THE SYMBIOSIS OF SECULAR AND SPIRITUAL INFLUENCES UPON THE JUDICIARY OF THE ANGLICAN CHURCH IN NEW ZEALAND

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I INTRODUCTION

Wherever legislative or executive authority is based in any legal system, it is necessary for some provision to be made for the administration of a judicial function, for the interpretation of legislation and for the judging of disputes.[1] Within the Christian Church this role is assigned to the Church courts,[2] which are special courts administering the ecclesiastical law.[3] In a general sense ecclesiastical law means the law relating to any matter concerning the Church administered and enforced in any court,[4] but for the purposes of this paper, however, we are concerned primarily with

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[1] See Charles de Secondat Baron de Montesquieu, 'The Spirit of the Laws' in Arend Lijphart (ed), *Parliamentary versus Presidential Government* (1992) 48-51.

[2] Also called Courts Christian (curiae christianitatis).

[3] This is of predominantly canon and civil law origin, though not uninfluenced even in the earliest times by the developing common law in the king's courts: *Caudrey's Case* (1591) 5 Co Rep 1a; *Ecclesiastical Licences Act 1533* (24 Hen VIII c 21) (Eng), preamble (now largely repealed); *Attorney-General v Dean and Chapter of Ripon Cathedral* [1945] Ch 239; 1 All ER 479.

[4] In a narrower technical sense ecclesiastical law is the law administered by ecclesiastical courts and persons; Alfred Denning, 'The meaning of "Ecclesiastical Law"' (1944) 60 *Law Quarterly Review* 236. The end of the temporal law is to punish the outward man; that of the ecclesiastical law, being spiritual, is to reform the inward man; *Caudrey's Case* (1591) 5 Co Rep 1a, 6.

laws as administered by ecclesiastical courts, specifically those of the Anglican Church in New Zealand,[5] but also the Church of England in England.

Though the emphasis of this paper is upon the Anglican Church in New Zealand, it is no accident that much of the discussion which follows is concerned largely with the development of the ecclesiastical courts in the Church of England. For the Anglican Church courts have, in New Zealand, inherited the tradition of the English Church courts. The New Zealand courts have always had but a narrow jurisdiction, as a consequence of the comparative weakness of the English Church courts chartered below, as well as in consequence of the non-established nature of the Church,[6] and of the transfer of the faculty jurisdiction to the bishops. The New Zealand Church courts must also be seen in the wider context of the Church courts in the Anglican Communion, which are exemplified, though not necessarily typified, by those of the Church of England.

The aim of this paper is to show that the structures and procedures of Church courts have been as much influenced by the secular laws as are organs of the legislative and executive arms of the Church.[7] Just as the general synod and diocesan synods reflect contemporary secular viewpoints, so do the Church courts. But both can reflect the will of God made manifest through mankind.[8] The authority of the Church courts however derives directly from ecclesiastical legislation.[9] Explicit processes for the resolution of disputes or offences within the Christian community are found in St Matthew's gospel.[10] But the Church Courts administer laws derived from both ecclesiastical and secular legal system, and the secular legal system has an important ongoing effect upon the Church courts, even though the Church is not established in New Zealand.[11]

Equally importantly, the very structure of the Church courts reflect a pre-occupation with the secular legal system, though, as will be seen, this is perhaps less pronounced in New Zealand than it is in England. The Ecclesiastical Jurisdiction Measure 1963[12] established the present judicial hierarchy for the provinces of Can-

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[5] Formally, the 'Anglican Church of Aotearoa, New Zealand and Polynesia'; Constitution, preamble and Part A, as amended 1992.

[6] See Norman Doe, *Canon Law in the Anglican Communion* (1998).

[7] For which see Noel Cox, 'Dispensation, Privileges, and the Conferment of Graduate Status: With Special Reference to Lambeth Degrees' (2002-2003) 18 *Journal of Law and Religion* 249-274; Noel Cox, 'The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England' (2001-2002) 3 *Rutgers Journal of Law and Religion* 1-45 <http://www-camlaw.rutgers.edu/publications/law-religion/cox1.pdf>; Noel Cox, 'Ecclesiastical Jurisdiction in the Church of the Province of Aotearoa, New Zealand and Polynesia' (2001) 6 *Deakin Law Review* 266-284.

[8] In that the actions of both secular and religious institutions, lay people and ordained, may be inspired by the divine.

[9] Including Constitution and canons, as well as the formularies of the Church, and the *Bible*.

[10] Matthew 18:15:

> Moreover if thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother.

[11] See Doe, above n 6, for a description of the meaning of establishment.

[12] The long title of the Measure is 'A Measure passed by The National Assembly of the Church of England to reform and reconstruct the system of ecclesiastical courts of the Church of England, to

terbury and York of the Church of England. This hierarchy comprises Church courts at diocesan and provincial levels,[13] with further appeals heard by the Court for Ecclesiastical Causes Reserved[14] and, in some instances only, the Judicial Committee of the Privy Council.[15] Final appeal from the Court for Ecclesiastical Causes Reserved, and from *ad hoc* Commissions of Convocation,[16] are heard by Commissions of Review appointed by the Queen in Council.[17]

The changes made to the judicial structure of the Church of England in 1963 were widespread, and were especially significant at the appellate level. One of the most notable change was the reduction in the role of the Judicial Committee of the Privy Council.[18] This would seem to have been largely motivated by long-standing opposition from within the Church to the perceived subordination of the ecclesiastical courts to secular tribunals.[19] This opposition was fuelled by the nineteenth century

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replace with new provisions the existing enactments relating to ecclesiastical discipline, to abolish certain obsolete jurisdictions and fees, and for purposes connected therewith;' *Ecclesiastical Jurisdiction Measure 1963* (UK).

[13] Consistory Courts in each diocese (under Chancellors, who may serve in more than one see), and the Arches Court and the Chancery Court of York (under the Dean of the Arches and the Auditor respectively, offices which are, however, held concurrently by the one individual). The Arches Court and the Chancery Court of York have four other judicial officers, two in holy orders appointed by the prolocutor of the Lower House of Convocation of the relevant province, and two lay persons appointed by the Chairman of the House of Laity after consultation with the Lord Chancellor with respect, inter alia, to their judicial experience; See the *Ecclesiastical Jurisdiction Measure 1963* (UK) ss 3(2)(b)-(c).

[14] Two of the five judges appointed by Her Majesty the Queen must hold or have held high judicial office and be communicants of the Church of England; *Ecclesiastical Jurisdiction Measure 1963* (UK) s 5; *Appellate Jurisdiction Act 1876* (39 & 40 Vict c 59) (UK) s 25(9) (defining the requirements for judicial appointees to the court for Ecclesiastical Causes Reserved). Three must be, or have been, diocesan bishops; *Ecclesiastical Jurisdiction Measure 1963* (UK) s 45(2).

[15] *Ecclesiastical Jurisdiction Measure 1963* (UK) s 1(3)(d). This is the permanent committee of the Queen's Most Honourable Privy Council, to which appeals to the Queen are referred for hearing and judgment. It was established on a permanent footing in 1833; See the *Judicial Committee Appeals Act 1833* (3 & 4 Will IV c 41) (UK) s 1; The *Ecclesiastical Jurisdiction Measure 1963* makes the theoretical nature of such appeals clear. "Her Majesty in Council shall have such appellate jurisdiction as is conferred on Her by this Measure." *Ecclesiastical Jurisdiction Measure 1963* (UK) s 1(3)(d).

[16] These would comprise four diocesan bishops and the Dean of the Arches; *Ecclesiastical Jurisdiction Measure 1963* (UK) s 35, 36(a).

[17] *Ecclesiastical Jurisdiction Measure 1963* (UK) s 1(3)(c); Revised Canons Ecclesiastical, Canon G1 para 4. The Commissions of Review would comprise three Lords of Appeal (being communicants), and two Lords Spiritual sitting as Lords of Parliament. See the *Ecclesiastical Jurisdiction Measure 1963* (UK) s 11(4).

[18] The Judicial Committee being that tribunal which assumed the jurisdiction of the Court of Delegates, in 1833, but which has a much longer informal existence, being indeed one of the oldest institutions in the United Kingdom. See the *Judicial Committee Act 1833* (3 & 4 Will IV c 41) (UK); *Appellate Jurisdiction Act 1876* (39 & 40 Vict c 59) (UK); *Appellate Jurisdiction Act 1887* (50 & 51 Vict c 70) (UK)

[19] This opposition found expression in a succession of commissions which advocated a new joint appeal court to replace the Judicial Committee of the Privy Council; Archbishop of Canterbury and York's Commission on Ecclesiastical Courts, *Report of the Archbishops' Commission* (1883) lvi-lviii; Royal Commission Ecclesiastical Discipline, *Report of the Royal Commission on Ecclesiastical Discipline* (1906) Cd. 3040 paras 67, 77-78; Archbishop of Canterbury and York's Commission on Ecclesiastical Courts, *Report of the Archbishops' Commission on Ecclesiastical Courts* (1926) ss 26-46; Archbishop of Canterbury and York's Commission on Church and State, *Report of the Archbishops' Commission on Church and State* (1935) 68-71; Archbishops' Commission on Canon Law, *The Canon Law of the Church of England* (1947).

controversy over ritual and ceremonial and the legality of ornaments, most of which disputes had doctrinal implications, yet were decided in courts which were essentially secular in composition, if not in nature.[20] The courts were emphatic that they were there to apply ecclesiastic laws, and not determine doctrine[21] — much as the role of common law courts is to discover the law rather than to make it — but both arguments are liable to criticism as mere semantics.[22]

It has been customary to distinguish between ecclesiastical courts proper, and secular courts hearing Church appeals.[23] But, to some extent this has been to make an artificial distinction.[24] In England the new Court for Ecclesiastical Causes Reserved, and the Commissions of Review, may be classified as Church courts proper also, although they may include secular members,[25] since they do not have a role in the secular legal system. Only the Commissions of Convocation would not normally include secular judges.[26] However, since none of these courts hear causes on matters not within the jurisdiction of the ecclesiastical law, they may be loosely classified as ecclesiastical rather than secular courts, though the members of the Judicial Committee of the Privy Council are appointed by secular authority. Even the Judicial Committee of the Privy Council will transform itself into a quasi-ecclesiastical court to hear Church causes,[27] although it is properly a secular court or rather tribunal.[28] Nor must lay membership necessarily be equated to secular mem-

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[20] Examples include *Ridsdale v Clifton* (1877) 2 PD 276 (PC); *Liddell v Westerton* (1856) 5 WR 470 (PC). After *Ridsdale*, the correctness of the decision of the Judicial Committee was challenged in light of subsequent historical research; Royal Commission Ecclesiastical Discipline, *Report of the Royal Commission on Ecclesiastical Discipline* (1906) Cd 3040 para 41. See also G C Broderick and W H Freemantle, *Ecclesiastical Cases, collection of the Judgements of the Judicial Committee of the Privy Council in Ecclesiastical Cases relating to Doctrine and Discipline* (1865), which describes fifteen cases between 1840 and 1864 in which doctrine questions were involved.

[21] Stephen Lushington, Dean of the Arches, wrote of the Arches Court that: 'This is not a court of Divinity, it is a court of ecclesiastical law'; *Essays and Reviews* (1861), cited in S M Waddams, *Law, Politics and the Church of England: The Career of Stephen Lushington, 1782-1873* (1992) 274.

[22] Traditionally, law-finding (rather than law-making) is a peculiar feature of the common law system. Under a common law system judges find laws by interpreting decided cases; see Oliver Wendell Holmes, Jr, *The Common Law* (1882).

[23] As, for example, the consistory courts and the judicial committee of the Privy Council.

[24] The consistory courts, the Arches Court, and the Chancery Court of York may be classified as the former. The Chancellor of a diocese is appointed by letters patent of the bishop (who may himself sit if he so wishes), although the Lord Chancellor must be consulted before any appointment is made; *Ecclesiastical Jurisdiction Measure 1963* (UK) ss 2(1)-(2). The archbishops of Canterbury and York appoint the Dean of the Arches acting jointly, with the Queen's approval signified by warrant under the sign manual. *Ecclesiastical Jurisdiction Measure 1963* (UK) s 3(2)(a); Revised Canons Ecclesiastical, Canon G3 para 2a.

[25] Court for Ecclesiastical Causes Reserved — *Ecclesiastical Jurisdiction Measure 1963* (UK) s 5. Commissions of Review — *Ecclesiastical Jurisdiction Measure 1963* (UK) s 11(4).

[26] *Ecclesiastical Jurisdiction Measure 1963* (UK) ss 35, 36(a).

[27] In a similar way to that in which the Judicial Committee of the Privy Council would become a New Zealand tribunal for the purposes of hearing an appeal from the Court of Appeal of New Zealand. See the Judicial Committee Act 1833, 3 & 4 Will IV c 41 (UK); Appellate Jurisdiction Act 1876, 39 & 40 Vict c 59 (UK); Appellate Jurisdiction Act 1887, 50 & 51 Vict c 70 (UK); New Zealand (Appeals to the Privy Council) Order, 1910, no 70 (L. 3) (S.R. & O. and S.I. Rev. 1948 vol. XI, 409; S.R. 1973/181); Privy Council (Judicial Committee) Rules, Notice of 1973 (S.R. 1973/181) (NZ).

[28] The transformation being that the court is called upon to hear an appeal as a part of the ecclesiastical courts hierarchy, rather than as a secular court, and in that there is provision for clerical members.

bership, since the people of God include lay persons.[29] In the case of New Zealand Church courts, all will be ecclesiastical in that they are not the Queen's courts, though they may include lay persons.

But this preoccupation with a perceived subordination in England to secular authorities[30] distracted attention, it will be argued, from a more subtle weakness in the judicial apparatus of the Church – and one which is also present in New Zealand. Although the Church had largely freed itself from subordination to secular tribunals,[31] it was not free from the continuing influence of the parallel secular legal system. This seems to have been due to two major factors that influenced, and continue to influence, the ecclesiastical courts. The first is that, because the general law of the country establishes the Church of England as the official State Church,[32] the Church courts in England are the Queen's courts.[33] The second and arguably much more important factor — and one which has added relevance in New Zealand where the Church courts are not the Queen's courts — is the influence of the common law and of its practitioners upon the jurisprudence of the Church courts, particularly those who have practised in the ecclesiastical courts since the middle of the nineteenth century, and who have profoundly affected the way in which the Church courts have operated.[34] Both of these influences will be examined in the course of this paper, though the emphasis will be upon the second, as being more pertinent to

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[29] The laos (λαοσ). The courts of the Roman Catholic Church include lay persons. Diocesan judges are to be clerics, but the Episcopal Conference can permit the appointment of lay persons; *The Code of Canon Law: in English Translation* prepared by the Canon Law Society of Great Britain and Ireland (1983) Canon 1421 s1, s2. In any trial a sole judge can associate with himself two assessors as advisors. These may be lay persons; *The Code of Canon Law: in English Translation* prepared by the Canon Law Society of Great Britain and Ireland (1983) Canon 1424.

