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the legal development of the Established Church, Religious Toleration and Conscientious Objection.

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INTRODUCTION.

This thesis is a legal study on Church and state relations in England between 1532 and 1994. In 1532, Henry VIII began the process, by legal means, of separating the Church in England from the rest of Europe. Within three generations, his children had each used their legislative capacity to bring about changes in religious worship on a national scale and which were to affect English Society for more than four hundred years. This study will focus on the way that the secular law—chiefly by Acts of Parliament—was used to create a national church, to determine its creed and its liturgy; then how it was used to prescribe and punish religious dissent; finally, how it was used to give effect to the mellowing of religious attitudes and the acceptance of religious toleration.

In legal theory, England is a confessional state. The Established Church retains a special legal position within the English constitution and the ecclesiastical law of the state, chiefly affects and concerns her matters. How this came about legally within the major ecclesiastical reforms of first Henry VIII and then Edward VI and Elizabeth I. will be studied, by surveying the most important Acts of Parliament in those times. The first five chapters will concentrate upon the Established Church, tracing her evolving juridical position from the sixteenth century to modern times. The following five, will then examine how initially English law was used to punish religious dissent; how the principle of religious liberty gradually took shape and finally, in the twentieth century, how religious liberty has come to be recognised along with the closely linked, but different concept, of conscientious objection.

As this work is chiefly a legal study, undertaken in the faculty of Canon law in the Pontifical University of the Holy Cross, important legal documents have been used to facilitate the research; important case decisions of the English Courts but

1 Throughout this thesis, we have referred to the Anglican Church as The Established Church, for it is the Church established by law. This is examined in greater detail, including the Acts of Parliament in chapter 2.

2 The law on conscientious objection is probably most familiar for those working in pro-life legislation. The 1967 Abortion Act accepted in principle the concept of a legal right to refuse to participate and carry out an abortion, on certain grounds. In recent years, there have been a series of decisions, recognising the principle in other legal areas.
above all, Acts of Parliament passed by Henry VIII and then his children, Edward VI, Mary and Elizabeth. Photocopies of the relevant extracts from these documents were sent by post, whilst the initial drafts of each chapter were being written. They were subsequently checked with the official collection of statutes in the law library of the University of Manchester. The use of the law library also permitted the writer to make notes of other important statutes and case decisions and to incorporate further references to these within the footnotes.

English law now operates the judicial doctrine of binding precedent. Throughout the text, where possible, we have made extensive use of and cited the important reported case decisions, where they relate to issues in respect of religious cult or worship, education, employment and religious freedom of expression. These case decisions, have facilitated the common law growth of religious diversity and together with modern English statutes, give the present legal position of English law on religion. The older case decisions are to be found within the official collection of English Reports (E.R.). The modern decisions are reported in the official collection of Law Reports, the Weekly law reports (WLR) as well as the All England law Reports (All E.R.).

We have consulted several English legal textbooks on diverse aspects of English law. Books on English legal history, Equity, the English Constitution, Ecclesiastical law, Charity law and civil liberties. In each of the ten chapters, there is a brief mention made of the sources, consulted to support the narrative as well as the analysis and short conclusion appearing at the end of each chapter. We have at the same time, used various textbooks and other works of historical research, which give the historical background to the Parliamentary reforms.

This project is divided into two sections and comprises ten chapters. The first section, which has five chapters, concentrates on the Established Church. It traces its origin and historico-legal development up to 1994. The second section, also containing five chapters, deals with the legal way that religious dissent was initially handled, the growth of religious toleration and the present position of

3 The most important statutes of Henry VIII are referred to and quoted, as they abolished papal authority in England and put on a statutory basis, Henry’s claim to be supreme Head of the Church in England.

4 The Acts of Parliament are to be found within the official collection of Statutes, called Statutes at large. A table of all the statutes consulted has been prepared, by reference to their year of enactment. All the case decisions have also been checked and an alphabetical index prepared as well.
INTRODUCTION

religious freedom in the light of the European convention on human rights. Allied with religious freedom is the relatively new concept, recognised to some extent, of conscientious objection.

The first chapter gives a general historical survey of the position of the Catholic Church in England, prior to 1532. It concentrates above all, on major legal landmarks such as the arrival of St. Augustine in England in AD 597, equipped with the mandate of Gregory the Great to erect the hierarchical structure of the Church, the Magna Carta of 1215, which guaranteed the freedom of the English Church and the important Statutes passed by earlier monarchs to try to restrain the freedom of the English Church. The chapter also surveys the growth and the extent of monasticism in the country, the rise of canon law and how this was administered. The first chapter ends with a brief analysis of English law, to put into context, the last three chapters of the thesis.

In chapters two to four, the legal process used by Henry VIII and then his successors, is studied which forged the characteristics of the Established Church. The growth of the power of Parliament and how this was used to create the identity of the Established Church, to determine its doctrine and liturgy and to create the new area of ecclesiastical law and then the canon law of the Established Church. The code of canons of 1603 are mentioned as they assumed great importance within the working life of the Established Church.

By the end of the seventeenth century, England had become a constitutional democracy and two important Act of Parliament, whose provisions are still relevant today, underpin that settlement. The Bill of Rights of 1689 and the Act

5 This is felt to be necessary so as to understand, how this affects Anglican canon law. Chapter 1 includes a brief study of the English law of Equity, which owed a heavy debt to the canon law of the Mediaeval Church. Many of its concepts and principles were borrowed and incorporated within English Common law.

6 What was and is meant by canon law for the Established Church is not clear. A working commission was set up by the Archbishops of Canterbury and York in 1939, to define not only the canon law of the Established Church, but also to examine the status of the old canon law of the Mediaeval Church. That Commission also addressed the possibility of compiling a Code of Anglican Canon law. Its conclusions are mentioned within the text. Cf. The Archbishops’ Commission. The Canon law in the Church of England.
INTRODUCTION

of Settlement of 1700. They ensured the sovereignty of Parliament over the Crown and over the Established Church. How this doctrine is applied to the present day working of the Established Church is studied in chapter five, especially in its legislative making process. The current powers of the Queen—she is still the supreme governor—over the Church—and how they are today exercised, are presented along with the general legal position of the Established Church and her complex court structure, with its integration with that of the state.

Chapters six to eight trace the legal way that religious dissent was treated from the time of Henry VIII onwards and by his successors. How the Crown and Parliament tried to eradicate all religious diversity, by Acts of Parliament. The Acts of Supremacy and Uniformity of first Edward VI and then Elizabeth I legally attempted to impose uniformity of belief and worship according to the State religion. Chapter six concentrates on the period up to 1688, when the Toleration Act accepted religious toleration on a limited basis. Chapter seven, traces how this legally evolved and was extended to all forms of Protestantism and Unitarianism and other faiths. Chapter eight is devoted in its entirety to the legal development of religious toleration for Catholicism, with special emphasis on the Catholic Emancipation Act 1829.

The European Convention on Human Rights of 1950, in respect of which the United Kingdom is a signatory, sets out within Articles nine, ten and eleven certain safeguards, which cover freedom of conscience and religion, including the right to manifest expression of religion. At the time when the bulk of the work on this thesis had been carried out, this Convention had not been formally incorporated within the law of the United Kingdom. The relevant Articles of the Convention have been duly cited within chapter 9 but examined from the way that English law has accommodated to date such religious freedom within its own domestic law, particularly in the field of Charity law and the law of education as well as employment legislation. Within the current legal framework, albeit briefly, how other religious bodies within Christianity and non-Christian religions legally operate.

7 The Bill of Rights of 1689 and the Act of Settlement of 1700 have enormous constitutional significance.

8 In 1998, by the European Convention Act of 1998, the Convention for the first time has become incorporated within UK law, although it will not become operative until the year 2000.

9 Specifically, of interest, how the Catholic Church uses the law to carry out her mission. The status of her own canon law and the legal status of her own internal tribunals.
INTRODUCTION

In chapter ten, we study the whole legal concept of conscientious objection. What it is, juridically; how it has been defined by the courts, when the notion has been recognised and its limitations. The most important cases and Acts of Parliament, over the recent years are quoted and we have commented upon them, to illustrate this difficult area within English law.

We end this research with general conclusions, after the tenth chapter. They are our overall conclusions on the present status of English law by reference to the Established Church, freedom of religion and liberty of conscience or conscientious objection.
ACKNOWLEDGEMENTS

I owe a large debt to many people who have enabled me to write this doctoral thesis. First, I should mention the unfailing help and encouragement of my supervisor, Professor José Tomás Martín de Agar and my co-relator, don. Vicente Prieto. The broad idea of the thesis was initially suggested to me by Professor Martín de Agar, over two years ago. He drew to my attention the recent interest paid by English courts to the concept of conscientious objection and suggested how useful it would be to study this within a thesis on canon law and to include within it an analysis of religious freedom and liberty of conscience. From this suggestion, there was born the idea to produce a legal study of law and religion in England, from the period of the Reformation in England until contemporary times.

Professor de Agar has provided me with invaluable help and assistance throughout the various phases that the thesis has taken. Both he and d. Vicente offered many constructive suggestions on the various drafts of each of the chapters that were sent to them for approval and criticism. I must thank them not only for their kindness but also for their patience throughout.

I cannot deny that it has proved to be difficult to write a legal analysis of English law and religion in England between the years 1532 to 1994. The majority of the materials, including the old and recent case decisions of the English courts and the Acts of Parliament, were too specialist material to be found within any of the University libraries in Rome, pontifical or lay. For this reason, I have had to rely upon the unfailing generosity and support from members of my family, friends and legal colleagues. They have all been able to send to me by post,-in some cases at considerable expense-the most important materials, whether they be legal text books and photocopied extracts from specialist legal texts, or photocopies of the important English case decisions and the old as well as current Acts of Parliament.

In particular, I should like to record my gratitude to my parents, who spent many hours of their time in the reference section of the House of Lords as well as other London libraries, painstakingly trying to locate the many statutes on ecclesiastical matters passed by the Parliaments of Henry VIII, his children Edward VI, Mary Tudor, Elizabeth I and their successors. This cannot have been a particularly easy task, as many of these Acts of Parliament have long since been repealed. In every case, the particular statute first had to be tracked down and then, after being located, photocopied and despatched by mail. Their detective work enabled me to do the necessary research and later write the historico-legal background for the constitution of the Church of England and the legal method employed by the state to deal with religious dissent.
I should also mention the invaluable help provided to me by a long standing friend, Michael Fraser. He generously procured for me much research material. He purchased at his own expense and sent to me the current canons of the Church of England. They have considerable importance, as they set out the legal constitution of the Established Church, from her own perspective. In addition, Michael carried out legal research on a number of other legal issues concerning the Church of England. He traced and then photocopied two relevant case law decisions reported in *The Times* on women priests, which arose from a court action in the English High Court, attempting to challenge the resolution of the General Synod to ordain women to the ministry within the Church of England. I must also record my gratitude to him for next making available for me (at considerable expense) copies of all the relevant sections (running into many pages) from two of the volumes of the legal encyclopaedia, Halsbury’s Laws of England, on Constitutional and Ecclesiastical law.

Many lawyer friends have helped me enormously, responding to my cries for help for information and requests for copies of legal case decisions in the area of Blasphemy law, Employment and Race Relations. Particularly, I should like to mention Joseph Hewins and Stephen Greedy, the latter a long standing colleague and friend from the Solicitors’ Department of London Transport. Both gathered for me and then posted suitable case materials to help with the compilation of the tenth chapter on conscientious objection. I should at the same time thank other friends and colleagues who have helped me with other chapters of the dissertation: Simon Porter, who faxed through to me legal materials on marriage; Derek Conway, who sent to me the transcript of the well publicised libel case brought by the Unification Church against the Daily Mail newspaper; Felix Martin, Paul Callaghan and Christopher Pinto, who posted to me extracts of the 1829 Act of Parliament on Catholic Emancipation and other statutory materials of the last century, the legal effect of which was to extend the principles of charity law and religious toleration to the institutions of the Catholic Church.

I am also grateful to Mr Roger Groves, a barrister with extensive legal experience in Charity law, who gave practical advice and legal orientation on the working of present day Charity law, in respect of the Catholic Church and how these principles are applied by the Charity Commissioners; to Mr Robin Haig, a Solicitor of the Supreme Court and the chairman of the Association of Lawyers for the Defence of the Unborn (ALDU). Mr Haig sent to me very useful material from ALDU, in the form of their newsletters, with commentaries on recent English decisions on pro-life issues, which helped me to write in part chapter ten; and to Professor Keith Ewing, Professor of Public law at Kings College and...
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To all who have assisted me with the typing and material preparation of the thesis, I must give thanks; to Joseph Evans, now studying in the pontifical University of the Holy Cross in Rome. Joseph masterly produced for me the indexes containing the lists of books, articles, cases and Acts of Parliament consulted, a laborious process as it entailed reading the manuscript and collating the information; to Pablo Buenaventura, a resident of Greygarth Hall, where I am now the Chaplain- Pablo invested much of his time, reformating the thesis and producing the chapter index and to all my colleagues with whom I studied at the Pontifical University of the Holy Cross and at Cavabianca, the international seminary of the Prelature of Opus Dei.

My deep-felt gratitude goes out as well to the present Bishop Prelate of Opus Dei, monsignor Javier Echevarría, who ordained me to the priesthood on 8 June 1997. Bishop Echevarría demonstrated to my parents and myself, many paternal signs of affection and helped me to realise the importance of study and working for the glory of God.

WORKS USED OFTEN THROUGHOUT THE TEXT:

- The Canon law of the Church of England;
- Civil Liberties: cases and materials;
- Ecclesiastical History;
- History of the Church (vol.1);
- Civil liberties: cases and materials, Bailey, Harris, Jones, Butterworths, London 1995.
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Chapter 1

THE POSITION OF THE ENGLISH CHURCH PRIOR TO 1532: THE RELATIONSHIP BETWEEN ITS CANON LAW AND ENGLISH LAW; PRINCIPLES OF MODERN ENGLISH LAW.
Chapter 1
Chapter 1.

The Position of the English Church prior to 1532; the relationship between its Canon law and English law: principles of English modern law.

1.1. Introduction. 1.2. The Church in England prior to 1066. 1.2.1. The arrival of Christianity in Britannia. 1.2.2. The separation of the Church from the rest of the Western Church. 1.2.3. The Arrival of St. Augustine in 597 and the ecclesiastical government given to it by Pope Gregory the Great. 1.2.4. The English Church from 604 to 1066. 1.3. The legal Reforms of Pope Gregory VII and William the Conqueror. 1.3.1. The Creation of separate Ecclesiastical Courts. 1.3.2. Royal control over the Church and the Hierarchy. 1.4. The Constitutions of Clarendon of 1164 and the murder of Thomas Becket in 1170. 1.4.1. The infeodation of England to Pope Innocent III. 1.4.2. Magna Carta of 1215. 1.5. The evolution of Parliament and secular legislation to control the Church. 1.5.1. The Statute of Mortmain of 1279. 1.5.2. The Statute of Provisors of 1351 and 1353. 1.5.3. The Statute of Praemunire of 1393. 1.6. The growth of monasticism between 1215-1532. 1.7. The Ecclesiastical Tribunals until 1532. 1.7.1. The Ecclesiastical Tribunals between 597-1532. 1.7.2. The canon law applied. 1.7.3. The legislative authority of the English Bishops. 1.7.4. The Provincial Constitutions. 1.7.4. The legatine council of London of 1237. 1.8. The influence of canon law upon English common law. 1.8.1. Equity. 1.8.2. Specific Equitable remedies and the creation of the Trust. 1.8.3. The development of Equity. 1.9. Brief characteristics of Modern English law. 1.9.1. The absence of a written constitution and the supremacy of Parliament. 1.9.2. Case law and the doctrine of judicial precedent. 1.9.3. Supplemental sources for English law. 1.10. Conclusion.
1.1 INTRODUCTION. 10

This first chapter will cover a number of themes in outline, to provide the historical and legal background knowledge for this thesis. It will give an historical account of the arrival of Christianity in England11 from earliest known times and will trace the evolving legal structure of the Catholic Church in England up to the time of the Norman conquest; the creation of the hierarchical church structure by St. Augustine, restoring its dependency upon Rome, after nearly two centuries of separation from the rest of the Church, following the military and civil disorder in Europe. The Church in England, within the context of the Gregorian reform of the eleventh century and the tense Church and state relations which afterwards occurred between the two orders, the ecclesial and the civil. Several Archbishops of Canterbury fought for the rights of the Church and the Kings struggled to assert their royal supremacy, the most famous constitutional struggle of all occurring between the Archbishop of Canterbury, Thomas Becket and King Henry II, culminating with Becket`s murder in 1170.

In 1066, William the Conqueror invaded England and changed the whole social and legal order of English society. A great supporter of reform within the Church but anxious to bring the same under secure royal control, he took certain steps that were to have far reaching consequences for the Church. He ordered the separation and creation of independent ecclesiastical tribunals, which were to foster the growth and the importance of the canon law of the mediaeval Church. But what were the essential characteristics of these ecclesiastical courts? The

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10 The main historical works used to compile this chapter are: Bede`s, Ecclesiastical History: Hughes, History of the Church volumes (1) and (2): and Helmholz, Canon Law and the law of England. The following legal textbooks, have also been consulted:- Hanbury and Maudsley, Modern Equity: Smith and Bailey, The Modern English legal system: Cross Precedents in English Law. The various Acts of Parliament cited are to be found within Statutes at Large (Vol 1) [1225-1416] and (Vol 2) [1461-1601] and in Barry`s Readings in Church History Vol (1): the law cases are located in either The English Reports Series (E.R.), the Weekly Law Reports (W.L.R.) or the All England Law Reports. (All E.R.)

11 Unless otherwise stated, all references to (a) "the United Kingdom", are to "England, Scotland, Wales and Northern Ireland", (b) "Great Britain", are to the whole island of "England, Scotland and Wales", Scotland since the Act of Union of 1707 having surrendered its parliamentary sovereignty and being governed by the Parliament in Westminster and (c) "England", are to the island of Great Britain but excluding the countries of Scotland and Wales.
canon law applied within the same and its authority, from where did it derive its authority and what were its limits? To what extent did the canon law of the Church influence English common law? In this chapter, we shall also address these issues.

A knowledge of the ecclesiastical structure of the Catholic Church within England, as well as its Canon law, is necessary to put into context and to be able to understand the nature and the true intent of the ecclesiastical reforms of Henry VIII. When he defined by means of Parliament, that the Church in England was the Church of England or the Established Church and that he was its Supreme head, he was faced with the difficult problem of explaining the constitutional position and the role of the mediaeval Church and its ecclesiastical tribunals within England and by reference to the state. How this was done and upon what legal basis, will be examined more fully in chapter two. The concept of the secular law within the State and the law of the Established Church was to evolve and to give rise to the legal theory that the king ultimately had the legal right to legislate and to control the Church.

Since 1532, the Established Church has by necessity, always held a very special relationship with the Crown and Parliament. The Established Church forms a part of the English Constitution and its own ecclesiastical or canon law is part of the overall secular law administered by the State. Because that close legal relationship still continues to exist between these two entities, it is necessary to have an understanding of the general legal principles of modern English Common law which will explain how the Established Church currently operates and how its legal system functions today. The doctrine of Parliamentary supremacy, in the absence of a comprehensive civil code, and the role of judicial precedent and case reporting, insofar as this impinges upon the ecclesiastical law of the Established Church. For this reason, this chapter will close with a brief synopsis of what are the principal and essential characteristics of English common law.

12 The numerous Acts of Parliament passed by Henry VIII and his successors and the Canons of the Church of England (both the old canons of 1603 and the present canons of 1964) describe the Church of England as the Established Church. By English law it is the Church established by King and Parliament. Throughout this thesis, all references to "The Established Church" are to the Church of England/the Anglican Church.
1.2. The Catholic Church in England prior to 1066.

Julius Caesar, the famous Roman statesman, dictator and general, wrote in his famous commentary on his military exploits in Gaul, descriptions of two invasions that he led in the southern part of England in the years 55 and 54 B.C. Partly written as political propaganda, to impress and maintain his high profile in Roman political and military life, Caesar's vivid account of his military expeditions into what was to become Britannia, present a fascinating account of the island occupied by peoples not yet incorporated within the Roman world. Following his assassination in 44 B.C. and the second civil war which tore the empire apart, culminating in the battle of Actium of 31 B.C. Caesar's nephew, Octavian (later the emperor Augustus) pursued a policy of consolidation instead of expansion. Britannia was therefore to remain outside the control and jurisdiction of the Roman empire until its formal annexation and incorporation within the empire in A.D. 43.

The Emperor Claudius, sent the Roman General Aulus Plautius, in 43 A.D. to begin the gradual process of conquest and incorporation of the Island within the Roman empire. The initial military successes achieved by Plautius and the subjection of the tribes in the southern part of the country led to a state visit by the emperor Claudius and the humble submission to Rome by British Tribes at Camolodunum in the same year. The successor of Aulus Plautius, Ostorius Scapula, consolidated all gains made and supervised the gradual extension of military presence within the new province. Within fifty years and following intense military exercises and campaigns undertaken by several Roman governors, including that of Julius Agricola the province was effectively brought under Roman military rule.

There followed the quick process of effective romanisation of the province, which would in the fullness of time help and assist the organisation of the

13 Caesar, *De Bello Gallico* Bk. IV Ss. 20 et sequentia.
15 This is the modern city of Colchester.
The English Church prior to 1532: Canon Law and English Law

primitive Church. The construction of towns, such as London, Bath, York and Chester; a marvellous network of roads to provide efficient communications and a simplified civil structure which would facilitate the provision of Roman justice. The country was effectively placed under one ruler, the "Vicarius Britanniarum", who was subject to the prefect of Gaul. Under the Vicarius, there were five subordinates, each ruling under one military district. They, together with three military officials, effectively ruled the Province of Britannia.17

1.2.1 The arrival of Christianity in Britannia.

When exactly, Christian missionaries first penetrated the province of Britannia there is no firm evidence. The celebrated letters of the Pliny the younger, the governor of Bithynia, to the Roman emperor Trajan (98 A.D-117)18 give no indication of the extent and the organisation of the early Christian Church within the Roman empire and whether Christianity had yet arrived in Britain. The little information that we possess, would indicate that there were Christians within the Island by the end of the third century and a simplified Church structure had taken shape. There were British Bishops of York, London, Lincoln and Caerleon who travelled to and participated in the Council of Arles in 314.19 The first three towns were Roman colonies-Coloniae and it is possible that they were organised as dioceses. Saint Bede, the Venerable, (672-735), writing in the eighth century his account of the Ecclesiastical History of the English People, confirmed that Christianity existed in Britannia during the bitter persecutions of the Christians carried out by the Emperor Diocletian (286-305). The first Martyr was Saint Alban, martyred in or around A.D. 30420 but unfortunately we have no details of the ecclesiastical hierarchy, the number of Bishops and priests and the faithful

17 For a brief history of the early years of the province, following its annexation, see Hughes History of the Church (Vol 1). Chapter 1.

18 His famous letter 115 to the Emperor Trajan, makes it evident that there were many Christians in the province of Bithynia both in the countryside as well as the towns. Their presence and increasing numbers, meant that local cult to the emperor suffered. Pliny the younger, after conducting an organisation into their activities, had concluded that this sect was harmless. Should he nevertheless legally seek out Christians and prosecute them? See Pliny the Younger, Letters Book X. XCVI.

19 Hughes, History of the Church (Vol 1) p. 188.

20 Bede, Ecclesiastical History. Book I. Ch.7.
living within the province Britannia. After the Edict of Milan in 313, proclaimed toleration for all religious beliefs in the empire, a hierarchical structure emerged with some British Bishops being able to travel to Arles and later in 359, to attend a local council of Rimini.

1.2.2. The separation of the Church in Britannia from the rest of the Church.

After nearly four centuries of well developed organisation and civil government in Britannia, the Roman legionaries were recalled in 410. Relations with the central Government in Rome collapsed and there followed intense political turmoil, with many invasions of the island by the Jutes and the Saxons in the fifth and sixth centuries. Many of the Churches which had been built by the British Christians were destroyed and countless priests suffered martyrdom. Those local churches which survived, were to be isolated and their connections with the rest of the western Church severed.21

During these turbulent times, monastic life was introduced into Britannia by St Germanus of Auxerre for the first time,22 and he founded the first monastery and then ordained St Illtyd, the first abbot of the British Church. Over the next two centuries, Irish and Celtic monastic life was to flourish in Scotland and Wales and in northern England, replacing the normal ecclesiastical diocesan structure of a diocese and bishop, with that of a monastery and abbot.23 The overall result and the development of monastic life was that the northern parts of the Island, including the northern parts of the Province Britannia, retained their Christian...

21 This isolationism would lead to differences in ceremony and ritual being adopted by the clergy in Britain and the rest of the Church. Differences in liturgy and, a discrepancy in the Church’s liturgical calendar, concerning the date for the celebration of Easter. These ritual issues were to be specifically debated at the synod of Whitby held in 664. The debate would take place between the successors of the Irish missionary monks who had evangelised the North and the followers of St. Augustine who had re-evangelised the South of Britain from Canterbury.

22 He visited Britannia in 429 and 447. See Bede, Ecclesiastical History Book I. Ch 14.

23 In A.D. 615, for example, there was a large monastery at Bangor, near Chester, with a community of over 2000 monks. See Hughes, History of the Church (Vol 2) p. 97.
roots. The South of England, on the other hand, lapsed back into paganism, the Celtic monks being unable to effectively penetrate these territories.24

1.2.3. The arrival of St Augustine in 547 and the ecclesial government given to the English Church by Pope Gregory the Great.

Pope St Gregory the Great (590-604), the first Benedictine Monk Pope, used the authority of his pastoral office as Pope, to begin the slow process to reconvert England and to re-establish links between the surviving local monastic communities and churches in Britannia and the rest of the Church. St. Bede the Venerable, recounts how his missionary and apostolic zeal was kindled when seeing English slave-boys in a Roman market. On being informed that they were Angles he commented that they were not Angles but "angels" and so harboured the apostolic ambition to go to England.25 On being elected as Pope, Gregory was unable to fulfil his mission and so he commissioned a Benedictine monk, St. Augustine, the Prior of the Cealian Monastery in Rome, to undertake this task.

Setting out from Rome and whilst travelling through Gaul, Augustine and his companions, received frightening reports of the savagery of the English. Augustine therefore returned to Gregory for fresh instructions26 and after being encouraged by Pope Gregory, continued his missionary journey, arriving towards Easter of 597 in Kent at Ebbsfleet. The King of Kent, Ethelbert, received Augustine with great hospitality—his wife was a Catholic—and after giving

24 The Church which flourished in the north, became increasingly more monastic and by force of circumstances, more isolated from Rome.

25 Bede, *Ecclesiastical History* Book II.I. This anecdote would have occurred between the years 586 and 590, having returned from Constantinople, where he had been papal legate. Bede comments that when Gregory asked where these slaves came from, and was told that they were from Britain, where there were many pagans, he exclaimed "Alas. How sad that such bright-faced folk are still in the grasp of the author of darkness and that such graceful features conceal minds void of God's grace!"

26 Bede, *Ecclesiastical History* Bk. I, Ch 23. Bede states that Augustine and his monks "were appalled at the idea of going to a barbarous, and pagan nation, of whose very language they were ignorant. They unanimously agreed that it was the safest course and sent back Augustine—who was to be consecrated bishop in the event of their being received by the English—so that he might humbly request the holy Gregory to recall them from so dangerous arduous and uncertain a journey".
permission for Augustine to make converts, was in fact baptised at Pentecost in 597. Many converts were made and the slow conversion was followed with great joy by Pope Gregory, who sent more monks to help Augustine.

