Act 1533 (25 Hen. VIII c. 19) (England), 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 (PC).

21. Robbie A. Giles, *Constitutional History of the Australian Church* (London: Skeffington and Son, 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* (Sydney: Standing Committee of the General Synod of the Church of England in Australia, c. 1981), p. 4.

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>22</sup>

Samuel Marsden's involvement in New Zealand was largely through the Church Missionary Society, which was a voluntary society (with no establishment status within the Church of England). It is also notable that Broughton visited New Zealand in 1838–39 and undertook episcopal ministrations on the basis of his own episcopal authority, by virtue of his consecration rather than because of the legal status of the Church.<sup>23</sup>

George Augustus Selwyn was appointed the first Bishop in New Zealand in 1841.<sup>24</sup> After the establishment of a colonial government in New Zealand in 1840,<sup>25</sup> letters patent, modelled upon those of the Bishop of Australia, of which New Zealand had been a suffragan,<sup>26</sup> erected the latter country into a see on October 14, 1842.<sup>27</sup> There was officially no voluntary compact at this time; but neither was the Church formally established. The status of the Bishop in New Zealand, in relation to the Bishop of Australia, was to change several times in the first 15 years.<sup>28</sup>

22. Standing Committee of the General Synod of the Church of England in Australia, *The Anglican Church of Australia*, pp. 4, 5.

23. G.P. Shaw, *Patriarch and Prophet: William Grant Broughton 1788–1853. Colonial Statesman and Ecclesiastic* (Melbourne: Melbourne University Press, 1978), pp. 126, 127.

24. There was a call for a bishopric of New Zealand at the time of the formation of the Colonial Bishoprics Fund; William Sachs, *The Transformation of Anglicanism* (Cambridge: Cambridge University Press, 1993), pp. 115, 116.

25. 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', *Australian Journal of Law and Society* 4 (1985), p. 41; David Williams, 'The Constitutional Status of the Treaty of Waitangi: an historical perspective', *New Zealand Universities Law Review* 14.1 (1990), p. 9; David Williams, 'The Foundation of Colonial Rule in New Zealand', *New Zealand Universities Law Review* 13.1 (1988), p. 54.

26. 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* (Wellington: Government Printer, 1958).

27. Standing Committee of the General Synod of the Church of England in Australia, *The Anglican Church of Australia*, p. 118.

28. From 1841–47, Selwyn was under the Archbishop of Canterbury as Metropolitan; 1847–54 he was under the Bishop of Sydney; 1854–58 he came under Canterbury again. In 1858, Selwyn became Metropolitan for New Zealand.

The Bishop was not entirely without official support. The payment of half of Selwyn's salary by the Colonial Office was one of the links back to the Government in England. He was also given the status of number three on the precedent list and was, for a period, a member of the Legislative Council. Gladstone, as Colonial Secretary in 1846, raised the possibility of 'voluntary compact', being a better method to settle the status of the colonial Church than legislation action.<sup>29</sup>

In 1850, a group of New Zealand laity led by the Governor, Sir George Grey, wrote to Bishop Selwyn asking for the establishment of a formal church government.<sup>30</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 Authorized Version of the *Bible*.<sup>31</sup>

Selwyn agreed with the broad basis of the proposal of Grey and the others.<sup>32</sup> This was not entirely surprising, since Selwyn attended an important conference of Australasian Bishops in 1850,<sup>33</sup> and was one of its leaders.

But Selwyn was not entirely sure of the possibilities regarding a constitution. In his 1853 Pastoral Letter, he wrote that he 'was still looking to England to gain "the consent of the heads of the State and of the Church in England to some form of Church Constitution adapted to our circumstances and wants"'.<sup>34</sup> Only when the three attempts to define the legal status of the Church by parliamentary legislation failed (1852, 1853, 1854) – and with the necessary English legal advice that the Church could constitute itself as a voluntary compact – did Selwyn finally feel he could go ahead on that basis.

The instrument by which the broad aim outlined in 1850 was to be achieved was the 1857 Constitution, which was not however enacted

29. A.K. Davidson, "'A Sort of Cast-Off Step Daughter': Established but Not Established. Defining Anglican Sovereignty in Colonial New Zealand', *Anglican Historical Society Newsletter* 38 (2007), p. 5.

30. *Colonial Church Chronicle* V (1852), p. 161.

31. Ross Border, *Church and State in Australia 1788–1872* (London: S.P.C.K., 1962), p. 186.

32. *Colonial Church Chronicle* V (1852), p. 161; *Colonial Church Chronicle* VI (1853), p. 168f.

33. See, for example, E.D. Daw, 'Church and State in the Empire: The Conference of Australian [sic] Bishops 1850', *Journal of Imperial and Commonwealth History* 5.1 (1976), pp. 251–69.