[30] This may perhaps be categorised as a perception of Erastianism.

[31] A formal subordination which never existed in New Zealand. The jurisdiction of the Supreme Court, established 1841, was said to include the jurisdiction of "Her Majesty's Courts of Queen's Bench, Common Pleas, and Exchequer, at Westminster". No ecclesiastical jurisdiction is specified. The primary source of the jurisdiction of the High Court is statutory, now found in the *Judicature Act 1908* (NZ), especially s 16. This general jurisdiction can be traced through a series of statutes, from the original conferral of prerogative authority in 1840, and the first statutory authority, in 1841; Royal Charter 16 November 1840, "Charter for erecting the Colony of New Zealand, and for creating and establishing a Legislative Council and an Executive Council"; *British Parliamentary Papers* (1970) 153-155; Supreme Court Ordinance session 2, no 1 (1841) ss 2-7; Supreme Court Ordinance session 3, no 1 (1844) (NZ) ss 2-3; *Supreme Court Act 1860* (NZ) ss 4-6; *Supreme Court Act 1882* (46 Vict no 29) (NZ) s 16.

[32] The combined effect of the *Act of Uniformity 1662* (14 Chas II c 4) (Eng); *Thirty-Nine Articles of Religion* (1562, confirmed 1571 by the *Subscription (Thirty-Nine Articles) Act 1571* (13 Eliz I c 12) (Eng)), *Ecclesiastical Licenses Act 1533* (25 Hen VIII c 21) (Eng); *Submission of the Clergy Act 1533* (25 Hen VIII c 19) (Eng); *Appointment of Bishops Act 1533* (25 Hen VIII c 20) (Eng); *Ecclesiastical Appeals Act 1532* (24 Hen VIII c 12) (Eng) and similar legislation.

[33] The combined effect of the *Supremacy of the Crown Act 1534* (26 Hen VIII c 1) (Eng); Ecclesiastical Licenses Act 1533 (25 Hen VIII c 21) (Eng); Ecclesiastical Appeals Act 1532 (24 Hen VIII c 12) (Eng) and later legislation. Once appointed, an ecclesiastical judge derives his or her authority not from their bishop, but from the law, and is charged, like in all manner to all the Queen's judges, with hearing and determining impartially causes in which the bishop himself or the Crown may have an interest. *Ex parte Medwin* (1853) 1 El & Bl 609 (KB); *Lord Bishop of Lincoln v Smith* (1668) 1 Vent 3 (KB).

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

the New Zealand situation.[35] It will be shown that the very structure of the courts reflect an obsession with limiting formal secular influences, while at the same time unconsciously fostering other forms of secular influences.

Although the Church law was based on canon law, rather than Roman civil law or the secular common law, in the absence of formal education for canonists in England after 1535,[36] the civilians, or practitioners in the civil law,[37] were, to some extent at least, the guardians of the learning of the Church courts.[38] They were the sole practitioners in the ecclesiastical courts until the late nineteenth century.[39] Some clerical judges were also to sit in ecclesiastical courts until at least the nineteenth century, but they may have lacked effective legal training, and their influence upon the development of the law was proportionately less.[40]

If there is one lesson which may be learnt from the experience of the Church courts in England since the Reformation, it is that their strength depended not just upon retaining the confidence of the bishops, clergy and laity. Without a strong cadre of professional judges and counsel "learned in the ecclesiastical law" they fell under the increasing influence of the common law.[41] Without these personnel, and an understanding that secular judicial procedures are not necessarily appropriate to decide religious disputes,[42] the ecclesiastical courts were condemned to satisfy few when they were called upon to decide contentious issues.[43]

The first part of this paper will examine the provision for pre-Reformation appeals from the provincial courts, and the nature and effect of the Reformation settlement.

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[35] Much of the following is taken from ibid.

[36] A strict injunction issued by Henry VIII in October 1535 forbade the study of canon law in the universities; See Richard Helmholz, *Roman Canon Law in Reformation England* (1990) 152-153; Philip Hughes, *The Reformation in England* (1963) 239; D R Leader (ed), *The History of the University of Cambridge* (1988) vol. i, 332-333.

[37] As a consequence of the injunction even the civil law faculties suffered a decline; See J L Barton, *The Faculty of Law* in James McConica (ed), *The History of the University of Oxford* (1986) vol iii, 271-272; Thomas Fuller, *The History of the University of Cambridge* Marmaduke Prickett and Thomas Wright (eds) (1840) 225.

[38] It has also been said that the civil and canon laws were so interdependent by 1600 that they could scarcely be separated: "*Ius canonicum et civile sunt adeo connexa, ut unum sine altero vix intelligi possit*" — Petrus Rebuffus, 'Tractatus de nominationibus' Quaest 5 no15, in *Tractatus univeri iuris* (1584-1600) xv part 2 fols 301-339.

[39] Proctors also served the ecclesiastical courts; Like the attorneys, they were domini litis rather than merely spokesmen; *Obicini v Bligh* (1832) 8 Bing 335, 352 per Tindal CJ. They were ultimately housed in Doctors' Commons. Prior to 1570, when membership of Doctors' Commons was made compulsory for advocates, some proctors had been members; Sir John Baker, 'The English Legal Profession 1450-1550' in Wilfred Prest (ed), *Lawyers in Early Modern Europe and America* (1981) 24.

[40] In the early nineteenth century many judges were clerics, arguably lacking the experience and training necessary for judicial office — though until the *Ecclesiastical Jurisdiction Measure 1963* (UK) judges had to be "learned in the civil and ecclesiastical laws and at least a master of arts or bachelor of law, and reasonably well practised in the course thereof;" Canons Ecclesiastical (1603) 127 (revoked). See the Archbishop of Canterbury and York's Commission on the Ecclesiastical Courts, *Report of the Archbishops' Commission on the Ecclesiastical Courts* (1954) 9-13.

[41] Cox, above n 34.

[42] This may be a reason why in New Zealand ecclesiastical judicial bodies are styled tribunals rather than courts, and mediation plays a major role.

[43] See Cox, above n 34 See also Broderick and Freemantle, above n 20.

The settlement at the Restoration of the monarchy in 1660 will be assessed. The common law influences on the ecclesiastical courts are then reviewed. An assessment is then made of the influence of counsel in the ecclesiastical courts. The relevance in New Zealand of this tradition, and its effect upon the authority of the Church courts, is then examined. In the fifth and subsequent parts the application in New Zealand of the tradition of English Church courts will be evaluated.

II THE SETTLEMENT OF DISPUTES

Spiritual courts, separate from the secular, existed in England from shortly after the Norman Conquest in 1066.[44] This process of separation seems to have occurred around 1072-76,[45] although it seems to have not been a deliberate move but rather the effect of the increasing sophistication of the legal system in late Saxon England.[46] The precise identification of courts was still not easy, even at the end of Henry I's reign. *Leges Henrici Primi* (c.1118) does not distinguish between a tribunal to try lay and a tribunal to try ecclesiastical cases.[47] However, as a general rule, ecclesiastical jurisdiction in the immediate post-Conquest period was primarily over moral offences.[48] In subsequent centuries the jurisdiction of the ecclesiastical courts was gradually enlarged,[49] and was eventually to cover important aspects of what is now predominantly secular law. These included marriage,[50] divorce,[51] and succession to property.[52] Although the Church courts were to lose most of this jurisdiction to the secular courts in the nineteenth century, the influence of the Courts-Christian

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[44] Sir William Blackstone, *Commentaries on the Laws of England* ed Richard Burn (1978) Book 3 pp 64-65.

[45] Archbishop of Canterbury and York's Commission on the Ecclesiastical Courts, above n 40, 1.

[46] Ibid, 1-22; Felix Makower, *Constitutional History and Constitution of the Church of England* (1895) 384. The late Saxon legal and fiscal systems were comparatively sophisticated, and their efficiency was one of the principal reasons for the strength of the Norman kingship which was to follow; Emma Mason, *Norman Kingship* (1991).

[47] Gillian Evans, 'Lanfranc, Anselm and a New Consciousness of Canon Law' in England in Norman Doe, Mark Hill and Robert Ombres (eds), *English Canon Law* (1998); *Leges Henrici Primi* ed & trans L J Downer (1972).

[48] Colin Morris, 'William I and the Church Courts' (1967) 324 *English Historical Review* 449-463, 451.

[49] See William Holdsworth, *History of English Law* (7th ed, 1972) vol i 614 ff.

[50] Until the *Matrimonial Causes Act 1857* (20 & 21 Vict c 85) (UK). In Ireland, ecclesiastical courts lost their matrimonial jurisdiction only under the *Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870* (33 & 34 Vict c 110) (UK), and the jurisdiction survived until 1884 in the Isle of Man, the *Diocese of the Bishop of Sodor and Man Ecclesiastical Judicature Transfer Act 1884* (Statutes, vol V, 352-373).

[51] Until the *Matrimonial Causes Act 1857* (20 & 21 Vict c 85) (UK).

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

upon the development of the law in these areas is significant[53] – and this influence extends to the laws of New Zealand.[54]

At least in theory, both the Courts-Christian and the king's (secular) courts were supreme within their own fields. This was in an era which saw an ongoing contest throughout Christendom between the Church and secular princes.[55] Medieval jurists were accustomed to what we might call shared sovereignty, and saw nothing amiss with the pope having a concurrent jurisdiction with temporal sovereigns,[56] nor with the Church exercising concurrent jurisdiction with the king. In accordance with this principle, espoused in particular by the Bologna school of canonists,[57] the Church courts were as unfettered within their jurisdiction as the secular courts within theirs.[58] As a corollary, as a general principle no appeal lay from an ecclesiastical court to a secular court.[59] Appeals from the courts of the archbishops lay to the patriarch, in the west the bishop of Rome.[60]

The right of English litigants to appeal to the pope dates from at least the time of King Stephen,[61] and probably before.[62] Such appeals were heard either by the pope himself, from the time of Pope Gregory VII by his permanent legates, or by special delegates appointed by the pope to hear a particular cause.[63] An appeal to the papacy might omit some preliminary steps, *omisso medio*.[64] Any appeal heard by a

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[53] This leads to the civil law, and to some extent the canon law also, having a continuing influence upon the development of the common law (and even statute law) in these areas of law; Thomas Scrutton, *The Influence of the Roman Law on the Law of England* (1985) 163-169.

[54] Which were those of England as of 1840; *English Laws Act 1858* (21 & 22 Vict no 2), considered in *King v Johnston* (1859) 3 NZ Jur (NS) SC 94.

[55] See, for instance, the conflict between the papacy and the empire over the right of investiture; Uta-Renate Blumenthal, *The Investiture Controversy: Church and Monarchy from the Ninth to the Twelfth Century* (1988).

[56] In practice, many matters are dealt with though the administrative hierarchy of the Church, rather than through that of Vatican City State, the residual part of the Papal States.

[57] Bologna began as a law school but widened its scope to become a true *universitas litterarum.* The University of Bologna remains probably the oldest still extant; Rashdall Hastings, *The Universities of Europe in the Middle Ages* (1936).

[58] *R v Chancellor of St Edmundsbury and Ipswich Diocese* [1947] 2 All ER 604 (KB), affirmed [1948] 2 All ER 170 (CA).

[59] Holdsworth, above n 49, vol 1, 9. Cf. Richard Burn, *Ecclesiastical Law* (4th ed, 1781) vol I, 57, in which he claims there was appeal for failure of justice to the king in his court of nobles. It is instructive that the king's courts copied the hierarchical system from the ecclesiastical courts. Theodore Plucknett, *A Concise History of the Common Law* (1956) 387-388.

[60] Patriarchs were located in Rome in the west, and Jerusalem, Alexandria, Antioch, and Constantinople. There were also, and remain, other examples of the style patriach in use as for the archbishops of some prominent sees (such as Venice), and the heads of some Churches which separated from Rome during the first millennium.

[61] Burn, above n 59, 58. These were at the instigation of Henri de Blois, bishop of Winchester and papal legate. G I O Duncan, *The High Court of Delegates* (1971) 2.

[62] Makower, above n 46, 225-227.

[63] Such as that of King Henry VIII and Queen Catherine of Aragon; See Garrett Mattingly, *Catherine of Aragon* (1950).

[64] Z B van Espen, *Jus ecclesiasticum universum* (1720) pars iii, tit, x c 2, 5.

subordinate could be appealed to the pope himself, and even appealed from the pope to the pope 'better informed.'[65]

Partly because the *omisso medio* had political implications, but also due to the increasing jealously of the common law, the right to appeal to Rome was long subject in England to restrictions imposed by the king or Parliament.[66] For, although the church courts were supreme within their jurisdiction, precisely what that jurisdiction was could be the subject of dispute, and the common law courts assumed the role of deciding these limits.[67] Nor were the courts immune from contemporary political controversies, particularly those concerned with the respective roles of Church and State.[68] Attempts were made from time to time to limit appeals to Rome, as well as the original trial jurisdiction of papal delegates.[69] But appeals continued nevertheless, perhaps with the king's licence.

One attempt of many to limit further appeals to Rome was in the Constitution of Clarendon 1164, which gave an additional right of appeal from the primate to the king: If the archbishop shall have failed in doing justice recourse is to be had in the last resort to our Lord the king that by his writ the controversy may be ended in the court of the archbishop, because there must be no further process without the assent of our Lord the king.[70]

But the king did not hear the cause by proxy, nor adjudicate upon it in person.[71] He merely corrected slackness or the failure to do justice, *si archiepiscopus defecerit in justitia exhibenda*, and by his writ[72] directed that the controversy be decided in the metropolitan's court. There would then be a rehearing before the archbishop as metropolitan.[73] The most common reason for recourse to the king[74] was delay by the Courts-Christian.

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[65] Makower, above n 46, 225-227.

[66] There were similar restrictions elsewhere, as in France.

[67] As they did with the royal prerogative; see the *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352 (KB); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

[68] Indeed, until the Reformation, the Church and State were essentially indivisible, or, rather, each was an aspect of the whole. See, for example, Thomas Glyn Watkin, 'Vestiges of Establishment: The Ecclesiastical and Canon Law of the Church in Wales' (1990) 2 *Ecclesiastical Law Journal* 110.

[69] For example, by legislation of Edward III and Richard II; *Suing in Foreign Courts Act 1352* (27 Edw III st 1 c 1) (Eng); *Suits in Spiritual Courts Act 1377* (1 Ric II c 13) (Eng).

[70] Constitution VIII, in William Stubbs, *Select Charters and other illustrations of English constitutional history* (1913) 133.

[71] It was later to be held that he could not even hear common law cases in person, having delegated the judicial role to the judges; *Prohibitions del Roy* (1607) 12 Co Rep 63.