In 601, Pope Gregory sent Augustine the pallium, to mark and to emphasise the close relationship and the dependence of the See of Canterbury on the See of Peter, and at the same time he gave to St. Augustine details and the plan of how the Church was to be organised and structured. There were to be two provinces, the first having its metropolitan see in London with twelve suffragan bishops. The second was to have as its metropolitan see York, also with twelve suffragan bishops. Augustine was to rule both provinces, during his lifetime and the intention was that he would transfer his episcopal see from Canterbury to London, but this did not and in fact, never did materialise. On the death of Augustine, Pope Saint Gregory had stipulated that the senior of the two archbishops of London and York was to have precedence over the other. As the Church Historian Mgr Philip Hughes has pointed out, the overwhelming characteristic of the ecclesiastical regime given by Gregory to Augustine in respect of the English Church is the normal style of Church Government i.e. that of metropolitan and suffragan bishops with their direct dependence upon the See of Rome. The special relationship and the dependence of the hierarchical ecclesial structure upon Rome was cemented by the need for St Augustine and his successors to receive the pallium from the Apostolic See. The re-conversion of England was the direct initiative of the Roman Pontiff, Pope Gregory the Great. The formal erection of two provinces within the Church in Britannia and the ecclesial government established, was the result of a papal legislative act making the Anglo-Saxon Church, from its beginnings, dependent upon the Apostolic See.

1.2.4. The English Church from 604 to 1066; the arrival of St Augustine of Canterbury to the battle of Hastings.

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27 The precise details of the ecclesiastical government, given by Pope Gregory to St Augustine are set out in Bede, *Ecclesiastical History* Bk. I. Ch 21.

28 After St Augustine died, a dispute lasted for centuries as to which episcopal see should have priority over the other. To this day, the Archbishop of York is described as the Primate of England and the Archbishop of Canterbury is designated as being the Primate of All England.

29 Hughes, *History of the Church (Vol 2)* p.96
Within the project of Gregory the Great, was the ambition to enter into relations with those British Christians, whose existence had evolved around the remaining monasteries and those Christian communities in the northern and western parts of Britain and to fuse the two churches and hierarchies. Pope Gregory, exercising his papal authority, placed the latter under the direct authority of Augustine and Augustine summoned the British Bishops to attend a local synod. There were two conferences; at the first none of the British Bishops agreed to attend, sending priests to act in their stead. At a second, seven British Bishops assisted together with the Abbot of Bangor and some of the most learned of his monks. Tempers rose and the British Bishops refused to participate in any evangelising activity that related to the Saxons, whom they considered to be cruel and treacherous. They upbraided Augustine and his followers for their patronage of the English. The synod was tough and the British bishops refused not only to modify their customs but also to accept Augustine as their bishop.

The two hierarchies were unable to reach any form of agreement with the result that they were to ignore each other for the best part of two centuries. Whilst Augustine and his companions were to carry out their evangelical activities in the South, the local churches in the north, were to remain isolated, maintaining their separate differences, especially with regard to the date for the celebration of Easter.

30 Bede, *Ecclesiastical History* Bk. II. Ch 2.

31 Cf. Bede, *Ecclesiastical History*. Bk. II Ch. 2 There were, in addition the continuing points of discipline unresolved:—namely (a) the shape of the clerical tonsure, (b) the details of the rite of Baptism and (c) the date at which Easter should be celebrated.

32 The growth of the Church, the Bishops and hierarchy with their successors firmly united to the See of Peter, would continue in the southern, eastern and central parts of England. Mellitus was to be consecrated as Bishop of London by Augustine and with London as the centre, a movement for converting the rest of the land was co-ordinated and directed. The missionary activity of the Hierarchy established by Augustine, was not to be without setbacks and severe difficulties, which became evident in the year 616 when the king of Kent, Ethelbert had died and was succeeded by his son, Eadbald a pagan. A bitter pagan reaction set in, which threatened the efforts and work of Augustine. The Bishop of London had fled the country in 616 and the current Archbishop of Canterbury, was considering following suit when Bede recounts that St Peter appeared to him to upbraid him for his temerity and scourged him so seriously that the next morning he could reveal to Eadbald the wounds he had received. Eadbald was convinced and received Baptism and so Kent was able to return to peaceful conditions within which the Church could operate. Bede, *Ecclesiastical History* Bk. II
Chapter 1

1.2.5. The Synod of Whitby of 664.

By 664, the year in which the famous synod of Whitby was to be convoked, the former Roman colony of Britannia had effectively been re-evangelised and the widespread numbers of clergy had helped to dispel some of the mutual distrust and hostility which existed between the two hierarchies. It had now became a matter of great urgency to resolve the two issues of separate liturgical practices and the overlapping jurisdiction of two hierarchies. For this reason, a synod was summoned at St Hilda's abbey at Whitby in 664.

Two Northumbrian kings participated at this local synod, as well as St Wilfred, later to be bishop of York (and consecrated by the Pope), and the English Bishops representing the successors of the church hierarchy established by St. Augustine. On the opposing side, were those representing the Celtic tradition, specifically, Oswy, the King of Bernicia and St. Colman of Lindisfarne. To reinforce his view and to convince those in the north as to why they should adopt the date for the celebration of Easter observed by St. Augustine, St. Wilfred appealed to the practice of universal Christendom. All the rest of the Catholic Bishops in the West observed the date, as given by Rome he argued so the entire Church in England should follow suit. St. Winifred won the day and the majority of the Bishops accepted the authority of the Apostolic See and to celebrate Easter on the same day as the rest of the Western Church, following

33 In the terrains converted by St. Augustine and his successors, the Catholic Church was able to function and with relative peace. The southern part of the country soon saw the emergence of a native clergy. In 644 there was a Saxon who became Bishop of Rochester. Following him, another Saxon, Frithonas was to become the first native archbishop of Canterbury, taking the name of Deusdedit in 655. See Hughes, History of the Church (Vol. 2). p. 102.

34 St. Wilfred had lived as a monk at the famous monastery at Lindisfarne, had been initiated into the clerical order at Lyons and had then gone to Rome. In Rome, he had met at first hand the new rule of St. Benedict and also came to appreciate the reason for the calculation of the date for Easter, adopted by the See of Rome and observed by St. Augustine.

35 This argument in fact proved to be decisive. King Oswy, on learning that the system as proposed was that now used by the Successor of St Peter, declared "I cannot decide against him who holds the keys of heaven, or when I appear at the gate he may not open it to me." Cf. Bede, Ecclesiastical History Bk. IV.
the decision of the popes.36 This issue having been determined, the next problem to resolve would be the continuing existence of two hierarchies.

1.2.6. The fusion of the two hierarchies under Archbishop Theodore.

Pope Vitalian had in 669 nominated to the See of Canterbury, a cleric called Theodore to resolve the juridical situation. A strong personality, a great organiser and extremely cultured, Theodore as well as establishing a fine school at Canterbury, erected a number of new episcopal sees37 and set his task to govern England and forge one hierarchy for the whole of England. St. Wilfred, who had in the interim period been displaced as Archbishop of York, was restored by Theodore. Theodore convoked the first national synod at Hertford and laid down a number of canonical rules relating to episcopal authority, confining the episcopal jurisdiction of a bishop to that of his diocese, and to the clergy.38 As Archbishop of Canterbury and Primate of all England, Theodore governed the English Church with a firm hand and often without consultation.39 It was by a combination of his apostolic activity and his governance that when he died in 690, the Church would be in possession of a unity of discipline and liturgy and an ecclesial structure that would last for centuries.

From the eighth century until the latter part of the eleventh, culminating with the invasion of England by William the Conqueror in 1066, the secular history of England is complex. Between 757 to 825, the kingdom of Mercia was dominant, replacing the influence hitherto exercised by the kingdom of Northumbria. Its King, Offa (755-796) was to reign supreme, having eliminated his domestic

36 Not all those participating however agreed to yield. Refusing to accept this decision, St. Colman retired with some of his followers to Iona, in Scotland.

37 At Worcester, Leicester, Stow, Dorchester and Hereford.

38 Canonical norms were passed so that Clergy would be strictly subject to their proper diocesan bishop and monks subject to the jurisdiction of their abbots and superiors.

39 For example, he divided the diocese of York, of which St Wilfred was Bishop. St Wilfred resisted such a decision and appealed to the Holy See to be re-instated. St Wilfred was in fact to make three appeals to the Apostolic See, before mandatory letters were to be issued by Pope John VI (to different kings and a new Archbishop of Canterbury) ordering his re-instatement. This finally took place in 704 and St Wilfred was to remain in the See of York, until his death in 709.
enemies and defeated his enemies, the Kentish men and West Saxons. Following the Viking and then Danish invasions, the relations between Church and the secular authority vary but the overall pattern is one of respect and cooperation. Kings would seek to preserve good church and state relations and although would try to influence episcopal nominations, their veneration and respect for the Apostolic See was evident.

1.3. The legal reforms of the Church by Pope Gregory VII and William the Conqueror.

Between 1066 and 1170, the Church in England, like that of the rest of Europe, entered the whole movement of reform, to tackle the various abuses which had existed, especially the most prevalent of lay investiture.

In 1066, the last Anglo-Saxon monarch, St Edward the Confessor, had died without leaving issue. There were two rival claimants to the Kingdom of England. Earl Harold, a Saxon, recommended to the Saxon Witan by King Edward on his death bed. On the other hand, William, Duke of Normandy, who claimed that Edward had promised him the throne. William promptly asserted his right to the kingdom. Previously he had extracted from Harold an oath of allegiance after the latter had been shipwrecked off the coast of Normandy. When the Witan acknowledged Harold as the lawful successor to Edward, William therefore portrayed Harold's conduct as morally unacceptable and Harold as a usurper. In addition and to strengthen his claim, William had appealed to the Pope, taking

40 He held the view that Mercia should be marked by ecclesiastical distinction, and applied to Pope Adrian I for permission to raise Lichfield to an archbishopric. Two legates were sent, and at the council of Chelsea, 787, the ecclesiastical province of Canterbury was divided, six suffragan bishops being placed under the jurisdiction of the archbishop of Lichfield. This change was to be short lived for, at the request of Offa's successor, Pope Leo III reversed the action of Adrian.

41 Saxon Kings as well as Danish would undertake pilgrimages to Rome. In 1027, King Canute after having become master of all England in 1017, journeyed to Rome, to pay his respects to the Roman Pontiff. With gratitude and recorded in a letter written to his English subjects, King Canute was to state that the Roman Pontiff had agreed to diminish the sums demanded from the Archbishops of England when, according to custom they had visited the Apostolic See, to obtain the pallium.

42 The king's council, which would be the assembly to initially sanction any successor and thereafter, to help the King to govern
advantage of the disorder then existing within the Church, especially the uncanonical deposition of the Archbishop of Canterbury, Robert of Jumièrges and the illegal appointment of Stigand as archbishop of Canterbury. The Pope, Alexander II, did not hesitate in sanctioning William's expedition and sent him a consecrated banner.

### 1.3.1. The creation of separate Ecclesiastical Courts.

William's victory over Harold and his Saxon troops after the famous battle of Hastings in 1066, meant that the Church in England entered into a new phase. William in keeping with his overall policy to govern his newly acquired kingdom, aimed to bring the Church more firmly under his control, especially by controlling episcopal appointments. William nevertheless was a firm supporter of the reform movement but subject to his own terms. He asked Pope Gregory VII to send three legates to reorganise the Church in England, in accordance with the recent ecclesiastical reforms and deposed the schismatic Stigand, replacing him by Lanfranc. All the Anglo-Saxon bishops, except one, were removed and their sees were given to Normans. In the same way, William arranged for all the Saxon abbots to resign and to be replaced by Norman monks.

The other great reform pioneered by William was the creation of separate ecclesiastical courts, which exclusively applied the canon law of the Church to ecclesiastical suits. In this way, he put an end to the Anglo-Saxon practice that had existed for centuries and whereby bishops would sit in the shire-courts with lay officials to try both secular and canon law disputes. Under William, ecclesiastical synods were held on a more regular basis, to continue the process of ecclesiastical reform. Summoned by the King and often graced by his

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43 What had made the situation worse, was the fact that Stigand had received the pallium from the anti-Pope Benedict XIII.

44 To assist the development of Canon law within these separate tribunals in England, Archbishop Lanfranc, as Archbishop of Canterbury, introduced into England his own private collection of canons, made at Le Bec. Compiled from an abridgement of the pseudo-Isodorian papal decretes, and the canons and decrees collected from the various church councils, this collection was used extensively. Cf. Barlow, *The feudal Kingdom of England*. p. 125.
presence, a novel legal feature would be that their decrees and decisions in theory required royal approval.45

**1.3.2. Royal control over the Church and the Hierarchy.**

To further maintain his control over the English Church, William also insisted that his barons and servants should not be excommunicated without his consent and neither should they be brought before ecclesiastical courts without his approval. Between 1073 and 1080, he refused to allow the entry of any papal legate in England and would not permit any bishop to visit Rome without his agreement.46 In the case of a disputed secession to the papacy, he maintained that he could decide which pope England should support. On papal government in general, whilst not denying the authority of the Apostolic See, he insisted that before being delivered, all papal letters should be first submitted to him. It is fair to say that under William and with the prudent governance of Archbishop Lanfranc, religion within England was to flourish.47

William was to exercise a much greater authority than his Anglo-Saxon and Viking predecessors, over the hierarchical structure of the Church—its Archbishops and bishops as well as the abbots. He extended to these ecclesiastical positions the whole concept and theory of feudalism and insisted on his rights of nomination. Bishops and abbots before assuming their positions, were to be required to be formally invested with the livery of the episcopal ring and staff within a ceremony. Church lands, he viewed, were his baronies and the bishops as his vassals, were bound to do him homage and swear fealty and obedience to him.

45 The aim of these synods was to restore ecclesiastical law and order and to maintain the high standards of ecclesiastical life that were being promoted in the continent. The duties of the bishops were defined with greater precision and laws were made to enforce the clerical obligation of celibacy, an obligation that was at times ignored. Cf. op.cit. p.126


47 The country was covered with magnificent cathedrals and churches and the number of monastic cathedrals increased. By the end of William's reign, nine of the seventeen English episcopal sees were in monasteries. Even so, few new monastic houses were founded. The radical innovation followed by William and in keeping with his desire to retain control over all structures, both lay and ecclesiastical, was to replace many English abbots by Norman monks.
This theory and policy, represented a direct challenge to the whole reform movement of Pope Gregory VII, who was trying to re-assert the independence of the Church and its freedom from secular control. Fighting to eradicate simony, clandestine marriage of the clergy and the influence of the laity in ecclesiastical appointments, Gregory and his successors firmly resisted the policy of royal control over the English Church pursued firstly by William and then by his son, William II. William II likewise demonstrated that he was not prepared to yield and after Archbishop Lanfranc died, he tried to exploit the English hierarchy with the archbishopric of Canterbury being vacant. A leaderless Church was soon found to be too difficult to control and so in 1093 he nominated St. Anselm as Archbishop of Canterbury, who had succeeded Lanfranc as abbot of Bec, in Normandy. Relations between William and St Anselm were fraught with difficulties as St Anselm was imbued with the whole spirit and zeal of the Gregorian reform and was prepared to hold out and resist royal attempts to stifle the independence of the Church. Under William's successor, Henry I, the position was not to improve and so St. Anselm left England in 1103 for Rome, to consult with and to await the outcome of negotiations between the King and the Pope. After lengthy discussions, a compromise was finally reached and on 1


49 He plundered the reserves of bishoprics and would keep them vacant for as long as possible so that the revenues could be diverted to the crown. See Hughes, *History of the Church* (Vol 2).

50 In 1095, St Anselm asked William for leave to go to Rome so as to receive the pallium direct from Pope Urban II. William refused to permit this and so St Anselm, after various negotiations, received the pallium from Pope Urban II, indirectly through the hands of Walter, Cardinal Bishop of Albano. Finding his position and intolerable, St. Anselm left England in exile in 1097, to be invited to return by Henry I, who promised that the Church would be free and the revenues of the bishoprics would not be seized.

51 St. Anselm had participated in the Council in Rome in 1099, summoned by the Pope Urban II, which had reaffirmed the decrees of Gregory VII against specifically, clandestine marriage amongst the clergy, simony and the investiture of clerical offices by lay patronage.

52 Henry maintained that he was exercising what he saw were regal rights. The bishops were his vassals and as such were obliged to swear oaths of loyalty and fidelity to him, and in return to receive the symbols of ecclesiastical office, the ring and the crosier.
August 1107, in a council in London it was resolved that lay investiture was to be forbidden but that no prelate would be refused consecration because he had merely performed homage to the king for his fief. On 11 August 1106, many vacancies in the Church (the fruit of twelve years breach with Rome) were thereby filled when St. Anselm consecrated the candidates. It was also decided that henceforth, elections were to be made for Bishoprics in Cathedral chapters in the Kings Court.53

1.4. THE CONSTITUTIONS OF CLARENDON IN 1164 AND THE MURDER OF ARCHBISHOP ST THOMAS BECKET IN 1170.

William I had inherited a Church, united in doctrine and liturgy, under one national hierarchy and subject to the Apostolic See. By replacing the Anglo-Saxon hierarchy with his own nominees and then creating separate ecclesiastical courts in the realm, so that canon law could be exercised separately, William had hoped to forge and to bring more firmly under his control its ecclesiastical structure. He could not have foreseen in their full ambit and extension, the controversies that were to take place between his successors and the Archbishops of Canterbury and the papacy in the following century, to reach a climax in the reign of Henry II (1154-1189), when Henry purported to define the rights of the Church under the famous document called the Constitutions of Clarendon in 1164.

The Constitutions of Clarendon of 1164, being so called because it was the fruit of a number of propositions debated at a great council in Clarendon in 1164 in the presence of Henry II, contained a number of propositions which were, at least in theory, only designed to record the rights and the liberties of the Church and the State in the light of disputes and discord which had broken out between the king and the Church. Disputes over elections to ecclesiastical offices, the trial of clergy within the ecclesiastical courts (and not the secular), the freedom and rights of the clergy to travel in and outside the kingdom and the episcopal power of excommunication. All these aspects of Church government and authority, Henry wished to limit. He always maintained that he never intended to deny the rights of the Church but only to define them, in the light of uncertainty. The

53 As Barlow writes, this solution was to prove satisfactory to none. Barlow, Feudal Kingdom of England. Pp. 180-181.
elaborate preamble of the Constitutions, therefore proclaimed that its intention was only to clarify:—

"the customs, liberties, and dignities of his predecessors...which ought to be preserved in the kingdom. And because of quarrels and discords which had broken out between the clerics and judges of the lord king..."54

Some of its chapters did represent old customs, whilst others were a novelty and clearly manifested the desire of Henry II to curb what he had felt to be a Church which had become all too independent. The document was an attempt to blend old customs with new laws, and if accepted in its entirety, would have reduced the independence of the Church dramatically. For this reason, the Archbishop of Canterbury, Thomas Becket stubbornly resisted and refused to be bullied into accepting a legal document, purporting to represent the legal status but actually, so he maintained, ended up by diminishing the rights of the Church.

There were a total of sixteen chapters within the Constitutions, all carefully worded. Archbishop Thomas Becket immediately took exception to those clauses which violated the Church's free right of election to benefices and clerical appointments;55 those which attacked the separation of the orders of Church and State by the power being claimed by Henry to charge within the secular courts clerics accused of crimes;56 those which purported to control the free travel and movement of the clergy of the Church;57 those which challenged the

54 This document can be found in Barry *Readings and Documents in Church History (vol. 1).* Pp. 425-427. The preamble and all subsequent clauses are taken from this volume.

55 Set out in Chapter I and recording that "If disputing about the advowson and presentment to churches shall break out between laymen, or between laymen and clerics, or between clerics, it is to be dealt with and decided in the court of the Lord King." op.cit. This right had in fact been acknowledged by Henry I, albeit grudgingly.

56 Chapter 3 stated that "Clerics cited or accused concerning any matter shall, when summoned by the King's justiciar, come into his court to give an answer there to whatever the King's court shall think is fitting to be answered there: with the proviso that the King's Justiciar shall send to the court of the Holy Church to observe by what method the case is treated there. And if the cleric shall be proved guilty and shall confess, the Church must not give him any further protection." Barry, *Readings and Documents (Vol 1).* Pp. 425-26.

57 Chapter 4 specified that "The Archbishops, deacons and persons of the realm are not allowed to go out of the kingdom without the permission of the lord King. And if they go, they
independent executive power of the Roman Pontiff and bishops generally to excommunicate; finally, all attempts to control the juridical and legislative power of the episcopate, by making the ultimate exercise of it subject to royal consent. Perhaps the most controversial of all rights being claimed by Henry were encapsulated within chapter 12, which gave to the king rights over the nomination and the installation of bishops. Ostensibly this only claimed in writing, the two rights traditionally held by the Crown namely that of (a) nominating bishops and during the vacancy of episcopal sees to collect their ecclesiastical revenue and (b) secondly, to invest all bishops elect with the episcopal regalia i.e. the crosier and the episcopal ring. If accepted by Becket, it would have signified an abandonment of all the principles for which St Anselm had fought Henry I. It would have also destroyed the compromise which had reached between the Crown and the Papacy.

In his excellent monograph on Thomas Becket, David Knowles points out that this regal document actually and fundamentally contravened the principles

shall, if it please the King, give assurance that neither in going, nor in making their stay, nor in returning, will they seek the harm or damage of king or kingdom." Op.cit. Pp. 425-26.

58 Chapter 7: "No one who holds from the king in chief and no one of his desmene officers shall be excommunicated, nor shall the lands of any of them be put under interdict unless first the lord King, if he be in the land, or his Justiciar, if he be outside his kingdom, be asked to do right to him; and so what shall pertain to the King's court shall be terminated there and what shall belong to the ecclesiastical court shall be sent to the same and treated there." Op.cit. Pp. 425-6.

59 This was set out within clause 8: "If appeals arise, they are to proceed from the archdeacon to the bishop and from the bishop to the archbishop. And if the archbishop fails in rendering justice, they have to come finally to the lord King in order to conclude the dispute by his command in the court of the archbishop, so that it must not proceed further without the consent of the lord king." Op.cit. Pp.425-26. The ostensible intention of this clause was only to control but not prevent appeals to the Apostolic See.

60 This chapter boldly declared that "When an archbishopric is vacant, or a bishopric, or an abbey, or a priory of the desmesne of the king, it must remain in his own hand; and he shall receive all the revenues and income from it, as if they were revenues and incomes of a desmesne. And, when it comes to providing for the church, the lord King has to summon the chief persons of the Church and the election is to take place in the chapel of the lord King with the assent of the same lord King and with the counsel of the persons of the realm whom he shall have called upon to do this. And there the elect shall do homage and fealty to the lord King as to his liege lord, for his life and his limbs and his earthly honour, saving his order, before he is consecrated." Barry, Readings and Documents in Church History (Vol 1. . Pp.426.

61 Cf. Knowles, Thomas Becket. pp. 142 et seq.
of Gregorian Reform, for which many Popes had fought and for which St Anselm had stood so firm. Initially giving his verbal consent to the general principles, St Thomas after actually seeing the document and reading the clauses in detail refused to affix his episcopal seal to the document. So depressed was he, after he had had the opportunity of seeing the clauses, that he immediately wrote to the Pope, asking pardon for his action; in having unwisely and unwittingly, agreed to place restrictions on the freedom of the Church freedom. 62

To try to defuse the situation and to reap advantage from what had happened, Henry sent a copy of the Constitutions to the Pope, Pope Alexander III asking for him to approve the same. Pope Alexander took a slightly different approach and, in a spirit of compromise, indicated to Henry that he would be prepared to accept those clauses which fell within the competence of secular government and responsibility and did not therefore prejudice the freedom and the rights of the Church.63 An ongoing struggle ensued between Becket and King Henry, with the Archbishop leaving the country and relations between the two becoming increasingly embittered. In 1166, the Archbishop wrote to Henry, setting out plainly and without ambiguity, why he was refusing to yield. Setting out his legal theory of the two orders, the clerical and the lay, Becket argued that Henry had no power or right to attack the independence of the Church and to subordinate it to royal authority. He accepted that he was obliged to pay due reverence and honour to the King but not to compromise the independence of the Church.64


63 At the same time, that he condemned the chapters to which Becket had objected, he said that he would otherwise accept five of the chapters namely 2, 6, 11, 13 and 16. Chapter 2, for example, would confirm the regal rights in ecclesial buildings; "Churches in fee of the lord King can not be granted in perpetuity without his own consent and grant."

64 He wrote to Henry: "With desire I have desired to see your face and to speak with you; greatly for my own sake but more for yours...For your sake for three causes: because you are my lord, because you are my king, and because you are my spiritual son. In that you are my lord I owe and offer to you my counsel and service, such as a bishop owes according to his lord according to the honour of God and the holy Church. And in that you are my king I am bound to you in reverence and regard. In that you are my son I am bound by reason of my office to chasten and correct you.

The Church of God consists of two orders, clergy and people. Among the clergy are apostles, apostolic men, bishops and other doctors of the Church, to whom is committed the care and governance of the Church, who have to perform ecclesiastical business, that the whole may redound to the saving of souls. Whence also it was said to Peter, and in Peter to the other rulers
Becket set out, plainly what he considered to be the important issues at stake. The Church could not be a mere tool of the secular state and did not obtain her power, her remit to act from the Crown. The Church was not established by the monarchy, but by Christ himself and to whom She was responsible and to whom She had to render an account. Unwilling to prejudice and jeopardise the freedom and liberty of the Church within England and to destroy the reforms initiated by Pope Gregory VII, Becket resisted and refused to be brow beaten by the King. Fleeing the country and living in exile, Henry retaliated by confiscating the possessions of the See of Canterbury and banishing the family and relatives of the Archbishop. Becket was ultimately to pay the price for his resistance and was martyred in 1170.

Following the murder of Becket, Henry II, faced widespread rebellion and difficulties not only within England but also Normandy. In 1174, he crossed the English channel and made his way to Canterbury in July of that year65 to do public penance for his involvement in the murder. He spent one whole night in prayer, an all night vigil, before the tomb of the martyr, asking pardon for what had occurred.66 Pope Alexander III had already granted pardon to the bishops of England, for having appended their seals to the Constitution of Clarendon, in the papal bull of 2 September 1173 and a year earlier, Henry had made substantial concessions, promising filial obedience to Pope Alexander III. Henry had by now, no wish to upset his extremely delicate position in the realm and to continue his quarrel with the Church. During and after his pilgrimage, negotiations continued between himself and the papal legates leading to a compromise solution. Henry returned the possessions of the See of Canterbury, of the Church, not to kings nor to princes, "Thou art Peter, and upon this rock will I build my Church, and the gates of hell shall not prevail against it.”

Among the people are kings, princes, dukes, earls, and other powers, who perform secular business, that the whole may conduce to the peace and unity of the Church. And since it is certain that kings receive their power from the Church, not she from them but from Christ, so, if I may speak with your pardon, you have not the power to give rules to bishops, nor to absolve or excommunicate anyone, to draw clerks before secular tribunals, to judge concerning churches and tithes, to forbid bishops to adjudge causes concerning breach of faith or oath...It is known almost to the whole world with what devotion you formerly received our lord the pope and what attachment you showed to the Church of Rome...Forbear then, my Lord, if you value your soul, to deprive that Church of her rights..." Quoted in Barry, Readings and documents in Church History (Vol. 1). p.428

65 Thomas Becket was canonised by Pope Alexander III on 21 February 1173.

66 Cf. Knowles. Thomas Becket. pp. 223-224
which had been confiscated and steered away from any further collisions with the Church. There was to be relative peace for the Church until the reign of King John in the year 1205.

1.4.1. The Infeodation of England to Pope Innocent III and Magna Carta of 1215.

In 1205, Archbishop Hubert, the Archbishop of Canterbury, died and there arose a bitter legal dispute over the question of his successor to the See of Canterbury. King John, the youngest son of Henry II and by now king, wanted his candidate, John de Grey, Bishop of Norwich to succeed. The monks of Canterbury, in whom the See of Canterbury was legally vested and who therefore had the right to elect a successor, chose a different candidate. After a trial, lasting over a year, Pope Innocent III confirmed that the right to elect a successor belonged to the monks. As the original choice made by the monks was deemed to be uncanonical, Pope Innocent then set aside their choice, Reginald and appointed a candidate of his own, Stephen Langton, an eminent theologian and a canonist.