34. Daw, 'Church and State in the Empire: The Conference of Australian [sic] Bishops 1850', p. 3.

by Parliament or expressly consented to by the Crown.<sup>35</sup> Meanwhile, attempts during 1852–54 to obtain an Imperial Act for the Church in Australia had failed.<sup>36</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>37</sup> But it was also due to the belief that an attempt was being made to obtain exclusive privileges for the Church of England.<sup>38</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>39</sup> and few, if any, advantages. The debate about whether and when the Church of England was established in Australia, and when it was no longer established, is beyond the scope of this article. There is a degree of disagreement about this question, unlike the situation in New Zealand.

Meanwhile, on June 13, 1857, at a General Conference held at Auckland, the Bishops<sup>40</sup> and many of the clergy and laity of the Church in New Zealand,<sup>41</sup> including missionary clergy, agreed to a Constitution for the purpose of associating together by voluntary

35. Though the role of the Crown was not altogether ignored:

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

– Const. A2, 3

36. Ross Border, *Church and State in Australia 1788–1872* (London: S.P.C.K., 1962), pp. 190–98.

37. This was introduced by the New Zealand Constitution Act 1852 (15 & 16 Vict. c. 72) (UK). 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) (UK).

38. Border, *Church and State in Australia 1788–1872*, p. 204.

39. Border, *Church and State in Australia 1788–1872*, pp. 192, 193.

40. After the diocese of New Zealand (eventually to be renamed Auckland in 1868), dioceses were subsequently formed in Christchurch (1856), Waipu, Wellington and Nelson (1858–59). Dunedin was added 1869 (formerly part of Christchurch), and Waikato (from the southern part of Auckland) in 1925.

41. Two bishop, eight clergymen, and seven laymen. The two bishops at the conference were Selwyn himself and Bishop H.J.C. Harper. Harper arrived in New Zealand in December 1856. There was an error in Harper's letters patent and he was put under the jurisdiction of Australia while Selwyn was under Canterbury; Davidson, ‘‘A Sort of Cast-Off Step Daughter’’: Established but Not Established. Defining Anglican Sovereignty in Colonial New Zealand’, p. 4.

compact as a branch of the 'United Church of England and Ireland'.<sup>42</sup> The Constitution declared the Doctrine and Sacraments, which the Church held and maintained,<sup>43</sup> and provided for a General Synod.<sup>44</sup> '[F]undamental provisions' (mentioned under 'PROVIDED THAT....') were entrenched in the Constitution as a means of safeguarding the doctrinal and liturgical integrity of the Church in its connection with the mother-Church in England. Fundamental provisions could not be changed, thus preserving the identity of the Church as part of the wider Church of England.

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, this was surrendered in 1865.<sup>45</sup>

Thus, in New Zealand, the legal basis for the Church was consensual compact, rather than legislative enactment,<sup>46</sup> although specific

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

43. Const. A.1.

44. Const. Preamble.

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

46. Border, *Church and State in Australia 1788-1872*, p. 249; See also D.N. Swain, 'Self Government in the Anglican Church in New Zealand, 1838-1865' (Victoria University of Wellington, MA thesis, 1965); G.A. Phillipson, 'The Thirteenth Apostle, Bishop Selwyn and the Transplantation of Anglicanism in New Zealand, 1841-1868', (University of Otago, PhD thesis, 1992); Warren Limbrick, *Bishop Selwyn in New Zealand 1841-68* (Palmerston North: Dunmore Press, 1983); John H. Evans, *Churchman Militant: George Augustus Selwyn, Bishop of New Zealand and Lichfield* (Wellington: Allen & Unwin/Reed, 1964); A.K. Davidson, *Christianity in Aotearoa: A History of Church and Society in New Zealand* (Wellington: Education for Ministry, 3rd edn, 2004).

parliamentary Acts were needed to provide for trusts and similar ancillary institutions.<sup>47</sup> At least until 1865 the royal supremacy was acknowledged, but thereafter, under the influence of wider imperial developments, this became largely inapplicable.<sup>48</sup>

The 'Christian' influence on New Zealand in the nineteenth century was pervasive. But they were partially countered by the determined effort of many parliamentarians to avoid privileging any one denomination over another. That is reflected in a number of parliamentary debates. These include the opening of sessions with prayer, the refusal to accept responsibility for Bishop Selwyn's stipend when the Colonial Office discontinued payment, and the 1877 Education Act with its 'secular' clause.<sup>49</sup>

In New Zealand, by contrast to the situation in Australia, the Church early assumed independence, and was comparatively less concerned with the nature of the underlying basis of authority – at least until its constitutional debates and reforms of the late twentieth century. Broughton's episcopal acts in New Zealand, and Selwyn's calling of synods in 1844 and 1847 were on the basis of inherent episcopal powers through consecration. These actions challenged the supreme authority of the Crown. Selwyn himself engaged in a long consultative process both in New Zealand and in England between 1847 (his second synod) and 1857.<sup>50</sup> Selwyn was very cautious in moving until he was clear from his consultations in England that the Church could go ahead on the basis of voluntary compact.

47. William Sachs, *The Transformation of Anglicanism* (Cambridge: Cambridge University Press, 1993), p. 191; Henry W. Tucker, *Memoir of the Life and Episcopate of George Augustus Selwyn, DD* (London: Wells Gardner, vol. I, 1879), p. 89f; G.A. Wood, 'Church and State in New Zealand in the 1850s', *Journal of Religious History* 8.3 (1975), pp. 255–70.