[72] *Precepto*.

[73] See the Archbishop of Canterbury and York's Commission on Ecclesiastical Courts, *Report of the Archbishops' Commission* (1883) i. The archbishop of Canterbury was metropolitan of the province of Canterbury and primate of All England, and the archbishop of York was metropolitan of the province of York and primate of England. Anglican Communion News Service, "Archbishop of Canterbury will have rich and varied ministry", 13 November 2002, available at <http://www.anglicancommunion.org/acns/articles/32/00/acns3200.htm>

[74] *Recursus ad principem.*

The secular power did not, as a general rule, purport to decide ecclesiastical questions itself. These were a matter for the Church, subject to correction if there was a complaint of undue delay.[75] Otherwise, the jurisprudence of the Church was in the hands of Church courts, presided over by ecclesiastical judges, and whose advocates were trained in canon and civil law rather than the secular common law of the king's courts.[76] As such, the pre-Reformation Church courts were, at least to a significant degree, an intellectual island largely isolated from mainstream English common law developments,[77] while yet attuned to wider canon law developments on the Continent.[78] This was to undergo a radical and fundamental change in the sixteenth century – one which still has consequences for New Zealand Church courts. For it cannot be said that the Church courts in New Zealand now occupy the position of the pre-Reformation courts. The Reformation changed the balance of the courts, and the situation in even a non-established Church, as in New Zealand, reflects that.

The Statute of Appeals 1532[79] ended the right to appeal to the papacy in causes testamentary and matrimonial, and in regard to the right to tithes and oblations. A final appeal was given to the archbishops of the two English provinces, Canterbury and York, but in causes concerning the king a further appeal was given to the Upper House of Convocation in each province.[80] After 1534 neither the king nor his successors, nor any subject, could sue for licences, dispensations, to the see of Rome. The archbishop of Canterbury had exercised the *legatus natus*[81] of the pope throughout all England before the Reformation. Since then the archbishop has been empowered by the *Ecclesiastical Licences Act 1533*[82] to exercise certain powers of dispensation in causes formerly sued for in the court of Rome.[83] The archbishop of Canterbury has the power to grant licences, dispensations and faculties,[84] subject

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[75] A situation today covered by the writ of *mandamus*, available from the Queen's Bench Division; *Ecclesiastical Jurisdiction Measure 1963* (UK) ss 83(2)(c).

[76] The advocates were trained at Oxford or Cambridge, obtaining the degrees of DCL or LLD respectively; *R v Archbishop of Canterbury* (1807) 8 East 213.

[77] The precise nature of the legal relationship between pre-Reformation canon and common law is disputed. It is not certain, in particular, whether the canon law was binding in England *ipso facto*, or only if admitted by domestic councils or similar means. See J W Gray, 'Canon Law in England: some Reflections on the Stubbs-Maitland Controversy' (1964) 3 *Studies in Church History* 48-68.

[78] It was not unusual for would-be practitioners to study civil law at the University of Paris for two years, followed by a similar period studying canon law at the University of Bologna. *The Laws of England* (1910) vol xi, 503n.

[79] *Restraint of Appeals Act 1532* (24 Hen VIII c 12) (Eng); *Parham v Templar* (1821) 3 Phill Ecc 223, 241.

[80] *Restraint of Appeals Act 1532* (24 Hen VIII c 12) (Eng).

[81] Thereby having a concurrent jurisdiction with that of all bishops within his province.

[82] 25 Hen VIII c 21 (Eng).

[83] Diocesan bishops also retained whatever rights they possessed, which then covered such diverse matters as residence, ordination outside the diocese of birth, fasting, and the public reading of banns; s 4. These dispensations are but rarely invoked today, if at all; Timothy Briden and Brian Hanson, *Moore's Introduction to English Canon Law* (3rd ed, 1992) 135-136.

[84] The faculty is, in ecclesiastical law, a privilege or special dispensation, granted to a person by favour and indulgence to do that which by the common law he could not do. This includes marrying without banns, or erecting a monument in a church. The Master of the Faculties (Magister ad Facultates) grants these in the Court of Faculties, under the *Ecclesiastical Licences Act 1533* (25 Hen VIII c 21) (Eng).

always to the authority of the Crown.[85] These powers were confirmed by another Act of 1536.[86]

The Master of the Faculties regulated the appointment of notaries public[87] and all dispensations that fell under the *Ecclesiastical Licences Act 1533*.[88] The Court of Faculties was in effect created by the Act, though it was not expressly named.[89] It was — and remains — more than a court, and its functions were discretionary rather than ministerial.[90] The Master however occasionally sat *in iudicis* to hear argument.[91]

The archbishop of Armagh was given similar powers.[92] The commissary of the Irish Court of Faculties was also judge of the Court of Prerogative,[93] and admitted Irish notaries.[94] The power of making notarial appointments was abolished by the *Irish Church Act 1869*,[95] and vested in the Lord Chancellor by the *Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870*.[96]

The ending of appeals to Rome was confirmed by the *Act of Submission of the Clergy 1533*,[97] which ended all appeals to Rome, and gave a further appeal "for lack of justice" from several courts of the archbishops to the king in chancery.[98] But, unlike the mediæval *recursus ad principem*, these latter appeals were heard not by the archbishops' courts by way of rehearing, but by the king in person or his depu-

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Consistory Courts may also grant certain faculties; G H Newsom, *Faculty Jurisdiction of the Church of England* (2nd ed, 1993).

85 E F Churchill, 'Dispensations under the Tudors and Stuarts' (1919) 34 *English Historical Review* 409-415.

86 The *Ecclesiastical Licences Act 1536* (28 Hen VIII c 16) (Eng).

87 Notaries are appointed under the inherent jurisdiction conferred by that Act and the later statutory authority of the *Public Notaries Act 1801* (41 Geo III c 79) (UK), the *Public Notaries Act 1843* (6 & 7 Vict c 90) (UK), and *Courts and Legal Services Act 1990* (UK) s 57(4). New Zealand notaries are still appointed by the Master of the Faculties on behalf of the archbishop; Noel Cox, 'The Notary Public — the third arm of the legal profession' (2000) 6 *New Zealand Business Law Quarterly* 321.

88 25 Hen VIII c 21 (1533) (Eng) s 3.

89 Wilfrid Hooper, 'The Court of Faculties' (1910) 25 *English Historical Review* 670.

90 Ibid, 676.

91 *Re Champion* [1906] P 90. The current Master is Sheila Cameron (since 2002).

92 Though indirectly. The powers conferred by 25 Hen VIII c 21 (1533) (Eng) extended to Ireland. Some time in the course of the sixteenth century a permanent commission granted the jurisdiction to the archbishop of Armagh (as Primate of All Ireland), in virtue of which he took over the jurisdiction exercised by the Court of Faculties. Certainly, he exercised dispensing power by 1690; Hooper, above n 89, 685.

93 *Court etc (Ireland) Act* (7 & 8 Geo IV c 44) (UK).

94 *O'Brien v Bennett*, cited in *Re Champion* [1906] P 90.

95 32 & 33 Vict c 42 (UK) s 21.

96 33 & 34 Vict c 110 (UK) s 29.

97 25 Hen VIII c 19 (Eng).

98 This Act did however assert the partial continuance of the authority of the canon law; *Act of Submission of the Clergy 1533* (25 Hen VIII c 19) (Eng). Petitions for default of justice originally lay to the king. But, being unable to hear all causes in person, he usually left the Council to hear and determine the matter and advise him. The Chancellor, as the principal officer, and one originally versed in the laws spiritual and temporal, later undertook this delegated task alone. See Holdsworth, above n49, vol i pp 395-476; Holdsworth, above n 49, vol v, 215-338; Holdsworth, above n 49, vol ix, 335-408; Holdsworth, above n 49, vol xii,178-330, 583-605.

ties.[99] For the first time appeals from Church courts would be heard, not by Church dignitaries or the pope, but by a secular judge, the king or his lay servants. Under King Henry VIII his vicar-general, Thomas Cromwell, heard these appeals.[100] Commissioners heard appeals under King Edward VI.[101] Since then the Privy Council has been, in many causes, the highest appellate court in England, though it is not strictly an ecclesiastical court.[102]

The judges of the post-Reformation Church courts were still appointed by the Church hierarchy, but as the Church now was required to acknowledge that the king was "supreme Head in earth of the Church of England,"[103] they were also the king's judges. The judges of the new Church courts were lay persons,[104] recruited from the practitioners of the ecclesiastical law Bar, the civilians.[105] Now, for the first time, the Courts-Christian were also the king's courts. Where once the pope or his delegates might hear appeals, of necessity the pope now gave way to the king and his council, supreme in all questions spiritual as well as secular. The abolition of the papal jurisdiction in itself had little direct effect on the substantive law applied in the courts,[106] and even upon the structure of the courts.[107] Overall, however, the Reformation in England may be characterised as relentlessly juridical in nature.[108] The effects of the legalism remain with the Anglican Church in New Zealand, and

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[99] *Re Gorham, Bishop of Exeter, ex parte Lord Bishop of Exeter* (1850) 10 CB 102 (CP). Blackstone noted that the "grand rupture" was "when all the jurisdiction usurped by the pope in matters ecclesiastical was restored to the Crown, to which it originally belonged: so that the statute 25 Hen VIII was but declaratory of the ancient law of the realm"; Blackstone, above n 44, Book 3, 67.

[100] For his appointment as vicegerent, see 'From Edmund Bonner's commission as bishop of London, 1538', reprinted in Sir Geoffrey Elton, *The Tudor Constitution* (2nd ed, 1982) 367-368.

[100] *Act of Supremacy 1534* (26 Hen VIII c 1) (Eng).

[101] Established under the *Submission of the Clergy Act 1533* (25 Hen VIII c 19) (Eng). For the history of the Court of Delegates, see Blackstone, above n 44, Book 3, 66; Holdsworth, above n 49, vol I, 603-605; Duncan, above n 61.

[102] The Judicial Committee of the Privy Council (formally Her Majesty in Council), is the Court of Final Appeal, and replaced the Court of Delegates as a result of the *Judicial Committee Appeal Act 1833* (3 & 4 Will IV c 41) (UK). By the *Appellate Jurisdiction Act 1876* (39 & 40 Vict c 59) (UK) all archbishop and bishops were eligible to be members of the Judicial Committee, but they were not ex officio members; Order in Council dated 11 December 1865, Rules for Appeals in Ecclesiastical and Maritime Causes, rule 3.

[103] *Act of Supremacy 1534* (26 Hen VIII c 1) (Eng). This was repealed by the *See of Rome Act 1554* (1 & 2 Phil & M c 8) (Eng), and was revived and confirmed by the *Act of Supremacy 1558* (1 Eliz c 1) (Eng).

[104] Men in holy orders (even as deacons) were ineligible for admission as advocates; *R v Archbishop of Canterbury* (1807) 8 East 213.

[105] Trained in the civil law, as well as the ecclesiastical or canon law, they were normally recruited from the Advocates of Doctors' Commons; George Squibb, *Doctors' Commons* (1977) 31.

[106] Helmholz, above n 36, 38.

[107] For example, the archdeacons' courts remained active to the late eighteenth century and were only finally abolished in 1963; *Ecclesiastical Jurisdiction Measure 1963* (UK) ss 82(2)(a), 83. Hughie Jones, 'Omnis Gallia … Or, The Roles of the Archdeacon' (1990-92) 2 *Ecclesiastical Law Journal* 236; R L Ravenscroft, 'The Role of the Archdeacon Today' (1993-95) 3 *Ecclesiastical Law Journal* 379-392.

[108] This was, of course, an ironic development given that papal authority had been extended and reinforced throughout Western Christendom through the work of the great lawyer-popes and the canonists and civilians; see, for example, Brian Tierney, *Church law and constitutional thought in the Middle Ages* (1979).

the subsequent history of the courts has been one of efforts to reduce the consequences of the royal supremacy.

At the Reformation, some common lawyers advocated the abolition of ecclesiastical courts altogether. This would have required the fusion of common and canon law, a truly monumental task. The option of abrogating the ecclesiastical laws altogether was not seriously considered. A commission was appointed to prepare a code of "the king's ecclesiastical laws of the Church of England,"[109] which they proceeded to do, but the report was not implemented.[110] The canon law therefore was to continue in force, except where it was contrary to the common or statute law, or the king's prerogative,[111] and subject to amendment.[112]

The two jurisdictions thus existed side by side, but with the balance now weighted in favour of the common law.[113] The ecclesiastical law was now fully a part of the laws of England, even if it was not part of the common law.[114] The law reports of relevant cases in either jurisdiction were cited in the courts exercising the other jurisdiction.[115] The ecclesiastical courts were now overtly influenced by developments in the common law courts, and not merely obliged to consider the political or secular consequences of spiritual judgments, as before the Reformation. The Church courts were no longer separate and equal – they were subject to the sovereignty of the Crown and of Parliament. This was to have important consequences for the development of the ecclesiastical law, because after the Reformation the supremacy of the Crown gradually became the supremacy of Parliament, and the

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[109] For a modern edition, see *The Reformation of the Ecclesiastical Laws as attempted in the reigns of King Henry VIII, King Edward VI, and Queen Elizabeth* ed Edward Cardwell (1850).

[110] Generally, see James Spalding (ed), *The Reformation of the Ecclesiastical Laws of England, 1552* (1992).

[111] *Act of Submission of the Clergy 1533* (25 Hen VIII c 19) (Eng).

[112] By Convocation or by Crown-in-Parliament.

[113] Particularly with the common lawyers led by Sir Edward Coke, Chief Justice of Common Pleas and later King's Bench; Conrad Earl Russell, 'Whose Supremacy? King, Parliament and the Church 1530-1640' (1997) 4(21) *Ecclesiastical Law Journal* 700, 701.

[114] The ecclesiastical law of England consists of the general principles of the *ius commune ecclesiasticum*. Foreign particular constitutions received by English councils or so recognised by English courts (secular or spiritual) as to become part of the ecclesiastical custom of the realm; and the constitutions and canons of English synods. The *Submission of the Clergy Act 1533* (25 Hen VIII c 19) (Eng), provided that only the canon law as it then stood was to bind the clergy and laity, and only so far as it was not contrary to common and statute law, excepting only the papal authority to alter the canon law, a power which ended later in 1533, when it was enacted that England was "an Empire governed by one supreme head and king;" *Appointment of Bishops Act 1533* (25 Hen VIII c 20) (Eng). New canon law could only be created by Act of Parliament, and now by Measure, under the *Church of England Assembly (Powers) Act 1919* (9 & 10 Geo V c 76) (UK).