King John refused to accept this decision and so Pope Innocent placed England under an interdict in 1208. This meant that all organised worship came to a standstill. To make matters worse for John, he was personally excommunicated in 1209. Faced with widespread revolt and a threat of invasion by Philip II of France, John finally surrendered and recognised Archbishop Langton as Archbishop and made over England and Ireland to the Papacy, receiving these territories back as the Pope’s vassal. The document of surrender, signed by John, dated 15 May 1213 acknowledged his misdemeanours and effectively made England a papal fief.

67 The document of surrender conceded to "God and His Holy Apostles Peter and Paul and to our Mother the Holy Church, to our lord Pope Innocent and to his Catholic successors, the whole kingdom of England and the whole kingdom of Ireland with all their rights and appurtenances...and receiving them and holding them, from now onwards, from God and the Roman Church as a vassal, we now do and swear fealty to the aforesaid our lord Pope Innocent, to his Catholic Successors and to the Roman Church..." Cf. Document No 6 in Barry, Readings and documents in Church History (Vol 1).
the Roman Church. The legal effect of England being made a papal fief, would secure greater independence for the Church, guarantee her rights of self governance and, in theory, safeguard her canon law and her court structure.

1.4.2. Magna Carta 1215.

By making peace with the Church, King John hoped to defuse the political situation within England, to divide his enemies and to reassert royal control within his troublesome barons. He failed to do this, as he had not been able to gain the support of the chief barons of the realm. Their continuing opposition to his policies and his style of government continued and so in May 1215, John was forced to sue for peace and negotiate terms. Heads of Agreement were drawn up by 24 June 1215 and then this Great Charter-Magna Carta-was issued for publication. The aim of this Great Charter, Magna Carta, containing sixty clauses, was to attack arbitrary government and to provide a framework within which royal power could function according to justice and law. However, as many historians have pointed out while it was considered by many seventeenth and eighteenth century lawyers to be the foundation charter of all English rights and liberties, one has to take great care not to exaggerate the importance of this document. Magna Carta was the first real attempt to define in writing, a form of constitutional government and to set out in a general terms, the general principles and basis upon which the realm should be governed. It included an important provision, reaffirming the liberty and independence of the Church,

68 Although it may come as surprising, such a gesture on the part of King John, there were in fact precedents. Pope Gregory VII had requested such an oath of loyalty from William the Conqueror, even though he had refused to give it. Richard I had in fact given such an oath to the German Emperor, Henry VI, as a condition of his release, after his return from the Crusades and after his capture in Germany.

69 Negotiations lasted from 10 to 23 June 1215 on the Thames, near Runnymede between Winsdor and Staines.

70 For example, Barlow, Feudal Kingdom of England. p.430.

71 For example, at the turn of the sixteenth century, by Sir Edward Coke, the Lord Chief Justice, under James I. In the subsequent century, by Professor William Blackstone, the Oxford Professor of Law.
guaranteeing her freedom and her rights. Church courts and her canon law were to be safeguarded.72

Pope Innocent III, refused to accept the provisions of Magna Carta in this form and on 24 August 1215 he formally revoked this Charter,73 but was to approve a modified version in 1216, which would confirm that all episcopal ecclesiastical appointments were to be filled by free election, without royal control, such mode of election to be made by the cathedral chapters. These provisions were to be confirmed by John`s successor, Henry III in 1225, in a subsequent version of the Great Charter.74

When Edward III and his Parliament in 1366 formally repudiated the papal vassalage made by King John, on the grounds that the consent of the barons and bishops of England had never been obtained, Magna Carta became the most important constitutional document to which clerics and laymen would invoke to protect and to safeguard the freedom of the Church. Thomas More and John Fisher would invoke the provisions of Magna Carta, to justify their opposition to Henry VIII`s ecclesiastical policy.

72 Clause 1 of Magna Carta contained a provision that the Church should be free: ut ecclesia Anglicana libera sit. The meaning was clear, that the Church should be free to operate, unhindered by royal control and subject to the jurisdiction of the papacy. A contrary interpretation was placed on this phrase in 1913, by the Anglican historian McKechnie who saw this clause as guaranteeing to the Church, freedom from papal interference. Nothing could have been further from the truth. The freedom desired was from royal interference in ecclesiastical appointments and for unrestricted contact with the papal court. See "Times Change" Anne Duggan in The Past and The Present; Problems of understanding. Grandpont Papers 1993.

73 It may seem strange that he should have reacted so strongly, objecting to a document which had in part been negotiated by Cardinal Stephen Langton. In taking such a step, he was doubtless acting on advice given to him by King John who persuaded the Pope that the terms of the Charter had been extracted by force. This would have made it, prima facie, invalid. England being a papal fief, any changes made to the customs and the exercise of royal power, would have also needed the prior approval of the Apostolic See.

74 Cf. Magna Carta Henricus III c 1. (1225): The first clause of this reissued document read "In primis concessimus Deo et hac preferenti carta nostra confirmavimus pro nobis et hereditibus nostris imperpetuum quod ecclesia Anglicana libera sit et habeat omnia iura sua integre et libertates suas illeras..." (The official translation is;- First we have granted to God and by this our present charter have confirmed , for us and our heirs for ever, that the Church of England shall be free, and shall have all her whole rights and liberties inviolate...). This document is to be found in Statutes at large (Vol 1).
1.5. The evolution of Parliament and the enactment of ecclesiastical statutes to control the Church.

The period from 1217 to 1532 witnessed the steady growth of regal government in England. Starting with Edward I, the kings began to summon their chief barons and bishops from time to time and to use their convocation in Parliament, as the legislative means to enact legislation in a constitutional manner, above all to raise money by means of taxation. Hardly surprisingly, it was also a convenient forum used by the kings, to bring the Church more under their control and to reduce the influence of its canon law as well as to impede legislative and executive measures from Rome.

The arrival of the new religious orders in England, in the thirteenth century, was at the same time seen as a threat to the feudal system of land tenure, when these religious communities began to be granted the use of lands for their religious purposes, thus depriving the crown of revenue in land as well as military help. At the same time, as it became more frequent for litigants to appeal in canon law disputes, to the Roman Rota in Rome, royal control over canon law litigation and the ecclesiastical tribunals in the realm weakened. Then there was the increasing inability of the crown to always secure its own nominees to episcopal and monastic offices and coupled with this, a growing resentment that in many instances, non-Englishmen were being appointed to episcopal sees in the realm.

Lands being used for religious foundations, canon law appeals to Rome and the question of appointments and nomination of ecclesiastical offices, were all matters to be addressed by kings enacting Parliamentary legislation, the secular law of the realm, to regulate and so control the ecclesiastical affairs of the English Church. Between 1279 and 1351, four important statutes were made by Parliament, which in a greater or lesser way aimed to limit the power of the English Church: the Statute of Mortmain of 1279; the Statute of Provisors of 1351 and the Statutes of Praemunire of 1353 and 1393.

1.5.1. The Statute of Mortmain, 15 November 1279.

The new system of land tenure introduced by William the Conqueror in England, after his conquest in 1066, was feudal. On conquering England, William became the effective legal holder of all the land within the realm. Being the absolute landholder, he granted to his chief barons and followers landed
interests, in return for the performance by them, as tenants, of military service and the payment of money or other services in kind. Creating a method of holding land, linked to the carrying out of military duties and the payment of money, in this way gave to William the military support and loyalty that he needed for his regime. The nature of land tenure was flexible and William permitted his followers, on the same basis, in turn to devise interests in their property to their followers. Within a short space of time, the legal position of land ownership became complicated. The King, as head landlord, remained the absolute landholder and was entitled to receive all military service and feudal dues from his barons and knights. The latter, being inferior landlords, were likewise entitled to receive military service and dues from their own tenants.

Lands were originally devised, whether by the King as the Superior landlord or by his tenants, as inferior landlords, by way of "a fee simple interest" to the owner and his heirs in perpetuity in return for feudal service. Every time there was a devolution of interest in the land and the property passed to a new heir, the landlord was entitled to receive a payment of money. The landlord was also entitled to receive compensation, when the children of landholders became of age or married. So long as lands remained within families, then military service and feudal dues were ensured. The challenge to the system came when lands were given over in the thirteenth century to the new religious orders in England. It soon became a frequent custom to devise, either by way of gift or by sale, interests in land to the new religious orders and by such methods, the Crown, as well as intermediate Lords in chief were being deprived of feudal service as well as revenue. To prevent the above and to curtail this practice, which had become a frequent way of helping the Church and especially the new religious orders in England. It soon became a frequent custom to devise, either by way of gift or by sale, interests in land to the new religious orders and by such methods, the Crown, as well as intermediate Lords in chief were being deprived of feudal service as well as revenue. To prevent the above and to curtail this practice, which had become a frequent way of helping the Church and especially the new religious orders in England. It soon became a frequent custom to devise, either by way of gift or by sale, interests in land to the new religious orders and by such methods, the Crown, as well as intermediate Lords in chief were being deprived of feudal service as well as revenue.


76 In particular, the Dominicans and later the Franciscans, who by their vow of complete poverty, were unable to legally own any property. To get round the legal difficulty, the secular courts were to invent the concept of a "trust". See later in this chapter.

77 Because such religious houses and communities held the interest in such properties, as the legal owners, the customary payments due to the Crown and the lords in chief, regularly paid upon the legal devolution of such an interest in the property would be delayed and avoided for some time. There would generally be sufficient numbers of monks or nuns within such communities, who would be the original legal owners at the time when the original grant of land was made. Only when all had died, would a fresh grant need to be made, vesting the lands in the new community of persons.
religious orders, Edward 1 and his Parliament, passed the Statute of Mortmain in 1279.78 The Statute of Mortmain, within the preamble, referred to the growing abuse of certain lands being alienated for religious purposes, without the consent of the crown and inferior landlords, recording that:-

"Where of late it was provided that Religious men should not enter into the Fees of any without licence and fee of the chief lord...and notwithstanding that such religious men have entered into their own fees...We therefore to the profit of our realm intending to provide convenient remedy, by the advice of our prelates, earls, barons and others, have provided, made and ordained that no person, religious or other, whatsoever he be that will, buy or sell any lands, tenements, or under the colour of gift or lease...under pain of forfeiture of the same whereby such lands or tenements may anywise come into mortmain...”79

By the express provision of this Statute, the practice of selling any lands on such a basis and without the consent of the crown, was declared to be void. Where this was done, then the King's judges were given the power to confiscate such lands for the Crown.80 This would mean that in practice and to avoid the penal effects of the Statute, the consent of the kings were obtained before lands were given as religious foundations.

The Statute of Mortmain of 1279, intended to abolish an abuse which was seen as weakening the feudal system and so the very foundations upon which lands had been legally devised.81


79 Cf. The Preamble to this Statute.

80 The statute of Mortmain proclaimed that:="we therefore, to the profit of our realm, wishing to provide a fit remedy in this matter, by advice of our prelates, counts, and other subjects of our realm who are of our counsel, have provided, established and ordained that no person, religious or other, whatsoever he be, shall presume to buy or sell any lands or tenements, or under colour of gift or lease, or of any other term or title whatever to receive them from anyone, or in any other way, by craft or by wile to appropriate them to himself, whereby such lands and tenements may come into Mortmain; under pain of forfeiture of the same." Cf. The Statute of Mortmain in Statutes at large. This section can also be found in Barry, Readings in Church History (Vol. 1). p. 461

81 The paradox would be that the restriction, imposed under this Statute, would in fact be overcome by lawyers, using principles borrowed from Canon and Roman law. Civil Lawyers would devise the whole concept of a "trust" and distinguish between (a) the persons who were the legal
1.5.2. The Statute of Provisors of 1351 and the Statute of Praemunire of 1353.

Magna Carta had guaranteed the freedom of the Church, and that bishoprics were to be filled by an election process made by the cathedral chapter. As the Bishops were great officials with baronial status, advisers to the Crown, the Kings continued to assert that they had the right to be consulted upon such appointments. The practice became common that invariably, whenever a vacancy occurred to any ecclesiastical office, the King would issue a "licence to elect" to the Cathedral Chapter, authorising them to proceed to elect a new candidate. At the same time, the Kings would intimate the candidate that they wished to see elected. The persons then elected, would seek confirmation from the relevant Archbishops and in the case of a disputed election to an archiepiscopal see, there would be an appeal to Rome.

As there were indeed many disputed elections in the thirteenth century, it became frequent for the popes to exercise their right of making direct provision and reservation when episcopal vacancies arose. In 1351, by the Statute of Provisors, Parliament provided that henceforth, all persons receiving papal provisions for ecclesiastical offices without crown consent would be liable for imprisonment. Furthermore, all preferments filled by such methods, were deemed to be forfeited to the Crown, the Kings claiming in such circumstances to have the right to nominate candidates of their choice without further involvement.82

In 1353, Edward III used Parliament to pass yet another statute, the Statute of Praemunire of 1353, forbade the King's subjects from pleading in a foreign court in matters which were deemed to fall within the competence of the King's court. For any person who disregarded its provisions, the penalty was

owners of the land, who held the "legal interest" and (b) the persons who were entitled to enjoy the fruits of the land, the "equitable interest". By dividing legal from equitable ownership, the onerous sections of this statute would be overcome.

82 Cf. The Statute of Provisors of Beneﬁces 25 Edward III 6 (1352) in Statutes at large (Vol 1). The title of the Act is stated as follows:- The king and other lords shall present unto beneﬁces of their own, or their ancestors Foundation and not the Bishop of Rome.
confiscation of assets. No direct mention was made of the ecclesiastical courts of the Church. Neither did the statute make any specific reference to the papal tribunals. However, in 1365, suitors in papal courts were specifically brought within its ambit.

The English bishops, as well as the popes in fact protested against the restrictions placed by this Statute, which in practice were rarely invoked. Appeals in canon law cases thus continued to be processed from the ecclesiastical tribunals to Rome.

1.5.3. The second Statute of Praemunire of 1393.

In the fourteenth century, it was frequent for the Roman Pontiffs to nominate their candidates to vacant English bishoprics and then to translate them from one see to another without consulting the Crown. It was also the practice for the popes to pass sentences of excommunication without previously informing the Crown. To curb these practices, the second statute of Praemunire was enacted in 1393. This stated that such actions (a) infringed the ancient prerogative of the Crown, (b) interfered with the regal power which (it was claimed) had always been free to act and without such constraints and (c) threatened the very laws and statutes of the realm. The second Statute of Praemunire, prescribing heavy penalties, established;

"...that if any purchase or pursue, or cause to be purchased or pursued in the court of Rome, or elsewhere, any such translation, processes and sentences of excommunication, Bulls, instruments, or any other things whatsoever, which touch our lord the King against him, his crown and his regality, or his realm, as is aforesaid, and they which bring them within the Realm, or them receive, or make thereof notification or any other execution whatsoever within the same Realm, or without, that they, their notaries, procurators...shall be put out of the kings protection, and their lands and tenements, goods and chattels forfeit to our lord the King.."
The threat of confiscation of lands and goods was a harsh penalty to be imposed upon those who, without royal authority, would dare to accept papal nomination to an episcopal see or accept transferral from one diocese to another as well as for those who were instrumental into putting into effect a sentence of excommunication. However, it must be pointed out, that like the first Statute of Praemunire of 1353, the provisions and the sanctions of this Statute were rarely be imposed.


Between the Norman Conquest and the thirteenth century, Monasticism flourished in England, the Angevin kings being keen to foster its growth. English kings were keen to establish many monastic foundations so that the monks could recite prayers and Masses for the salvation of their soul.

In the thirteenth century, the Cistercians and then the Carthusians arrived in England. The real founder of the Cistercians, was in fact an Englishman called Stephen Harding, who had formed a small community of monks between 1099 to 1122. He was the author of the "Carta Caritatis", which set out the new rules to govern the religious community living in the woods of Citeaux. Under the rule which he elaborately drew up, he insisted upon total isolation of the monks from the rest of the world, and from Citeaux, planned a series of daughter houses, which would retain their connection with the mother house. Shortly there followed within England, the establishment of five Cistercian monasteries. The Carthusians were to be established in England as a separate religious order between the years 1110 and 1136 and although their intense ascetic life attracted few followers, Henry II founded a religious house at Charterhouse in

86 For example, in 1127, Stephen I granted land to Savigny, recording in the document of its foundation, that this was being done inter alia, for "the salvation of my soul and for that of my wife...". Cf. Barlow, Feudal Kingdom of England. p.239.

87 For an account of the growth and spread of the religious orders in this period, see Dorris Mary Stanton, English Society in the early Middle Ages. Penguin Books, London 1952.

88 At Waverley (1128), Garendon (1133), Tintern (1131), Rievaulx (1132) and Fountains (1132) Cf. Barlow, Feudal Kingdom of England. p. 186.
1180. From this foundation was to come St. Hugh of Lincoln, to be elected bishop of Lincoln in 1186.

By the end of the thirteenth century, the religious life in England had taken on a novel direction with the arrival of two new religious orders, one founded by St. Francis and the other by St. Dominic. The Dominicans, were to come to England in 1221 and the Franciscans in 1224. The eloquence and the lifestyle of these new friars generated much enthusiasm and led to many people embracing this new life. In addition, they were able to excel in the art of preaching and this led to improved standards within the clergy. From the days of Henry III, the King’s confessor would frequently be a Dominican friar and many nobles would follow this example. In 1273, a Dominican, Robert Kilwardy, became archbishop of Canterbury. He would be succeeded by a Franciscan, John Pecham in 1279. The Statute of Mortmain of the same year, was passed in the context of the rapid growth of many religious foundations, with grants of lands being made over to religious houses, threatening the stability of the land system devise by William the Conqueror.

Between 1215 and the Reformation Parliament of Henry VIII, all the religious orders, both the monks and the new friars, flourished and exercised an important role in the English Church. The two most important archiepiscopal sees of Canterbury and York, preserved their monastic community and retained their right to elect the new archbishop, subject to papal confirmation. Many of the monastic communities and foundations, fell outside the jurisdiction of the local bishop and fell, in some cases, under the direct authority of Rome. It was because their influence was so great and that they were an integral part of ecclesiastical life, representing the old traditions of the Church, that Henry VIII took such decisive steps to remove their presence and their threat to his ecclesiastical reforms.

89 For example, Robert Grosseteste, later Bishop of Lincoln, was to work strenuously for the betterment of the clergy. He had been master at one of the Franciscan schools at Oxford since 1214.

90 For example, the monastic community at Westminster Abbey. At the Reformation, these foundations were brought exclusively under the ultimate jurisdiction of the Crown, all appeals to Rome being abolished. by Henry VIII under the Ecclesiastical Licences Act 25 Henry VIII c.21 (1533), details of which are studied in the next chapter. Within the Established Church, these entities are now known as Peculiars and Royal Peculiars and to this day remain outside the jurisdiction of the Bishops of the Established Church. See E. Garth Moore, An Introduction to English Canon Law. Oxford 1967. pp. 48-49.
1.7. THE ECCLESIASTICAL COURTS OR TRIBUNALS UNTIL 1534.

In 597, Pope Gregory the Great had delegated and given to St. Augustine the power to constitute within England, a new hierarchy for the English Church, establishing two provinces, each being subject to the archiepiscopal sees of Canterbury or York. Within that mandate, the hierarchy were given authority to act in a judicial and legislative capacity and therefore to determine ecclesiastical disputes, applying to the same the Church’s evolving canon law.

1.7.1. The Ecclesiastical Tribunals of the Church 597-1532.

After the arrival of St. Augustine in England in A.D. 597, we have knowledge of the existence of the Witan, an Anglo-Saxon institution and being a legislative and judicial assembly used by the Anglo Saxons Kings. The Witan was a great council, attended by the King's officials, his courtiers and in time by the bishops of the Church. As a court in its own right, it fell to this body to hear and pass judgement on both ecclesiastical and secular matters and disputes.

As there did not then exist separate ecclesiastical and civil courts, the distinction between the jurisdiction of the State and the Church and their respective boundaries, was difficult to determine. How the Witan, with its judges including bishops applied the Church’s law to ecclesiastical disputes and how they would have worked out its principles is far from clear.91 William the Conqueror, within the background of the Gregorian reform of the Church, had ended this practice, by ordering that henceforth bishops were no longer to sit in the old Anglo-Saxon shire courts with lay judges but to sit in independent ecclesiastical courts.

These new ecclesiastical courts confined their jurisdiction to all matters concerning the discipline of souls—quaе ad regimen animarum pertinet. The bishops would sit, as the competent judge and try causes—secundum canones et episcopales leges—applying the laws of the Church, the Corpus Juris

91 Cf. Chapter 1 of The Archbishops' Commission on The Canon law of the Church of England. Canon law, at the same time, was a growing discipline and science. As the number of private collections of papal decrees and canons of both General and Particular Councils grew, so canon law would assume greater importance. Especially would this be the case in the background of the general reforms of the Church, spearheaded by Pope Gregory VII in the eleventh century,
Canonici. Initially, these ecclesiastical courts had limited jurisdiction, but over a period of time, they came to handle a great variety of issues, affecting not only the clergy but the laity as well; legal problems relating to marriage and the family, the making of last wills and testaments, conduct amounting to defamation, the swearing of oaths and perjury and disputes concerning the payment of tithes and taxes to the Church.

At the same time, these Ecclesiastical Courts dealt with a variety of other matters: disputes relating to church property—church lands and ecclesiastical ornaments and money donated to the Church for pious uses; causes concerning the public misbehaviour of men and women, who had violated Christian standards, including offences against public morality and heresy; the large clerical class, comprising those in Holy Orders (the archbishops, bishops, priests and deacons) as well as those who had embraced the religious life such as monks and nuns, friars and hermits; disputes on the canonical validity of elections; and conflicts which arose between the local churches and the bishop.

Each diocese had its own ecclesiastical court, with its own staff of well trained canonists and canon law judges, who would be drawn from the ranks of the clergy, the rules of canon law prohibiting those not in holy orders to sit as canon law judges. Appeals would run from these courts to the archiepiscopal court in each province, and then from this court of appeal to the papal courts in Rome.

The relationship which subsisted between the ecclesiastical tribunals and the secular courts, was not always harmonious. It was not always the case that the common law courts and judges were prepared to respect and to enforce the decisions of the Church courts. Great rivalry and jealousy existed between the two classes of lawyer, the civil and the canon. It was also, at times, resented that litigants were able at times to bypass the English common law courts, by


93 All questions involving the formation and annulment of marriage, actions brought to enforce contracts of marriage, to secure juridical separations, and to dissolve unions which had been contracted contrary to the canonical form. See R. H. Helmholz, *Roman Canon law in Reformation England*. Cambridge university Press 1990. Chapter 1. “The Mediaeval inheritance.”

94 This power of almost exclusive probate jurisdiction extended to the proving of all last wills and testaments not involving freehold property, supervising the collection of the assets of the testator and then the payment of debts and legacies out of the same. See Helmholz. op.cit.

commencing an action before an ecclesiastical tribunal and then pursuing an appeal to Rome. To curtail this, Parliament had passed the statute of Praemunire of 1353, to prevent appeals.\textsuperscript{96} In addition, the common law judges used\textsuperscript{97} indirect means to control the ecclesiastical courts by issuing civil writs directed at ecclesiastical judges, prohibiting them from trying a case. Yet the different legal systems developed and existed side by side. The enforcement of canonical penalties and decisions depended upon the co-operation of the secular, common law courts which recognised that the church courts had the jurisdiction to tackle and to deal with all matters spiritual. The disputes arose when both legal systems claimed competence. The conflicts of laws arose because there existed two systems of law, of equal validity, each claiming to operate within the same geographical territory.\textsuperscript{98}

\textbf{1.7.2. The canon law applied within the Ecclesiastical Tribunals during this period.}

The canon law which was applied within the ecclesiastical tribunals of the Church, was the same as that used throughout the rest of Christendom. The English Church was no different to that of the rest of Europe. Being suitably flexible, to meet the legitimate local customs and variations prevalent in England, it was developed in accordance with the needs of the English Church, but subject to the universal jurisdiction of the Papacy as the supreme lawgiver and judge.

Lanfranc, the Archbishop of Canterbury, in the reign of William I, had originally brought with him his own private of canons and used the principles and the criteria abstracted therefrom within his own courts. It was the practice, in keeping with the rest of Europe, to use private collections, of varying degrees of authority, until they were replaced by the semi-official collection compiled by

\begin{quote}
\textsuperscript{96} See the Statute of Praemunire, ante. Although the Church Courts were not mentioned by name, it was evident that the Statute of Praemunire intended to limit their jurisdiction and competence.

\textsuperscript{97} Cf. Helmholz. Op.cit. p.21

\textsuperscript{98} J.H.Baker, \textit{An Introduction to English legal history}, (3rd Edition). London 1990. See Chapter 8, pp.148-150. The kings would at times intervene to determine the boundaries of the ecclesiastical courts. For example, by the formulation of legal procedures such as the writ of Circumspecte agatis, in the year 1280, and Articuli cleri in 1315.
\end{quote}
Gratian in 1140 or thereabouts. This collection - the Decretum of Gratian - formed the most authoritative text until the arrival of the first official compilations of canons beginning with the reigns of the great lawyer popes in the thirteenth century. The Decretals of Pope Gregory IX in 1234; the Sext of Pope Boniface VIII in 1298; the Clementines of Pope Clement V in 1317; the Extravagantes of Pope John XXII in 1500 and finally the Extravagantes Communes in 1500.99

Just exactly how binding were the canons contained within these collections upon the English Church? Were they only of persuasive value and were the English ecclesiastical courts free to disregard their principles? After some considerable debate, it is now the accepted view that the canon law and the papal legislation contained within these papal codes, formed the basis of the canon law used in England and administered within the ecclesiastical courts. A different view had been propounded in the last century, the conclusion of a specially constituted commission which had concluded that the ecclesiastical tribunals of the English Church held a large degree of independence from Rome and that whilst they treated these papal collections with great respect, their judges never considered themselves to be bound by their decisions and decrees.100 The findings of this commission were in fact challenged by the Cambridge legal historian, Sir Frederick Maitland at the turn of the century. In a series of six essays which he wrote on the Roman Canon Law in the Church of England,101 he concluded that the papal law emanating from these papal collections was the modern equivalent of English statute law, having absolute binding authority within the English ecclesiastical courts.102 A view shared by


100 This was the Ecclesiastical Courts Commission in 1883 chaired by the English constitutional legal historian, the Anglican Bishop Stubbs. He had stated that "the Canon law of Rome, although always regarded as of great authority in England, was not held to be binding on the English courts."


102 The Ecclesiastical Commission had reached their conclusions on the basis that not every single papal decision and decree was rigidly applied within the English ecclesiastical courts, along the lines of the modern English doctrine of judicial precedent and so the English tribunals must have therefore been independent from the rest of ecclesiastical court system within the Church. A conclusion that was partly anachronistic, based upon a mis-understanding of the general nature of canon law and the failure to appreciate its great flexibility. At this time, neither English common law nor canon law, were bound by concepts which underlie English law such as (a)
other historians, including Professor Z.L. Brooke, an authority on the relations between the Papacy and the English Church in the early mediaeval period after the conquest.103

As a result of modern methods of research and a deeper understanding of canon law, the apparent contradiction as to how the ecclesiastical courts in England were able seemingly to disregard some papal decisions, has become easier to understand. Taking a closer look at the way that canonists operated within the medieval period, it has become evident that they (a) did not prima facie accept all the decisions of a supreme legislator, solely on the basis that this organ had unfettered power and (b) often possessed great flexibility to foster and promote customs, which were only contrary to human ecclesiastical law ("contra legem").104

1.7.3. The legislative authority of the English Bishops and Synods.

Until the reformation, the English Church in synodal assemblies and its bishops, possessed legislative authority to make canons, particular laws to bind their clergy and their subjects, without royal approval. We are fortunate in that there are two examples in the thirteenth Century, one emanating from a Provincial Constitution of Edmund, Archbishop of Canterbury, in 1236 and the other, deriving from a legatine council in London in 1237, held by the Papal legate Otho.