48. Because the Crown generally had little involvement in appointing bishops; see Sir Robert Phillimore, *The Ecclesiastical Law of the Church of England* (London: Sweet & Maxwell, 2nd edn, vol. II, 1895), p. 1786.

49. See, for example, A.K. Davidson, 'Christianity and National Identity: The Role of the Churches in "the Construction of Nationhood"', in John Stenhouse and Brett Knowles (eds.), *The Future of Christianity: Historical, Sociological, Political and Theological Perspectives from New Zealand* (Adelaide: ATF Press, 2004), pp. 16–35; G.A. Wood, 'Church and State in the Furthest Reach of Western Christianity', in John Stenhouse and G.A. Wood (eds.), *Christianity, Modernity and Culture: New Perspectives on New Zealand History* (Adelaide: ATF Press, 2005), pp. 207–39.

50. See Bruce Kaye, 'The Strange Birth of Anglican Synods in Australia and the 1850 Bishops' Conference', *Journal of Religious History* 27.2 (2003), pp. 177–97.

### *The Applicability of Pre-Existing Canonical Systems*

Not only is it necessary to ascertain the nature of authority in a colonial Church, it is also necessary to establish precisely what pre-settlement English laws applied, and what their effect was. Various devices are employed by churches to ensure the binding effect of church laws and the rights and duties conferred by them.<sup>51</sup> These devices may be applied to clergy, lay officers or the lay membership generally. They include overriding principles containing general statements that the law of the Church is binding, and declarations, promises or oaths by which an undertaking is made to assent to or conform to the law of the Church or the decisions of its tribunals. There may also be provisions requiring compliance with executive directions (typified by the doctrine of canonical obedience).<sup>52</sup> The most ancient of these are the canons, which were preserved, at least in partially pre-settlement form, in at least some overseas churches.

Unlike in England, in most of the overseas churches canon law is binding on the laity, at least those laypersons who are members of the Church.<sup>53</sup> However, whether this is legally binding – in the sense that it is justiciable in the secular courts – or merely morally binding, or

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

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

53. *Middleton v. Crofts* (1736) 2 Atk. 650 (KB) (binding only if declaratory of ancient usage and law); approved in *Lord Bishop of Exeter v. Marshall* (1868) L.R. 3 H.L. 17. In New Zealand, ordained ministers give a declaration of canonical obedience to their bishop at ordination (Title D canon I.C1.2.1), and on appointment to office any ordained minister and office bearer to be licensed make a declaration of Adherence and Submission (Const. C.15) and a Declaration (Title A canon II.3; Title D canon I.C1.2.2). Non-licensed office bearers make a declaration of Adherence and Submission (Const. C.15) or a declaration of Acknowledgement of Authority of General Synod (Title B canon XXI; Title D canon I.C1.2.2). 'All persons who are subject to episcopal jurisdiction in this Church shall be liable to discipline for any of the following acts or omissions...'; Title D canon I.C2.3; *Gregory v. Bishop of Waiapu* (1975) 1 N.Z.L.R. 705.

enforceable in the Church courts or tribunals, is a further issue.<sup>54</sup> The question remained, however, as to just what comprised the canon law. In the Protestant Episcopal Church of the United States of America, English ecclesiastical law continues for some purposes only,<sup>55</sup> and English canon law does not now apply in Australia.<sup>56</sup> Since these churches are consensual bodies, these pre-settlement laws are not automatically enforceable. The applicable canon law was generally that new canon law created by the provincial or national churches, or their dioceses. Indeed, as the diocese may have their own canon law, there is considerable scope for differences across a single province.

Even consensual associations are subject to the secular power, even if 'the...Church of England...is not a part of the constitution in any colonial settlement'.<sup>57</sup> The Queen in Parliament has authority 'over all persons in all causes, as well ecclesiastical as temporal, throughout her dominions supreme', for Parliament can legislate for the Church as it can for any part of society. This is a consequence of the Reformation and the development of parliamentary supremacy,<sup>58</sup> and was recognized by Selwyn and Grey,<sup>59</sup> and later in the Constitution of the Church.<sup>60</sup> However, since 1857 the Church in New Zealand made its

54. McPherson, 'The Church as consensual compact, trust and corporation', pp. 159–74.

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

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

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

58. Noel Cox, 'Ecclesiastical Jurisdiction in the Church of the Province of Aotearoa, New Zealand and Polynesia', *Deakin Law Review* 6.2 (2001), pp. 266–84; Conrad Earl Russell, 'Whose Supremacy? King, Parliament and the Church 1530–1640', *Ecclesiastical Law Journal* 4.21 (1997), pp. 700–708.