[115] Ecclesiastical law is part of the law of the land. The law is one, but jurisdiction as to its enforcement is divided between the ecclesiastical courts and the temporal courts. When a matter of general law arises incidentally for consideration in a case before an ecclesiastical court, that court is bound to ascertain the general law and order itself accordingly; and where a matter depending on ecclesiastical law finds a place in a cause properly before the temporal courts those courts similarly will ascertain for themselves the ecclesiastical law and apply it as part of the law they administer.
— *Attorney-General v Dean and Chapter of Ripon Cathedral* [1945] 1 All ER 479 (ChD), citing *Mackonochie v Lord Penzance* (1881) 6 App Cas 424, 446 (HC).

supremacy of the common law,[116] which meant that the Church courts gradually lost their independence. New Zealand Church courts were not separate and equal, but subject to the sovereignty of the Crown and of Parliament, as well as the supervision of the common law courts. Yet they remained non-established.

The specialised nature of the jurisdiction and the survival of the civilians preserved the separate Church courts in the face of the jealousy of the common lawyers and the common law judges.[117] The settlement did not however survive intact for long, and it was that element most closely associated with the royal prerogative which was to suffer first in the seventeenth century struggle between king and commons[118] – the Star Chamber.

The Civil Wars of the seventeenth century ended with a general acceptance of Erastian ideology by Restoration prelates and their allies.[119] This approach, which stressed the interdependence of Church and State in England, was not inconsistent with the traditional lay perception of the Church, nor was it entirely novel in clerical circles,[120] but over time it was to sap the intellectual vigour of the Church courts. The desirability of a liturgical and doctrinal uniformity after a period of upheaval was expressed in the new *Prayer Book*,[121] and was for a time achieved, to a degree unmatched since,[122] and the Church courts contributed to this homogeneity. But it was an Erastian homogeneity.

With the coming of King William III and Queen Mary II, the High Church understanding of the royal supremacy suffered a serious setback. Erastians now saw the supremacy as that of the whole apparatus of government, carried out in the name of the Sovereign.[123] No longer could it be seen as the supremacy of the Sovereign personally — still less could this be true under the Roman Catholic King James II. The ecclesiastical law was seen as being as much a part of the law of the land as the common law itself.[124] The spirit of the age was very much in favour of the Church courts and the common law courts working as part of a unified system of laws.[125]

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[116] See Doe, above n 6, 13-15.

[117] The influence of Erastian thought was less pronounced than the belief of the common lawyers in their own correctness and ability to settle all matters spiritual and lay. See Sir John Baker, *Introduction to English Legal History* (1979) 92-95.

[118] This also was reflected in the history of the Star Chamber; Cora L Scofield, *A study of the Court of Star Chamber largely based on manuscripts in the British Museum and the Public Record Office* (1969).

[119] For the politics of the Restoration, see Robert Bosher, *The Making of the Restoration Church Settlement* (1951) 143-217; Anne Whiteman, 'The Re-establishment of the Church of England, 1660-1663' (1955) 5 *Transactions of the Royal Historical Society* (5th series) 111.

[120] See Edward Stillingfleet, *Irenicum — A Weapon-Salve for the Church's Wounds or the Divine Right of Particular Forms of Church Government* (2nd ed, 1662) vol ii.

[121] *The Book of Common Prayer* (1662), backed by the *Act of Uniformity 1662* (14 Chas II c 4) (Eng).

[122] The good inherent in uniformity, in distinction to the good in any liturgical or doctrinal uniformity, was stressed in Hugh Davis, *De Jure Uniformitatis Ecclesisticae* (1669).

[123] Robert Rodes, *Law and Modernization in the Church of England* (1991) 5.

[124] Sir Lewis Dibdin, *Establishment in England* (1932) 51-52.

[125] Judges and counsel were at pains to adjust their various precedents to this end, see for example, *Slater v Smalebrooke* (1665) 1 Sid 27.

Till the Civil Wars of the seventeenth century the two systems, ecclesiastical and secular,[126] had operated largely independently, now they were motivated by a sense of common purpose.[127] Before the Reformation the ecclesiastical courts had paid little or no attention to either common law or statute, and had accepted writs of prohibition from the Court of King's Bench only as *force majeure*.[128] The period 1533-1660 had been one of adjustment. After 1660 an intellectual rapprochement occurred.[129] Canonists made greater use of common law precedents and statutes,[130] and even the common lawyers were less inclined to deny the canonists their jurisdiction — though it was by now largely limited to testamentary and matrimonial matters.[131]

The bishops and clergy were estranged from their courts from the seventeenth century. This estrangement was in part attributable to the integration of the latter into the unified Erastian structure. But it may have had its roots in Elizabethan ecclesiastical judicial administration. The first generation after the Reformation was less legalist, and perhaps more efficient, than the mediæval canonists were. That after the Restoration was more legalist, but perhaps less central to Church life.[132] Rather than strengthening the position of the Church courts, this had the effect of emphasising their increasingly marginal role within the Church, and their weakness when compared to the secular courts. This jurisprudential weakness and marginalisation is even more apparent in New Zealand, where the Church courts lack the authority of the secular State – because of the separation of Church and State[133] – and yet are liable to correction by secular courts for error. But it was a position which the Church courts in New Zealand inherited in the nineteenth century; an attitude based on an Erastian notion which was inapplicable to a non-established Church.

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[126] The secular courts being predominantly common law courts, though the Court of Chancery administered the laws of equity, which were more strongly influenced by ecclesiastical notions; A H Marsh, *History of the Court of Chancery and of the Rise and Development of the Doctrines of Equity* (1985).

[127] Rodes, above n 123, 10-14.

[128] By 1753 the Court of Arches could recognise it as *res judicata*; *Pattern v Castleman* (1753) 1 Lee 387 (Arches). The Court of King's Bench also decided that ecclesiastical courts would try customs according to common law rules.

[129] The Restoration ecclesiastical judiciary was marked by an intellectual rapprochement between church and State. Rodes, above n 123, 13.

[130] See, for illustration, the writings of ecclesiastical lawyers of the post-Restoration period (the term canonists is probably a misnomer). John Aylliffe, *Parergon Juris Canonici Anglicani, or, a commentary, by way of supplement to the Canons and Constitutions of the Church of England, etc* (London: privately published 1727); Burn, above n 59; Edmund Gibson, *Codex Juris Ecclesiae Anglicanae* (1713). Within the courts themselves, a similar broad-minded approach was also clear. See *DaCosta v Villareal*, 2 Strange 961 (1753); *Phillips v Crawley*, 1 Freeman 83 (1673).

[131] These were ended in the nineteenth century; e.g. the *Matrimonial Causes Act 1857* (20 & 21 Vict c 85) (UK); *Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870* (33 & 34 Vict c 110) (UK).

[132] Rodes, above n 123, 14. Parallels may be drawn with the history of the Court of Chivalry during the seventeenth and eighteenth centuries; See Squibb, above n 105.

[133] See Doe, above n 6, 13-15.

III THE JEALOUSY OF THE COMMON LAW

Not only were the Church courts weakened by lack of use by the Church itself, they were also weakened by the jealousy, and at times the outright hostility, of the common law.

Only with the reign of King Henry VIII did the ecclesiastical courts become the king's courts. But applicants could always sue for writs of prohibition[134] or *mandamus*[135] from the king's common law courts. These may still issue out of the Queen's Bench Division — and in New Zealand the High Court — to restrain ecclesiastical courts from exceeding their jurisdiction, or to compel them to cease delaying hearing any matter.[136] For the enforcement of their own judgments, and the maintenance of order, contempt of a consistory court (or episcopal tribunal) would be dealt with by the High Court.[137] There is no recorded instance of a writ being issued to papal legates, though there are instances of suitors being prohibited from appealing to the pope.[138] But with the Church courts in England now the King's (or Queen's) courts, the degree of jealousy felt by the common law courts increased – and remains in modern times, even, apparently, in New Zealand where the Church courts are not the Queen's courts. Thus the secular courts did not relax their oversight, but rather increased it as the scope of administrative law grew.

The secular courts constrained excesses of jurisdiction by the Church courts even before the Reformation. The influence of these writs and orders since that time upon the development of the substantive ecclesiastical law has probably not been as significant as they were in the common law.[139] But what was significant in the Church courts was the influence of the principles and procedures of the common law.

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[134] *Prohibition to spiritual courts Act 1285* (13 Edw I Stat Circ Agatis) (Eng). This is an order to forbid an inferior court from proceeding in a cause there pending, suggesting that the cognisance of it does not belong to that court.

[135] Though not certiorari, as the courts are unfettered within their jurisdiction; *R v Chancellor of St Edmundsbury and Ipswich Diocese* [1947] 2 All ER 604 (KB), affirmed [1948] 2 All ER 170 (CA). The order commanded that proceedings be removed from an inferior court into a superior court for review. In this respect the ecclesiastical courts were not inferior to the High Court. When an application is made to review all or part of the determination of an inferior Court, a tribunal, a person exercising a statutory or prerogative power, or a person exercising a power that affects the public interest, the Court may make an order for certiorari, any other order that it thinks just, or both; High Court Rules, Rules 626(1) and (2).

[136] *Gregory v Bishop of Waiapu* [1975] 1 NZLR 705, 713 per Beattie J, following *R v Electricity Commissioners, Ex p London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171, 205 per Atkins LJ. This indirect control of the ecclesiastical courts was expressly preserved in England by the *Ecclesiastical Jurisdiction Measure 1963* (UK) s 83(2)(c).

[137] *Ecclesiastical Jurisdiction Measure 1963* (UK) s 81(2); *R v Daily Herald ex parte Lord Bishop of Norwich* [1932] 2 KB 402. The High Court enjoyed inherent jurisdiction to correct errors in lower courts — and this has included tribunals which are not part of the judicial system; *Taylor v Attorney-General* [1975] 2 NZLR 675, 682 per Richmond J; *Gregory v Bishop of Waiapu* [1975] 1 NZLR 705 (HC).

[138] *Mayor of London v Cox* (1867) LR 2 HL 239, 280 (Willes J).

[139] See, for example, R C van Caenegem, *Royal writs in England from the Conquest to Glanvill* (1959).

The common law was hostile at once to the royal prerogative and the ecclesiastical law.[140] Both limited the scope of actions possible in the post-Reformation common law courts. The criminal jurisdiction of the ecclesiastical courts included, at various times, heresy, adultery, incest, fornication, simony, brawling in Church, defamation,[141] and others. Some Tudor and Stuart legislation made secular offences of conduct that had formerly fallen within the Church's exclusive jurisdiction.[142] This led to a shared jurisdiction, which in the long term proved harmful to the ecclesiastical courts, in the face of the jealousy of the common law, and the allegedly more efficient processes of the common law courts.[143] The settlement of the Church after the disruption of the civil wars of the seventeenth century may have led to an intellectual rapprochement, but this encouraged intellectual borrowing from the common law, which was to help to erode still further the distinct identity of the ecclesiastical law.[144]

Although the ecclesiastical jurisdiction was further confined in the course of the nineteenth century, this was more a symptom than a cause of this decline. The ecclesiastical courts in England lost their power to punish lay persons for brawling in 1860,[145] although the residual criminal jurisdiction over the laity was only finally abolished in 1963.[146] They retained a power to discipline clergy, and (it would seem) lay persons holding office in the Church, to determine questions of doctrine and ritual,[147] to protect Church property, and to decide civil disputes relating to ecclesiastical matters.[148] The Church courts in New Zealand have a similar, though slightly more restricted, jurisdiction – more restricted mainly in respect of the faculty jurisdiction.

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[140] Cox, above n 34. None was more active in the assertion of the rights of the common law than Sir Edward Coke, Chief Justice successively of the Common Pleas and King's Bench; See Caroline Bowen, *The Lion and the Throne* (1957).

[141] This was lost in 1855; *Ecclesiastical Courts Act 1855* (18 & 19 Vict c 41) (UK) s 1. In Ireland the same effect was achieved by the *Ecclesiastical Courts Jurisdiction Act 1860* (23 & 24 Vict c 32) (UK).

[142] *Witchcraft Act 1562* (5 Eliz c 16) (Eng); *Sodomy Act 1562* (5 Eliz c 17) (Eng); *Fraudulent Conveyances Act 1571* (13 Eliz c 5) (Eng); *Bankruptcy Act 1571* (13 Eliz c 7) (Eng); *Poor Act 1575* (18 Eliz c 3) (Eng); *Bigamy Act 1603* (1 Jac I c 11) (Eng); *Plays Act 1605* (3 Jac I c 21) (Eng).

[143] Perceived as more efficient, in part because common law courts procedures had been subject to a series of rigorous reforms in the course of the nineteenth century; e.g. see Alan Harding, *A Social History of English Law* (1966) 330-358.

[144] The very term ecclesiastical law has been used to describe the laws of the Church, including those enacted by the secular State, in contrast to the canon law, which is purely ecclesiastical in nature. See Glyn Watkin, above n 68.

[145] *Ecclesiastical Courts Jurisdiction Act 1860* (23 & 24 Vict c 32) (UK) s 1.

[146] *Ecclesiastical Jurisdiction Measure 1963* (UK).

[147] At least so far as the former was justiciable — given the difficulty in determining doctrinal questions in the absence of a clear doctrinal authority in Anglicanism; Edward Norman, "Authority in the Anglican Communion" (Ecclesiastical Law Society Lecture given during the Lambeth Conference 1998, transcribed by the Society of Archbishop Justus 1998).

[148] The principal activity of the Church courts in England is in the faculty jurisdiction; Newsom, above n 84. This is absent in New Zealand, at once depriving the Church tribunals of the bulk of their potential work.

IV IGNORANCE OF THE NATURE OF ECCLESIASTICAL JURISPRUDENCE

It would seem that the jurisdiction of the ecclesiastical courts was reduced in England in the nineteenth century in part as a result of a lack of understanding of the procedure of the ecclesiastical law.[149] The ecclesiastical courts were criticised in an 1830 report for failing to give reasons for their decisions, and for not following a system of precedent.[150] Yet theirs was a canon law-based system, and in no way bound to follow the principles or procedures of the common law courts.[151] The criticism shows a lack of understanding of the nature of the judicial process in Church courts by those entrusted with its administration. It is therefore not surprising that Church courts became increasingly marginalised.[152]

The Church courts in England — though not those in New Zealand — are still the Queen's courts.[153] The significance of this has altered as the balance of the settlement has changed in England, and the Church has become more independent. The role of purely secular courts in ecclesiastical causes has declined.[154] The changes made in 1963 to the judiciary of the Church of England saw a reduction in the ecclesiastical jurisdiction of the Judicial Committee of the Privy Council,[155] but this was merely the latest stage in a process begun in the nineteenth century. But while the Church may have weakened one consequence of the establishment, it has permitted, indeed encouraged, a more serious undermining of their independence.

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[149] Though dissatisfaction with ecclesiastical courts appears to have been fairly general at that time; *Knight v Jones* (1821) Records of the Court of Delegates 8/79 (for a letter of complaint contained within the cause papers).