1.7.3.1. The Provincial Constitutions.


103 Professor Brooke had written that "the English Church recognised the same law as the rest of the Church; it possessed and used the same collections of Church law that were employed in the rest of the Church. There is no shred of evidence to show that the English Church in the eleventh and twelfth centuries was governed by laws selected by itself." Cf. Z.L. Brooke, The English Church and the Papacy from the Conquest to the Reign of King John. London 1931.

104 Medieaval Canonists classified all legislation into Natural law, Divine Positive law and merely Human law, the latter including mere ecclesiastical law. Ecclesiastical law which did not emanate directly from Natural and Divine Positive Law, would tolerate contrary customs to develop and operate, so long as they were reasonable.
In 1236, St. Edmund Rich, the Archbishop of Canterbury, promulgated his provincial constitutions, forty one in total for the diocese of Canterbury. They set out a number of canons, to control the conduct of the clergy, the administration of the Sacraments as well as on Matrimony, the monastic and religious state, on tithes and on sentences of Ecclesiastical tribunals.

These provincial canons give some idea of the problems that St. Edmund had to face and to resolve within his diocese. They reflect too, both his common and supernatural sense and his deep desire to protect the Church and his flock.

1.7.3.2. The legatine Council of London 1237.

In 1237, a council was summoned by the Papal legate, Otho, in November 1237. Held in St Paul's Cathedral and with its deliberations lasting over three days thirty six disciplinary canons were drawn up. These were to have great importance for they were to be the chief rule of discipline to be observed by the English Church, until the Reformation.

Out of the thirty six canons, canon 2 guaranteed the free administration of the Sacraments; canon 13 attacked clerical pluralism and absenteeism; canon 40 forbade the infringement of clerics or religious, or to infringe ecclesiastical liberties, under pain of excommunication.

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105 He was canonised in 1247 by Pope Innocent IV.

106 For example: Canon No.6; which forbade clerics to be present at or to encourage Scot-ales (drinking bouts): Canon No 8; which prohibited all simonia compact in masses under pain of suspension: Canon No.13; which stated that Church apparatus which had been blessed by a bishop was not to be converted to profane uses: Canon No 17; made it a rule that the confessions of women were to be made where they could be seen but not heard by the bystanders. The Confessor was not to enjoin Masses by way of penance, though he might counsel it. People were to be exhorted to go to confession at the beginning of Lent and indeed after falling into sin, lest one sin lead to another: Canon No. 33; Parishioners were not to make wills except in the parish priest's presence: Canon No 40; tithes were to be paid out of everything that yielded an annual crop: Canon No 41; Public officials were forbidden to invade the property of clerics or religious, or to infringe ecclesiastical liberties, under pain of excommunication.


107 "The Sacraments are to be freely administered without exacting any remuneration."

108 "As regards residence to be observed by rectors, and a regards pluralists, the Council refers the clergy to the decrees already issued by the Pontifical councils."
canon 22 set out the duties and obligations of the hierarchy and canon 23 dealt with matrimonial cases. The reference to decrees on clerical pluralism in earlier pontifical councils, demonstrates the clear canon law relationship between the central government of the Church in Rome.

1.8. THE INFLUENCE OF CANON LAW UPON ENGLISH LAW.

So far, we have considered the development of canon law and the ecclesiastical court structures of the English Church. At the same time, but at a different pace, English common law was maturing slowly but surely. It was in fact to be generously helped to develop by the canon law of the mediaeval Church. The separation and independence of the canon law from civil law, did not mean that they both remained isolated. The judges of the King's courts would from time to time look to the Canon law of the Church and borrow some of its concepts to remedy the defects of the civil common law.

1.8.1. The English system of Equity.

English law to this day uses principles, the origin of which can be traced to the canon law of the mediaeval Church. The incorporation of concepts, borrowed from canon law, gave rise to the birth and the development with the common law of England, of a separate branch of the law known as "Equity". Equity, not in

109 "On the Duties of Archbishops and bishops: They were to reside at their cathedrals: to celebrate Mass there on the principal feasts, on all Sundays, and during Lent and Advent. They should visit their dioceses at suitable times for correction and reformation, and for the consecration of churches. Let them be constantly sowing the word of Life in the Lord's field; and let them have the profession they made at their consecration read to them twice a year, in Advent and Lent."

110 Special care should be taken to appoint only competent and experienced judges in matrimonial suits. Deans, archdeacons and abbots who claim the privilege of hearing such cases must, before proceeding to a definitive sentence, first consult the diocesan.

111 A complete list of the canons can be found in The Life of St. Edmund of Canterbury, Op.cit. Cf. The Appendix VII.

112 For the historical background and an account of the development of this branch of the law see Hanbury and Maudsley, Modern Equity Chapter 1, pp. 3-45.
the sense of being opposed to justice, but a specific branch of the law designed to be more flexible and less rigid than the common law.

The system of Equity came to be administered within separate courts-Courts of Equity-under the jurisdiction of the King's Lord Chancellor. Usually a cleric and well versed in Canon law, he and his staff worked out a whole series of rules and customs and applied them in their courts to the cases as they arose.113

1.8.2. Specific Equitable remedies and the creation of the Trust.

As a separate branch of the common law, with its own body of rules to mitigate the severity of Common law and which, where this was completely deficient, would provide new remedies, the origin of "Equity" owed its existence to the discretionary exercise of regal power on the part of the King by his Chancellor in individual cases. Litigants who would come before the Lord Chancellor and request that he give justice in concrete cases, according to the conscience of the King. Where the common law either did not give an adequate remedy or was completely defective.

In the thirteenth and fourteenth centuries, the Chancellors and their staff, would grant or withhold relief to individual litigants, according to their view of justice and the facts of the particular case. They departed from acting according to precedent or custom and invariably required the defendant to be brought before their courts, to answer the complaint levelled against him after considering the petition of the plaintiff. The defendant would be ordered to attend the court to answer the complaint, upon pain of forfeiting a sum of money. For this reason, a legal document called a Writ was issued was called a Subpoena centum librarum. The examination would then be made under oath and the issues of fact as well as the law would be determined by the Chancellors. They would then decide whether to apply a specific remedy or not. Borrowing from the science of Canon law, the Lord Chancellors created new legal concepts supplement the common law. They were to do this within three areas.

113 Cf. "Des Origines de la Fiducie un exemple concret des racines institutionelles des droits occidentaux dans le droit Ecclésiastique" by André Morin. Ius Ecclesiae 7 (1995) pp. 481-491 and especially section 3: Évolution du droit anglais. This gives a brief survey on the influence of Canon law upon English law and Equity. "Equity was administered-by ecclesiastics, men dignified by high office in the church, men with some knowledge of the Canon law. Prior to the fourteenth century, this applies to the Equity administered by the courts" quoted from George W Keeton, English Law; The judicial Constitution. Newton Abbot, David and Charles. 1974.
First, by providing a remedy of specific performance in the area of contract law. At common law, if land were sold by contract by "A" to "B" and "A" refused to carry out his part of the bargain, the only remedy available to "B" would be to sue for damages. In Equity, the Chancellors worked out a different remedy, that of specific performance and had in certain cases, the power to compel the contract to be performed by a writ of specific performance.114

Secondly by the power that they had to issue injunctions, in cases whether contractual or otherwise. Common law judges had no discretion to order a litigant to act or not to act in cases. Where litigants were in breach of conduct, they could only be fined under the common law. In Equity, the Chancellors had such jurisdiction. If they felt that the justice of the case warranted the exercise of such power, then they could compel one of the litigants brought before their courts, to do or to refrain from a course of conduct. If the party thereby ordered refused to obey, then he could be imprisoned for contempt.

Finally, Equity added to English common law the doctrine of a "trust". The great legal Historian, Sir Frederick Maitland, himself, considered this to be the greatest and most distinctive achievement performed by Englishmen115 and the most important fruit of Equity. The concept of a "use", to evolve into a "trust", arose by lawyers drawing up a legal distinction between persons (a) holding the mere legal interest and title to assets, generally in land and (b) having a separate right to use the same, the "usufructus". At common law, no such distinction existed both the legal right and the right to enjoy the interest being one and the same. As Common law judges could not separate these two concepts, they were unable to provide a distinction.

The Chancellors took a different approach and ruled that it would be unconscionable for a legal owner to use property transferred to him, where it had been given for the benefit of another party. For example, land might have been given to "A" to hold for the family of "B" who was going on a crusade. Alternatively, land might have been transferred to a group of individuals, for the benefit of a community of Franciscan friars which, because of its rule of poverty, were not able to hold property, it being necessary for another entity to hold the legal interest. The Chancellors, in such cases, were prepared to act and to supply

the deficiencies of the common law by enforcing the rights of beneficial use against the legal owners, "in personam."

Gradually there developed within common law and Equity, a distinct legal terminology. "A", the legal owner, would be described as the "Feofee to use", the owner at law of the land and the actual beneficiary as the "cestui que use", the owners of the property, in equity and so entitled to enjoy the fruit of the land. It was by inventing this legal concept, the device of a trust, that the religious orders were able to hold land and to use it in defiance of the provisions of the statute of Mortmain.

At the time of the Reformation Parliament of Henry VIII, the use of the trust had developed, although it was still at its early stages of gestation. To circumvent its use and to be able to destroy the monastic foundations as well as to prevent them from being re-constituted, Henry passed his famous Statute of Uses of 1535.116 This aimed to abolish such trusts. By it, all feofees to uses, i.e. the Trustees, were to disappear.117 This Statute did not suppress all uses and its provisions did not apply where the trustee had active duties to perform and in certain other situations. Nor did the Statute apply to land held for a term of years, i.e. a leasehold interest nor to cases where land was held by "A" for the use" of "B" for the "use" of "C". By the eighteenth century, the second "use" had come to be known as a "trust".

1.8.3. The development of Equity and the fusion of the separate jurisdictions.

Whether these equitable remedies of the (a) decree of specific performance, (b) injunction and (c) creation of a trust would actually be available, would depend upon the discretion of the Lord Chancellors, with the Chancellors being guided by a series of well defined rules or equitable principles. These were

116 Statute of Uses. 27 Henry VIII c.10 in Statutes at large (Vol 2).

117 The Statute of Henry, specifically, stated that "...where any person or persons shall be seised of lands or other hereditaments to the use, confidence or trust of any person or persons, in every such case such person or persons that shall have any such use, confidence or trust in fee simple, fee tail, for term of life or for years, or otherwise shall stand and be seised deemed and adjudged in lawful seisin estate and possession of and in the same lands and hereditaments in such like estates as they had or shall have in the use". Quoted in Hanbury and Maudsley. Op.cit. pp.9-10.
enshrined within a number of maxims, which followed the growth and the
development of Equity.

Well known examples of these maxims were "Where equities are equal, the first
in time shall prevail": that is to say that where there were two litigants who are
both entitled to an equitable remedy, then the person who had acted first would
obtain the remedy. "He who comes to equity must do equity": a person seeking
an equitable remedy, had to have acted fairly. "Delay defeats Equity": where a
person had a right founded upon Equity, then he was obliged to act with speed,
or he would lose any remedy. "Equity will not suffer a wrong to be without a
remedy": where a legal right exists, then Equity will ensure that an appropriate
remedy was made available.118

Under these maxims, Maitland detected the clear influence of Canon law and
traced the origin of these rules to the principles to be found within the Liber
Sextus of Boniface VIII.119 These maxims were an indirect way of ensuring that
the continuing influence of canon law within the common law system after the
Reformation, once the principal source of canon law, the Papacy had been
rejected by Parliament. Their evident debt to the canon law of the Church would
explain why serious clashes would often take place between the common law
Judges and the Lord Chancellor. The common law judges increasingly came to
resent the separate jurisdiction of the Chancery Court, which challenged the
common law. In the seventeenth century, the Lord Chancellor, Lord Ellesmere
and the Lord Chief Justice Coke, fought bitter battles, the latter accusing the
former of undermining English Common law.

Separate Courts of Equity and Common law, continued to exist in England
down to the nineteenth century. Until 1873, to obtain an equitable remedy, it
was necessary to begin an action in one of the Court of Equity. In that year, by
Act of Parliament120 the two systems of law were fused and all English Courts
now have jurisdiction to apply the principles of Equity. Nevertheless, it was and

118 These equitable maxims were collected by Richard Francis in 1728 and published with the
title "Maxims of Equity collected from and proved by cases out of the Book of the Best Authority
in the High Court of Chancery."

119 Cf. The article of Javier Martínez-Torrón: "Consideraciones sobre la influencia del Derecho
p358

120 The Supreme Court of Judicature Act. 1873 (36 & 37) Vict. c.66.
still is, necessary for any plaintiff who seeks to rely upon the rules of Equity to demonstrate that his claim has

"an ancestry founded in history and in the practice and precedents of the court administering Equity jurisdiction. It is not sufficient that because we may think that the {justice} of the present case require it, we should invent such a jurisdiction for the first time."\(^\text{121}\)

To conclude, he must therefore know the origin of a rule, whether it lays in law or at equity.

1.9. BRIEF CHARACTERISTICS OF MODERN ENGLISH LAW.

Since the Reformation, and during the last two hundred years, English law has acquired its modern traits which distinguish it from other civil jurisdictions. Its principal characteristics are now briefly described, since they explain the current legal position of the Established Church and how its own ecclesiastical law operates.\(^\text{122}\)

1.9.1. The absence of a written constitution and the supremacy of Parliament.

The chief characteristic of the English legal system is that its constitution is not written and contained within one code of law. Instead, its constitution is based upon Acts of Parliament and important case decisions of the courts, supplemented by custom and tradition.

There is no comprehensive Bill of Rights nor any Civil or Criminal Code. The role and the position of the Sovereign, the power of Parliament, the duties and the rights of subjects and the position of the Church are all to defined by Acts of Parliament, cases decisions, custom and tradition. By the very important doctrine of Parliamentary supremacy; Parliament is the supreme legislator and her laws cannot be struck down or deemed to be unconstitutional. In the United

\(^{121}\) Re; Diplock (1948) Ch. (W.L.R.)

\(^{122}\) The present constitutional position of the Established Church is analysed in detail in Chapter 5.
Kingdom, there is no Constitutional Court to challenge Acts of Parliament, as being ultra vires or unconstitutional.

The effect of the doctrine of the absolute sovereignty of Parliament, means that the courts do not claim or try to exercise the power to strike down statutes or to declare them illegal or unconstitutional. This has not, of course, always been the position, for a power of judicial view was claimed by Lord Chief Justice Coke as long ago as in 1610 who eloquently declared that

"when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the Common law will control it, and adjudge such act to be void.”123

In fact, this has never occurred and no statute has ever been overturned on the basis of the above legal reasoning. The modern position of the supremacy of Parliament was stated by Lord Reid in 1974, who overturned a Court of Appeal decision which had ruled that a private Act of Parliament was unconstitutional. He commented that:-

"The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our country....In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the revolution of 1688 any idea has become obsolete.”124

A direct practical consequence of the absolute supremacy and sovereignty of Parliament is that Parliament still monitors and controls all ecclesiastical legislation.125

123 Dr Bonham's Case (1610) 8 Co Rep 114a, p. 118 (E.R.)
125 A recent example occurred in 1990 when Parliamentary approval was necessary to amend the canon law of the Church of England to remove the impediments to admission into Holy Orders of a man, who had divorced and subsequently re-married, whilst his first wife was still alive. Approval was given by Parliament, through its Parliamentary Ecclesiastical Committee, to
1.9.2. Case Law and the system of Judicial Precedents.

A second feature of the English legal system is the unparalleled importance given to cases reported by the Courts and the doctrine of judicial precedent, which is also known as binding precedent, and which became firmly entrenched within the English legal system in the last century. The importance of case law can be understood in part, in the absence of a written Code or Constitution, as the binding system of judicial precedent gives the English Common law system, the certainty that it would otherwise lack.

The Highest Court within Britain, is the House of Lords, sitting in its judicial capacity, hearing appeals from the Civil and the Criminal courts. The Civil Courts consist of Courts of first instance, whether County Courts or the High Court, depending upon the type of claim. The High Court is divided into three divisions, the Queens Bench, the Family and the Chancery Division. There are appeals from either the County Court or the High Court to the Court of Appeal and then from the Court of Appeal direct to the House of Lords. Most decisions of the High Court and the Court of Appeal are fully reported within the Official Law Reports.

The doctrine of Judicial precedent lays down the lower courts must follow the decisions of the higher courts and must apply the principles extracted from their decisions (the "ratio decidendi") to the cases that they are determining if the facts are the same. If they are not, then the courts may be able to distinguish decisions and arrive at a different conclusion. All decisions of the House of Lords are binding upon lower courts, i.e. the Court of Appeal and the High Court. All decisions of the Court of Appeal are binding on a subsequent Court of Appeal and the High Court. Decisions of the High Court are of great persuasive authority upon a different High Court. As with all other areas of law, decisions of the Synod of the Established Church. The result was the Clergy (Ordination) Measure 1990, 1990 No 1


127 The Weekly Law Reports (W.L.R). The All England Law Reports (All E.R.) although often used, are not the official collections.

128 The binding nature of case law is relatively modern and its principles have been traced to Lord Stowell in the eighteenth century who caused case decisions to be reported in full when he was a judge sitting in the now defunct, Admiralty Court. The effect of his practice, which was
ecclesiastical tribunals affecting the Established Church have been reported in specialist collections of law reports. All important decisions affecting the Established Church, are now reported in the official law report collections, in the Weekly Law Reports-and the doctrine of judicial precedent generally operates in the same way, with the Church courts being bound by decisions of superior tribunals.

1.9.3. Supplementary Sources of English Law.

If the principal sources of English Law are the Statutes, that is to say the Acts of Parliament as well as the important case decisions of the courts (which criteria applies to the ecclesiastical law of the Established Church, whose legal affairs are still subject to the competence of Parliament) then the supplementary sources for both the common law and the Ecclesiastical law of the Established Church, are custom and the works of learned authorities. Both these supplementary sources call for a brief commentary.

1.9.3.1.Custom.

Under English common law, in the absence of any Act of Parliament or reported case decision, a custom which has been observed for a determined period of time, is evidence of a law. For a custom to be binding, it was generally the case that it needed to be demonstrated that such had been observed since time immemorial, the usual commencement date being 1189. Under Ecclesiastical law, a different rule applies. For an ecclesiastical custom to be binding, it was decided by Lord Westbury in 1868, in a House of Lords, soon to be followed suit by his colleagues, was to make the whole nature of reporting case decisions a science and an extremely important task. The whole process of case reporting began, with unofficial collections appearing, their reputation varying and depending upon the skill and accuracy of the reporters. There are now official collections which are used by the courts themselves. See Cross, Op. Cit. On the details of the Court structure itself, see Smith and Bailey, The Modern English Legal System, pp. 30-104.

129 This harsh and at times almost impossible criteria to meet, has since been modified by Statute.
decision that the person claiming the benefit of it, is required to demonstrate that it has been

"...the invariable use of the Church from the earliest times down to the Reformation (which would be evidence of its being a law of the Church)"

A legal rule, which is different to that of the Common law and only applicable for the ecclesiastical law of the Established Church.

1.9.3.2. Learned books of authority.

Another supplementary source for English Common law, in the absence of any direct authority, are the leading works and opinions of great authors and the comparative laws of other legal jurisdictions. This is the same for the ecclesiastical law of the Established Church.

1.10. CONCLUSION.

When Henry VIII succeeded the English throne in 1509, he inherited from his father, Henry VII, a kingdom, which had recovered from the scourges of the civil war of the War of the Roses. A Kingdom essentially stable, with the Church and the State functioning side by side, with parallel structures on both the hierarchical and judicial level. The two orders existing on different planes, but with different objectives.

As with the rest of the Church, the Church in England applied the canon law of the universal Church, as developed and modified by the papacy, within its own ecclesiastical courts. The papacy, as it remained the chief legislator and the supreme judge for the whole of western Christendom, occupied the same position within the Canon law of the English Church. The English ecclesiastical courts observed the papal legislation in the same way and followed papal decrees on the same basis as the rest of the universal Church. Appeals were processed to the Roman Curia and judgements were handed down in its courts.

130 The Bishop of Exeter-v-Marshall (1868) L.R. 3 H.L.
The whole area of canon law, worked side by side with the state. Its existence served to provide a poignant reminder to the State that the Church was independent, governed by different principles, operated a separate legal system, which was older and based directly upon Roman law. The Church had an independent hierarchical court structure, with its own appeal procedure. The State generally respected this status quo, acknowledged the right of the Church to make its own laws, its canon law, and where it did legislate in respect of ecclesiastical matters, it only did so to define the juridical boundaries. The right of the Church to independently exist and to operate was never doubted.

The Canon law of the Church covered not only the lives of the Clergy and the religious, but to a wide extent the laity. Matters concerning marriage, wardship, wills and probate as well as defamation and offences relating to the public order and blasphemy, all came with the jurisdiction of the Church courts. English common law was prepared to permit these legal areas to be the exclusive concern of the canon law tribunals, partly because it did not have any separate system of its own and partly because the competence of the canon law courts was recognised in its own right, with its own legal rules and legal specialists, all clerics. This respect for the law of the Church was to lead to canon law wielding an enormous influence on English law, especially in the area of Equity and the creation of various equitable remedies such as the trust.
CHAPTER 2

THE LEGAL CREATION OF THE ESTABLISHED CHURCH AND ITS INITIAL LEGAL DEVELOPMENT (1532-1547).
Chapter 2

The legal creation of the Established Church and its initial development (1532-1547).

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2.1. INTRODUCTION. 131

The great charter of liberties, the first Magna Carta of 1215 and then its subsequent versions all intended to preserve the legal independence of the English Church. Her freedom from lay control and her right of self government, especially in the whole area of episcopal appointments. Her clergy were free to travel to and from Rome and her canon law and ecclesiastical tribunals, were largely left to function unmolested. Appeals in canon law matters were processed from the ecclesiastical courts to Rome, subject from time to time to

parliamentary attempts to control the same. All this changed within a generation, when Henry VIII modified royal ecclesiastical policy and from being a staunch defender of the English Church and maintaining its links with Rome became an ardent opponent of the papacy.

Between 1529 and 1545, the principle protagonists were Henry VIII; his archbishop of Canterbury; his Lord Chancellor, Thomas Cromwell; the king’s former Lord Chancellor, Thomas More and the Bishop of Rochester, John Fisher. Both the latter from a very early stage, detected Henry VIII’s intentions when in 1532 by Act of Parliament, he obtained the formal submission of the clergy to royal authority and thus made the English Church schismatic. They understood that this was more than just a quarrel with the English Church but was a legal move to destroy the old order. For this reason, they refused by their conduct to accept that Henry VIII and his Parliament had the legal power to attack the independence of the Church.

In 1517 Martin Luther had commenced his revolt in Germany, denouncing the doctrine of indulgences and pioneering a religious revolution that was later to have a great impact in the whole of Europe. Summoned to appear before the diet of Worms in 1521, Luther refused to retract his opinions and eventually denied the authority of the Papacy. One of his chief works was written specifically against the Papacy, the title of this being called “the Babylonish Captivity” attacking not only individual popes but also the office of the papacy itself. Henry VIII, initially as the champion of the papacy, refuted these views of Luther and strenuously defending the Papacy and the Sacraments of the Church wrote a well researched treatise in 1521 which was dedicated to Pope Leo X. For this, Henry was rewarded with the title "Defensor Fidei" an honour conferring upon him a dignity which did no more than recognise the

132 Under, for example the Statute of Praemunire of 1353. See chapter 1.

133 Luther would deny many articles of the Catholic faith and challenged the concept of a hierarchical, visible Church. Like many of his fellow reformers he also disliked canon law.

134 The title of this work was "Assertio Septem Sacramentorum". Henry was helped to write this by no less a person than Thomas More.

135 A title retained to this day by the English Crown and appears on English coinage. When Henry VIII had himself declared to be Head of the Church of England 1534 by Act of Parliament, he used this title in the Pre-amble. "Henry, by the grace of God of England and France King, Defender of the Faith, Lord of Ireland and supreme Head, on Earth, of the Church of England". Cf. 26 Henry VIII c.1 See Statutes at large (Vol 2).
extent of the deep doctrine and the wealth of his learning. Until 1529, he continued to be a strong defender of the rights of the papacy.

2.2. Petition for Nullity of Marriage in 1527.

Henry’s marriage to Catherine of Aragon had produced no surviving male heirs and in 1527, Henry VIII was to petition the Pope asking that he should declare the marriage to Catherine of Aragon null and void. Cardinal Wolsey, Henry's Lord Chancellor, was commissioned to secure an inquiry in Rome, with the view to obtain an annulment of the marriage, as soon as possible to enable Henry to contract a new marriage. Henry was to argue that his marriage to Catherine should be declared null on the legal and canonical grounds that she had previously been married to his brother, Arthur. Whatever his motives, and whether they were genuine or not, Henry was able to draw upon selected biblical texts as well as different interpretations of canon law to justify his contention that the marriage that he had made with Catherine, should never have been sanctioned in the first place by a papal dispensation. 137

136 A faithful servant of Henry VIII, but later disgraced, had held bishoprics of Tornay and Lincoln and in 1514 had become Archbishop of York. In 1515 he had been raised to the dignity of Cardinal and in 1517 was made Papal legate in England by Pope Leo X. In 1523, after Henry had summoned Parliament, Wolsey had requested the sum of eight hundred thousand pounds to finance the King's foreign policy. The House of Commons, lead by Thomas More, refused to be intimidated, even though Cardinal Wolsey had appeared in person. More bluntly told Wolsey, that the House would debate the matter alone and in private. Wolsey was forced to withdraw.

As Lord Chancellor, Wolsey was extremely competent. Possessed of great legal skills, he was proficient in Canon, Roman and English law. A notable feature of his rule, was the desire to secure prompt and impartial justice. The Venetian ambassador, Sebastian Giustinian, at this time resident in the English Court, stated that Wolsey had this reputation of being extremely just, favouring the people exceedingly and especially the poor (referred to within the biography of R.W. Chambers, Thomas More. p.173)

During his period of office as Lord Chancellor, Wolsey incurred the enmity of many. His style of government was resented. One of the criticisms that was later levelled against him was that he had intended to give greater influence and importance to Roman law, in place of English Common law.

137 Catherine had been betrothed and then married to Henry’s brother Arthur who had died before the couple had lived as husband and wife. Henry had been given a papal dispensation so as to be able to marry Catherine.
The issue from a canonical point of view was whether the original dispensation given to Henry to marry Catherine by the Roman Pontiff was valid or not. If valid, then he was unable to contract a new marriage whilst Catherine was alive. If invalid, because the union was prohibited, then Henry was a bachelor, living in sin. Who suggested to Henry that he should seek an annulment and whether he was acting on his own initiative or that of others is not clear. Amongst those learned in Pontifical law that Henry did consult in 1527 were some of his Bishops, including John Fisher and the outstanding civil lawyer, Thomas More.

Proceedings began in a secret suit, in which Cardinal Wolsey, as the Papal Legate and William Warham, as the Archbishop of Canterbury cited Henry to appear to answer the challenge that he had lived in incest with his brother's widow for eighteen years. The King appeared in person and appointed a proctor to act on his behalf. The commission considered the case from all legal angles and listened to different schools of thought. John Fisher, bishop of Rochester, was amongst those requested to give his learned opinion on the validity of the marriage and the licitness of the papal dispensation given. He argued that whilst it was clear that the whole range of authorities differed on their interpretation of the Biblical texts, this was no reason to presume that the marriage was prohibited by Divine law. It was for the Pope to decide in ambiguous cases; and as the Pope had thought fit to dispense, then he took the view that such power to dispense had been exercised legitimately.