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

60. Const. A2–A4.

own canons, which have supplanted and replaced the pre-existing canon law of the Church of England.<sup>61</sup>

### *The Anglican Church in New Zealand*

The Church in New Zealand may be classified broadly as quasi-established in the sense that whilst having the status of a contractual society, there are close legal links between the Church and State. The authority of internal Church law rests, at least in part, upon the existence of secular legislation, and secular legislation expressly and directly regulates some of the temporal affairs of the Church.<sup>62</sup>

Several parliamentary statutes 'declare and define the Powers of the General Synod of the Church of the Province of New Zealand',<sup>63</sup> they govern the alteration of the formularies of the Church,<sup>64</sup> and they regulate its trust property,<sup>65</sup> its (former) missionary dioceses<sup>66</sup> and its clergy pensions funds.<sup>67</sup> The secular courts may intervene to ensure compliance by the Church with its own internal law and with State law applicable to the Church.<sup>68</sup> In New Zealand, the secular courts will enforce the constitution and rules of churches,<sup>69</sup> though they will be reluctant to intervene in church matters unless there are valid and strong reasons for doing so.<sup>70</sup>

However, even where a statute has been passed specifically relating to a church or religious organization and its property, this does not involve parliamentary recognition of the institutions and procedures

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

62. Norman Doe, *Canon Law in the Anglican Communion* (Oxford: Clarendon Press, 1998), p. 14; Cox, 'Ecclesiastical Jurisdiction in the Church of the Province of Aotearoa, New Zealand and Polynesia', pp. 266-84.

63. Church of England Empowering Act 1928 (NZ) (as amended), Preamble.

64. Church of England Empowering Act 1928 (NZ) (as amended).

65. Anglican Church Trusts Act 1981 (NZ). Selwyn held all the land in trust up until 1858 when the Bishop of New Zealand Trust Act (NZ) was passed. From 1858 Church property had been vested in trustees; William Sachs, *The Transformation of Anglicanism* (Cambridge: Cambridge University Press, 1993), p. 191; Tucker, *Memoir of the Life and Episcopate of George Augustus Selwyn, DD*, p. 89ff; G.A. Wood, 'Church and State in New Zealand in the 1850s', *Journal of Religious History* 8.3 (1975), pp. 255-70.

66. Church of England (Missionary Dioceses) Act 1955 (NZ).

67. New Zealand Anglican Church Pension Fund Act 1972 (NZ).

68. For historical material, see William P. Morrell, *The Anglican Church in New Zealand* (Dunedin: McIndoe, 1973).

69. *Gregory v. Bishop of Waiapu* (1975) 1 N.Z.L.R. 705.

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

established by the rules of the Church. The institutions and procedures are still seen as private or domestic.<sup>71</sup> But even though the institutions may be private, nevertheless they are relying, for at least a part of their legal authority, on the laws of the State.

Even within its own jurisdiction the authority of the Church is limited. With respect to its fundamental provisions, 'it shall not be within the power of the General Synod, or of any Diocesan synod, to alter, revoke, add to, or diminish any of the same'.<sup>72</sup> In New Zealand, this law is fundamental in the sense that it is unalterable by the Church acting alone — though it may be altered in accordance with the provisions of an Act of Parliament.<sup>73</sup> The limitation on the legislative competence of the Church was stated in qualified terms. It was not comparable to the superficially analogous limited competence of the (colonial) New Zealand Parliament; rather, its origins lay much deeper. The Constitution states that the fundamental provisions (including the Book of Common Prayer, the Form and Manner of Making, Ordaining and Consecrating of Bishops, Priests and Deacons, and the Thirty-nine Articles of Religion) might not be altered.<sup>74</sup>

However, it is also stated that

2. PROVIDED THAT nothing herein contained shall prevent the General Synod from accepting any alteration of the above-named formularies and Version of the Bible as may from time to time be adopted by the United Church of England and Ireland, with the consent of the Crown and of Convocation.<sup>75</sup>

This suggests that there was some residual authority inherent in the Church of England — perhaps associated with the royal supremacy — to alter fundamental constitutional provisions (if not doctrine), which the local church might follow. This may probably be taken to not extend to doctrine per se, as synods, in the history of the Church, were seen as not having authority to determine doctrine, and had only local

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

72. Const. A.6.

73. Const. A.1; Church of England Empowering Act 1928 (NZ). In accordance with the principle of the supremacy of Crown-in-Parliament; Article 37 of the *Thirty-Nine Articles* (enacted in 1562, and confirmed in 1571 by the Subscription [Thirty-Nine Articles] Act 1571 [13 Eliz. I c. 12] [England]).

74. Const. A.1.

75. Const. A.2.

authority, and the Church of England asserted no wider authority.<sup>76</sup> The qualification may, therefore, be taken to refer to the Church of England's authority to maintain order and discipline in liturgy and worship.

The Church of England Empowering Act 1928 (NZ), passed to allow the Church in New Zealand to make changes in its fundamental provisions so that it would not imperil its ownership of property. It provides for the alteration of the formularies contained in the Constitution. Section 3 provides that:

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

Provided that the provisions of this section shall not empower or be deemed to empower the General Synod to depart from the Doctrine and Sacraments of Christ as defined in clause one of the Constitution.<sup>77</sup>

The procedures to be followed include gaining the consent of a majority of diocesan synods, a delay of at least a year<sup>78</sup> and the holding of General Synod elections before the enactment comes into force.<sup>79</sup> This procedure is similar to the legislative process for secular legislation, yet differs because law in the Church depends for its authority upon identification of the divine will rather than the consent of the governed.<sup>80</sup> There is also an attempt at ensuring that law is truly a manifestation of the divine in human law, so far as this is possible.