[150] Report of the Archbishop of Canterbury and York's Commission on the Practice and Jurisdiction of the Ecclesiastical Courts of England and Wales, *The Practice and Jurisdiction of the Ecclesiastical Courts of England and Wales* (1831-32) cmd. 199 part xxiv 1. For the question of adjusting common law and ecclesiastical precedents see *Burgoyne v Free* (1825) 2 Add 405 (Arches); *Burgoyne v Free* (1830) 2 Hag Ecc 663 (Delegates); Rodes, above n 123, 11-12.

[151] If there is a conflict between ecclesiastical common law and secular common law, ecclesiastical courts are not strictly bound by the latter; *In Re St Mary's, Banbury* [1985] 2 All ER 611, 615 per Boydell Ch (Oxford Consistory Court); *R v Chancellor of St Edmundsbury and Ipswich Diocese* [1947] 2 All ER 604 (KB), affirmed [1948] 2 All ER 170 per Wrottesley LJ (CA). However, ecclesiastical courts were citing common law cases from the seventeenth century; Helmholz, above n 36, 188-195.

[152] Though, on formation, each new diocese received its own bishop's court, and provision was made at provincial level for appellate courts.

[153] In Erastian terminological understanding, dominant since the Revolution of 1688, this supremacy was of the monarch as head of State, rather than personally. The idea that it was a personal supremacy of the monarch was not even mooted again till the time of Victoria; Sir Lewis Dibdin, *Church Courts* (1881); Dibdin, above n 124, 51-52.

[154] Strictly speaking, no secular court was part of the hierarchy at any stage, the Judicial Committee of the Privy Council being merely advisers to the Queen in Counsel. See the *Ecclesiastical Jurisdiction Measure 1963* (UK) s 1(3)(d).

[155] Ironically, perhaps, the Judicial Committee retained an important part of the secular judiciary in New Zealand until recently; *Supreme Court Act 2003* (NZ); Noel Cox, 'A New Supreme Court of New Zealand' (2003) 12(3) *The Commonwealth Lawyer* 25.

It was inevitable that the Church courts in England were themselves to change under this pressure. In 1854 oral evidence in open court was allowed.[156] The courts were still forbidden to cite anyone outside the diocese where he or she lived, and it was not clear that the courts could even hear legal arguments in London (where many cases where heard) unless the litigants lived there.[157] The inadequacy of powers to punish for contempt was also obvious to all who used the courts,[158] despite the inherent jurisdiction of the High Court to exercise this role,[159] because this still meant recourse to secular courts.

The clergy and laity were as much responsible as anyone for this situation; as many called for certainty, for precedents to be cited and followed.[160] The influence of the common law compelled the ecclesiastical courts to adopt principles of binding precedent.[161] The binding force of precedent was accepted by the ecclesiastical judges in England in the course of the nineteenth century,[162] and received statutory recognition in the Ecclesiastical Jurisdiction Measure 1963.[163] However, the Court of the Arches is still not bound by decisions of the Chancery Court of York, and vice-versa, though both are bound by their own decisions.[164] The Consistory Courts are bound by their own decisions,[165] but not by decisions of a consistory court in another diocese.[166] The substance of the canon law administered by the ecclesiastical courts of the Church of England was strongly influenced by the civil law, which continued to be studied at Oxford and Cambridge, and the Vice-Chancellor's Court of the University of Oxford followed civil law procedures until 1854,[167] when it too gave way in the face of the inexorable advance of the common law. Yet the Church courts, attacked for adhering to the procedures of the civil law (of which clerics and

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[156] *Ecclesiastical Courts Jurisdiction Act 1854* (17 & 18 Vict c 47) (UK).

[157] *Noble v Ahier* (1886) 11 PD 158 (Ch York); but see Rodes, above n 123, 463, note 81.

[158] The writ *de contumace capiendo* was obsolete. Rodes, above n 123, 360. Imprisonment for contumacy was eliminated by repealing the *Ecclesiastical Courts Act 1813* (53 Geo III c 127) (UK).

[159] *Gregory v Bishop of Waiapu* [1975] 1 NZLR 705, 713 per Beattie J, following *R v Electricity Commissioners, Ex p London Electricity Joint Committee Co. (1920) Ltd* [1924] 1 KB 171, 205 per Atkins LJ.

[160] Possibly through increased familiarity with common law procedures, coupled with less exposure to ecclesiastical court procedures.

[161] Both provincial courts are bound by decisions of the Judicial Committee of the Privy Council, though the Court for Ecclesiastical Causes Reserved and Commissions of Review are not bound by decisions of the Judicial Committee on matters of doctrine, ritual, and ceremonial; *Ecclesiastical Jurisdiction Measure 1963* (UK) s 48(6).

[162] Report of the Archbishops' Commission on Canon Law, *The Canon Law of the Church of England* (1947) 58; Archbishop of Canterbury and York's Commission on the Ecclesiastical Courts, *Report of the Archbishops' Commission on the Ecclesiastical Courts* (1954) 13, 27, 28. This was due, in no small part, to the influence of Sir William Scott (later Lord Stowell), as well as to the growing influence of the common lawyers.

[163] *Ecclesiastical Jurisdiction Measure 1963* (UK) ss 45(3), 48(5), (6).

[164] *In Re Lapford (Devon) Parish Church* [1955] 3 All ER 484; *Stephenson v Langston*, (1804) 1 Hag Con 379, 387 (Sir William Scott); *Re St Mary, Tyne Dock (No 2)* [1958] 1 All ER 1, 8-9 (Deputy Chancellor Wigglesworth).

[165] *Rector and Churchwardens of Bishopwearmouth v Adey* [1958] 3 All ER 441. This is similar to the rule of precedent as applied in common law courts.

[166] *Re Rector and Churchwardens of St Nicholas, Plumstead* [1961] 1 All ER 298.

[167] *Statutes, Decrees and Regulations of the University of Oxford* (1973) tit IV s xiii, 4.

lay persons alike were increasingly ignorant[168]), were compelled to adopt many of the procedures of the common law courts. The common law courts no longer fought to wrest jurisdictional victories from the ecclesiastical courts, but the latter were required by statute to surrender much of their jurisdiction to the supposedly more modern and efficient common law courts.[169] As a consequence, the Church courts began to lose something of their intellectual connection with their canon law heritage. This loss was encouraged by the decline of the civil law profession in the late nineteenth century,[170] with the decline of Doctors' Commons (the civil and canon lawyers' society).

This latter decline was caused by a reduction in business in civil and canon law courts, and itself contributed to a further decline in an appreciation of the intellectual separateness of the Church courts.[171] The lack of a separate profession increased the tendency for the law and practice of lay and spiritual courts to approximate more closely, and this, in turn, has tended still more to differentiate English ecclesiastical law from ecclesiastical law in other parts of Christendom, particularly the Roman Catholic.[172] This effect was even more pronounced in New Zealand, where there were few if any ecclesiastical lawyers, and any necessary litigation was conducted by lay counsel.

The influence of the common law has had an increasingly significant effect, which has accelerated since the decline of the civilians in the middle of the nineteenth century. Concentrating on the perceived misfortune of lay courts deciding Church causes obscured the arguably more insidious influence of the common law.[173]

The influence of the common law on the ecclesiastical courts stemmed in part from the nature of the judicial personnel. At times in the early nineteenth century many ecclesiastical judges were clerics, who may have been lacking the legal experience and training necessary for judicial office. But they were perhaps surer in their theological knowledge. The ecclesiastical judges in England are now required to have legal qualifications,[174] though not specifically knowledge of canon or ecclesi-

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[168] The strict injunction issued by Henry VIII in October 1535 forbad the study of canon law in the universities; See Helmholz, above n 36, 152-153; Hughes, above n 36, 239; Leader, above n 36, vol i, 332-333. As a consequence of the injunction even the civil law faculties suffered a decline; See Barton 37, vol iii, 271-272; Fuller, above n 37, 225.

[169] Cox, above n 34.

[170] See Squibb, above n 105.

[171] There were relatively few civilians in any case. With them also went their learning, and the valuable library of Doctors' Commons was sold and dispersed in 1861; ibid, 96-97.

[172] Cox, above n 34. Roman Catholic canon lawyers require a formal training. In order to be a canonist one must have earned a License (Juris Canonici Licentia, or JCL) in the study of canon law. Most seminaries require that its students take prescribed courses in canon law, but the license can be achieved only at a school with a full faculty of canon law.

[173] Ibid.

[174] The Chancellor must be over 30 years of age, a lawyer (previously a barrister) of seven years' standing or one who has held high judicial office, and a communicant of the Church. Appointment is only after consultation with the Lord Chancellor, and the Dean of the Arches and Auditor. *Ecclesiastical Jurisdiction Measure 1963* (UK) ss 2(1)-(2). The Chancellor is *oculus episcopi* and has second rank in the diocese, save for the precedence of the Dean within his or her cathedral. See John Godolphin,

astical law,[175] and until recently most had solely the standard common law training. It is only natural that their secular training and experience should influence their decision-making. It is equally natural that the common law experience and training should influence any reforms undertaken on the advice of the Church's legal advisers.

The loss of jurisdiction in the course of the nineteenth century seems to have been largely a consequence of the intellectual weakness into which the ecclesiastical law had sunk. This was encouraged by the common law. This was not, as in the sixteenth century, by directly confronting the Church courts, but was rather by working in conjunction with the Church courts. Until the Civil Wars the two systems had operated largely independently, now they were motivated by a sense of common purpose. Co-operation led to the intellectual assimilation of the jurisprudence of Church courts and common law courts. This, and the increasingly limited jurisdiction for the courts, was to contribute to the loss of a professional Bar,[176] and further intellectual weakness.

With the revision of the canons of the Church of England in the twentieth century,[177] new judicial and legislative machinery, and the example of the Roman Catholic canon law — which has recently undergone a major revision and consolidation[178] — there is a need for a new profession of ecclesiastical lawyers, trained in the common law, but able to apply their skills in the Church courts. There is evidence that this is occurring. The new Ecclesiastical Law Society seems well able to encourage the revival of ecclesiastical law in the Church of England in particular.[179] In the early 1990s the Anglican Church in New Zealand also revised its constitution and canons — and some of these changes were motivated by a desire to reform the ecclesiastical courts. Unfortunately, with the relative inactivity of Church courts in New Zealand, and the smallness of the jurisdiction, there is little scope for a developed

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Repertorium Canonicum, or an abridgement of the ecclesiastical law of the Realm, consistent with the Temporal, etc (1678) 85.

[175] Ecclesiastical judges were required to have a degree in canon law until 1545, though canon law had not been taught in English universities since 1535. Thereafter they only had the doctorate in civil law; *Ecclesiastical Jurisdiction Act 1545* (37 Hen VIII c 17) (Eng); Report of the Archbishops' Commission on Canon Law, *The Canon Law of the Church of England* (1947) 52.

[176] In the Roman Catholic Church, priests study canon law for a year, as part of their training; for priestly formation generally, see *The Code of Canon Law: in English Translation* prepared by the Canon Law Society of Great Britain and Ireland (1983) Canons 232-264, particularly 250 and 252 s 3. The canon law (and the wider ecclesiastical law) in the Church of England has a narrower scope and coverage, and therefore it is perhaps not surprising that it rarely found a significant place in vocational training. But, even allowing for this, there was, until quite recently, little effort taken to produce a body of trained canonists or ecclesiastical lawyers since the demise of Doctors' Commons.

[177] *The Canons of the Church of England. Canons ecclesiastical promulgated by the Convocations of Canterbury and York in 1964 and 1969* (1969).

[178] *The Code of Canon Law: in English Translation* prepared by the Canon Law Society of Great Britain and Ireland (1983); *Code of Canons of the Eastern Churches. Latin-English Edition* (1992).

[179] There has been much recent work towards a systematic jurisprudence, notably including Doe, above n 6. An LLM in canon law is also offered by the University of Wales Cardiff.

legal profession. The reforms to the ecclesiastical courts in New Zealand – slight as they were – seem to have been influenced by secular notions as much as religious, though the motivation may have been to strengthen the latter.

The disestablishment of the Church in Wales led to a reappraisal of the place of law within the Church; such a reappraisal seems possible in England without disestablishment. It was not the Reformation subordination of the Church courts to the authority of the Crown which weakened them, but the subsequent loss of intellectual vigour and independence. This independence was recently been re-asserted in the judgment of the Court of Ecclesiastical Causes Reserved in *In re St Stephen's, Walbrook*,[180] not in its being any less an element of the establishment, but in its less legalist, more theological approach to decision-making.[181] Such a reappraisal seems unlikely in New Zealand, for the reasons given above, but a renaissance in England may have flow-on effects in New Zealand.

V COURTS IN NEW ZEALAND

The Church is not established in New Zealand,[182] but its courts have not been strengthened thereby, because in the course of the nineteenth century the English tendency had been to weaken the church courts, linked as they were to the establishment of the Church. Although the Church in New Zealand was founded in 1857, later developments in England continued to influence the Church courts in this country. Additional complications included the lack of establishment itself – with the enforcement advantages which this would have brought – and the lack of a faculty jurisdiction, thereby greatly reducing the number of cases which could be heard.

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[180] [1987] Fam 146.

[181] It is important that canon law and theology are distinct though interrelated; Teodoro Jiménez Urresti, 'Canon Law and Theology: Two Different Sciences' (1967) 8(3) *Concilium* 10.

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

The Church in New Zealand sought to avoid the ecclesiastical perils of secular courts, but in so doing they minimised the importance of the courts and the judicial function within the Church. Indeed, lacking the secular authority which the Church courts have in England, they have been reluctant to act, less they incur the jealous wrath of the secular courts.[183] Whilst moves continued in England in the nineteenth and twentieth centuries to remove, or at least limit, secular involvement in church jurisprudence, this was unnecessary in New Zealand. The Church courts were entirely separate from the secular courts.[184] However, they rarely sat, and the resulting jurisprudential weakness was noticeable.

In the Anglican Church in New Zealand there is a two-tier system of ecclesiastical courts, with a tribunal in each of the dioceses and an appeal tribunal.[185] In the Episcopal Tribunal the bishop appoints members from a list of qualified persons drawn up by the Diocesan Synod.[186] The Episcopal Tribunals enjoy original jurisdiction over the "criminal" side of ecclesiastical discipline concerning priests and deacons, and over the laity.[187] The Episcopal Tribunal has original jurisdiction over the whole spectrum of ecclesiastical offences, and this includes those offences involving doctrine and liturgy.[188] The two-tier structure is simpler than that existing in England – at least before 1963 – but it also reflects the simpler New Zealand secular judiciary.[189]

Although not the Queen's courts — indeed the term "court" has recently been eschewed in favour of tribunal — these ecclesiastical tribunals are not immune from the influence of the common law. Equally importantly, their jurisdiction is comparatively limited. Of offences of morality, the canon law of New Zealand includes "[a]ny culpable disregard of the obligations recognised by law in reference to family relationships".[190] Violation of the law of the Church is also an offence.[191] Violation of ordination vows is an offence,[192] as is neglect of duty,[193] and disobedi-

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[183] Though this was never a serious threat, see *Gregory v Bishop of Waiapu* [1975] 1 NZLR 705, 708 (Beattie J).