The most that the Pope was prepared to do was to send a special legate to England, Cardinal Campeggio, to act with Cardinal Wolsey in the trial of the case. Cardinal Campeggio arrived in England in 1528 and after a delay, the trial opened in May 1529, with King Henry VIII and Catherine being cited to appear. Catherine, after a touching prayer to Henry VIII, before whom she knelt to plead for her rights and those of her daughter, appealed directly to the Pope. Her cause was warmly upheld by John Fisher, in a speech before the legates, which

138 From the Calendar of letters and State Papers, pertaining to the reign of Henry VIII, we have the following account that:-"whereas the King for some years past had noticed in reading the Bible the severe penalty inflicted by God on those who married the relicts of their brothers, he began to be troubled in his conscience and to regard the sudden deaths of his male children as a divine judgement. The more he studied the matter, the more clearly it appeared to him that he had broken a Divine law. He then called to counsel men learned in pontifical law. Calendar of Letters and Papers, Foreign and Domestic, of the reign of Henry VIII, Vols. 1-4 ed. by J.S.Brewer. 1529 IV, No 5156. Quoted in Chambers, Thomas More.

139 Cf. op.cit. L.P. No 3148;
provoked an angry reply from the King. By July, when Cardinal Campeggio adjourned the case, it was clear that Henry had failed to secure a favourable decision.

Henry VIII blamed Cardinal Wolsey for the failure of the papal tribunal to declare his marriage to Catherine, null and void. Anne Boleyn, whom Henry had wanted to marry, insisted that Cardinal Wolsey should be disgraced and removed from office and so Cardinal Wolsey was accordingly indicted on the charges of abusing his authority and infringing the royal jurisdiction and authority of the Crown, forbidden by the Statute of Praemunire of 1393. He had done this, so it was alleged, by having accepted the office of legate from the Pope and for having exercised such legatine jurisdiction within the realm. Having fallen from favour, he pleaded guilty and surrendered all his property to Henry VIII. In October 1529 he resigned the great seal of the Lord Chancellor.

Thomas More directly succeeded Cardinal Wolsey as Lord Chancellor, in October 1529, the first non-cleric for centuries to hold this position. He had hesitated in accepting the post as he did not want to be embroiled within the marriage proceedings. He had warned the King not to expect him to support him in his policy to obtain a nullity or a divorce in the absence of any agreement from the Holy See. Henry had indicated to More that he would not be involved and assured him that he would be permitted to follow his conscience. On this condition, Thomas More accepted the Great Seal of Lord Chancellor on 26 October 1529.

A week after the fall of Cardinal Wolsey, Henry VIII summoned Parliament to use it as a tool to transform the English Church and bring it under his complete control. Parliament was summoned and, without any precedent, sat through several sessions, between 1529 to 1536, and by a series of Acts of Parliament,

140 This was so, even though he had accepted such office on the authority of the King.

141 Cardinal Wolsey had already retired to his archbishopric in York in 1529, but before he reached his Cathedral, he was summoned to appear to London, being arrested for treason. Behind these charges, the Boleyn supporters were active and had seized the opportunity to consolidate their position. Cardinal Wolsey began the return journey, but when he reached Leicester Abbey he was too ill to travel any further and died on 30 November 1530. Before dying, he had already changed his lifestyle and when his servants came to prepare his body for burial, they found that under his robes he was wearing a hairshirt, evidently doing penance for his sins.

Before his death, he had said "If I had served God as diligently as I have done the king, He would not have given me over in my grey hairs."
prepared the legal way to sever the English Church from the rest of Europe, to end its dependence upon the papacy and to invest within the Crown supreme judicial and legislative power over the Church, in place of papal authority.142

Legal measures would be taken by Henry to neutralise all opposition. All the monasteries, religious houses and convents would be dissolved; their lands confiscated and all appeals in canon law disputes to Rome would be prohibited. Henry was also to assume, by law, the competence and power to arbitrate upon matters of faith and morals.

2.2.1. The Restraint of Appeals to Rome Act 1532.

During the Parliamentary session of 1529, Acts of Parliament were introduced by Thomas Cromwell, to tackle the problems which dealt with ecclesiastical pluralities, i.e. the abuse whereby bishops occupied more than one diocese, collecting the revenues from them as well as the practice of clerical fees. The King had as his target, the two Convocations of the House of Clergy in Parliament, the Upper House of Bishops and the Lower House containing the Abbots and other senior Prelates. As the majority of the Clergy had supported Catherine, Henry was determined to intimidate them and to coerce them into his submission.

The Convocations of the clergy were accused of offending the provisions of the Statute of Praemunire, by recognising Cardinal Wolsey's legatine authority. They pleaded guilty to the charges and Henry set out the conditions upon which he would be prepared to grant them the clergy a pardon. Fines of one hundred and eighteen thousand pounds were levied against the Convocation of Canterbury and eight hundred pounds against the Convocation of York. Both were also required to give an acknowledgement that Henry was "Protector, single and supreme Lord and, as far as the law of Christ allows, even supreme head of the Church of England."143 The Convocations, by a majority vote agreed to do this and gave this acknowledgement.

142 See Scarisbrick, *Henry VIII*, especially chapters, 9 and 10 dealing with the campaign against the English Church and the Royal Supremacy.

143 Acknowledged, in this form, by the Convocation of Canterbury, on the motion of Archbishop Warham. The date being 11 February 1531. See Chambers, *Thomas More*. 
Apart from being deliberately ambiguous, this was the legal admission desired by Henry VIII to set in motion his ecclesiastical reforms. First, the ecclesiastical court system would be modified. Then, the process whereby the higher clergy were elected. It would be a matter of time for Henry, and within a period of four years using the services and the influence of Thomas Cromwell in Parliament, to compel both Houses to pass an Act of Parliament which would ultimately proclaim Henry not only to be the Protector, single and supreme Lord, as far as the law of Christ allows of the English Church, but its only supreme head - the supreme head of the Church in England.144

Within the Parliamentary session of 1532-33, the two Houses within Parliament, the House of Lords and the House of Commons, were persuaded to discuss and eventually to submit to Henry, their new proposals to remove the jurisdiction of the See of Rome from the Church's ecclesiastical court system. A bill precisely to do this was submitted to Henry and received Royal Assent in 1532.145 It was known as the Restraint of Appeals Act of 1532 or, in brief, the Ecclesiastical Appeals Act.

The pre-amble of this Act declared that (a) the King held the absolute power as supreme judge to determine all legal issues, within the realm over all matters, ecclesiastical as well as secular, without any restraint from any other foreign power146 and that (b) the Body Spiritual, that is to say, the higher clergy, the Archbishops and Bishops and the Senior prelates of the kingdom were likewise competent to judicially act, without any foreign restraint.147 The Act ostensibly

144 Cf. The Act of Supremacy 26 Henry VIII.c.1, (1534) in Statutes at large (Vol 2), the provisions of which are examined later in this chapter.

145 An Act that the Appeals in such cases as have been used to be pursued to the See of Rome shall not be from henceforth used. 24 Henry VIII c.12 (1532) see Statutes at large (Vol 2) In short, known as the Restraint of Appeals to Rome Act.

146 The text of the Act stated that the King had the "... entire Power Pre-eminence Authority Prerogative and Jurisdiction, to render and yield justice and final Determination to all manner of Folk Resiants or Subjects within this his Realm, in all Causes Matters Debates and contentions happening to occur insurgre or begin within the Limits thereof, without Restraint or Provocation to any foreign Princes or Potentates of the World..."

147 The latter part of this recital, alleged that the clergy had always possessed sufficient learning to act as ecclesiastical judges. They had been prevented from carrying out their task by the intermeddling of other parties. The actual text, confirmed that they held the "...Power, when any Cause of the Law Divine happened to come in question, or of Spiritual Learning, then it was declared, interpreted and shewed by that Part of the said Body Politick, called the Spirituality,
intended to restore the status quo that had existed under previous reigns and Henry specifically made reference to the previous Acts of Parliament of Henry’s predecessors.148

The Restraint of Appeals Act contained a total of ten sections. It did not negate the competence and the jurisdiction of the courts spiritual and Temporal within the realm. They were still empowered to act, but the novelty was that they were now only authorised to do so under the jurisdiction of the King. These courts would continue to handle all testametary cases, issues on marriage and legitimacy, disputes concerning the payment of ecclesiastical taxes but their authority and their legitimacy now was to be derived from the will of the King and Parliament.

The canon law appellate process and the ecclesiastical courts themselves, were for the first time brought entirely under the control of the Crown. Previous Acts of Parliament had attempted to control the ecclesiastical court structure and to make the appeal process more difficult, but the novelty of this Act was that it now outright abolished the jurisdiction and power of the papacy within the English Church. Section 1 declared that all legal disputes touching canon law were to be tried only in the ecclesiastical courts of the realm, under the King’s authority and without any appeal to Rome.149

now being called the English Church, which always hath been reputed, and also found of that sort, that both for Knowledge Integrity and Sufficiency of Number, it hath been always thought, and is also at this Hour, sufficient and meet of itself, without the intermeddling of any exterior Person or Persons to declare and to determine all such Doubts...

148 The Act recited that the earlier legislation had been designed to facilitate the running of the ecclesiastical tribunals free from the annoyance as well as of the See of Rome.” This had been ignored and appeals had still been made so, that “sundry Inconveniences and Dangers, not provided for plainly by the said former Acts, Statutes and Ordinances, have arisen and sprung by reason of Appeals sued out of this Realm to the See of Rome, in Causes Testamentary, Causes of Divorces, rights of Tithes Oblations and Obventions...” See Recital in The Restraint of Appeals Act.

149 Section 1: "...all Causes, Testamentary, Causes of Matrimony and Divorces, Rights of Tithes Oblations and obventions...already commenced moving depending or hereafter coming in Contention Debate or Question within this Realm, or within any of the King's Dominions or Marches of the same or elsewhere, whether they concern the King our sovereign Lord his Heirs and Successors or any other Subjects or Resiants within the same, of what Degree forever they shall be, shall be from henceforth heard examined discussed clearly finally and definitively adjudged and determined within the King’s Jurisdiction and Authority and not elsewhere, in such Courts Spiritual and Temporal of the same...without having any respect to any Custom Use of
Legal Creation of the Established Church (1532-1547) 61

As appeals were prohibited to be made to the See of Rome, the ecclesiastical courts were given, by royal decree, an extended power and jurisdiction previously held only by the Papal Tribunals. Their judicial power was to be exercised subject to the King’s ultimate authority. In theory, there was to be no other changes made to the Church and the avowed intention was to preserve the Catholic Faith and to remedy an abuse. The Catholic faith would still operate, but now under the control of the King and with the proviso that the See of Rome had no authority nor power to interdict, excommunicate or interfere with the practice of the Catholic religion in England. The King now by secular law held this power, this facility as part of his office, by Act of Parliament.150

Those who refused to administer the Sacraments or to perform the Divine services, as the result of an interdict, suspension or sentence of excommunication emanating from the See of Rome, could be punished by the King’s courts and were liable to one year's imprisonment and to pay a fine.151

Under this Act, Henry not only formally abolished all appeals to Rome but also punished all those litigants who would attempt to do so, notwithstanding the provisions of the Act. To discourage such persons, the Act threatened all those who tried to use the appeal process with the penalties prescribed by the Statute of Praemunire. Upon being convicted, all litigants who were found guilty, faced a sentence of life Imprisonment and permanent loss of their land and goods.152

Sufferance, in Hindrance Let or Prejudice of the same ...any foreign Inhibitions Appeals Sentences Summons CitationsSuspensions Interdictions Excommunications Restraints Judgements, or any other Process or Impediments of what Natures Names Qualities or Conditions soever they be, from the See of Rome...notwithstanding..."

150 So Section III stated that: "...All the Spiritual Prelates Pastors Ministers and Curates within this Realm, and the Dominions of the same, shall and may use minister execute and do, or cause to be used ministered or executed and done, all Sacraments Sacramentals Divine services, and all other things within the said Realm and Dominions, unto all the subjects of the same, as Catholick and Christian men owen to do; any former Citations Processes Inhibitions Suspensions Interdictions Excommunications or Appeals, for or touching of the Causes aforesaid, from or to the See of Rome, or any other foreign Prince or foreign Courts, to the Let or contrary thereof in any wise notwithstanding..."

151 Cf. The remaining part of this Section, under the above Act.

152 Section IV:"... if any Person or Persons inhabiting or resident within this Realm, or within any of the King's said Dominions or Marches...do attempt move purchase or procure from or to the See of Rome, or from or to any other foreign Court...for any of the Causes aforesaid...that then every such Person or Persons so doing, and their Fautors Comforters Abettors Procurers..."
Sections V to IX of the Restraint of Appeals Act set out in detail, the expanded new procedure for all appeals in canon law cases. The ecclesiastical court structure and hierarchy was remodelled so that all appeals were to be confined to the Realm and were ordered not to proceed any further. So, where litigants were dissatisfied with a court decision given by an Archdeacon's court, they were permitted to appeal to the bishop and then to either the Archbishop of York or Canterbury but no further as section V had formally all abolished appeals to Rome.153 Appeals from the diocesan Bishop were to be made, within fifteen days, following the decision of the judgement or sentence, to either the Archbishops of Canterbury or York, depending upon which province the diocesan see belonged. If the episcopal see was subject to neither 154 then an appeal would be determined "as the case by the order of Justice shall require."

As far as an archiepiscopal see was concerned, the process was broadly the same. From the judgement of an archdeacon, an appeal could be processed, by virtue of section VII, within fifteen days to the Court of the Arches or Audience of the same archbishop or archbishops; then from this court, again within the same time limit of fifteen days from the date of the delivery of the judgement, to the Archbishop of the Province. From his judgement there was to be no further appeal. Where a case was directly decided by an Archbishop, whether of Canterbury or of York, then there was to be no appeal from his decision.155 Ordinary litigants of the ecclesiastical tribunals, the laity and the clergy, in theory had their rights protected within the realm, but were forbidden to make any right of appeal to the Roman curia.

To preserve the legal position of the Crown, all disputes concerning the King, his successors or heirs, were to be decided within the spiritual courts, with a

Executors and Counsellors and every of them, being convicted of the same for every such Default shall incur and run in the same Pains Penalties and Forfeitures ordained and provided by the Statute of Provision and Praemunire..."

153 Appeals were not to go "to the See of Rome". All litigants "...may and shall from henceforth take have and use their Appeals within the Realm, and not elsewhere, in Manner and Form as hereafter ensueth and not otherwise; that is to say, first from the Archdeacon or his official, if the Matter or Cause be there begun, to the Bishop Diocesan of the said See..."

154 Henry was King of England, Wales and Ireland: the bishops of the latter, did not form part of either the provinces of Canterbury or York.

155 There was an exception made to preserve in certain cases, the ancient right of appeal from the Archbishop of York to the Archbishop of Canterbury, by virtue of the prerogative of the latter.
right of appeal to a special convocation of clergy, the spiritual prelates, whose decision was to be final. With the abolishment of the canon law appeal process to Rome and the reorganisation of the Courts of law of the Church, Henry was only preparing the legal way to assume by secular law, all the judicial and legislative functions previously exercised by the papacy. To be effectively head over all matters, both spiritual and temporal, of the Church in England. Before he could do this, he first needed to obtain (a) the total submission of all the clergy by Act of Parliament and then (b) by Parliamentary legislation to prevent the payment of all taxes to Rome and transfer to his royal office the power previously exercised by the Papacy to grant licences and dispensations in canon law issues.

2.2.2. The Submission of the Clergy Act 1532.

In the same session of Parliament, Henry accelerated the momentum of his campaign, against the Church. He encouraged the House of Commons to look into and to consider the position and the status of the Clergy—the Archbishops and Bishops and the senior prelates of the Realm. The House reacted by making a series of complaints, in the form of a supplication, which was presented to the King. At the same time, the House debated another measure, another bill designed to prevent the withholding of annates to the See of Rome.

Delivering their petition, the members of the House had hoped that the King would dissolve Parliament and enable them to return to their occupations and to

156 Section IX; the final appeal would run to "...the Spiritual Prelates and other Abbots and Priors of the Upper House, assembled and convocated by the King's writ in the Convocation being...so that every such Appeal be taken by the Party aggrieved within fifteen days next after the judgement or Sentence thereupon given or to be given; And that whatever be done or shall be done and affirmed determined decreed and adjudged by the foresaid Prelates Abbots and Priors of the Upper House of the said Convocation, as afore is said, appertaining concerning or belonging to the King his Heirs and Successors in any of the aforesaid Causes of Appeals shall stand and be taken for a final Decree Sentence Judgement Definition and Determination and the same matter so determined never after to come in question and Debate to be examined in any other Court or Courts."

157 Corrected drafts of the Supplication or Complaint of the Commons against the Bishops, were made in the handwriting of Thomas Cromwell. Cf. Chambers, Thomas More. p. 251.
their work. Henry would not do this until he had obtained legally, the formal surrender and submission of the Clergy. Henry wanted their complete submission and waited for the reaction of the Convocation of Bishops.

The Archbishops and Bishops and the senior Prelates were to deliver their reply to the accusations. When the answer came, Henry handed the reply to the Commons saying "We think their answer will smally please you, for it seemeth to us very slender." Their second reply did not please the King, who complained to the Speaker of the House. Henry charged the clergy with disloyalty because of the consecration oath that they took to the Pope on their ordination.

The King's demands were again placed before Convocation and on 15 May 1532, the Clergy made their complete surrender to the King. By the Act for the Submission of the Clergy, containing seven sections, the Senior Clergy placed at the disposition of the King their episcopal offices and power, their right to legislate and to pass canons. They acknowledged that their right to meet in Convocation arose by virtue of the authority of the King and they give an undertaking that they would not in the future pass any law or canon which would attack the royal governance of the Church in England. The preamble of the Act of Submission, recorded their formal submission.

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158 Since 1529, Parliament had been prorogued. As members of Parliament at this time received no payment, their continued absence would have caused them great inconvenience.


160 "Well beloved subjects, we thought that the clergy of our realm had been our subjects wholly; but now we have well perceived that they be half our subjects-yea, and scarce our subjects. For all the Prelates at their consecration make an oath to the Pope clean contrary to the oath they make to us, so that they seem his subjects and not ours." Chambers, op.cit. p. 251.

161 An Act for the Submission of the Clergy to the King's Majesty. 25 Henry VIII c.19 (1533) In Statutes at large (Vol 2).

162 

"...(they were) the King's humble and obedient subjects, the Clergy of the Realm of England,(who) have not only acknowledged according to the Truth, that the Convocations of the same Clergy is always, hath been and ought to be, assembled by the King's writ, but also submitting themselves to the King's majesty, have promised in Verbo Sacerdocii, that they will never from henceforth presume to attempt alledge claim or put in use or enact promulgate or execute any new Canons Constitutions Ordinance Provincial or other, or by whatsoever other Name they shall be called in the Convocation, unless the King's most Royal Assent and Authority may to them be had..."
By Act of Parliament, the Senior clergy of the realm accepted that, as a House of Convocation, all their episcopal authority derived from the Crown and that all future assemblies would only be summoned by and under the control of the King. By their actions, they had created within Parliament the legal doctrine of Royal Supremacy, over the Church and soon to be legally defined as the Church established by law.

By Section I of the Submission of the Clergy Act, however, the Clergy, not only recorded their formal surrender, but also confirmed their absolute future dependence upon the Crown. In particular, they promised that henceforth

"...they ne any of them from henceforth shall presume to attempt alledge claim or put in use any Constitutions or Ordinance, Provincial or Synodal, or any other Canons, nor shall enact promulge or execute any such Canons Constitutions or Ordinances Provincial, by whatever Name or Names they may be called (which always shall be assembled by Authority of the King's Writ) unless the same Clergy may have the King's most Royal Assent and Licence..."

The higher Clergy who had made their formal submission to Henry, as well as having compromised their own independence, had also agreed to limit their own episcopal functions, thereby striking at the very root of the independence of the canon law of the Church. This inevitably would raise several important issues, such as the legal validity and binding nature of the Corpus iuris Canonici. The logical consequence of the legal doctrine of Royal Supremacy was that the whole corpus of canon law would need to be restructured, to remove all canons and decisions which reaffirmed papal authority and to substitute for them, the authority of the King. The existence of those canons which related to the powers and jurisdiction of the papacy, remained an anomaly and jeopardised the royal power of the King. For this reason, Section II of the Submission of the Clergy Act, provided for a new committee to be constituted to examine all such canons and to remove those which attacked the King’s royal prerogative. The clergy accepted that

"...the King's highness shall have Power and Authority to nominate and assign, at his pleasure, the said two and thirty Persons of his subjects, whereof sixteen to be of the temporality of the Clergy, and sixteen to be of the Temporality of the Upper and Nether House of the Parliament.... and that the two and thirty, by his Highness to be named, shall have Power and Authority to view, search and examine the said Canons Constitutions and Ordinances provincial and Synodal heretofore made; and such of them as the King's Highness and the said Two and
thirty, or the more part of them, shall deem and adjuge worthy to be continued kept and obeyed and executed within this realm...Provided always, That no Canon Constitutions or Ordinances shall be made or put into execution within this Realm by Authority of the Convocation of the Clergy, which shall be contrariant or repugnant to the King's Prerogative Royal or the Customs or Statutes of this Realm...”163

In the meantime, to confirm the King's absolute authority over the Church, its law and its courts, it was made clear, beyond any doubt that all court cases were not to be decided other than within the Courts of the Realm164 and under the authority of the King. The submission of the Clergy Act, also contained one very important innovation. It was to give, for the first time, to an aggrieved party the legal right to challenge within the secular courts, any case decided within the courts of the Church. A dissatisfied litigant was able to

"...appeal to the King's Majesty in the King's court of Chancery; and upon every such Appeal, a Commission shall be directed under the King's Great Seal to such Persons as shall be named by the King's Highness, His Heirs or Successors...to hear and determine such appeals, and the Causes concerning the same: which Commissioners, so by the King's Highness, his Heirs or Successors, to be named or appointed, shall have full Power and Authority to hear and determine every such Appeal...”165

By surrendering their authority to the King, the clergy paved the way for Henry VIII to change fundamentally the whole concept and the very basis of Church law. This marks the beginning of the whole process whereby the ecclesiastical courts of the Church and its canon law would be brought under the control of and eventually assimilated within the secular law and their courts fused with the secular. A fusion of the two legal jurisdictions under the direction of the King and thus a consolidation of royal power.166

163 Section II of the Submission of the Clergy Act.
164 By section III, and reaffirming the ban imposed on the Restraint of Appeals Act.
165 Section IV of the Submission of the Clergy Act.
166 Canon law would in time be viewed as the ecclesiastical law of the realm. A.R.Myers in England in the late Middle Ages, Penguin Books Limited 1953, refers to the vast jurisdiction entirely outside royal control and royal authority and often clashing with the secular authority, namely the ecclesiastical courts. There were many ecclesiastical courts within England;
The Convocation of clergy had surrendered to the King on 15 May 1532. The following day, 16 May 1532, Thomas More as Lord Chancellor, handed in his resignation to the King without giving any reason for his actions. It was only later and within the course of his trial for high treason, that he would explain his opposition to the ecclesiastical legislation of Henry VIII.

2.2.3. The Act for non payment of First fruits to the Bishop of Rome 1533.

At the same time that the Clergy had been forced to make their submission to the King, Thomas Cromwell introduced in Parliament a new bill to abolish the payment of the First Fruits to the Pope and the rights of the papacy in respect of the election of bishops within the Church. Although the bill had met with opposition, it had been conveniently introduced at the same time as the Submission of the Clergy bill and was able to receive royal assent. With the King personally intervening, the bill was passed by Parliament and became law.

This Act, originally entitled an Act for the non payment of First Fruits to the Bishops of Rome—and more briefly as “The Appointment of Bishops Act of 1533” transferred to the King the sole right to appoint all Archbishops and Bishops of the English Church and abolished the traditional payment of tithes to the See of Rome, a tax traditionally payable by bishops during their first year of office. It abolished the custom by establishing

"...that the Payments of the Annates or First Fruits and all Manner Contributions for the same, for any such Archbishops or Bishopricks, or for any Bulls to be obtained from the See of Rome, to or for the said purpose or intent, should utterly cease...And that no manner of Person or Persons to be name elected presented or postulated to any Archbishops or Bishoprics within this Realm should pay the Said Annates or First Fruits nor any other manner of Sum or Sums of Money, Pensions or Annuities for the same or for any other like archidiaconal, diocesan, provincial and others and there had been frequent appeals to Rome, to the Apostolic See. By subjecting all ecclesiastical jurisdiction to Royal Authority and to Parliament, Henry was able to greatly increase the basis of his power and create a strong centralised government. When Henry brought the Ecclesiastical courts under his control, he closed an era which had begun with William the Conqueror. See chapter 1, passim.

Its title was "An Act for non payment of First Fruits to the Bishop of Rome" 25 Henry VIII c.20 (1533) See Statutes at large (Vol 2).
Exactions or Cause, upon pain to forfeit to our sovereign Lord the King, his heirs and chattels for ever...” 168

So far as those nominations in respect of episcopal vacancies were concerned, already being processed in Rome, the Act preserved their validity, but reserved to the King the right to intervene in the event of any delay or refusal by the Pope. All future candidates to vacant episcopal sees were to be made only by the King who in future would issue a licence under seal to the appropriate governing ecclesial body (such as a Cathedral chapter), with the name of the Crown’s nominee to be elected. Where there was a delay or failure on the part of the governing body, then the King, by Letters Patent, would proceed to directly nominate the candidate. 169

The Act otherwise forbade any person to make a presentation to Rome, in respect of a vacant episcopal see as well as the payment of any taxes to the Papacy. Any person, refusing to nominate the person indicated by the King, would be liable to the penalties prescribed by the various Statutes of Praemunire. 170

2.2.4. The Act concerning "Peter's Pence“ and Dispensations 1533.

As the Higher Clergy had legally been made subject to the authority and the jurisdiction of the King, Henry turned his attention to the rest of the clergy and the laity. There were still a great variety of other taxes payable to Rome. Direct taxes, such as Peter's pence and indirect taxes, payable in respect of licences, dispensations and other privileges. A licence to preach, a dispensation to marry within the forbidden degrees of consanguinity and affinity or a permission to hold a number of benefices or receive ordination to the diaconate and priesthood on the same day. All such matters had hitherto been dealt with by the Papacy. Henry ended this practice and transferred by Parliament such power to himself and the office of the Archbishop of Canterbury, the latter being authorised to

168 Cf. The Preamble. The Act contained a total of eight sections and inter-alia, abolished the traditional tax paid to the papacy by a new bishop and transferred to the Crown the right to appoint their nominees to all episcopal vacancies.

169 Cf Section IV. The section emphasised that this was only a return to the custom- “as of old time hath been accustomed....”

170 Section VIII of the Above Act.
exercise his power, no longer by the papacy but by the jurisdiction of the King.171

The Act to Exonerate the King’s subjects from the payment of Exactions (Peter’s pence) and other impositions to the See of Rome,172-or as it came to be known “The Ecclesiastical Licences Act of 1533”-in its preamble, justified the legal prohibition of the payment of all future direct and indirect taxes to the papacy as the amounts of money claimed were exorbitant causing undue hardship to the people of the realm.173 Furthermore, the papacy was portrayed as having usurped a power which as of right belonged to the Crown and so had been guilty of deception.174 This Act, which had a total of twenty nine sections, was overall to consolidate the powers of the King, abolish completely papal jurisdiction in England and to transfer to the Archbishop of Canterbury some of the executive powers hitherto exercised by the Papacy. It acknowledged Henry as rightfully Head of the Church and gave him the power to control the movements of all clergy within England and prohibited them from attending or participating in General Councils without royal consent.175

171 The dispensing powers which were vested in the Archbishop of Canterbury as and from 1533, are examined in The Report of the Archbishop's Commission in The Canon law of the Church of England. Appendix II. pp. 69-70.

172 Its full title was An Act concerning the Exonerations of the King's Subjects from Exactions and Impositions heretofore paid to the See of Rome; and for having Licences and Dispensations within the Realm without suing further for the same 25 Henry VIII c.21. (1533). See Statutes at large.(Vol 2).

173 who were "greatly decayed and impoverished by such intolerable Exactions of great sums of Money as have been claimed and taken, and yet continually be claimed to be taken out of this your Realm, and other your said Countries and Dominions, by the Bishop of Rome...in Pensions Censes Peter pence Procurations Fruits Suits for Provisions, and Expeditions of Bulls for Archbishopricks and Bishopricks, and for Delegacies, and Rescripts in Causes of Contentions and Appeals, Jurisdictions Legatine, and also for Dispensations Licences Faculties Grants Relaxations Writs called Perinde Valere..." Cf. The preamble.