76. Edward Norman, 'Authority in the Anglican Communion', (Ecclesiastical Law Society Lecture given during the Lambeth Conference 1998, transcribed by the Society of Archbishop Justus: 1998).

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

78. To allow for appeals to the judicial tribunals of the Church, see C.W. Haskell, *Scripture and the ordination of women* (Wellington: privately published, 1979); Rosemary Neave (ed.), *The Journey and the Vision* (Auckland: The Women's Resource Centre, 1990), pp. 3, 7-8.

79. s. 4.

80. Hubert Box, *The Principles of Canon Law* (London: Oxford University Press, 1949), p. 11.

Internally, the Church can exercise coercive power or *imperium*, as well as persuasive power or *dominium*, often derived from secular authority.<sup>81</sup> The *imperium* includes Acts of Parliament, statutory regulations, canons and synodical orders.<sup>82</sup> The *dominium* includes policy documents, regulations, directives, codes of practice, circulars, guidance, and guidebooks.<sup>83</sup> These have only moral or persuasive force,<sup>84</sup> and do not depend upon secular authority. The Church uses some secular laws, and legal procedures such as Acts of Parliament, but it is not to be inferred thereby, that it has a right to do so greater than any non-public association or person.<sup>85</sup> The use of secular law by the Church is not surprising, given its frequent use in the post-Reformation history of the Church.

Although the supremacy of the State in all legal matters — for it is scarcely less than that — is not asserted over the Anglican Church in New Zealand, in that the State does not interfere in religious matters, yet religion is not altogether ignored by the State. Nor is the position of the State ignored by the Church.

The sixteenth century (re-)iteration of royal *imperium* over matters religious as well as secular was to have a continuing effect upon the law of the Church; effects which may still be seen in twenty-first century New Zealand,<sup>86</sup> although the Church is not, and never has been, established in New Zealand.<sup>87</sup>

#### *The Treatment of the Anglican Church in Statute*

The New Zealand Bill of Rights Act 1990 (NZ) recognizes that everyone has the right to freedom of thought, conscience, religion, and belief,

81. Norman Doe, 'Ecclesiastical Quasi-Legislation', in Norman Doe, Mark Hill and Fr Robert Ombres (eds.), *English Canon Law* (Cardiff: University of Wales Press, 1998), p. 95.

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

83. Doe, 'Ecclesiastical Quasi-Legislation', p. 95.

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

85. *Scandrett v. Dowling* (1992) 27 N.S.W.L.R. 483, 489 per Mahoney J.A.

86. Cox, 'Ecclesiastical Jurisdiction in the Church of the Province of Aotearoa, New Zealand and Polynesia', pp. 266-84.

87. Noel Cox, *Church and State in the Post-Colonial Era: The Anglican Church and the Constitution in New Zealand* (Auckland: Polygraphia, 2008).

including the right to adopt and hold opinions without interference.<sup>88</sup> It also provides that everyone has the right to manifest his or her religion or belief either individually or in community with others, in worship, observance, practice, or teachings, and either in public or in private.<sup>89</sup> The effect of this Act is principally confined to the actions of public bodies,<sup>90</sup> which are prevented from infringing this freedom of opinion. Thus, they are both precluded from imposing its doctrine or practices upon unwilling individuals, but are equally protected against suppression.

The provisions of the laws of the Church are not generally justiciable in a secular court,<sup>91</sup> except to the extent that they are involved in a matter concerning church property governed by statute<sup>92</sup> or otherwise within the jurisdiction of secular courts — and this latter varies between jurisdictions.<sup>93</sup> The courts have been reluctant to deal with theological matters.

But there are a great number of statutes which regulate aspects of the Anglican Church's life and work in New Zealand.<sup>94</sup> Many of these

88. s. 13.

89. s. 15.

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

- (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
- (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person by or pursuant to law.

91. The secular courts do not endeavour to interfere in matters of difference within a religious group, nor can they decide theological or liturgical questions; *Cecil v. Rasmussen* (unreported, High Court, Auckland, A1269/83, December 9, 1983, Baker J.); *Misa v. Congregational Christian Church of Samoa (Wainuiomata) Trust Board* (1984) 2 N.Z.L.R. 461 (CA); *Presbyterian Church Property Trustees v. Fuimaono* (unreported, High Court, Auckland, A1595/85, October 16, 1986, Thorp J.). This is not, however, an absolute exclusion of jurisdiction.