[184] Though they might still utilised secular judges and counsel.

[185] Episcopal Tribunal and appeal tribunal; Title D canon I.D.I.1; Title D canon I.E.3.

[186] It would be a breach of the principle of separation of powers for the bishop to try cases personally; *Re St Mary's, Barnes* [1982] 1 WLR 531, 532 (Moore Ch). Reservations were expressed about this practice — albeit rarely found — by the Court of Appeal in *R v Tristram* [1902] 1 KB 816. The common law courts, led by Coke, had much earlier declared that the king himself might not try a case in his own, having delegated that function to the judges; *Prohibitions del Roy* (1607) 12 Co Rep 63.

[187] The Episcopal Tribunal has jurisdiction "to mediate or to otherwise inquire into complaints or any matters that are referred to it by the Licensing Bishop"; Title D canon D.I.1 (the "licensing bishop" including the Diocesan bishops, Hiu Amorangi Pihopa and bishops with delegated episcopal responsibility for a region; Title D interpretation).

[188] Unlike the situation in England, where doctrine is heard separately, largely as a consequence of jurisdictional disputes over the role of the Judicial Committee of the Privy Council.

[189] This comprises (excluding specialist courts and tribunals) the District Court, High Court, Court of Appeal, and Supreme Court of New Zealand (formerly the Judicial Committee of the Privy Council).

[190] Title D canon I.C2.3.1.3, Title D canon I.C2.3.1.6.

[191] Wilful and knowing contravention of "any law or regulation" of the General Synod; uniquely in the Anglican Communion, trustees may also be proceeded against for contravening terms of a trust deed; Title D canon III.6.1.

[192] Title D canon I.C2.3.5.

ence of any lawful command of the ordinary.[194] Specific conduct deemed inappropriate or unbecoming to the office and work of a minister or office bearer is enumerated. This includes adultery,[195] "any act or habit of corruption or immorality",[196] and "any knowing and wilful contravention of canons or regulations of General Synod/te Hinota Whanui or of any Diocesan Synod, te Runangaanui or Hui Amorangi".[197] Priests, deacons, and licensed lay persons[198] also owe a duty of obedience to the bishop and those in positions of authority,[199] and all such ministers shall obey the lawful instructions from the licensing bishop.[200]

Ministers (including licensed lay persons) are enjoyed to "teach only doctrine and interpretation of the Faith that are in conformity with the Formularies of this Church, and not teach private or esoteric doctrine or interpretation in contradiction of those Formularies".[201] Ordained ministers shall "proclaim God's word and take their part in Christ's prophetic work, declare forgiveness through Jesus Christ, baptise, preside at the Eucharist and administer Christ's holy Sacrament".[202] Failure to adhere to these canons could result in proceedings being instigated. These arrangements largely mirror those in England. However, proceedings are rarely instigated, possibly for fear of this being perceived as undue legalism.[203] There may also be a fear of establishmentarianism, though the Roman Catholic Church has a more active judiciary. This fear of the Anglican Church being seen as "established" had also lead to the removal of prayers for the Sovereign and the Royal Family.

Perhaps in a conscious avoidance of secular legal forms — but also in a way which copies secular models[204] — the Church courts in New Zealand use mediation and determination proceedings. If they fail to adhere to the norms of the secular legal processes (such as the rules of administrative law),[205] they are liable to correction by the secular courts.[206]

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193 Title D canon I.C2.3.7.
194 It is an offence to "refus[e] or neglect by an Ordained Minister to obey the lawful directions of the Bishop and to submit to the godly admonitions of the Bishop"; Title D canon I.C2.3.6.
195 Title D canon I.C2.3.1.2.
196 Title D canon I.C2.3.1.3.
197 Title D canon I.C2.3.2.
198 Anyone who holds a licence from a bishop, this for certain purposes also including a trustee; interpretation, Title D.
199 Title D canon I.A.3.
200 Title D canon I.A.11.2.
201 Title D canon I.A.11.6.
202 Title D canon I.A.12.3.
203 Interview with the Rev'd Richard Girdwood, clerk in holy orders, 18 September 1999.
204 In particular, from family and employment law proceedings; Allison Morris and Gabrielle Maxwell (eds), *Restorative justice for juveniles: conferencing, mediation and circles* (2001); Robin Arthur, 'The Employment Relations Authority: aspects of the introduction, role and powers of a new institution' (2001) University of Auckland LLB(Hons) dissertation.
205 Philip A Joseph, *Constitutional and administrative law in New Zealand* (2nd ed, 2001).
206 For the inherent jurisdiction of the High Court, see *Taylor v Attorney-General* [1975] 2 NZLR 675.

VI MEDIATION PROCEEDINGS

In New Zealand, the recent revisions of the canons have served to de-emphasise the legal formalism of the judicial procedures. Bishop's Courts have been renamed Episcopal Tribunals, and the final stage of the process is styled an "outcome" rather than a sentence. The accused are now styled "persons against whom a complaint is made."[207] Yet the disciplinary — and legal — nature of the process remains clear. The basis of the judicial process, if it may still be so termed, is mediation and determination (what was formerly styled the "trial").

Given the centrality of episcopal authority in Anglican ecclesiology, it is not surprising that laws channel instances of conflict to the bishop. The "bishops are the primary guardians of discipline in the Church",[208] and have jurisdiction over standards of ministry in an episcopal unit.[209] The means by which this jurisdiction is exercised has varied over time. Disagreements arising from the application of Church laws are normally settled by administrative processes, which often necessitates the making of quasi-judicial decisions.

The use of visitation, an ancient institution preserved in the laws of the majority of churches, was an important means by which quasi-judicial power might be applied to ecclesiastical conflict.[210] The judicial character of visitation has given way in recent years to a more pastoral understanding of its purpose.[211] Its main object is to provide a first hand assessment of the condition of ecclesiastical property and the fulfilment of duties placed on clergy and lay officers. Primates, archbishops, or bishops within the Anglican Communion may exercise visitorial powers, as can the archdeacons in the churches which have that office[212] – including New Zealand.

A bishop may delegate the investigation of a complaint, except that the outcomes must be approved by the bishop in all cases.[213] The bishops have a duty to reconcile.[214] To achieve this they appoint a mediation member of a Panel of qualified tribunal members[215] to conduct mediation.[216] The purpose of the mediation is to seek

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[207] Title D canon I.D.
[208] Title D canon I.C.1.
[209] Title D canon I.C.1.1.
[210] In England the right of an archbishop, bishop or archdeacon to conduct visitations is expressly stated in the canons; *The Canons of the Church of England. Canons ecclesiastical promulgated by the Convocations of Canterbury and York in 1964 and 1969* (1969) Canon G.5 (1).
[211] Peter Smith, 'Points of law and practice concerning ecclesiastical visitation' (1990-92) 2(9) *Ecclesiastical Law Journal* 189; Helmholz, above n 36, 105-109, 165.
[212] Doe, above n 6, 74. The Sovereign is also, in England (though presumably not in New Zealand), supreme ordinary and visitor, and is entitled to visit archbishops and receives their resignations; Archbishop of Canterbury and York's Commission on Church and State, *Report of the Archbishops' Commission on Church and State* (1970) 94.
[213] Title D canon I.C.1.1.1.
[214] Title D canon I.B.1.
[215] Title D canon I.D2.4.1. Title D canon I.D.I.1.1.2: 'a sufficient panel of ordained and lay persons with appropriate qualifications to be available to be appointed by the bishop to a particular tribunal having a particular complaint or matter referred to it'.

to reconcile the parties to achieve an acceptable settlement of the complaint and an appropriate pastoral solution to the issues.[217] The bishop determines the length of time that the mediation process shall be allowed.[218] The duty to reconcile derives from ecclesiastical law, but the manner of its achievement owes more to secular examples of alternative dispute resolution.[219]

The tribunal shall, if required by the bishop, provide mediation assistance in order to facilitate agreed settlements of complaints referred by the bishop.[220] The mediation process may take place in private or in public, according to the Tikanga (or cultural tradition – Pakeha,[221] Maori or Polynesian) of the licensing bishop.[222] After a successful mediation, the bishop may suspend the licence or impose other conditions as the bishop may deem appropriate.[223]

The mediation process may also be seen as largely secular in origin. The process of mediation is borrowed, not only from the Church — which used other, analogous processes[224] — but from secular models of mediation, such as used in the Youth Court, Family Court, Employment Court, and Environment Court.[225] It may be that these latter, secular models formed the basis for the current Church procedures, rather than the more ancient Church precedents. Attempts to reduce the legalism of the Church may have had the effect of increasing (through broadening) the secular influence upon its judiciary.

VII DETERMINATION PROCEEDINGS

Not all matters can be resolved by mediation, and it is sometimes necessary to utilise judicial processes to make a conclusive determination. In most churches the ecclesiastical courts enjoy "criminal" jurisdiction only over ecclesiastical offences involving clergy and, in some churches, lay officers and ordinary members of the laity. Some courts also have "civil" jurisdiction over church property.[226]

In New Zealand the bishop may require the Episcopal Tribunal to inquire into and determine the matter.[227] The tribunal shall, if required, hear and determine differences between complainants and respondents on behalf of the bishop.[228] Proceedings

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[216] Title D canon I.D2.4.2.
[217] Title D canon I.D2.4.4.
[218] Title D canon I.D2.4.6.
[219] See, for instance, Tania Sourdin, *Alternative Dispute Resolution* (2001).
[220] Title D canon I.D.I.3.1.
[221] New Zealander of European descent.
[222] Title D canon I.D2.4.8.
[223] Title D canon I.D2.4.13.
[224] Such as derived from the principle of canonical obedience.
[225] See Peter Spiller (ed), *Dispute Resolution in New Zealand* (1999).
[226] See Doe, above n 6.
[227] Title D canon I.D3.5.
[228] Title D canon I.D.I.3.2.

continue with an allegation,[229] and notice of all allegations with particulars, and the time, place and circumstances of the alleged commission, must be given to the accused.[230] A bishop may treat an issue regarding misconduct, coming to his or her knowledge, as a complaint.[231] Otherwise, complaints are made to the licensing bishop.[232] This appears to be an attempt to deal fairly with all situations which might lead to legal consequences, but in so doing a relatively complex and legalistic process has been established.

The bishop may choose to inquire into a complaint, or to not do so.[233] The decision may be taken to veto further proceedings.[234] The primate may also suspend a minister pending a determination.[235] The complaint may be dismissed if frivolous or if it is clear on the evidence that the facts do not constitute an offence.[236] This, and many of the other procedures, are borrowed from secular court procedures. If the complaint is deemed by the bishop to be serious or significant, it may be referred to the tribunal for determination without the preliminary step of mediation.[237] A decision of the bishop to take no further action may be appealed.[238] In any case the bishop's first responsibility is to seek to reconcile the parties.[239] Thereafter the bishop may send the matter to mediation or determination.[240] If the former, there is no trial, if otherwise the proceeding passes to the tribunal. Despite attempts to reduce the legal formalism, a proceeding may still proceed to a trial.

The Episcopal Tribunal called upon to hear a case will have at least three determination members or members who are both mediation and determination members.[241] At least one must be a clerical member and one a lay member.[242] The tribunal selects its own chairman.[243] Where possible one member is to be a barrister and solicitor of the High Court of New Zealand of at least seven years standing, or similarly qualified and experienced in any legal jurisdiction in the Diocese of Polynesia.[244] The

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[229] "Any person may complain against a Minister or Office Bearer of this Church for any misconduct under this Title D"; Title D canon I.C3.4.1.

[230] "Persons against whom allegations are made shall be told according to the Tikanga what the allegations are and know who made the allegation"; Title D canon I.B.9.3.

[231] Title D canon I.C3.4.1.1.

[232] Title D canon I.C3.4.1.

[233] Title D canon I.C3.4.4. For bishops, the primate enquires; Title D canon II.3.1.1.

[234] Title D canon I.C3.4.5.

[235] Title D canon I.C3.5.2.

[236] Title D canon I.C3.4.5.

[237] Title D canon I.D2.4.11.

[238] Title D canon I.C3.4.4.1; Title D canon I.D5.

[239] Title D canon I.C3.4.6.

[240] Title D canon I.C3.4.7.

[241] Title D canon I.D.I.1.4 — Title D canon I.D.I.1.6; Title D canon I.D.I.2.1.1 — Title D canon I.D.I.2.1.3. "A panel may be drawn from both lay and ordained persons from within or outside of the Episcopal Unit, or of this Church" (Title D canon I.D.I.1.3).

[242] Title D canon I.D3.5.1.

[243] Title D canon I.D3.5.1.1.

[244] Title D canon I.D3.5.2. cf. Chancellors of consistory courts in England are required to have a seven-year general qualification within the meaning of s 71 of the Courts and Legal Services Act 1990 (UK) or a person who has held high judicial office; *The Canons of the Church of England. Canons ecclesiastical promulgated by the Convocations of Canterbury and York in 1964 and 1969* (1969) Canon G.2 (2).

bishop may take part in the Tribunal only if it is the custom of the Tikanga.[245] This latter provision raises legal issues of its own, involving notions of the separation of powers,[246] which could potentially lead to successful judicial review by the High Court.

The tribunal regulates its own proceedings.[247] However, the same persons cannot both mediate and determine in the same matter,[248] and the proceeding must adhere to secular standards for quasi-judicial and judicial bodies, to avoid successful judicial review by secular courts.[249] Thus the tribunal is not truly free to regulate its own proceedings, since the rules of administrative law apply to all bodies exercising, or purporting to exercise, quasi-judicial powers.[250] Failure to adhere to the norms of administrative law could also lead to successful judicial review by a secular court.

Tribunal proceedings may be in private or in public, having regard in each case to the competing needs for openness and the protection of the parties where appropriate.[251] The accused has a right to silence,[252] and to legal representation.[253] Evidence would not necessarily be on oath,[254] and evidence is admissible whether or not it would be admissible in a court of law[255] – though this again raises the possibility of a successful review by a secular court. In some respects this reflects a desire for a less legalistic process. Yet, in seeking to differentiate the Church tribunals from the secular courts, the canons resort to secular terminology and assumptions – possibly in the absence of a developed legal procedure to serve as a model, except for the common law.