174 "...the Bishop of Rome aforesaid (who) hath not been only to be blamed for his usurpations in the Premises, but also for his abusing and beguiling your subjects, pretending and persuading to them that he hath full power to dispense with all human laws and Uses and Customs of all Realms, in all causes which be called spiritual..."Quoted from the pre-amble to the above Act.

175 The title "Supreme Head of the Church" was to be granted to Henry by a further Act of Parliament. See 2.2.4.
Section II formally abolished the payment of all taxes, whether direct or indirect to the Papacy in respect of licences, which were all now to be paid over direct to the Crown. Sections III to XVIII then elaborated upon the new procedure, which transferred to the Archbishops of Canterbury, but under royal supervision, the canonical power to issue all licences, permissions and dispensations under canon law. All the conditions under which such power was to be exercised and the fees to be paid for the exercise of this power; the limits placed on the exercise of such powers and the remedies available when improperly used; the ratio of distribution of all taxes received and how the fees were to be calculated.

Papal power to grant licences in respect of the English Church being abolished, such faculties and functions were transferred under sections III and IV to the King, with the Archbishops of Canterbury exercising the same. Section IV specified how that dispensing power was henceforth to be exercised, previously enjoyed by the See of Rome. Where the Archbishops of Canterbury and all

Section II"...no Person or Persons of this your Realm, or of any other your Dominions, shall henceforth pay any Pensions Censes Portions Peter-pence or any other Impositions to the Use of the said Bishop, or of the See of Rome, like as heretofore have used, by usurpation of the said Bishop of Rome and his Predecessors, and sufferance of your Highness... but that all such Pensions Centes Portions and Peter-pence, which the said Bishop of Rome, otherwise called the Pope, hath heretofore taken and perceived, or caused to be taken to his use and chambers, which he calls Apostolick, by Usurpation and Sufferance, as is above said within this your Realm, or any your other Dominions, shall from henceforth clearly surcease, and never more be levied taken perceived nor paid."

Cf. Section III, which said that "...neither your Highness, your Heirs nor Successors, Kings of this Realm, nor of any other your Dominions, shall from henceforth sue to the said bishop of Rome called the Pope, or to the See of Rome or to any Person or Persons having or pretending any Authority by the same, for Licences Dispensations Compositions Faculties Grants Rescripts Delegacies or other Instruments or Writings, ... but that from henceforth every such Licence Dispensation Composition Faculty Grant Rescript Delegacy and Instrument and other Writing aforenamed and mentioned, necessary for your highness, your heirs and Successors, and your and their People and Subjects, upon the due Examinations of the Causes and the Qualities of the Persons procuring such Dispensations...shall be granted, had and obtained, from Time to Time, within your Realm and other your Dominions, and not elsewhere, in Manner and Form following and not otherwise; that is to say the Archbishop of Canterbury for the time being, his Successors, shall have Power and Authority, form Time to Time by their directions to give grant and dispose, by an instrument under Seal of the said Archbishop."

"...after good and due Examination, by them had, of the Causes and Qualities of the Persons procuring for Licences Dispensations Compositions Faculties Delegacies Rescripts Instruments or other Writings...full power by themselves, or by their sufficient and substantial
other bishops of the Realm had possessed a general delegated papal authority to issue all such licences, dispensations or faculties, then such were deemed to be enjoyed by permission of the King and not by under any papal power, since the latter had been abolished.179 All such delegated power was to be exercised under the sanction and the control of the King. The royal seal was required to be affixed to all judicial transactions of the Archbishops of Canterbury where the value of the tax to be paid at Rome for the expedition of any dispensation, licence, grant or faculty had exceeded the Sum of Four pounds.180

Previously, where marriages had been contracted within the forbidden degrees of kindred and without any dispensation, then any children born by that union, were deemed to be illegitimate. This left it legally open to challenge the validity of marriages, henceforth contracted by a licence or faculty issued by the King or the Archbishops of Canterbury. Sections VII and VIII of this Act, confirmed authoritatively, that all licences granted by the King or by the Archbishop were good and valid and that all children born after a licence had been given to solemnise a marriage were legitimate.181

The Archbishops of Canterbury were legally given under the Act,182 royal authority and the power to constitute a clerk to register the grant of all such dispensations, the discretion to reduce the taxes payable in connection with the same and the power to draw up a table of fees, prepared in conjunction with the Lord Chancellor and the Lord Treasurer of England. The detailed provisions providing the apportionment of the revenue collected were covered in section XIII which depended upon whether the fee exceeded four pounds or less.183

Commissary or Deputy, by their Discretions from Time to Time, to grant and dispose, by an Instrument under the Name and Seal of the Said Archbishop...all manner Licences Dispensations Faculties Compositions Delegacies Rescript or other Writings for any such Cause or Matter, whereof heretofore, such Licences or Writings which have been accustomed to be had at the See of Rome..."


180 Section VI.

181 This is an example of the Civil law, in this case English Common law, usurping the function of canon law. From the civil law viewpoint, this legal presumption was necessary as otherwise such dispensations theoretically would have been invalid under Canon law.

182 Under the provisions of Sections IX and XII.

183 In the case of four pounds, then two thirds of the amount were to go to the Crown and one third to the Archbishop: under that amount, a different percentage was to apply.
In the event of the Archbishops refusing to grant a licence or faculty or dispensation for no proper cause, then the Act gave to an aggrieved party the right to challenge such a decision within the King's common law courts. The power of the Archbishops of Canterbury and the other bishops, was not exercisable in respect of those places, under canon law, previously outside their territorial jurisdiction. Monasteries, abbeys, convents and other religious houses all which had been, juridically speaking, subject direct to the Papacy. These were to remain outside the local control of the bishops, but instead of being subject to Rome, would henceforth be subject direct to the King and under his patronage. Now being subject to the authority of the King and his royal jurisdiction, they were forbidden to pay any pensions to Rome nor make any oath to the Pope.

Under the Ecclesiastical Licences Act of 1533, all clergy were at the same time forbidden to depart from England and to attend General Councils of the Church,

184 Section XVII; "if the Archbishop of Canterbury or the said Guardian of the Spiritualities for the time being hereafter refuse or deny to grant any Licences Dispensations Faculties Instruments or other Writings...to any person or persons (who) ought, of a good just and reasonable cause, to have the same by reason whereof this present act, by their Wilfulness Negligence or Default should take none effect... then the Chancellor of England, or the Lord Keeper of the Great Seal for the time being, upon any complaint thereof made, shall direct the King's Writ to the said Archbishop... denying or refusing to grant such Licences or Dispensations Faculties or other Writings..."

The dissatisfied party, had to demonstrate within the civil courts that the Archbishop had acted unreasonably. If he were able to do so, by an action commenced within the Courts of Chancery, then the Lord Chancellor could issue a writ, compelling the Archbishop of Canterbury to grant the appropriate remedy.

185 Under Section XX There were over five hundred religious houses throughout the realm, and in such cases, the Prelates-the abbots and Priors in certain cases-possessed limited dispensing powers, subject to the jurisdiction of Rome. For confirmation of election as abbot or prior, confirmation had been needed from Rome. Section XX of the Act confirmed that such persons and their properties were outside the control of the hierarchy and no longer subject to Rome: "...the Archbishop of Canterbury or any other Person or Persons, shall have no power or authority by reason of this act to visit or vex Monasteries, Abbeys, Priories Colleges Hospitals Houses or other places Religious, which be or were exempt before the making of this Act...but that Redress Visitation and Confirmation shall be had by the King's Highness, his Heirs and Successors, by Commission under the Great Seal, to be directed to Such Persons as shall be appointed requisite for the same...(such places not be visited and to be ) exempt from the bishop of Rome..."

without royal consent\textsuperscript{187} and this restriction on travel applied also to the religious. They were no longer to have the legal right to travel to their mother house,\textsuperscript{188} where this was situated outside the Kingdom.

Again, the ostensible intention of the Act, was not to destroy the old order or introduce change but to return the Church to the status quo ante that had existed. The aim of King and Parliament was not to

"decline or vary from the Congregation of Christ's Church in any Things concerning the very Articles of the Catholick Faith of Christendom...." but to 
"make an Ordinance by Policies necessary and convenient to repress vice and for good conservation of the Realm in Peace Unity and Tranquillity from Ravin and Spoil, issuing much the old ancient Customs of this Realm in that behalf...."\textsuperscript{189}

This was not the view shared by all. Whatever the grandiose language used, this statute went further to bring the Church under royal control by abolishing all papal jurisdiction and by bringing the religious under the supremacy of the Crown. This was to be the first move to be taken by Henry to dissolve the monastic foundations. In the meantime, Henry would punish any resistance to the measures of this Act, by imprisonment. There would be resistance to Henry's legislation from clerics and religious as well as laity. Amongst the most famous to refuse, were John Fisher and Thomas More.

2.3. PARLIAMENTARY LEGISLATION IN 1533/4, CONFIRMING THE DEFINITIVE SEPARATION OF THE ENGLISH CHURCH FROM ROME.

By using the parliamentary process, Henry VIII had been able to secure the submission of the clergy to his royal authority, abolish all appeals to Rome in canon law matters and to assert that the Crown alone had the right to fill all episcopal vacancies. Henry had by now repudiated Catherine of Aragon and

\textsuperscript{187} Section XX.

\textsuperscript{188} By section XIX: "...Nor that any Person, Religious or other resiant in any of the King's Dominions shall from henceforth depart out of the King's Dominions to or for any Visitation or Congregation or Assembly for Religion, but that all such Visitations Congregations and Assemblies shall be within the King's Dominions."

\textsuperscript{189} Cf. Section XIX op.cit.
married secretly, Anne Boleyn. That left open to debate the legitimacy of the offspring of Catherine, her daughter Mary, and any offspring of Anne.

**2.3.1. The Act of Succession of 1533.**

In March 1534, Henry had procured that a law should be passed, which had the effect of fixing the succession to the throne of England on the offspring of Henry and Anne Boleyn. By Act of Parliament, the marriage of the King to Catherine was declared to be null and void and the legitimate heirs of the marriage between the King and Anne were to succeed to the throne. The Act stipulated that the subjects of the King should take an oath of loyalty to the King, swearing loyalty not only to the King’s issue, but also affirming the contents of the Act, including an acknowledgement that Henry was the Head of the Church in England. This was an Act of Parliament that individuals opposed to Henry’s ecclesiastical policy, would not accept in principle. Individuals like Sir Thomas More, the previous Lord Chancellor, even if privately they may have felt it unfair and even regrettable that Parliament should have passed over the Princess Mary would have been prepared to take an oath, upholding the question of succession. This related to affairs of the state within the competence of Parliament, which had the power to determine the successor to the King. The oath to be tendered, went beyond this, however as the deponent swear that in addition he or she accepted the veracity of the contents of the Act of succession, which contained the earlier ecclesiastical legislation of Henry VIII.

**2.3.2. The Act concerning the King to be Supreme head of the Church of England and to have authority to reform and address all heresies and abuses in the same 1534.**

The Act of Succession was the precursor to the further Act of Parliament which declared Henry to be the Supreme Head of the Church in England. This was

190 The Act concerning the King’s Succession. 25 Henry VIII c.22 (1533) Statutes at large. (Vol 2)

191 Sections II and VI of the above Act.

192 An Act concerning the King’s Highness to be Supreme Head of the Church of England, and to have Authority to reform and redress all Errors Heresies and Abuses in the same. 26 Henry VIII c.1. (1534) See Statutes at large. (Vol 2).
the Act of Supremacy which received Royal Assent in November 1534 and formally completed the legal separation of the Church in England from Rome. The Church from this moment, was a national Church, set up by the King and under the King as its Supreme Head. This Act was to confirm that the King had been recognised as such by the Senior clergy, in their convocations: -

"Albeit the King's Majesty jointly and rightly is and ought to be the Supreme Head of the Church of England, and so is recognised by the Clergy of this Realm in their Convocations, yet nevertheless for corroboration and confirmation thereof, and for the increase of Virtue in Christ's Religion within this Realm of England, and to repress and extirp all Errors Heresies and other Enormities and Abuses heretofore used in the same: be it enacted by the Authority of this present Parliament, that the King our Sovereign Lord, his heirs and Successors, Kings of this Realm, shall be taken accepted and reputed the only Supreme Head in Earth of the Church of England called Anglicana Ecclesia; and shall have and enjoy, annexed and united to the imperial crown of this Realm, as well as the Title and stile thereof, as all Honours Dignities Preheminences Jurisdictions Privileges Authorities Immunities Profits and Commodities to the said dignity of Supreme Head of the same Church belonging and appertaining; and that our said Sovereign Lord, his heirs and his successors, Kings of this Realm, shall have full power and Authority from time to time to visit repress redress reform reorder correct restrain and amend all such errors Heresies Abuses Offences Contempts and Enormities, whatsoever they be..."

As Supreme Head, it perforce followed that the king had the full, and supreme juridical, legislative and executive authority over the Church. The Church was now established by law, by Parliament and as its head, the King possessed the power to

"...visit, repress, reform, order, correct, restrain, and amend all such errors, abuses, offences, contempts and enormities, whatsoever they may be, which by any manner of spiritual authority or jurisdiction ought or may lawfully be reformed..."193
Henry VIII had by means of his Parliament, formulated his ecclesiastical policy. His marriage to Catherine of Aragon had been declared null and void, by a special Divorce Court, chaired by Archbishop Thomas Cranmer. He had contracted a new marriage, with Anne Boleyn and had legalised her offspring as his legitimate successor. He had also been able to centralise and to bring under his control, under his firm hand, the Church and to set himself as its Supreme Head on earth. With this power, went the right to reform and redress all heresies, determined by his authority.

On 1 February, 1535, Parliament made it a secular offence and an act of high treason to utter any words maliciously denying the royal supremacy of the King. Such conduct was deemed to render the speaker to the penalty of a traitor's death. Under this auspices of this Act, both Thomas More and John Fisher were eventually arraigned and found guilty, each being sentenced to a traitor's death. John Fisher, Bishop of Rochester and subsequently made a Cardinal, was executed on 22 June 1535 and Thomas More a few weeks later on 6 July. Both had steadfastly refused to accept that the King and Parliament had the right to legislate over the English Church. Unwilling to yield, they were martyred for following their conscience. As Richard O'Sullivan, a distinguished English lawyer was to write, on the outstanding example of Thomas More:

"The life and death of Thomas More are witness to the principle of limitation of the Power of King or of Parliament, and the writings and the judgements of a constellation of Catholic and non-Catholic historians and lawyers in our own time have led to a reaffirmation of the principles of Natural and Divine Law for which he lived and died." 195

2.3.3. First fruits and Tenths, Act 1534.

The Act of Parliament which had made Henry VIII legally, the head of the Church was followed shortly by another law, the effect of which was to confiscate and to divert all taxes payable to the papacy to the Crown. The Act of First Fruits and Tenths legally ensured that henceforth, the first fruits, profits and revenue for one year of every spiritual living, were to paid over to the Crown. The money was to be handed over to the King and the Act contained detailed

194 The Act of Treasons 26 Henry VIII c 1 (1535). See Statutes at large (Vol 2).


196 The First Fruits and Tenths Act. 26 Henry VIII c.3. See Statutes at large. (Vol 2).
provisions, dealing with people who refused to comply with the law.197 This piece of legislation was to make it clear that all financial connections with the papacy had been well and truly severed.

2.3.4. Suffragan Bishops Act 1534.

Henry’s Parliament was yet to pass another law regulating ecclesiastical matters, this time touching and concerning the nomination and the appointment of Suffragan Bishops by the Crown. All papal involvement in the nomination of Archbishops and Bishops having already been prohibited, Parliament passed a new Act that gave to the Crown, the power to nominate the appointment of suffragan Bishops, to complement the power of the King to nominate individuals to the vacant sees of Archbishops and Bishops.198

The Suffragan Bishop’s Act199 contained eight clauses. The King, his heirs and successors, was given the power to create ecclesiastical entities, the office of a suffragan bishop. The person appointed to such an office was to be known as a Suffragan Bishop. The Act set out the election process, a more simple procedure than the nomination of Archbishops and Bishop. Under the Suffragan Bishop’s Act, every Archbishop or Bishop was required to present to the King, two names for each suffragan bishop he wanted to be nominated. The Crown would choose one of the names and then the person so elected would be consecrated by the appropriate Archbishop, within three months.200

2.4. ACTS TO PROCURE THE DISSOLUTION OF MONASTERIES 1536 AND 1539.

With notable exceptions, the opponents to Henry VIII's ecclesiastical policy and to his chief and principal advisor, Thomas Cromwell, had been the regular secular clergy, the Friars Observant and the Carthusians together with several lay people, including the former Lord Chancellor, Thomas More. Henry feared greatly that the Church which he had now created and brought under his control, could well be thwarted by the various religious communities which continued to

197 Cf. Sections I and III of the above Act.

198 See the Act for the non payment of Annates to the Bishop of Rome, ante.

199 This was called in full; An Act for the nomination of suffragans and consecration of them. 26 Henry VIII c. 14 (1534). See Statutes at large (Vol 2).

200 See Sections I, III and V of the Act.
exist, although now firmly under the jurisdiction of the Crown. Henry, had to destroy their influence, both moral and physical, if his ecclesiastical programme was to survive.

Well endowed with much land, at times extensive, as well as other natural resources; possessing considerable wealth, for religious worship and for the education of the young, Thomas Cromwell, Henry’s chief adviser turned his attention to these religious foundations. Using their resources, Henry foresee that he would be able to create a new order and a new class system for a very little price, loyal to himself and very keen to preserve the settlement that he had created.

The general level of the religious life within the religious houses and monastic foundations, is difficult to objectively assess. Studies range from portraying the religious life in a general state of decline, using evidence based on the hostile biased reports which were complied at the time by Cromwell, whilst others have been able show that the decay has been exaggerated. Recent historical studies have confirmed that their subsequent destruction led to general resentment and the dissolution of the monasteries was in fact very unpopular with the poor and the middle classes who stood to lose and actually suffered much.

General Visitations and Reports on the state of the Monasteries in 1535

To spearhead the campaign, this time against the properties and the religious life of the Church, Thomas Cromwell had ordered General Visitations to be carried out in 1535. Henry now had the appropriate legal authority and power to do this, as all religious houses and monasteries were legally, no longer under papal but subject to royal control, under the King.

Cromwell had indicated that he expected the report to conclude that the religious houses were in a great state of decline, which would enable him to push

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201 For example, A.J.Myers in his *History of England in the Late Middle Ages*. See especially p. 218 et seq.


203 A study of Henry VIII’s policy and the effect of the Henrician legislation to suppress the monasteries, can be found in E.Duffy’s, *The Stripping of the Altars*, Yale University Press, 1992

204 Section XIX of the Restraint of the Payment of Annates Act 25 Henry VIII c.21. had brought all monasteries, religious houses and convents under royal control.
through legislation providing for their dissolution and the confiscation of their assets. In 1536, the Commissioners produced their report, favourable to Cromwell's policy, which was laid before Parliament in the session of 1536, the same year which saw the fall and later execution of Anne Boleyn. Originally, only the smaller religious houses were to be affected, their communities dissolved and their assets confiscated. Two Acts of Parliament were passed in 1536 and then in 1539, providing for their dissolution.

Of the less wealthy foundations of religious houses, there were a total of three hundred and seventy-six monasteries and religious houses. In 1536, the bill was introduced within the House of Commons,205 to petition the King to assume complete control over them on the grounds of their general state of decay and disorder.206 All these properties were legally vested in the King, his heirs and assigns "to do and use therewith according to their own wills, to the pleasure of Almighty God, and to the honour and profit of this realm."

The justification for the suppression of the smaller religious houses, rested upon the report prepared by the Commissioners of Cromwell, that the religious houses and properties were in fact generally corrupt and dissolute. That this was

205 This was to become The Act for the dissolution of Monasteries and Abbeys. 27 Henry c.1 (1536). See Statutes at large.(Vol 2).

206 The preamble referred to their state of decay;— " Forasmuch as manifest synne, vicious, carnal and abominable living is dayly used and committed commonly in such little and small Abbeys, Priories and other Religious Houses of monks, canons and nuns where the congregation of such religious persons is under the number of twelve persons, whereby the governors of such religious houses and their Convent, spoyle, destroye, consume and utterly waste, as well as their churches, monasteries, priories, principal farms, granges ...to the high displeasure of Almighty God...And albeit that many continual Visitations hath been heretofore had by the space of two hundred years and more, for an honest and charitab le reformation of such unthrifty, carnal and abominable living, yet nevertheless little or none amendment is hitherto had, but their vicious living shamelessly increaseth and augmenteth...In consideration whereof the King's most royal Majesty, being supreme Head on Earth, under God, of the Church of England, dayly studying and devysing the increase, advancement and exultation of true doctrine in the said Church, to the only glory and honour of God, and the total extirpation and destruction of vice and sin, having knowledge that the premises be true, as well as the accompts of the his late visitations...Whereupon the said Lords and Commons, by a great deliberation, finally be resolved that it is and shall be much more to the pleasure of Almighty God and for the honour of this his realm that the possessions of such small religious houses, now being spent, spoilt and wasted for increase and maintenance of sin, should be used and committed to better uses..." Cf. The preamble was quoted by William Cobbett, A History of the Protestant Reformation in England. Abridged version, prepared by Hugh Arnold, published by Fisher Press 1994. See pp 67-68.
not universally accepted, is proved by the fact that the bill to confiscate these assets to the Crown, actually encountered stiff opposition whilst it was being debated in Parliament, and only became law because of the personal intervention of Henry VIII.

Some writers have interpreted the fact that the bill was passed as evidence of the popularity of the measure. The Scottish philosopher and economist, David Hume, writing in the eighteenth century had written that "it does not appear that any opposition was made to this important law." Writing a history of Great Britain and revealing his hostility to the monastic ideal, he had relied heavily on the Protestant historian Spelman arrive at that conclusion. He must have overlooked the following passage, which Spelman had written and which showed that the King was not prepared to be defeated on this issue:

"... the bill stuck long in the Lower House and could get no passage, when the King commanded the Commons to attend him in the forenoon in his gallery, where he let them wait till late in the afternoon, and then coming out of his chamber, walking out a turn or two amongst them and looking angrily on them, first on one side and then on the other, at last said "I hear that my bill will not pass, but I will have it pass, or I will have some of your heads " and without any other rhetoric returned to his chamber. Enough was said, the bill passed and all given to him as he desired."207

Three years later, Henry proceeded to legally expropriate all the properties and the lands of the remaining monasteries and religious houses.208 On this occasion, no reference was made to their general state of decay and moral disorder. Instead, the Act for their Dissolution was justified on the basis that the abbots, priors and religious superiors had voluntarily surrendered such wealth and buildings to the King.

This Act contained a total of twenty three sections, vesting all the lands and wealth of the religious houses in the absolute ownership of the Crown. By law, the King was given the power to use and dispose of these lands as he thought


208 An Act for the Dissolution of all Monasteries and Abbeys. 31 Henry VIII c. 13 (1539) See Statutes at large (Vol 2).
fit. All monastic lands and properties were now legally brought under the jurisdiction and control of the Ordinary.”

What happened to the lands and to the wealth of these, in some cases, foundations with centuries of tradition? A small part of the confiscated revenue found its way back to the Established Church. Some of the money was spent on educational purposes. Most of the revenue raised by their expropriation went direct to the Crown and was used to create a new class of landlords such as Lords Russell, Paget, Dudley and Seymour. As expected, the result of the dissolution of the monasteries was to seriously weaken any opposition to Henry VIII. It was also to leave a religious and moral vacuum within the Established Church.

2.5. THE ACT OF SIX ARTICLES OF 1539.

The cumulative result of the Parliamentary legislation between 1532 and 1539, was the complete separation of the English Church from the rest of the western Church; a national church, under the firm control of Henry. A church which was now established by law, with all Papal authority and jurisdiction abolished outright, but in all other respects, catholic. Henry VIII intended to otherwise preserve and safeguard what he considered to be the Catholic faith for his subjects and to use his power and authority, as the Supreme Head of the Established Church, to define doctrine and punish heresy. He was soon required to act in such a capacity, as there began to circulate very quickly the doctrines and theories of Luther and Calvin.

General Catholic doctrine and Church Discipline were soon openly being challenged; the Doctrine of Transubstantiation, the discipline of the Celibacy for the Clergy, the legitimacy of celebrating private Masses as well as private vows made in virtue of religion. Against people who began to deny and to teach outright denial of such articles of faith as well as church discipline, Henry responded using Parliament to define the doctrine of the Established Church and to punish error and heresy. Under the Act of Six Articles of 1539, Parliament

209 Cf. Section XXIII op.cit.

210 An Act for abolishing of diversity of Opinions of Certain Articles concerning Christian Religion. 31 Henry VIII.c.14 (1539)
justified its action to intervene in the doctrines of the Established Church, to restore harmony after

"...prudently pondering and considering that by occasion of variable and sundry opinions and judgements... great discord and variance has arisen as well amongst the Clergy of this realm as among a number of vulgar people...: whereupon after a great and long, deliberate and advised disputation and consultation had and made concerning the said articles211 as well as by the King's Highness, as by the assent of the Lords spiritual and temporal and other learned men of the Commons."212

The Act of Six Articles, used the Royal decree and authority of the King, and defined that all the Clergy and laity were to believe in (a) Transubstantiation, (b) Communion under one kind alone for the laity, (c) the celibacy of the Clergy, (d) vows of chastity, (e) the legitimacy of Masses celebrated in public and (f) auricular confession. It defined the dogma of Transubstantiation, as being the doctrine of the Real Presence of Jesus Christ in the bread and the wine after Consecration;213 that Holy Communion under both kinds was not necessary for the laity but that it was sufficient for them to receive this under the form of bread;214 that the clergy should be celibate;215 that vows of chastity should be

\[ \text{211 which had denied Transubstantiation, Celibacy, the Celebration of Holy Masses in private, the custom of receiving Holy communion under one kind alone.} \]

\[ \text{212 Cf. The pre-amble to the Act.} \]

\[ \text{213 "...in the most Blessed Sacrament of the Altar, by the strength and efficacy of Christ's mighty word, it being spoken by the priest, is present really, under the form of bread and wine, the natural body and blood of our Saviour Jesus Christ, conceived of the Virgin Mary, and after the consecration there remains no substance of bread or wine, nor any other substance of bread or wine, but the substance of Christ, God and man." See Barry, \textit{Readings in Church History (Vol 2)}, Number 8.b.} \]

\[ \text{214 "that communion in both kinds is not necessary (ad salutem) by the law of God to all persons; and that it is also to be believed and not doubted of, but that in the flesh under form of bread is the very blood, and with the blood under form of wine, is the very flesh, as well apart as though they were both together." Op.cit.} \]

\[ \text{215 "that priests after the order of priesthood receive as afore, may not marry by the law of God." Op.cit.} \]
observed by those who had taken the same. 216 That private Masses were licit; 217 and that auricular confession was not only necessary but should be frequent. 218

The denial of the first article of faith, the doctrine of Transubstantiation, was ordered to be punished by death, by burning. By this Act, Henry indicated that he would not tolerate any dissension and that he would use his royal prerogative to eliminate all heresies and dissension.

2.6 The initial steps to prepare a new revised code of canons for the church as established and reforms to the ecclesiastical courts.

With the new Ecclesiastical legislation, the King and Parliament begin the difficult process of trying to define the status of Canon law within the Established Church. The font of Canon law, the papacy, had been removed from the Church and had been replaced by the Doctrine of the Royal Supremacy. Henry VIII and his advisers endeavoured to explain that the Acts of Parliament confirming this were merely asserting the general law of the land. This being the case, they had to confront the task of explaining how the canon law of the Church fitted in with the new doctrine of Royal Supremacy. How to preserve the vast body of ecclesiastical law which had covered the Church, from the highest to the lowest cleric of the land; on what basis this controlled the laity, especially in the area of matrimony and testamentary succession.