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

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

94. In 2008, including the Anglican Church Trusts Act 1981 (NZ), Anglican Church Trusts Amendment Act 1989 (NZ), Anglican Trust for Women and Children Act 1962 (NZ), Anglican Trust for Women and Children Amendment Acts 1968 (NZ) and 1975, Anglican Trustees Investment (Auckland) Act 1972 (NZ), Cathedral-Site Parnell Leasing Act 1886 (NZ), Christ's College Canterbury Act 1885 (NZ), Christ's College (Canterbury) Act 1928 (NZ), Christ's College, Canterbury Act 1999 (NZ), Christ's College (Canterbury) Amendment Act 1929 (NZ)

are concerned with the property that the Church acquired since the nineteenth century, and are similar to many others enacted for the benefit of particular churches or other organizations.<sup>95</sup> In practice, the secular courts will become involved in church disputes where the interests of justice so require.

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

An Act to widen the powers of trustees under trusts in connection with the Church of the Province of New Zealand and the Church of the Province of Melanesia and to provide for the administration of such trusts.<sup>96</sup>

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

WHEREAS there is real and personal property in New Zealand held on trusts for and in connection with the Anglican Churches in New Zealand and Melanesia: And whereas the powers of the trustees in

(*F'note continued*)

and 1945, Church of England Empowering Act 1928 (NZ), 1934 and 1966, Church of England (Missionary Dioceses) Act 1955 (NZ), Church of England Tribunal (Validation of Election) Act 1934 (NZ), Church Property Trust (Canterbury) Act 1879 (NZ), Church Property Trust (Canterbury) Act 1887 (NZ), Church Property Trust (Canterbury) Act 1879 Amendment Act 1889 (NZ), 1906, 1915, 1927, 1934, 1951, 1962, 1964 and 1990, Church Property Trustees (Canterbury) Indemnity Act 1890 (NZ), Church Reserves (Canterbury) Act 1904 (NZ), College House Act 1985 (NZ), Dunedin Anglican Social Services (Child Welfare) Act 1978 (NZ), Melanesian Trusts Board 1974 (NZ), New Zealand Anglican Church Pensions Act 1972 (NZ), New Zealand Mission Trust (Port Waikato Maraetai) Empowering Act 1986 (NZ), Saint Mary's Guild Trust Act 1956 (NZ), Nelson Diocesan Trust Board Empowering Act 1937 (NZ), St. John's Anglican Church (Parochial District of Johnsonville) Burial Ground Act 1964 (NZ), St. John's College Trusts Act 1972 (NZ), St. Mary's Church (Karori) Burial Ground Act 1963 (NZ), Social Service Council of the Diocese of Christchurch Act 1952 (NZ), Waikato Anglican Boys College Trust Act 1987 (NZ), Warkworth Anglican Burial Ground Act 1968 (NZ), Wellington Bishopric Endowment Trust (Church of England) Act 1929 (NZ) and 1934, Wellington City Mission (Church of England) Act 1929 (NZ) and 1965, and the Wellington Diocesan Board of Trustees (Church of England) Act Repeal Act 1988 (NZ).

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

96. Anglican Church Trusts Act 1981 (NZ).

relation to the investment of the trust assets are limited by the instruments creating the trusts: And whereas it is desirable to consolidate and extend the powers conferred on trustees by the Church of England Trusts Act 1913 and its amendments and to give greater powers of investment to the major Trust Boards holding property for the said Churches: And whereas there are trusts held for religious or charitable purposes in connection with the Anglican Church where it has become impossible or impracticable or inexpedient to carry out the trust objects or purposes, and by reason of the limited assets of the particular trusts or for reasons of expense it is desirable to provide a means for varying the trusts in addition to the means provided by the Charitable Trusts Act 1957.<sup>97</sup>

This Act is, therefore, to give the church institutions greater flexibility than was then enjoyed by the general public in respect of trusts,<sup>98</sup> for instance in the range of funds in which it could investment. This is one field which is commonly the subject of secular legislation enacted for the benefit of the Church.<sup>99</sup>

The Church of England Tribunal (Validation of Election) Act 1934 (NZ) was of historical interest in that it was 'An Act to validate the First Election of the Tribunal elected under the Church of England Empowering Act 1928 (NZ), to hear and determine Appeals under that Act'.<sup>100</sup> In 1931, the first election of an appellate tribunal under the Act of 1928 was disrupted by the series of earthquakes referred to in the Hawke's Bay Earthquake Act 1931 (NZ). The proceedings of the General Synod were to some extent disorganized by reason of these earthquakes, and the first election of the Tribunal was not held in accordance with the Act, but was held at the session of the General Synod, which took place at Napier in 1934.<sup>101</sup> The Church of England Tribunal (Validation of Election) Act 1934 (NZ) is purely a validating

97. Anglican Church Trusts Act 1981 (NZ) preamble.

98. The following Regulations were made pursuant to this Act: Anglican Church Trust Boards Order 1982 (S.R. 1982/274); Anglican Church Trust Boards Order 1985 (S.R. 1985/110); Anglican Church Trust Boards Order 1990 (S.R. 1990/299); Anglican Church Trust Boards Order 1992 (S.R. 1992/219); Anglican Church Trust Boards Order 1994 (S.R. 1994/218); Anglican Church Trust Boards Order 1996 (S.R. 1996/310); Anglican Church Trust Boards Order 1998 (S.R. 1998/282).