The Episcopal Tribunal may refer any question of doctrine or orthodoxy of theology to the bishop for a ruling and may for that purpose defer determination or adjourn the proceedings subject to receiving that ruling.[256] This may be a conse-

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[245] Title D canon I.D.I.2.1.4.
[246] See note 187 above.
[247] Title D canon I.D3.6.2.
[248] Title D canon I.D.I.1.7.
[249] For example, in *Burt v Governor-General* [1992] 3 NZLR 672 (CA) and *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374.
[250] Joseph, above n 205.
[251] Title D canon I.D4.8.2.
[252] 'Persons against whom a complaint is made under this Title D have the right to remain silent …'; Title D canon I.B.10. This is a common law presumption, though not one of great antiquity; J Wood and A Crawford, *The Right of Silence* (1989); David Harvey, 'The Right to Silence and the Presumption of Innocence' [1995] *New Zealand Law Journal* 181; Stephen Odgers, 'Police Interrogation and the Right to Silence' (1985) 59 *Australian Law Journal* 78; Robert Williams, 'Silence in Australia: Probative Force and Rights in the Law of Evidence' (1994) 110 *Law Quarterly Review* 629.
[253] Title D canon I.D3.6.1.4.
[254] Where an oath has been duly administered and taken, the fact that the person to whom it was administered had at the time of taking the oath no religious belief does not affect the validity of the oath; *Oaths and Declarations Act 1957* (NZ) s 5. People are entitled as of right to make affirmations instead of taking an oath without enquiry as to religious belief; s 4 cf. *R v Clara* [1962] Cr App R 113; 1 All ER 428, where a person is only permitted to affirm if the judge is satisfied that the person bases his or her objection to the taking of the oath on the ground that it is contrary to religious belief, or that he or she had no religious belief.
[255] Title D canon I.D3.6.3.
[256] Title D canon D2.7.

quence of the legacy of the nineteenth century Privy Council cases (which were bitterly disputed), but it is equally likely to be deferring to the teaching authority of the bishops.[257] This, at least, is an ecclesiastical provision, with no direct secular counterpart. It also recognises the teaching role of the bishop.

The findings of a tribunal are reported to the bishop and to the parties.[258] The tribunal may also make recommendations to the bishop. These are not, however, binding,[259] for it is the bishop who imposes any sanction,[260] which itself could potentially be challenged through judicial review, since the bishop must act in a quasi-judicial capacity.[261]

Perhaps not surprisingly, given their leadership role, proceeding against bishops require a special procedure.[262] For the trial of a bishop all bishops would be involved, and all lay members of the Judicial Committee[263] are members of the Panel.[264] Membership of the Judicial Committee includes any bishop, any ordained minister holding a bishop's licence or authorisation for any ministry, and any lay member of the Church who is a barrister and solicitor of the High Court of New Zealand of seven years standing, or equivalent in any jurisdiction in the Diocese of Polynesia.[265] Every Bishop's Determination Tribunal shall consist of not less than three members, of whom there shall be at least two bishops chosen by the House of Bishops and one lay member appointed by the Judicial Committee from the Panel.[266] This tribunal combines representation of the membership of the Church with formally qualified judges – though again the latter are comparatively few in proportion.

These determination proceedings are argued by barristers and solicitors of the High Court of New Zealand, or equivalents from the civil jurisdictions contained within the diocese of Polynesia.[267] Perhaps unsurprisingly, there is no specific requirement that they be learned in the ecclesiastical law.[268] The advocates of Doctors' Commons never practised in New Zealand,[269] and there has never been a domestic eccle-

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[257] The charges to preach and teach were presented clearly and forcefully in the pastoral epistles; 1 Timothy 4; 2 Timothy 4.
[258] Title D canon D3.8.
[259] Title D canon D3.8.1.
[260] Title D canon D3.8.1.
[261] *Gregory v Bishop of Waiapu* [1975] 1 NZLR 708.
[262] At least two priests must bring a complaint; Title D canon II.3.1.
[263] Not, of course, the Judicial Committee of the Privy Council, but the Judicial Committee established by canon.
[264] Title D canon II.7.1.
[265] Title C canon IV.2.
[266] Title D canon II.7.2.
[267] Fiji, Tonga, Samoa, and the Cook Islands — the latter an associated state of New Zealand.
[268] Cf. "learned in the civil and ecclesiastical laws and at least a master of arts or bachelor of law, and reasonably well practised in the course thereof." Canons Ecclesiastical (1603) 127 (revoked).
[269] Therefore, in England, barristers may do so on the basis of the doctrine *ex necessitate rei*, as explained *In the matter of the Serjeants at Law* (1840) 4 Bing (NC) 235, 239 per Tindal CJ, approving *Parton v Genny* (1462) YB 2 Edw IV, Trin f 2, 14 (Littleton J) (barristers would be allowed to practise in

siastical law bar.[270] The law of the church perhaps cannot be properly understood and properly administered without something more than a perfunctory knowledge of theology and church history.[271] The result is that the Church courts, or tribunals as they are now styled, rely on lay counsel and, in many cases, judges (both secular and religious)[272] who are also comparatively unacquainted with ecclesiastical law and practise,[273] and the tribunals themselves are but rarely resorted to.

VIII OUTCOMES

As noted above, the Church tribunals may only recommend a sentence, which is imposed by the bishop[274] in accordance with the latter's disciplinary role. There are no automatic penalties as in England, where a priest or deacon might find himself or herself liable to ecclesiastical penalties upon conviction in a secular court, without further trial[275] – this being a consequence of establishment which perhaps enhanced efficiency. The bishop's determination is given in writing to complainant and respondent.[276] The authority of this determination is based on canonical obedience,[277] as the tribunals are not the Queen's courts and do not have independent powers of enforcement. The enforceability of their judgments, if disputed, is therefore problematic,[278] and for that and other reasons,[279] the courts are rarely used.

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the Court of Common Pleas if all the serjeants were dead). A similar application of the doctrine was given in the Court of Chivalry in 1954; *Manchester Corporation v Manchester Palace of Varieties Ltd* [1955] WLR 440, 449 (Lord Goddard).

[270] Each diocese does however have a Church Advocate, who is a senior barrister with an interest in ecclesiastical law. They do take cases before the tribunals, when such arise.

[271] Eric Kemp, 'The Spirit of the Canon Law and its application in England' (1989) 1(5) *Ecclesiastical Law Journal* 5, 14.

[272] Where these latter are utilised.

[273] The current diocesan chancellors and legal advisers include barristers and solicitors of the High Court of New Zealand, but none with formal qualifications in canon or ecclesiastical law, or civil law.

[274] Title D canon I.D.I.1.1.2; Title D canon I.D3.8.1; Title D canon I.D3.9.1 — canon I.D3.9.5.

[275] These include conviction for treason or felony, or conviction on indictment for a misdemeanour followed by a sentence of imprisonment or greater punishment. They also include an affiliation order; a decree of divorce or judicial separation on the ground of adultery, rape, sodomy, or bestiality; a finding of adultery in a divorce or matrimonial cause; an order made under the *Matrimonial Proceedings (Magistrates' Courts) Act 1960* (8 & 9 Eliz II c 48) (UK), in respect certain assaults upon his wife, or in respect of certain sexual offences, or for adultery, or for intercourse while the accused was knowingly suffering from a venereal disease, or for being an habitual drunkard or drug addict, or for compelling his wife to submit to prostitution; *Ecclesiastical Jurisdiction (Amendment) Measure 1974* (UK).

[276] Title D canon I.D4.9.

[277] Or, for lay office-holders, a declaration of adherence and submission to the authority of the General Synod; Const. C.15.

[278] As it now is in the High Court of Chivalry; *Manchester Corporation v Manchester Palace of Varieties Ltd* [1955] WLR 440, since the loss of the right to imprison in the Marshalsea Prison ended with the closure of that prison.

[279] Which may include an unwillingness to enforce Church laws where there is scope for legitimate disagreement in interpretation.

If the tribunal determines and reports to the bishop that there has been misconduct under Part C2 of the canons, the bishop may decide to take no further action, or impose the sentence, or outcome as it is called.[280] These may include admonition,[281] suspension from the exercise of ministry or office,[282] deprivation of office or ministry,[283] or deposition from the exercise of ordained ministry.[284] These are similar to the English equivalents.

Admonition, or monition, may be "a formal written order or injunction."[285] This is an order to do or not do a specified act, and is also available in England. The bishop may reverse admonition.[286] Suspension is the suspension from the exercise of ministry or office.[287] In English this practice is divided into two, called inhibition and suspension respectively. Any person subject to deprivation is incapable of holding any office or performing any function in any episcopal unit of the Church until restored.[288] This is also available to an English consistory court, where it involves removal from preferment, and disqualification from holding further preferment without the express consent of the diocesan bishop with the consent of the archbishop and of the bishop of the diocese where the censure was imposed.[289] Deposition is "the permanent taking away of the right to perform the duties of every office for which Holy Orders is required".[290] These provisions have been borrowed largely unchanged from England, and have no secular equivalent.

Although lay people may be subject to the sanctions of the tribunals, these are but rarely imposed. Again there are potential difficulties of enforcement, even where an oath of canonical obedience has been taken. Failure to recognise the authority of an ecclesiastical court in England can be treated as contempt, and the High Court has jurisdiction in such instances.[291] In New Zealand there is no such equivalent express authority,[292] and there are no formal automatic contempt proceedings for an ecclesi-

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[280] Title canon I.D4.9.1.
[281] Title D canon I.D4.9.2.
[282] Title D canon I.D4.9.3.
[283] Title D canon I.D4.9.4.
[284] Title D canon I.D4.9.5.
[285] Title D canon I.D4.9.2.
[286] Title D canon I.D4.10.4: 'Persons who have imposed upon them an outcome under clause 9.2 may at any time while the outcome is operative apply to the Bishop who imposed the outcome or the successor of that Bishop for removal of the outcome on the grounds that since the commission of the misconduct they have given evidence to satisfy the Bishop of such complete reformation, and fitness for restoration to their former status, as to make it just, having regard to the welfare and interests of this Church, that further continuance of the outcome should be dispensed with, and the Bishop may thereupon declare that the misconduct has been completely expiated, and may determine that, from a date to be specified, every ineligibility arising from such outcome shall be removed'.
[287] Title D canon I.D4.9.3.2.
[288] Title D canon I.D4.9.4.1. They may be restored under Title D canon I.D4.9.4.2.
[289] *Ecclesiastical Jurisdiction Measure 1963* (UK) s 55.
[290] Title D canon I.D4.9.5.
[291] *Ecclesiastical Jurisdiction Measure 1963* (UK) s 81(2); *R v Daily Herald ex parte Lord Bishop of Norwich* [1932] 2 KB 402.
[292] However, see *Baldwin v Pascoe* (1889) 7 NZLR 759, citing *Long v Lord Bishop of Cape Town* (1863) 1 Moo NS 411 (PC):

astical tribunal – though failure to recognise an outcome of admonition, for instance, could potentially be subject to judicial review, or contempt proceedings in the High Court.

Jurisdiction is limited to what are strictly ecclesiastical offences, but trials are conducted by tribunals which derive at least part of their procedure if not their substantive rules from common law and statutes, yet without the backing of the apparatus of the secular judicial system.

IX GROUNDS OF APPEAL

There is a right of appeal from a determination by an Episcopal Tribunal to the Appeal Tribunal,[293] which must be exercised within 28 days.[294] The grounds for appeal must be specified.[295] The right of appeal from the judgments of spiritual courts in mediæval times in general arose if there was a procedural flaw or a suspicion of bias,[296] and modern tribunals must also be given due evidence of a valid ground of appeal. The Appeal Tribunal may confirm, modify, or reverse the findings appealed against.[297] This procedure is also equivalent to the secular judicial appeal process.[298]

The Appeal Tribunal consists of five members — the Primate, and the Co-Presiding Bishops, and if there is any vacancy in these offices the Senior Bishop, one lay member and one clerical member of the Judicial Committee appointed by the chairman of the Appeal Tribunal for the particular case.[299] The Primate is chairman, unless a party to the appeal, in which case the Co-Presiding Bishops shall choose which of them shall be the chairman.[300] This arrangement is equivalent to that for the (secular) Court of Appeal – or, indeed, that of the Court of Arches, though it may be noted that there is a clear majority of clerical members.

> [s]uch tribunals are not Courts, but their decisions will be binding if they have acted within the scope of their authority. They must also have either observed the prescribed procedure

or, if there is none

> have proceeded in a manner consonant with the principles of justice, and the Civil Courts will enforce the decision if necessary.

[293] Title D canon I.D5.11.
[294] Title D canon I.D5.11.1.
[295] Title D canon I.D5.11.2.
[296] *Leges Henrici Primi*, ch 5.3 a: 'Si in testibus et iudicibus et personis satisfactum sit ei, si iudicibus consentiat [si iudice suspectos habeat] advocet aut contradicat'; *Leges Henrici Primi* ed & trans by L J Downer (1972).
[297] Title D canon I.D5.11.3.1.
[298] Which, historically, was comparatively rarely provided. Indeed the Church appeal procedures have long been more elaborate than their secular equivalents.
[299] Title D canon I.E.1.
[300] Title D canon I.E.2.

The Judicial Committee itself hears disputes with respect to the interpretation of the Constitution.[301] This also hears appeals from acts or decisions of Te Runanga o Te Pihopatanga o Aotearoa or any diocesan synod, or of the Synod of the Diocese of Polynesia.[302] The nine members include at least two from each Tikanga, one bishop, one ordained minister, and three lay persons,[303] and the quorum is five.[304] General Synod elects the members.[305] The Judicial Committee selects its own chairman and deputy chairman.[306] The composition is designed to represent all elements in the Church, including lay. But it is not equivalent to the English Court of Ecclesiastical Causes Reserved, or even of the Judicial Committee of the Privy Council, as the lay members are not necessarily senior judges, nor are clerical members exclusively — or even predominantly — bishops. It has no equivalent in the secular courts, except in those jurisdictions where a constitutional court exists.[307] The comparative scarcity of episcopal members may be questioned, but they are better represented in the next tribunal.

This is the Tribunal on Doctrine, established for the purpose of deciding all questions of doctrine referred to it.[308] As might be expected, bishops are better represented in a tribunal to deal with doctrine than they are in the Judicial Committee, whose jurisdiction is limited to constitutional interpretation. Episcopal membership comprises three bishops (including retired bishops) elected by the bishops in full-time active and constant episcopal ministry in the dioceses in New Zealand, a bishop elected by the bishops in Te Pihopatanga o Aotearoa, and a bishop representing the Diocese of Polynesia.[309] There is also an equal number of priests or deacons,[310] and lay persons duly qualified to be members of General Synod.[311] This is approximately equivalent to the Court of Ecclesiastical Causes Reserved in England,[312] except that the membership is exclusively episcopal.