Parliament had declared that the Canon law of the Church enjoyed its status within the Church and the Realm, only by royal consent and was equivalent to the English common law. 219 The problem soon became very acute, with the

216 “that vows of chastity and widowhood by man or woman made to God advisedly, ought to be observed by the law of God, and that it exempts them from other liberties of Christian people, which without that they might enjoy.” Op.cit.

217 “that it is meet and necessary that private Masses be continued and admitted in this the King's English Church and congregation as whereby good Christian people ordering themselves accordingly do receive both godly and goodly consolations and benefits and it is agreeable also to God's law.” Op.cit.

218 “..that auricular confession is expedient and necessary to be retained and continued, used and continued and frequented in the Church of God.” Op.cit.

continuing existence of canons of local and general councils and the legislation emanating from the Roman Curia, the existence of which openly challenged the supreme authority of the King. A new code of canons was required to remove all inconsistencies, and so for this reason, Parliament gave powers to Henry to set up a new commission to recodify the law of the Established Church, such Commission

"...to be assembled by authority of the King's most royal assent and licence to make promulgate and execute such canons constitutions and ordinances provincial or synodal..." but, with the very important proviso that "... No canons constitutions or ordinance shall be made or put in execution within this realm by authority of the Convocation of the Clergy, which shall be contrary or repugnant to the King's prerogative royal or the customs laws or statutes of this realm any thing contained in this Act to the contrary hereof notwithstanding..."220

Such an assembly was never in fact convoked neither under this nor under the provisions of this Act nor under a similar Act of 1535.221 In 1543, yet a further Act was passed222 and this time, the King was given a new power to appoint thirty two commissioners who were to have the authority to prepare new canons, to approved by the King. There is no evidence to indicate that this Commission

"For where your Grace's realm recognising no superior under God, but only your grace, has been and is free from subjection to any man's laws, but only to such as have been devised, made and ordained within this realm, for the wealth of the same, or to such other, by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, by their own consent to be used amongst them, and have bound themselves by long use and custom to the observation of the same, not as to the observance of the laws of any foreign prince, potentate or prelate, but as to the accustomed and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and custom and not otherwise." See Chapter 4.1.


221 27 Henry VIII c.15 (1535) This was a short Act of Parliament. See Statutes at large (Vol 2).

"The King shall have Authority to name xxxii Persons, viz xvi spiritual and xvi Temporal, to examine the Canons and Constitutions heretofore made according to the Statute of 25 Henry VIIIc.9 but no Canons or constitutions shall be made without the King's Assent, nor which be contrary to the King's prerogative or the Laws of this realm."

222 35 Henry VIII c.16 See Statutes at large (Vol 2).
ever met either and that new canons were drawn up. For the time being, the
Ecclesiastical courts were therefore faced with the growing problem of
interpretation and the difficulty of deciding which canons of the mediaeval
Church were in force and which had been necessarily abrogated.

2.7. THE ACT OPENING TO MARRIED DOCTORS OF THE CIVIL LAW, TO JUDICIAL POSITIONS
WITHIN THE ECCLESIASTICAL TRIBUNALS. 1545.

Henry VIII and Parliament, had introduced major reforms in respect of the
Ecclesiastical courts, the most radical being the complete abolition of all appeals
to Rome and initiating the legal process whereby the ecclesiastical courts of the
Established Church would be brought within the secular court structure. Up until
1545, all judges of the Ecclesiastical tribunals, had been clerics, following the
canon law of the Western Church. By one of Henry's last Acts of Parliament223
this practice was abolished, so that these ecclesiastical positions would be made
available to laymen, married doctors who had studied civil law. By this Act,
Parliament reaffirmed that all ecclesiastical jurisdiction was exercisable only
under the royal jurisdiction of the King who was

"...the Supreme Head in Earth of the Church of England, and hath full power
and Authority to correct punish and repress all manner of heresies...and to
exercise all other manner of jurisdictions, commonly called Ecclesiastical
jurisdiction: nevertheless the Bishop of Rome and his adherents...have in their
Councils and synods provincial, made, ordained established and decreed divers
ordinances and constitutions that no lay or married man should or might
exercise or occupy any jurisdiction Ecclesiastical or otherwise, nor should be any
judges or register in an Court commonly called Ecclesiastical Court..."

Relying upon his authority of the King as head of the Church, the custom was
changed. Parliament decreed that henceforth all doctors of the civil law, married
or otherwise, would be permitted to become judges and to sit in the
Ecclesiastical courts.224

223 Its full title was; An Act that Doctors of the Civil Law being married, may exercise
Ecclesiastical Jurisdiction..37 Henry VIII c. 17 (1545) See Statutes at large. (Vol 2).

224 "...all and singular persons, as well lay, as those that now be married, or hereafter shall
be married, being doctors of the civil law... shall be ordained constituted and deputed to be any
2.8. CONCLUSION.

By the time that Henry VIII had died in 1547, the revolutionary process that he had began in 1532 had reached a crucial phase. Like his predecessors, Henry had used Parliament to influence ecclesiastical affairs. Unlike his predecessors, Henry used the Parliamentary process to not only confine and restrict the independence of the Church and to temper papal influence and control. By secular legislation, he abolished the power and the jurisdiction of the Papacy and in place of the authority of the Pope, substituted that of the Crown. This became known as the doctrine of the Royal Supremacy, the King being the Supreme Head of the Church.

The doctrine of Royal Supremacy was to permeate the Church and affect it on all levels, theological, doctrinal, legislative and judicial. Theological problems, doctrinal issues as well as legislative and judicial decisions would be tempered and modified to reflect that the King was the Supreme Head of the Church, the Church as established by law, by Parliament. All the Acts of Parliament which were to affect the ecclesiastical matters of the Established Church, were to derive their juridical efficacy and validity from the new nature of the kingly office.

The King, as the Supreme Head of the Church, was now given the power to determine all questions of doctrine, which he did not hesitate to use. The Act of Six Articles of 1539, was an attempt to stem the flood of new opinions within the Established Church, a civil law passed by a secular organ, Parliament and setting out its creed. With this and the overall policy of Henry VIII, the Church and State were no longer independent but fused. England would be a confessional state. Once the custom had began, neither Henry nor his successors, would cease to use Parliamentary authority and its sanctions to promote and to regulate ecclesiastical affairs.
Acts of Parliament and judicial decisions in the Common law and Ecclesiastical Courts, having replaced the papacy, would be the guiding force and help the Established Church to find its identity and to develop. The Ecclesiastical courts of the Church, having been brought firmly under royal jurisdiction, would undergo a re-examination as they struggled to come to terms with their new identity and role.
Chapter 3

THE LEGAL DEVELOPMENT OF THE ESTABLISHED CHURCH (1547-1602).
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Chapter 3

The legal development of the Established Church (1547-1602).

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3.1. INTRODUCTION; THE LEGACY OF HENRY VIII.225

Henry VIII had been declared by Parliament in 1534, to be legally the only Supreme Head of the Church in England.226 With complete power under the civil law, to define and to determine the creed of the Church and to punish dissent, the last years of Henry’s reign, had become increasingly difficult as he tried to steer a middle course for the Established Church. The Act of Six Articles had attempted to eliminate a great diversity of religious opinions on several important areas of faith, as doctrinal differences had spread rapidly within the Church and much to the alarm of Henry VIII.227 The ecclesiastical issues became even more complicated, interwoven with the dissolution of all of the lands, hitherto held by the religious houses and the monasteries. A whole new

225 THE MAIN HISTORICAL SOURCE FOR THIS CHAPTER IS THE MAJOR THREE VOLUME WORK, ALREADY CONSULTED AND REFERRED TO WITHIN CHAPTER 2, HUGHES, AND ESPECIALLY HIS The Reformation in England (Vol. 2). In addition, limited use has been made of Leo Solt’s work, Church and State in early Mediaeval England. Oxford University Press. 1990. For the legal issues and Parliamentary legislation, The Archbishops’ Report on The Canon law of the Church of England has been consulted. The various Act of Parliament are to be found with Statutes at large (Vol. 2): (1461-1601.)

226 By the Act of Supremacy, 26 Henry VIII c.1, ante.

227 Under Henry VIII, apart from those who refused to take the oath of supremacy, there were twenty seven people executed for denying the dogma of Transubstantiation, defined under the Act of Six Articles.
landed class had been created which feared the loss and deprivation of their wealth with a return of the Established Church to papal jurisdiction. Henry used their fear and so secured their support. For so long as Henry was King, he was able to maintain control of the Established Church and ensure that at least outwardly, it retained all the doctrine and rituals of Catholicism, but without the authority and the supremacy of the See of Rome.

Within the royal council, there had been in fact two powerful and rival factions, each trying to impose their own will and policy upon the King and motivated by different considerations. One party, led by Thomas Cromwell, Archbishop Cranmer and Bishop Ridley were out to push for greater reforms. This faction, wanted Parliament and the King to press ahead with legislative reforms, amending and changing by the secular law, the doctrine and the liturgy of the Church. The other faction at court, led by the Duke of Norfolk, Bishop Gardiner, Bishop of Winchester and Bishop Bonner, Bishop of London wanted to retain the status quo and their presence acted as a counterweight to the influence of Cromwell and his supporters. Content with the reforms made by Parliament, they were prepared to accept and to give their support to a church which would exist, within the realm but as an independent unit of the universal Church with papal supremacy moderated or repudiated. They tried to check all doctrinal changes and the triumph of their influence was secured when Henry married his fifth wife, Catherine Howard, the niece of the Duke in 1540.

In 1547, Henry VIII died and, having been empowered by Parliament to settle the question of succession by will, had nominated his son, Edward, a weak nine

228 Using Parliamentary legislation, they aimed to facilitate that the doctrine and the ceremonial, as well as the ecclesiastical structure of the Established Church would reflect the new Reformation Theology being taught in Germany and Switzerland. This group broadly believed that there were two sacraments, Baptism and the Holy Eucharist. They denied the dogma of Transubstantiation and hoped to abolish the law of celibacy. Many of their ideas and views were to find their way into the Formularies that were eventually to be used to define the doctrine and the dogma of the Established Church, as set out within the "Thirty Nine Articles of Religion" prepared in 1571. See Hughes, *The Reformation in England* (Vol 1). Passim.

229 In the same year, Henry had in fact contracted beforehand a marriage with Anne, the sister of the Duke of Cleves. This marriage had been engineered by Cromwell who had hoped by this marriage to promote and to strengthen the Protestant League against the Emperor, Charles V. Henry had repudiated Anne, very quickly and the Convocation of the Clergy, declared his marriage to be null and void. This declaration of nullity enabled Henry to marry Catherine Howard. Following the divorce of Henry from Anne of Cleves, Cromwell lost all influence. By a bill of attainder, he was charged with high treason and then executed.
year old boy to become king. His son became Edward VI. Henry had by his Will, named eighteen executors as a council of Regency to rule during the minority of Edward, all carefully selected so as to procure a permanent religious settlement, with the two parties in the council, under the presidency of Edward Seymour, Earl of Hereford and uncle of Edward VI. Nevertheless, this delicate arrangement was to be upset. The moderate party, led by Bishop Gardiner, who were opposed to any further doctrinal changes were quickly excluded from power. Seymour was soon made Lord Protector, taking the title Duke of Somerset and his brother became Lord Seymour of Sudeley. Dudley, the son of the minister of Henry's father, was made Earl of Warwick.

Henry VIII bequeathed to his son, a difficult legacy. An independent Church, with its hierarchy and ecclesiastical structure moulded by Parliament, but unsure of its doctrinal identity. Against the background of doctrinal and liturgical confusion, which was beginning to emerge, it would only be a question of time for new legal measures, Acts of Parliament to be enacted to try to control and by the secular law, the chaos. Which religious opinions would be tolerated and which would be prescribed were to depend upon the party in power and the use that they could make of Parliament. Against the background of these problems, Edward became King in 1547.

3.2. THE ESTABLISHED CHURCH UNDER EDWARD VI: ECCLESIASTICAL REFORMS BY ROYAL INJUNCTIONS.

Lord Somerset was determined to push on ahead with the effects of the Reformation began within England and to abandon the quasi-orthodox position of the Established Church. Somerset was to be supported by Bishops Latimer, Ridley and the Archbishop of Canterbury, Thomas Cranmer. All these reformers perceived, that to consolidate the reforms effected within the Established Church, it was absolutely necessary to prepare, as soon as possible, and to introduce through Parliament, a reformed liturgy and at the same time a new collection of Articles of faith, to set out the doctrine of the Established Church. Once the New Prayer book and Liturgy had been compiled as well

230 In the event of his son dying without issue, Henry had stipulated that his daughters Mary and Elizabeth should succeed.

231 The new Liturgy would reflect the doctrines to be held by the Established Church and a new series of definitions to provide the Bishops and the priests with the necessary tool to
the Formularies of the Established Church prepared. Cranmer would convocate a select committee of ecclesiastical lawyers coming from the ranks of the Established Church as well as Common Lawyers, to begin the complicated task of compiling a new separate code of ecclesiastical law, to support the new liturgy and the doctrinal Formularies.

Until the first Parliament of Edward VI met in November 1547, the use of his episcopal authority, backed up by royal decree, was the effective legal way employed by Cranmer, to govern the Established Church. He was thus able to compel all the Clergy and the laity of the realm to observe not only all the reforms made to the Established Church by Parliament, through its ecclesiastical legislation, but also -where these he felt fell short-the recent reforms and modifications made to the liturgy of the Established Church. Relying upon his mandate from the King, Cranmer supplemented his episcopal power with royal authority, so that these injunctions were officially sanctioned within the ecclesiastical and civil courts. Clergy who refused to obey the same or who departed from the established teaching or liturgy, were to be punished for disobeying not only Parliament but royal and episcopal authority.

232 Although the latter would have no legal force as the Forty-one Articles of Religion never received regal or parliamentary approval.

233 Appointed as Protector of the realm and the guardian of the King, Lord Somerset had persuaded the King, Edward VI, to renew the authority and mandate of Thomas Cranmer as Archbishop of Canterbury to carry out these forms by way of royal injunctions. This renewal of Episcopal authority was crucial, for Cranmer to be able to exercise his Episcopal power. The mandate of Cranmer depended upon that of the Crown and in the absence of that, then Cranmer possessed no legal authority, whether ecclesiastical or secular, to compel his fellow bishops and clergy, as well as the laity, to obey all reforms that he wished to introduce within the Church.

Cranmer and Somerset were soon to use the parliamentary process to make changes to Episcopal appointments and to bring the selection procedure of bishops within the direct control of the Crown.

issuing these injunctions, that Cranmer introduced within the Established Church, the introduction of the New Liturgy compiled in 1544, a new prayerbook, called "the Primer" which had been written in 1546 and a Book of Homilies, that he had written in 1547.234

3.2.1. The Liturgy of 1544; The Primer of 1545 and The Homilies of 1547.

The Liturgy of 1544 was a liturgical responsive prayer, sung in English for processions. The Episcopal injunctions issued by Cranmer, commanded that this should be sung by the faithful, whilst they knelt and not while processing round the church. The Primer which was the Prayer Book of 1545, incorporated the new liturgy and the Creed, the Lord’s Prayer and the Ten Commandments in English. The Book of Homilies, contained officially approved sermons in English, on various subjects and which were ordered to be read in each church on Sundays and other feast days.

Of all the royal injunctions, that which ordered the use of the Book of Homilies, was the principal means used by Cranmer to take the Established Church in a more Protestant direction. The fundamental doctrine of justification by faith alone. Some of these official homilies openly contradicted the articles of

234 The New Liturgy of 1544, the Primer of 1545 and the compilation of the Homilies in 1547 raise the question to what extent Henry VIII, at the end of his reign still believed in the traditional dogmas of the Catholic Faith (obviously with the exception of papal supremacy). It seems evident that his religious convictions and views had come to change. That he sympathised with Protestantism, would be undeniable although he rejected the extreme position adopted by Luther. Henry's sixth and last wife, Catherine Parr held strong Protestant views and Henry had gone to the extent of signing a bill of articles, accusing her of heresy and treason. However, he would not allow, the Lord Chancellor Thomas Wriothesley, to arrest her, after Catherine pleaded that she had no intention to insult Henry as head of the Church. In 1543, Cranmer was similarly accused of heresy, but notwithstanding his outwardly Protestant views, he was not only allowed to remain as Archbishop of Canterbury but was appointed by Henry to the Regency Council. In 1544, Henry asked Cranmer to examine all missals with the view of making some liturgical changes, and in 1545, Parliament had transferred some select chantries (Chapels endowed by benefactors, with priests appointed to offer Masses for the souls of the departed) to the Crown. Some liturgical changes had also been made, such as adoration of the Cross on Good Friday. The facts are confusing, as Henry had stipulated in his last will and Testament that Masses should be offered for his soul. See, Leo Solt., Church and State in Early mediaeval England., especially Chapter 2: The Anglican Reformation. p.48.
Faith which had been defined by Henry VIII by the Act of Six Articles of 1539. Cranmer argued that they were not illegal, pointing out that the Homilies had been approved by Henry VIII and so resisted Bishop Gardiner, the Bishop of Winchester, who refused to comply with this ordinance and forbade these homilies to be read out in his diocese. He justified his stance on the fact that the Act of Six Articles of 1539 had not been repealed. For refusing to comply, he was arrested and imprisoned in the Fleet Prison. He was also to be deprived of his bishopric.235

3.2.2. The initial Acts of Edward VI’s Parliament, repealing slowly the Act of Six Articles.

The first Parliament of Edward VI met on 4 November 1547, four months after the Homilies compiled by Cranmer had been officially promulgated and had been ordered, by royal injunction to be read out within all churches. Together with Lord Seymour, Cranmer now turned his attention to bring about all parliamentary legislation, to formally repeal the articles of Faith set out within the Act of Six Articles.

Cranmer saw that legislation was urgently required to reform the teaching of the Established Church on the Sacraments in general. He had substantially revised his opinions on the Holy Sacrifice of the Mass, the Holy Eucharist and the doctrine of the Real Presence, and he was anxious to secure the authority of Parliament to repeal these dogmas, especially that of Transubstantiation236 and to confiscate the remaining chantries which had been set up in the fourteenth and fifteenth centuries and lavishly endowed for the purposes of having Masses for the dead said for their donors. In addition, further legislation was required, to tighten the grip of royal control over all episcopal appointments so as to ensure that only new bishops were appointed to vacancies who could be trusted to

235 Bishop Gardiner was to be soon released under a general amnesty granted on 8 January 1548, but only to be subsequently re-arrested and summoned to appear before the Privy Council to answer various charges of heresy and in particular refusing to obey royal ordinances on doctrine and ceremony, as determined by Cranmer. He manifestly preached in favour of the Sacrifice of the Holy Mass and the real presence of Christ in the Holy Eucharist. He wrote a strong pamphlet against Cranmer who now believed only in a symbolic presence. See p. 104 et seq. Hughes, The Reformation in England (Vol 2).

236 Cranmer no longer believed in the doctrine of Transubstantiation, the sacrificial aspect of the Mass. He believed that Christ was only spiritually present in the Holy Eucharist.
maintain the whole spirit of reform within the Established Church. Finally, Cranmer wanted Parliament to repeal and as soon as possible, all canonical prohibition on the marriage of clergy, which had been specifically confirmed in the Act of Six Articles of 1539.

3.2.2.1. The Punishment for the Contempt of the Sacrament Act 1547.

The first Act of Edward VI's Parliament, concerned the ecclesiastical affairs of the Established Church and specifically its doctrine on the Holy Eucharist. Known as the "Punishment for Contempt of the Sacrament" Act, it contained a total of eight sections. Recording that the King was anxious for religious accord within his realm, that the Sacrament of the Holy Eucharist was a great mystery and that this notwithstanding, it had been subject to abuses and disrespect, the Act punished all those who despised or treated the Sacrament with contempt or disrespect, with a sentence of imprisonment and a fine. Sections 2 to 7 contained detailed provisions to deal with offenders, giving local magistrates the power to examine and to try such offenders. Section 8 ordered that the Sacrament was to be administered under both kinds:

"the most blessed Sacrament be hereafter commonly delivered and ministered unto the people, within this Church of England and Ireland and other the King's dominions, under the both kinds that is to say of bread and wine, except necessity otherwise require."

The Punishment for the Contempt of the Sacrament Act, was the first step towards the general revision of the doctrine of the Established Church on the Holy Eucharist, with the stipulation that Communion had to be administered under both kinds.

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237 Many clergy had married without obtaining any papal dispensation. Their status, technically and legally speaking, was irregular.

238 Its full title; An Act against such as shall unreverently speak against the Sacrament of the body and blood of Christ commonly called the Sacrament of the Altar and for the receiving thereof in both kind. 1 Edward 6 c.1. (1547) See Statutes at large (Vol 2).

239 Section 1 of the Act.
Following this Act, Lord Seymour and Cranmer kept up the process of reform and steered through the other Acts covering episcopal appointments, the confiscation and dissolution of all remaining chantries and legislation permitting and legitimisation of all marriage by the Clergy.

3.2.2.2. Legal Changes made in the creation of Bishops.

Whilst distribution of Holy Communion under both kinds had been made obligatory by the Punishment for Contempt of the Sacrament Act of 1547, the second Act in Edward’s first Parliament, changed the procedure for the election of bishops, an alternative to the legal method stipulated within the Act of Henry VIII which forbade the payment of first fruits to Rome of 1534. Under the former, the legal fiction of the cathedral chapter to elect its candidate on a vacancy was preserved; in reality, when this occurred, the Crown issued a licence to the chapter, directing them to elect the nominee of the King.240 The election process was in reality, a formality, but the mere semblance of an election was seen as a challenge to the Sovereign’s position as the supreme head of the Established Church. Under the new Act,241 this elective process was abolished, the right of nomination passing direct to the Crown, by the King issuing letters patent.242

3.2.2.3. The Abolition of Chantries Act 1548.

Archbishop Cranmer and Lord Seymour now turned their attention to the Chantries which existed and consisted of endowments of real property (freehold land) created to support priests who were not attached to any curacy, enabling them to say private Holy Masses for the souls of their deceased benefactors. The Act of Six Articles had held that such bequests for private Masses were agreeable

240 Act for non payment of first fruits to Rome. 25 Henry VIII c.20. Section 4, examined in detail within chapter 2.


242 The pre-amble of the Act referred to the fact that "...All authority of Jurisdiction, Spiritual and Temporal, is derived and deducted from the King’s Majesty, as Supreme Head and...the Courts Ecclesiastical ... be kept by no other power, or authority, either foreign or within the Realm except by the King."
to God’s law. In 1545, Henry VIII by an Act of Parliament,243 had slightly modified their arrangement, stating within "the King's book" that the fruits of these Masses should not be limited to the souls of the benefactors but should be applied to all the faithful departed, although the name of Purgatory should not be mentioned. Some select chantries under that Act had been abolished, the revenue being used to finance Henry VIII's foreign policy. The new Act,244 had thirty nine sections, and contained very detailed provisions dealing with the confiscation of all the remaining chantries, including those sustained by Corporations, Guilds and Fraternities and colleges (but excluding those at Oxford and Cambridge) and free chapel. All of them, along with all their possessions, were turned over to the Crown. The reason given for their dissolution was stated within section I of the Act; for the reason that;- "Superstitions and errors in Christian religion hath been brought into the minds of men...by devising and planting vain opinions of purgatory:"

The Act dissolved almost three thousand Chanceries, colleges and free chapels and produced about six hundred and fifty thousand pounds. The intention was that the money raised would be used to erect grammar schools, to augment the universities and to make better provision for the poor and the needy. Some of the chantry foundations were already grammar schools and so these were refounded as Edward VI grammar schools. Otherwise no new grammar schools and almshouses were built with only one tenth of the confiscated revenue245 being used to help the then existing charitable institutions.

3.2.2.4. Act to take away all positive laws against marriage of priests 1548.

Within the same session, Parliament passed two further important laws, one which abolished the law of celibacy for the clergy and the other prescribing the prayer of divine service, devised by Cranmer. The Convocation of the Clergy had voted in December 1547, by 53 votes to 22, to abolish the canonical law of celibacy for the clergy and which had previously stipulated that all marriages of

243 Under 37 Henry VIII.
244 The Act for Chantries Collegiate. I Edward VI, c 14 (1548), in Statutes at large (Vol 2).
clerks in Holy Orders were null and void, ab initio. A bill to change the law was then introduced in Parliament, passed by the House of Commons, but because it had been introduced into the House of Lords late, it became law in the next session of Parliament.

The Act declared utterly void all existing laws and canons that forbade marriage "to any ecclesiastical or spiritual person...of what condition or degree they be..." All the clergy were now, by law, no longer bound by the law of celibacy for clergy and were "by God's law free to contract marriage." The only legal requirement was that all such marriages were to be conducted in accordance with the ceremonies of the Established Church and to be regulated by the norms set forth in the Book of Common Prayer. Three years later, a second Act was passed, to legitimise all the children born of such marriages.

The effect of all this Act, along with the Punishment for Contempt of the Sacrament Act and the Act abolishing the chantries, was to repeal the principal sections of the Act of Six Articles of 1539. To remove all the remaining sections, Cranmer relied upon the ritual and the rubrics contained within the New Prayer Book and the New Communion Service which he ordered to be used in 1548, to replace all existing religious services.

3.2.2.5. The New Communion Service 1548.

Two months before the Convocation of the Clergy had formally discussed the reforms to be made to a new communion service in 1548, Cranmer issued a series of ceremonial directions which anticipated the modifications to be introduced by the new rite. He issued new injunctions to attack some of the old rites and devotions, which had been declared as superstitious and idolatrous in

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246 The bill was by no means willingly passed and only became law for "the Duke of Somerset's and other's of the King's executors pleasure." Hughes, The Reformation in England (Vol II).

247 Its full title was "An Act to take away all positive laws against marriage of priests" 2 & 3 Edward 6 c.21. (1548) See Statutes at large (Vol 2).

248 Section 1 of the above Act. More briefly to be known as The Clergy Marriage Act 1548.

249 These norms bound not only the clergy, but also the laity.

250 Under 5 & 6 Edward VI c.12 (1553).
the Homilies and ordered the clergy and the laity to cease using them. On 21 February 1548, Archbishop Cranmer ordered that all religious statues and pictures should be removed from the Churches and destroyed. On 8 March 1548, for the first time, the English tongue was used in the administration of the Sacrament under a New Communion Service. Called "The Order of Communion" it was compiled by Cranmer and was based upon the rite prepared by the former Archbishop of Cologne who had recently become a Lutheran. This rite was eventually to be incorporated within the New Book of Common Prayer. The ceremony itself was simple and introduced to meet the doctrinal position of Cranmer.

The New Ceremonial, was accompanied by news that further changes were in preparation. Opposition to such changes by some of the clergy, including the episcopate, had been foreseen by Cranmer who feared that one of the chief opponents to his doctrinal formulations and liturgical changes would be Bishop Gardiner, recently released from Fleet prison on 8 January 1548 under a general amnesty. During Whitsuntide, Bishop Gardiner was accused of maintaining the ancient liturgies of the Holy Week, in spite of the royal proclamations and was informed that he could not leave London. He was eventually arrested for his opposition to the reforms and remained imprisoned within the Tower of London, for the rest of the reign of Edward VI.

### 3.2.3. The Acts of Uniformity of 1548 and 1551.

Cranmer had succeeded, by the Parliamentary process, to dissolve all the chantries and remove all laws against the marriage of priests. The Contempt of

251 These included the blessing of candles at Candlemass, the blessing of ashes on Ash Wednesday and of the Palms on Palm Sunday, the veneration of the Cross on Good Friday and then the use of Holy Water.

252 The doctrine underlying the new Communion Service has been clearly analysed by Hughes. The New service, made it clear that the dogma of Transubstantiation no longer applied to the Holy Eucharist. Hughes, *The Reformation in England (Vol 2)*. pp. 102 et seq.