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

100. Church of England Tribunal (Validation of Election) Act 1934 (NZ) preamble.

101. Church of England Tribunal (Validation of Election) Act 1934 (NZ) preamble.

Act, to ensure that the validity of the election should not be questioned on the ground that the provisions of the Act had not been complied with.<sup>102</sup> Yet, it is significant that recourse should be had to secular authorities, and shows the extent to which the Church's procedures were influenced by (secular) legalistic concepts.<sup>103</sup> The great majority of other Acts are concerned with the temporal goods of the Church, and regulate trusts and property.

The Church is not, however, exempt from regulation by general legislation. Thus, the Church is bound by the general prohibition on discrimination on the grounds of religious belief.<sup>104</sup> It is unlawful for an employer, or any person acting or purporting to act on the employer's behalf, to refuse or omit to employ a qualified applicant by reason of the applicant's religious or ethical belief.<sup>105</sup> It is also unlawful to discriminate on the grounds of sex, or on a number of other grounds, in employment, the provision of goods or services, access to public facilities housing and in education. But the Human Rights Act 1993 (NZ) allows for the different treatment of people based on sex, where the discrimination is for the purpose of an organized religion and is required to comply with the doctrines, rules, or established customs of the religion.<sup>106</sup> 'Religion' is, moreover, defined broadly.<sup>107</sup>

Some special statutory provisions are made for the personnel of the churches. 'Ministers of religion'<sup>108</sup> are prohibited by statute from disclosing in any proceeding a confession that was made to the minister in his or her professional character, except with the consent of the

102. Church of England Tribunal (Validation of Election) Act 1934 (NZ) preamble.

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

104. Human Rights Act 1993 (NZ), s. 21(c), apart from the exceptions in s. 28.

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

106. ss. 22 and 28(1).

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

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

person who made the confession.<sup>109</sup> However, any communication made for criminal purposes is not privileged.<sup>110</sup>

Whilst only a minority of marriages in New Zealand are today conducted in a church, the names of ministers of religion that have been sent to the Registrar-General of Births, Deaths and Marriages by any of the religious bodies referred to in the Marriage Act 1955 (NZ) are entered in the list of marriage celebrants.<sup>111</sup> There is no requirement for separate civil and religious weddings, as the churches' own ministers will normally be authorized — as marriage celebrants — to conduct marriages.

The offence of blasphemy remains in the Crimes Act 1961.<sup>112</sup> It is an offence punishable by up to one year's imprisonment for any person to publish blasphemous libel.<sup>113</sup> It seems that this provision will apply only to attacks on Christian beliefs.<sup>114</sup> Whether a particular published matter is or is not a blasphemous libel is a question of fact. To express in 'good faith and decent language' a religious opinion of any sort is

109. Evidence Amendment Act (No. 2) 1980 (NZ), s. 31(1); *Cook v. Carroll* (1945) I.R. 515; *Francome v. Mirror Group Newspapers Ltd* (1984) 1 W.L.R. 892; (1984) 2 All E.R. 408 (CA). For confessions generally, see Rupert Bursell, 'The Seal of the Confessional', *Ecclesiastical Law Journal* 2 (1990), p. 84.

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

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

112. Crimes Act 1961, s. 123. However, the consent of the Attorney-General is required for any prosecution and doubt has been expressed whether there is any particular room for application of this section. See, for the English position, Graham G. Routledge, 'Blasphemy: the Report of the Archbishop of Canterbury's Working Party on Offences Against Religion and Public Worship', *Ecclesiastical Law Journal* 1.4 (1989), p. 27.

113. s. 123(1).

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

not an offence. In New Zealand, unlike England, the law regarding blasphemy is confined to published matter.<sup>115</sup> In the only reported New Zealand case on the scope of the offence, the judge's direction to the jury asked whether on the basis of community standards the words had exceeded the bounds of propriety and reached contemptuousness, reviling, and insult.<sup>116</sup>

In a number of respects, while no particular religious denomination is preferred, religion as such – particularly Christianity – receives a favoured treatment. This includes direct aid, immunities, regulation of cemeteries, school and hospitals, and in the recognition of religious practices by the State.<sup>117</sup>

It can be seen from the above that the Anglican Church and (perhaps to a lesser extent) other religious denominations enjoy a special legal status in New Zealand, especially in respect of property holdings and investments. The Anglican Church is not an established Church, but it does, often in common with other recognized churches, enjoy certain legal rights not enjoyed by other corporate bodies – though it is only special in contrast to the other churches in the scale and scope of its use of secular laws.<sup>118</sup> Many of these owe their origins to the extensive grants of land to the Church of England during the nineteenth century, particularly in the southern province of Canterbury.<sup>119</sup>

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

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

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

117. Sir Ivor Richardson, *Religion and the Law* (Wellington: Sweet & Maxwell, 1962), p. 8; Peter Lineham, 'Government Support for the Churches in the Modern Era', in Rex Ahdar and John Stenhouse (eds.), *God and Government* (Dunedin: University of Otago Press, 2000), pp. 41–58.