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[301] Title C canon IV.1.
[302] Title C canon IV.1.
[303] Title C canon IV.2.2.
[304] Title C canon IV.3.2.
[305] Title C canon IV.2.3.1 — Title C canon IV.2.10.
[306] Title C canon IV.3.1.
[307] The Judicial Committee of the Privy Council has jurisdiction to hear and determine "devolution issues", that is questions relating to the powers and functions of the legislative and executive authorities established in Scotland and Northern Ireland by the *Scotland Act 1998* (UK) and the *Northern Ireland Act 1998* (UK), respectively, and questions as to the competence and functions of the Assembly established by the *Government of Wales Act 1998* (UK).
[308] Title C canon V.1.
[309] Title C canon V.2.
[310] Title C canon V.2.2. These are elected by the clergy in General Synod; Title C canon V.3.1.
[311] Title C canon V.2.3. These are elected by the lay members of General Synod; Title C canon V.3.1. Qualification for membership of General Synod Qualification includes baptism and a minimum age of 16 years; Title B canon I.1.7.
[312] *Ecclesiastical Jurisdiction Measure 1963* (UK) s 10.

Only applications for appeal supported by seven people, one of whom must be a bishop, one a licensed priest or minister, and one a lay member of the Church,[313] are entertained.[314] The tribunal shall specify in its judgment, advice or opinion, the matters in respect of which it finds that there is involved a departure from the doctrine and sacraments, or a matter of doctrine requiring its advice and opinion.[315] This tribunal has a greater prospect of use, in that there is no equivalent secular court, and its jurisdiction is one which no secular court would normally entertain.

These judicial mechanisms and procedures are modelled in part on the structure of the ecclesiastical courts in the Church of England. The influence of secular legal procedures, the absence of ecclesiastical law specialists, and the comparative rarity of actions help to reduce the judicial arm of the Church in New Zealand to a mere shadow of what it is in England. The separation of normal appeals and those relating to doctrine appears to be a consequence of the delicacy of questions of doctrine, and its historic entrustment to the hands of the bishops as teachers.[316]

The jealously of the common law is not the main problem facing the Church courts – though this has resulted in a diminished jurisdiction. The legacy of the courts as part of the establishment, or to a fear of legalism[317] seems to have contributed to a weakening of their role. Attempts to strengthen the courts by reducing their obvious parallels with secular courts have yet to be proven successful, but in so acting the Church may have introduced further secular ideas and concepts.[318]

X FACULTY CASES

Mediation and determination by tribunals are not the only judicial or quasi-judicial processes in the church. In England, no alteration may be made to the fabric or decoration of a church or in respect of its ornaments and furnishings, whether permanent or temporary, movable or fixed, without the authority of a faculty.[319] Without such authority new ornaments and furnishings may not be introduced into the church, nor those already there removed (even though they were introduced illegally).[320] In practice an exception is made in respect of trivial matters,[321] while the

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[313] Title C canon V.4.0.
[314] This appears to allow for the possibility of an application supported by a majority of non-members of the Church.
[315] Title C canon V.11.
[316] See also Norman, above n 147.
[317] Perhaps 'popish' legalism.
[318] In an interesting parallel, Blackstone, commenting on the decline of the Court of Chivalry, attributed this to "the feebleness of it's [sic] jurisdiction, and want of power to enforce it's judgments; as it can neither fine nor imprison, not being a court of record"; Blackstone, above n 44, Book 3, 67.
[319] Newsom, above n 84.
[320] Ibid.
[321] Such as flowers, footstool, literature, new washers, and electric light bulbs.

doctrine of necessity can justify, and indeed demand, the immediate carrying out of urgent repairs without further authority.[322] The judge of the Consistory Court of the diocese, the chancellor, exercises this general faculty jurisdiction.[323]

In contrast to the English position, an episcopal faculty system is employed in New Zealand.[324] For the erection of or addition to church buildings the consent of the bishop is required.[325] No alteration of a significant kind, affecting the stability and general plan of a church building and no erection of monuments, shall take place without the written consent of the Trustees, the Ordained Minister, and authorised lay officers of the local ministry and mission unit.[326] The bishop may issue a faculty for such alterations if satisfied that any conditions laid down have been complied with, and no alteration is permitted without a faculty having been issued.[327]

The result is that a major element of English ecclesiastical law is entrusted to the bishop — and dealt with in an administrative or quasi-judicial manner. Again, this can be seen as possibly being evidence of a certain distrust of courts, perhaps because of nineteenth century English experience. Yet this attitude — if it is indeed present — may be misconceived. The courts in the pre-Reformation church, and in the Roman Catholic Church today, had a wider and more important role than the tribunals of the Anglican Church in New Zealand.[328] Nor should the difficulties with the Privy Council be relevant in the New Zealand situation, where no secular court is authorised to hear ecclesiastical cases. Whatever the reasons for this use of an episcopal faculty system, it appears to be a reasonably efficient process. In ecclesiological terms this is perhaps ultimately a sufficient justification.[329]

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[322] The doctrine of necessity is found in ecclesiastical and secular law alike; See Benjamin L Berger, 'A Choice Among Values: Theoretical and Historical Perspectives on the Defence of Necessity' (2002) 39 *Alberta Law Review* 848.

[323] Newsom, above n 320.

[324] 'No alteration of an important kind, affecting the stability and general plan of the church, and no new arrangement of seats or erection of monuments shall take place without the written consent of the Trustees, the Minister and Churchwardens', 'A Faculty for such alteration ... may be issued by the Bishop" if satisfied inter alia that there is adequate insurance: no alteration may occur until the faculty is issued and any questions arising between trustees and the ministers or officers of the parish "shall be decided by the Bishop and the Standing Committee of the Diocese"; Title F canon III, 15-17. A faculty "confers liberty on a person to do something; it does not command him to do anything"; *Re St Mary, Tyne Dock (No 2)* [1958] P 156, 166 (Wigglesworth Dep Ch). But faculty procedures may be used for remedial purposes.

[325] "No building shall be erected on any Church site until plans thereof have been submitted to the Bishop of the Diocese/Pihopa of the Hui Amorangi, or the Commissary authorised to preside at the meetings of the Standing Committee/Amorangi Whaiti, or a Commission specially authorised for the purpose, and to the Trustees"; Title F canon III.13.

[326] Title F canon III.15.

[327] Title F canon III.16.

[328] Though even here its jurisdiction is largely confined to the determination of marriage laws.

[329] In the Eastern Orthodox Churches the concept of economy (οικονομια) is generally equated with dispensation, though there are important differences, both in theory and practise; J A Douglas, 'The Orthodox Principle of Economy, and Its Exercise' (1932) 13:3(4) *The Christian East* 91-98. For dispensations generally, see the Report of a Commission appointed by the Archbishop of Canterbury, *Dispensation in Practice and Theory* (1944).

XI SUPERVISION BY THE SECULAR COURTS AND THE INTERPRETATION OF ECCLESIASTICAL LEGISLATION

Church tribunals may determine questions of ecclesiastical law, but secular courts may also be called upon to settle disputes within the Church. The tribunals are also subject to supervision by secular courts, particularly with respect to questions of the interpretation of constitutions.[330]

In the Roman Catholic Church it is provided that, when the law of the Church remits some issue to the civil law, the latter is to be observed with the same effects in canon law, insofar as it is not contrary to divine law, and provided it is not otherwise stipulated in canon law.[331] This has some echoes in the experience in England with the Privy Council. The Anglican Church in New Zealand does not expressly provide for questions to be remitted to secular courts, but procedures within the Church — including judicial and quasi-judicial actions — may be reviewed by the secular courts due to the inherent jurisdiction of the High Court.[332] The Church must acknowledge this reality.

As a voluntary association the church is competent "to constitute a tribunal ... to decide questions arising out of this association". Moreover, "[s]uch tribunals are not Courts, but their decisions will be binding if they have acted within the scope of their authority. They must also have either observed the prescribed procedure", or, if there is none, "have proceeded in a manner consonant with the principles of justice, and the Civil Courts will enforce the decision if necessary".[333]

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[330] Or of codes or even quasi-judicial procedures, as in *Gregory v Bishop of Waiapu* [1975] 1 NZLR 708.

[331] *The Code of Canon Law: in English Translation* prepared by the Canon Law Society of Great Britain and Ireland (1983) Canon 22.

[332] The High Court has 'all judicial jurisdiction which may be necessary to administer the laws of New Zealand'; *Judicature Act 1908* (NZ) s 16. This is also recognised by the *Church of England Empowering Act 1928* (NZ) s 7: 'Nothing in this Act contained shall annul, limit, or abridge the inherent power of the [High Court] to prohibit anything purporting to be done under this Act on the ground that it is not a bona fide exercise of the powers conferred by this Act.' (The reference to the High Court was substituted, as from 1 April 1980, for a reference to the Supreme Court pursuant to s 12 Judicature Amendment Act 1979). *Taylor v Attorney-General* [1975] 2 NZLR 675, 682 (Richmond J) adopted this description of the inherent jurisdiction by Master Jacob, 'The Inherent Jurisdiction of the Court' (1970) *Current Legal Problems* 27, 28:

> The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.

[333] *Baldwin v Pascoe* (1889) 7 NZLR 759, citing *Long v Lord Bishop of Cape Town* (1863) 1 Moo NS 411 (PC).

The Anglican Church in New Zealand provides for a definitive interpretation of its own laws.[334] Disputes about the interpretation of church law may be referred to a superior tribunal, the Judicial Committee.[335] But the secular courts will provide their own interpretation whenever recourse is made to them.[336] The effect is that the two systems of courts cannot be said to be truly co-equal — as they arguably had been before the Reformation. This is due to the limited nature of the recognition by the civil courts of the ecclesiastical courts, and to the enforceability of the judgments of secular courts, and their ancillary jurisdiction for punishment for contempt.

Even where a statute has been passed relating to a church or religious organisation and its property, this does not involve parliamentary recognition of the institutions and procedures established by the rules of the church. The institutions and procedures are still seen as private or domestic.[337] This does not exclude the jurisdiction of the courts, however, as the churches remain subject to the jurisdiction of the Crown.[338] A valid and strong reason to intervene could include any question of property or office[339] — and thereby involve the secular courts in disputes involving doctrine or practice. However, differences within a religious group of any kind are resolved purely on a legal basis. The Court must not endeavour to interfere nor can it decide theological or liturgical differences.[340] Insofar as the Church tribunals and officers are subject to the supervision of the secular courts, the ecclesiastical laws may be categorised as more than merely private. They are in a limited sense part of the law of New Zealand, though for limited purposes only.

In the United States of America, the Supreme Court has prescribed the involvement of secular courts in disputes that depend for their resolution on religious doctrine or practice.[341] The only exception is church disputes capable of being decided by the application of neutral principles of law developed for use in all property disputes,[342] and perhaps also decisions of church tribunals that are vitiated by "fraud, collusion or arbitrariness".[343] In practice the jurisdiction is somewhat wider than this might suggest.

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[334] The Judicial Committee; Title C canon IV.1.
[335] Title C canon IV.1.
[336] *Baldwin v Pascoe* (1889) 7 NZLR 759, citing *Long v Lord Bishop of Cape Town* (1863) 1 Moo NS 411 (PC). Also applied in *Gregory v Bishop of Waiapu* [1975] 1 NZLR 708.
[337] *Gray v M* [1988] 2 NZLR 161 (CA).
[338] *Gregory v Bishop of Waiapu* [1975] 1 NZLR 705, 708.
[339] As in *Gregory v Bishop of Waiapu* [1975] 1 NZLR 705.
[340] *Cecil v Rasmussen*, High Court, Auckland, A.1269/83, 9 December 1983, Barker J; *Misa v Congregational Christian Church of Samoa (Wainuiomata) Trust Board* [1984] 2 NZLR 461 (CA), *Presbyterian Church Property Trustees v Fuimaono*, High Court, Auckland, A.1595/85, 16 October 1986, Thorp J.
[341] *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 US 440 (1969).
[342] *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 US 440, 449 (1969)
[343] *Gonzales v Roman Catholic Archbishop*, 280 US 1, 16 (1929); Mr Justice Bruce McPherson, 'The Church as consensual compact, trust and corporation' (2000) 74 *Australian Law Journal* 159.

In Australia the secular courts do hear disputes in respect of church law, at least if property or civil rights and liberties are involved.[344] In New Zealand the secular courts will enforce the constitution and rules of churches,[345] but they will be reluctant to intervene in church matters unless there are valid and strong reasons for doing so.[346] In practice the courts will become involved where there is an office or property involved.

XII CONCLUSIONS

The judiciary of the Church mirrors the procedures of the secular courts, from whom they have borrowed – just as, in earlier times, the secular courts borrowed from the ecclesiastical courts.

In New Zealand, the small number of cases, and a limited jurisdiction, combined with the virtual absence of counsel with knowledge of the ecclesiastical laws, have seriously weakened the Church tribunals.

Anglican jurisprudence in general is ambivalent to the question of recourse from ecclesiastical courts and tribunals to the secular courts, though in many states — including New Zealand — the latter provide a supervisory jurisdiction over the former. It was perhaps a conscious attempt to distance the Church judiciary from the secular courts that led to the former being restyled tribunals. But the jurisprudential weakness of the tribunals remains a marked feature of the Church in New Zealand, and seriously weakens the legal authority of the Church.

At the 1948 Lambeth Conference, "the positive nature" of Anglican authority was identified as "moral and spiritual" rather than legal or institutional, and as resting on "charity".[347] It might be doubted whether this is a sufficiently robust foundation for the internal jurisprudence of the Anglican Church in New Zealand — or of the Anglican Communion — but a sense of spiritual freedom has coloured the whole ethos and expression of Anglicanism.[348] In limiting the role of formal tribunals as

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[344] *Attorney-General of NSW v Grant* (1976) 135 CLR 587, 600 (Gibbs CJ) (HCA); *MacQueen v Frackleton* (1909) 8 CLR 673 (HCA). "Civil rights and liberties", and "property" can have wide application.

[345] *Gregory v Bishop of Waiapu* [1975] 1 NZLR 705.

[346] *Gregory v Bishop of Waiapu* [1975] 1 NZLR 705, 708 (Beattie J). cf. *Barker v O'Gorman* [1971] 1 Ch 215; [1970] 3 All ER 314.

[347] Conference of Bishops of the Anglican Communion, *The Lambeth Conference, 1948. The Encyclical Letter from the Bishops; together with Resolutions and Reports* (1948) 48 Report IV, 'The Anglican Communion'. See also "There is only one source of authority, which is the freedom and love of the Triune God" — Stephen Sykes, *The Integrity of Anglicanism* (1978) 98.

[348] Emmanuel Amand de Mendieta, *Anglican Vision* (1971) 63.

much as possible, the Church has arguably sought to reduce the influence of legal formalism. But the smallness of the jurisdiction has encouraged the survival and growth of common law notions of process, whilst not encouraging the development of ecclesiastical equivalents.