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

119. Based on the City of Christchurch. See the Church Property Trust (Canterbury) Act 1879 (NZ) and 1887 (NZ), Church Property Trust (Canterbury) Act 1879 Amendment Act 1889 (NZ), 1906, 1915 and 1927, Church Property Trust

Ironically, perhaps, the advance of humanism, and oft-times militant secularism (and even anti-Christian sentiment) in modern western society, is especially noticeable in New Zealand. Thus, it might be questioned whether it is a Christian, post-Christian, or non-Christian State. The legal relationship of the Anglican Church and the State doesn't seem to have had a significant impact upon that.

### *Conclusions*

The concept of the deliberate and complete separation of Church and State, so influential in many parts of the world,<sup>120</sup> was never dominant in New Zealand, since the two developed together during the colonial period. Belief in this full separation is alien to both the secular laws and church practice. Civil law cannot be separated from Biblical law, for the Biblical doctrine of law includes all law, civil, ecclesiastical, societal, familial and all other forms of law. The law of Western civilization has historically been Christian law, and the links remain important, for both Church and State. The ecclesiastical law of the Church of the Province of Aotearoa, New Zealand and Polynesia is partly created by the State.

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

It may be argued that the Anglican Church is no more established than any other church. Wood argues that by the end of the 1850s, the privileges which had been enjoyed by Anglicans, compared with other denominations, had virtually gone.<sup>121</sup> But this relationship was much more than a question of 'privileges'. The quasi- or pseudo-establishment status of the Anglican Church in New Zealand has much to do

(*Fnote continued*)

(Canterbury) Amendment Act 1934 (NZ), 1951, 1962, 1964 and 1990, Church Property Trustees (Canterbury) Indemnity Act 1890 (NZ), Church Reserves (Canterbury) Act 1904 (NZ).

120. In the modern world, governments have generally sought either to be entirely separate from Churches or to manipulate them to their own purposes; James Coriden, *An Introduction to Canon Law* (New York: Paulist Press, 1991), p. 24.

121. G.A. Wood, 'Church and State in New Zealand in the 1850s', *Journal of Religious History* 8.3 (1975), pp. 255-70.

with the way in which it has assumed and sometimes been given the 'establishment' role, for example on state occasions. While the identity of the Church, particularly in relation to its property, is regulated by secular law, it could be argued that this does not make it quasi-established. However, it is argued that the extent of the relationship between Church and State is more complex, and inter-dependent.

The laws of the Church are made by the Church itself, and its members are bound to one another by consensual compact. But several parliamentary statutes 'declare and define the Powers of the General Synod of the Church of the Province of New Zealand',<sup>122</sup> and they govern the alteration of the formularies of the Church.<sup>123</sup> To be spiritually autonomous, the Church must show that, as the organic body of Christ, it has the capacity to determine truth from error, that it is possessed of a Doctrine of the Church.<sup>124</sup> The freedom of the Church to conform to the universality of the whole Church is at once limited by the dependence, in form if not substance, on secular statutory provisions for altering fundamental provisions of the Constitution, and by an assertion that General Synod can 'develop doctrine'.<sup>125</sup>

The result is that, although the Church is free to regulate its own doctrinal and liturgical laws, and is a purely a voluntary association, it is not unknown to the law.<sup>126</sup> While this means that certain of the formularies of the Church may not be altered without following a process enacted by Parliament, this is not necessarily wrong, *per se*, for it imposes upon the Church an external check. This prevents precipitate changes, and encourages mature deliberation and consideration.

122. The Anglican Church in Aotearoa, New Zealand and Polynesia in the canons of the Church since 1992: 'This Church, which in the Fundamental Provisions of the Constitution/te Pouhere, is designated as a "Branch of the United Church of England and Ireland", shall be referred to and designated in English as *The Anglican Church in Aotearoa, New Zealand and Polynesia*, and shall be referred to and designated in te reo Maori, as *Te Hahi Mihinare ki Aotearoa ki Niu Tireni, ki nga Moutere o Te Moana Nui a Kiwa*' (Title G canon I.1.5).

123. Church of England Enabling Act 1928 (NZ).

124. Norman, 'Authority in the Anglican Communion'.

125. Const. Preamble.

126. The suggestion that they exist solely as voluntary associations, and that although they may be recognized in statute, they are otherwise treated as voluntary associations, is not sufficient to explain the nature of the relationship of Church and State; *Gregory v. Bishop of Waiapu* (1975) 1 N.Z.L.R. 705, and see *Lord Bishop of Natal v. Green* (1868) 18 L.T. 112; (1868) N.L.R. 138 cf. McPherson, 'The Church as consensual compact, trust and corporation', pp. 159-74.

However, there are inherent tensions in the 'quasi-Establishment' of the Anglican Church of New Zealand relying on the secular State, especially when the State is at times militantly post-Christian, or non-Christian. The role of the State hasn't been intrusive or unwanted, because direct regulation has been sought by the Church itself and therefore thought to be desirable. But the indirect consequence of this interdependent relationship hasn't necessarily been wholly beneficial for the Church, when the organs of the State itself are anti-Christian or post-Christian.