253 In December 1550, he was tried before an ecclesiastical court, with some of the judges being laymen, in accordance with the reforms of Henry VIII. Amongst the judges were Archbishop Cranmer; Bishop Ridley; Bishop Goodrich, Bishop of Ely; Bishop Holbeach, Bishop of Lincoln; the laymen included—Sir William Petre; Sir James Hales; Griffin Leyson, John Oliver (doctors of law) and John Gosnold. Hughes, *The Reformation in England (Vol 2)*. p. 104.
the Sacrament Act of 1547, was one of the first moves to bring about by law, the abolition of the celebration of the Mass. The pace of change would be kept up and Cranmer would be able by further legislation to abolish the old prayers and services, and substitute for them a new liturgy in harmony with the creed of the Established Church.

3.2.3.1. The background.

Bishop Gardiner had already spent nearly three months in the Tower, when Cranmer and his colleagues began the complicated process of re-organising for the established Church the new Liturgy, which was designed to encapsulate all the reforms began by Henry VIII and continued by Edward VI, including the doctrine of the royal supremacy. The new liturgy would be the daily public prayer for the Established Church and would contain the new Ritual for the administration of the Sacraments and the lesser rites. It would be celebrated in English and the plan was to use it to replace all existing Breviaries, Missals and the Pontifical used by the mediaeval Church.

To help these reforms, with the authority of the King and his council, Cranmer constituted a special committee of experts and at which there assisted a number of the bishops of the Established Church with several learned experts. The fruit of this Committee, was the First Prayer Book of King Edward VI- "The Booke of the Common prayer and administration of the Sacramentes, and other rites and ceremonies of the Churche: after the use of the churche of England." On 7 January 1549, Cranmer arranged that the bill to authorise the above, should be formally introduced in the House of Lords. It was given its first reading on that day, a second on 10 January and a third on 15 January 1549. It then went to the House of Commons before it was given its approval and authorised by Parliament on 21 January 1549. It was sanctioned to be used from the following Whit Sunday 9 June 1549.254

254 Under 2 & 3 Edward VI c.1.

In the House of Lords, eighteen bishops of the Established Church were present when the final vote was taken. They were fairly evenly divided, ten in favour of the bill and eight against. Of those who were in favour of the bill, there included the two primates of England, Archbishops Cranmer and Holgate; two veteran bishops who had acted within Henry VIII's Secretariat, Bishops Goodrich of Ely and Samson of Lichfield; Bishop Nicholas Ridley, newly appointed to the See of Rochester and successor to the Martyr, St John Fisher; a number of other Bishops, who had all been at-one time religious such as Bishops Salcot of Salisbury and Barlow of Bath. See
3.2.3.2. The First New Prayer Book of Common Prayer (1549).

The First New Prayer Book achieved some of the modifications to the liturgy of the Church, desired by Cranmer. It reduced the number of Sacraments to two, that of Baptism and the Holy Eucharist and redefined the nature of a sacrament. References to Matrimony, Confession, Confirmation and Extreme Unction were retained within the First New Prayer Book, within the context of ceremonies, but the language used was ambiguous and left it unclear as to whether these were sacraments or not. Marriage was now presented as a civil ceremony, no longer as a sacrament. The new liturgy expressed what Cranmer and his colleagues believed about the Holy Eucharist and was described as “the Supper of the Lord and the Holy Communion commonly called

Hughes, The Reformation in England (Vol 2), p 106, and the footnote number 2. The debates about the Prayer Book were preceded by great debates in the House of Lords (between 14-18 December 1548) on the Holy Eucharist. The Bishops were also divided on the doctrine of the Holy Eucharist. Some, like Archbishop Cranmer and Bishops Barlow and Ridley refused to believe in the Real presence and held that Christ was present in a figurative sense. Others, like Bishops Tunstall and Heath, maintained the contrary position.

255 Within the new draft code of Canon law, the Reformatio Legum prepared by Cranmer, but never being confirmed either by Convocation or by Parliament, it is said that there are three things necessary for a sacrament (in the section, de Sacramentis); a manifest and evident outward sign; a promise of God represented by that sign; a command of God imposing on us the need of doing and commemorating. “Since these three things are only to be found, with scriptural authority, in Baptism and in the Holy Eucharist, we lay it down that these two alone are to be considered true and proper sacraments of the New Testament.” See Canon number 2. See Hughes, Op.cit.

256 In the New Rite for Confession, the formula "I absolve thee form all thy sins" is specifically included. Yet there is an ambiguous passage that states that after the penitent has confessed and received absolution, he is not to be imputed with his former sins. This could mean that the sins are forgiven or that they remain, but with the punishment removed. See Hughes, op. cit.

257 Reflecting the ideas of Luther for whom marriage was only a civil contract. When Cranmer came to prepare a new code for the general revision of Canon law, the relevant draft canons reflected this teaching on marriage. As marriage would no longer be considered to be a Sacrament, then it would be easier to justify a divorce. The new draft canons would permit divorce in certain cases.

258 Cranmer had by now firmly rejected the dogma of Transubstantiation and the Holy Mass as being a propitiatory sacrifice.
the Mass.” A variety of sources were used to make it, in part Lutheran and in part Catholic.

**3.2.3.3. The Act of Uniformity of 1548:**

The Act of Uniformity of 1548,259 which officially legalised the celebration of the New Liturgy, contained thirteen sections. Its pre-amble set out the reason why Parliament had decided that there should be imposed a uniformity of service and ceremonial. The existing diversity of customs and various forms of common prayer used within the country, had caused some great pleasure and others great offence. To bring about unity, a commission had been constituted, comprising several eminent persons260 to bring about a common rite.

Section 1 of the Act, made it compulsory for all clergy of the Established Church to use the Book of Common Prayer and no other261 and Section 2 imposed heavy penalties upon those clerics (bishops or otherwise) who either refused to use the New Book of Common Prayer and to administer the Sacraments according to the rites to be found therein or who used alternative

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259 The year is 1548 and not 1549. Notwithstanding that the bill received royal assent in 1549, it was introduced in the parliamentary session of 1548/49. The full title was “An Act for the Uniformity of Service and Administration of the Sacraments throughout the realm.” 2 & 3 Edward VI c.1. (1549). See *Statutes at large* (Vol 2).

260 The preamble referred to the convocation by "...the Archbishop of Canterbury and certain of the most learned and discreet bishops and other learned men of this Realm, to consider and ponder the premises, and thereupon having as eye and respect to the most sincere and pure Christian religion taught by the Scripture, as to the usage in the primitive Church, should draw up and make one convenient meet order rite and faction of common and open prayer and administration of the Sacraments, to be had and used in his majesties realm of England and Wales; the which at this time, by the aid of the Holy Ghost, with one uniform agreement is of them concluded set forth and delivered to his highness, to his great comfort and quietness of mind, in a book entitled The Book of the Common Prayer and administration of the Sacraments and other rites and ceremonies of the Church after the use of the Church of England..."

261 "...All and singular ministers in any cathedral or parish church, or other place within this realm of England and Wales Carlisle and marches of the same or other the King's unions shall...be bounden to say and use the matins evensong celebration of the Lord's Supper commonly called the Mass and administration of each of the sacraments and all their common and open prayer, in such order and form as mentioned in the said book and none other or otherwise."
liturgical books or rites, not approved (for example, the Missal or Sacramentalia of the Catholic Church under the old Sarum Rite).

All those clergy who spoke against the New Rite, were to be punished, on a first conviction, with a penalty to be determined by the King.262 A second conviction, carried the loss of all spiritual promotions and imprisonment of one year. A third carried life imprisonment. Civil penalties were imposed upon any person who (a) held to scorn the new prayer book (b) compelled any cleric to use any other rite not approved or (c) interrupted any member of the clergy using the approved rite. The penalty was a fine of ten pounds,263 with second and third offences being punished more severely, including higher fines as well as loss of goods and life imprisonment.

Lay judges were given the power to hear and to determine all such offences,264 but with the right always safeguarded in favour of every Archbishop and bishop to sit in with these lay judges in these temporal courts.265 Offences were also punishable in the ecclesiastical courts but with the proviso that first offences were to be punishable only once, either in the spiritual

262 "(those who)...shall preach declare or speak anything in the derogation or deprivation of the said book (i.e. the Book of Common Prayer) or anything therein contained, or of any part thereof, and shall thereof lawfully convicted according to the laws of this realm by verdict of twelve men or by his own confession...shall lose and forfeit to the King's Highness, his heirs and successors, for his first offence, the profit of such one of his spiritual benefices or promotions as it shall please the King's Highness...and also that the same person so convicted shall for the same offence suffer imprisonment by the space of six months..." Section 2. Ibid.

263 Section 3: "And that any person...in any interludes plays songs rhymes or by other words declare or speak anything in the derogation depraving or despising of the same book or of anything therein contained or any part thereof, or shall by open fact deed or by open threatening compell or cause or otherwise procure or maintain any parson vicar or other minister, in any cathedral or parish church or in any chapel or other place, to sing or say any common and open prayer or to minister any sacrament, otherwise or in any other manner or form then is mentioned in the said book, or that by any of the above means shall unlawfully interrupt or let any person vicar or other ministers in any cathedral or parish church or other place to sing or say common and open prayer or to minister the sacraments or any of them in such manner and form as is mentioned in the said book...then every person lawfully convicted shall forfeit to the King our sovereign lord his heirs and successors for the first offence ten pounds..."

264 Under section 4. ibid.

265 Under section 5. ibid.
or the temporal courts. Finally, the Act made it licit to recite prayers in Latin, Greek or Hebrew, so long as they were taken and prayed in accordance with the New Common Prayer book; the use of the Psalms or prayers taken from the Bible (the translation authorised by the Established Church) with the prescribed prayers taken from the New Common Prayer book not being omitted.

### 3.2.3.4. General Reaction to the New Common Prayer Book.

The New Common Prayer book was ordered by Parliament and Convocation to be used as and from 9 June 1549, throughout all churches and chapels of the Established Church. All previous rites and ceremonies were henceforth abolished and were not to be used by the clergy or the laity. During 1549-1550, Cranmer, for example conducted a campaign ordering a series of liturgical changes to be made to church buildings within the diocese of East Anglia during its Episcopal vacancy. Altars within churches were removed and replaced with communion tables.

Despite a general compliance with the Act of Uniformity of 1548 through most of the country, an insurrection arose in Devonshire in June of 1549 and this soon spread to the West country. The leaders of this rebellion, justified their action on the basis that they were resisting religious changes unlawfully introduced by Edward's first Parliament and including the New Prayer Book. They issued a manifesto, demanding the restoration of the Six Articles, private Masses for the Souls in Purgatory, the Mass in Latin with Holy Communion given in one kind

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266 Sections 12 and 13. ibid.

267 Under sections 6 and 7. Section 8 was to make it mandatory for all parish and cathedral churches to provide the New Common Prayer Book for the benefit of the parishioners.

268 In 1550, Bishop Ridley issued the following injunction for the visitation of his diocese, the diocese of London. "Whereas in divers places some use the Lord's board after the form of a table, and some of an altar, whereby dissension is perceived to arise among the unlearned; therefore, wishing a godly unity to be observed in all our diocese and for that the form of a table may move and turn the simple from the old superstitious opinions of the popish mass, and to the right use of the Lord's Supper, we exhort the curates, churchwardens and questmen here present to erect and set up the Lord's board after the form of an honest table decently covered, in such place of the quire or chancel as shall be thought most meet by their discretion and agreement, so that the ministers with the communicants may have their place separated from the rest of the people: and to take down and abolish all other by-altars or tables." Quoted in Hughes, *The Reformation in England (Vol 2)* at p. 120.
only and the revival of some of the ancient ceremonies such as images, ashes and palms. Their manifesto also called for the withdrawal of the new translation of the Bible, compiled by the reformers, and the withdrawal of the New Liturgy since it was a "Christmas game" in a foreign language. It demanded as well, that half of the expropriated chantry and abbey lands should be used to create two new abbeys in each county. The government reacted quickly and was able to quell the rebellion and four West Country men were hanged in January 1550. Cranmer and his advisors made use of the occasion to put into practice some of the ideas that were set out in one of the homilies on "Obedience".

3.2.3.5. Other important Acts within the Session of Parliament 1549/50.

During this Parliamentary session, a further three bills were presented to change the ecclesiastical law of the Established Church. The first, ordered the destruction of all statues and images from Churches and abolished the use of any liturgical books other than those authorised. The second, related to the constitution of a new commission to draw up a revised code of canons for the Established Church and the third, gave the legal power to Cranmer to draw up a new ordination rite.

The Abolition of Divers Books and Images Act269 was to have a total of six sections. Most importantly, section 1 was to outlaw the use of any prayers to be used within churches, other than those within the authorised texts. Section 3 was to order the removal and destruction of all remaining images within churches.

The Act which established a new Commission to draw up a new code of canons,270 was another response to resolve the legal chaos and uncertainty of the ecclesiastical law of the Established Church. The Commission was given the powers to draw up a code which would resolve the difficulties and produce canons that would be in harmony with the new ecclesiastical legislation of Edward VI.

The Ordering of ecclesiastical ministers Act, was to empower Cranmer to prepare the new Ordination Rite for the making and consecration of Archbishops,

269 3 & 4 Edward VI c. 10. See Statutes at large (Vol 2).

270 See section 3.2.4. of this chapter.
priests and deacons. Under this Act, a group of authorised commissioners were given parliamentary power to write the new ordinal, which they did with great speed.

The Commissioners were given two months to complete their work. They seem to have completed the task within the week, to judge by the fact that on 8 February, the Bishop of Worcester would not assent to the book that had been prepared. The New Ordinal was to provide the official rite of ordination for all bishops, priests and deacons of the Established Church. Its main effect was not to substitute English for Latin, but to produce a new rite suited to the doctrinal needs and the position of the Established Church.

3.2.3.6. The New Prayer Book.

The Prayer Book which was authorised in 1549, from the very beginning had its deep critics in that it still retained many of the elements of Catholicism. For many reformers, it did not go far enough and needed to be purged of its more Catholic doctrines. By 1552, Cranmer had produced a new version, which would receive Parliamentary approval.

The new version, incorporated further modifications and substantial changes to satisfy and to placate the more extreme reformers. Some of the ceremonies in the old Prayer Book were deleted and the rite dealing with the Holy Eucharist—or Supper of the Lord—was drastically modified. This was now renamed the "Order for the Administration of the Lord’s Supper or Holy Communion”, the word “Mass”, no longer appearing. The rubrics and rite of service also suppressed therefrom, any commendation of the faithful departed and the cult of devotion to the Virgin Mary and the saints. Once compiled, Cranmer obtained Parliamentary authority to repeal the Act of Uniformity of 1548 and by means of a new Act, to make the New Prayer Book the only authorised version to be used by the clergy and the laity of the Established Church.

3.2.3.7. The Act of Uniformity of 1551.

271 The Ordering of ecclesiastical ministers Act 3 & 4 Edward VI c.12. See Statutes at large (Vol 2)
The Bill to authorise the New Prayer Book was introduced into Parliament on 9 March 1552, in the 1551-1552 session, and a final vote was taken on 6 April 1552. The Act came into force on 1 November 1552, and was known as The Act of Uniformity of 1551. 272 It made the use of the New Prayer Book compulsory. Under section 1, it also imposed fines upon all those who did not attend the services of the Established Church on Sundays and holiday without good excuse. 273 The clergy were charged with the responsibility of promoting the law 274 and the Archbishops and Bishops of the Established Church were given the power to correct and punish offenders by ecclesiastical censures. 275

When Edward VI died, eight months later in 1553, Cranmer had not only succeeded in introducing the Official Book of Common Prayer throughout the Established Church. He had also brought about the formulation of new draft canons and the Forty two Articles of Religion., both of which he had intended to be legalised by further statutory legislation.

3.2.4. The Draft New Code of Canon Law-Reformatio Legum Ecclesiasticarum.

By the Submission of the Clergy Act of 1532, the convocation of the Clergy had undertaken to Henry VIII that they would never again offend the Royal prerogative and make laws without the consent of the King. They had implicitly acknowledged that some of these canons offended the royal prerogative. 276 In the Act of Submission of 11534, they had given to the King their approval, to set


273 Section 1: "...all and every person and persons inhabiting within this realm or any other the King Majesty's dominions, shall diligently and faithfully, having no lawful or reasonable excuse to be absent, endeavour themselves to resort to their parish church or chapel accustomed...and then and there to abide orderly and soberly during the time of the Common Prayer preachings or other service of God there to be used and ministered; upon pain of punishment by the censures of the Church.

274 under section 2.

275 Under section 3: this power was to "...reform, correct and punish by censure of the Church, all and singular persons which shall offend within any their jurisdictions or dioceses..."

276 See the Act of Submission of the Clergy in Chapter 2. 25 Henry VIII c.19
up a new commission to prepare a new code. This would have examined all the existing canon law and have removed therefrom all the canons in provincial statutes and constitutions, which contravened the supreme authority of the King. No such commission ever met and the authority of Parliament lapsed. Under Edward VI, fresh powers were given and a new Commission was erected on 6 October 1551 to prepare a new set of canons.277 This commission consisted of eight bishops, eight theologians, eight civilians and eight Common lawyers,278 the latter including Sir Edward Carne, the "Excusator" of Henry VIII in his famous marriage case and Messrs Legh and Ap Rice, two commissioners who visited monasteries to procure their dissolution.

Much of the work on the new code had already been done, prepared by Cranmer personally. In March 1553, when the draft had been finished, Cranmer wanted to have the whole scheme laid before Parliament and approved accordingly. Lord Northumberland, the new Protector of the King, was unwilling, and told him quite bluntly to stick to his clerical functions. The work therefore remained only a draft and never received any legal force.

The draft new canons were all based on the legal premise that by the ordinance of God, the King was the supreme earthly head of the Church of Christ in England and that the canons were true laws of the king. They defined the King as having the power of jurisdiction- "potestas iurisdictionis" and the "potestas legis". His laws were promulgated to strengthen the true worship of God in the kingdom and for the preservation of the very state of the church. To achieve this, the King held the power to punish all errors and heresies, the bishops being his administrators. The penalty for religious dissent was death. Draft canons defined the fundamentals of Christian religion, being the doctrines of the Incarnation and the Redemption; the list of books of sacred scripture and a description of heresy with a list of the most prevalent heresies of the day.279


278 Civil Lawyers, long time rivals of their fellow canonists, were beginning to emerge as a superior class of lawyers. Especially since 1546 when they became available for judicial positions in the Ecclesiastical Courts.

279 These heretical opinions ranged from those who denied the doctrine of Original sin to those who did not believe in the divine nature of Jesus. It included also those who believed that (a) the Church of Rome was founded on the rock of Peter, (b) the universal Church of the whole Christian world fell to rulership under the Bishop of Rome, (c) there took place after the words of
One half of the code was in fact devoted to the organisation of the Established Church's courts and their trial procedure. All questions of heresy were to fall within their competence as well as issues relating to wills, marriages and divorce (now allowed) legitimacy and the bad behaviour of laymen and clerics such as blasphemy, adultery, fornication and sorcery. The Ecclesiastical courts were to be re-organised efficiently, under the complete power of the King. A final section within the code, dealt with the way that Sundays and feast days of the Church were to be spent. They were to be used profitably by the laity, given over to prayer and general instruction.

The draft code of canons were a comprehensive attempt to present a coherent code of the law of the Established Church, in the light of all reforms made by the legislation of Henry VIII and Edward. But it only remained in draft and was never approved by the King nor by Parliament. Three months later, Cranmer had produced his Forty-two Articles of Religion and he had hoped to obtain the King's consent to both, to consolidate all ecclesiastical reforms. The death of the boy King Edward VI and the succession of his half sister, Mary put an end to this.

### 3.2.5. The Forty-two Articles of Religion of 1552.

The Forty-two Articles of Religion compiled by Cranmer, were to be the basis for the Thirty-nine Articles of Religion which eventually appeared in 1571. Never in fact approved by the Convocation of the Clergy, notwithstanding the

consecration the Transubstantiation of the bread and wine into the body and blood of Jesus (d) the Mass was a sacrifice and (e) those who had taken vows of religion and those who had received Holy Orders could not marry. See Hughes, *The Reformation in England (Vol 2).* Chapter 2. pp. 127 et seq.

280 The canons are collected within a section called "De Divinis Officiis".

281 The timetable to be followed was thus; Morning Prayer, followed by a sermon and then, numbers permitting, Holy Communion. In the afternoon, there was to be catechism, for adults as well as children and followed by baptism and then Evensong. The final part of the day was to be dedicated to the disciplining of the flock, those parishioners guilty of serious offences being invited to procedure their sins and to be given publicly their penance, so as to reform their behaviour.

282 its full title was: "Articles agreed on by the Bishops and other learned men in the Synod at London in the year of Our Lord 1552 for the avoiding of controversies in opinions and the establishment of a godly concord in certain matters of religion."

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advertisement which appeared in its title, and lacking the authority of Parliament, Cranmer managed to persuade the young King to approve them, three weeks before his death. He made it a mandatory requirement, that all members of the clergy who were to be licensed to preach or to receive a benefice as well as those who sought a university degree, should subscribe to their contents.

The Forty-two Articles were designed to be read in conjunction with the Book of Homilies, the New Book of Common Prayer and the New Reformatio Legum Ecclesiasticarum and to provide an authoritative teaching of the Established Church. They covered a vast area of matters and affirmed the Established Church’s belief in the dogmas of the Blessed Trinity; the Incarnation; the Passion, death and Resurrection of Jesus Christ. The fonts of Revelation were described as being only Sacred Scripture and the Articles defined the heresies which had to be avoided and being those enumerated within the draft code.

The number of Sacraments in the Church were defined as being two and Purgatory was declared to be a dangerous and superstitious doctrine.

The Articles remained in draft, and were the personal work of Cranmer. On that basis, he could not authorise their use until approval was obtained by Edward VI on 12 June 1553. Once he had managed to get Edward VI to sign his approval of the same, that royal signature transferred “the Archbishop of Canterbury’s opinions into the official teaching of Christian teaching of the Established Church.”

3.3. THE POSITION OF THE ESTABLISHED CHURCH UNDER MARY (1553-1558).

By 1553, the delicate ecclesiastical settlement achieved by Cranmer, was already in great danger due to the delicate health of King Edward VI. Before his death, the Protector, Lord Northumberland had persuaded Edward VI to make a will, passing over Mary and Elizabeth as illegitimate and appointing Lady Jane

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283 e.g. the proposition that all General Councils which defined matters on faith or morals and universally approved by the Roman Pontiffs were infallible. The Articles said that General Councils "may err and sometimes have erred, not only in worldly matters, but also in things pertaining to God"

Article XXII proclaimed that General Councils could only be summoned by Princes.

Grey to be his successor. The plan backfired and although Lady Jane Grey was proclaimed Queen by Northumberland, her father-in-law, she had no real support. The nation rallied to Mary, the capital London accepting her as the rightful Queen in August 1553, after Edward died in June 1553.

### 3.3.1. The accession of Mary.

Mary would undo the changes made to the Established Church by her half brother and the regency council, using her royal authority and Parliament. She was pious and loyal to the memory of her mother, Catherine of Aragon and to her Catholic faith. As a teenager she had been forced to make a humiliating surrender to her father's demands, to acknowledge the royal supremacy over the Church, to renounce the papacy and to admit her own illegitimacy. Once on the throne, she was determined to reverse the situation and used the title of "Supreme Head" to re-inforce her authority, with a special dispensation from the pope. Later she would abandon this in favour of "Defender of the Faith."

Using her authority as Supreme Head of the Church in England, she deprived those Bishops appointed during the reign of Edward, such as Bishops Ridley and Hopper. She then restored to their sees, Bishops Gardiner and Bonner, who had been ejected by Cranmer. Cranmer himself, who had pronounced in favour of the divorce of her Mother, Catherine of Aragon and who had lent his support to Lady Jane Grey as Queen, was imprisoned. Mary then began the repeal of the Acts of Parliament, which had created the Established Church.

### 3.3.2. Repeal of Edwardian legislation: Restoration of the celebration of the Holy Mass and the law of Celibacy for the Clergy.

In her Royal Proclamation, issued in August 1553, Mary had proclaimed that she could not "hide that religion which God and the world knoweth she hath ever professed from her infancy hitherto" and which she "would be glad the same were of all her subjects quietly and charitably embraced." For the time being, she indicated that she was not disposed to compel any of her subjects to return to Catholicism until further counsel had been taken by common consent. Her chief adviser, Bishop Gardiner, persuaded her to use her royal power to undo all the ecclesiastical laws of Edward VI. In the first session of her Parliament, a total of nine statutes were repealed, including those dealing with communion in both kinds, the selection of bishops by royal patent only, the marriage of priests and the use of the New Prayer Books. In addition, the Act of Henry VIII which had
declared her illegitimate, was repealed.285

By the Act against offenders of Preachers and other Ministers in Church of 1553, all religious services were to revert to those in use during the last year of the reign of Henry VIII. The Mass was thus restored and with it, the doctrine and the belief of Transubstantiation. Fearing that this might be opposed by some of the Reformers, the Act made it an offence to disrupt the celebration of the Sacraments and the Holy Mass in Churches.286 All offenders could be arrested and then imprisoned.287 Those who tried to interrupt preachers, priests celebrating the Mass and the Sacraments and those who physically attacked the Blessed Sacrament as well as other Christian symbols were to be arrested and punished accordingly before a Justice of the Peace, before a Secular Court. The Act was careful to respect the rights and powers of the Ecclesiastical courts to impose appropriate punishments according to canon law288 but contained

285 Mary had been declared legitimate by Parliament, by “An Act declaring the Queen's highness to have been born in a most just and Lawful matrimony and also repealing all Acts of Parliament and Sentences of Divorce had or made to the Contrary” 1 Mary c.1 (1553). See Statutes at large (Vol 2). The various statutes of Edward VI were repealed under 1 Mary c.2 (1553)

286 An Act against offenders of Preachers and other Ministers in the Church. 1 Mary c.3 (1553) See Statutes at large (Vol 2).

287 Section 1 of that Act: "...any person or persons of their own power and authority...do or shall willingly and of purpose by open and overt word fact act or deed, maliciously or contumuously molest let disturb vex or trouble, or by other unlawful ways or means disquiet or misuse any preacher or preachers that now is or that at any time or times hereafter shall be licensed or authorised to preach...and...any person or persons ...shall maliciously willingly or of purpose molest let disturb vex disquiet or otherwise trouble any person vicar parish priest or curate or any lawful priest preparing saying doing singing ministering or celebrating the Mass or other such divine service sacraments or ...as was most commonly frequented and used in the last year of the reign of the late sovereign lord King Henry the Eighth...or if any person or persons ...shall contemnuously unlawfully or maliciously of their own power or authority pull down deface spoil abuse break or otherwise unreverently handle or order the most Blessed comfortable and holy Sacrament of the body and blood of Our Saviour Jesus Christ, commonly called the Sacrament of the Altar being or that shall be in any Church or chapel or in any other decent place or the pyx or canopy wherein the same sacrament is or shall be; or unlawfully contemnuously or maliciously of their own power and authority pull down deface spoil or otherwise break any altar or altars or any crucifix or cross that now or hereafter shall be in any Church chapel or churchyard; that then every such offender and offenders ...shall be apprehended arrested and taken ...”

288 Cf. Section 5. ibid.
safeguards so that no-one could be punished twice for the same offence, in the ecclesiastical and then in the secular court.289

3.3.3. Royal injunctions issued by Mary to govern the Church.

Mary also issued a series of royal injunctions to deal with the customs and practices that had been permitted and decreed by the Reformers, relying on the same power and authority that Henry VIII and Edward VI had used. The old practice of celibacy for the clergy was restored. Church processions were then revived and likewise was the use of Latin, the Order of the Communion Service thus falling away. Any priest ordained by the Edwardian Ordinal, the royal injunctions so stated, had not been validly ordained to the priesthood in the Catholic sense and so those who had been commissioned by Edwardian Bishops were to be ordained conditionally or properly according to the Old Rite. Another change made by Mary was to remove the Episcopal oath to the Crown, some parts of which ironically the reformer Bishop Hopper had opposed at the time when he had been ordained under Edward VI.290

Between April and May 1554, Parliament consented to the forthcoming marriage between Mary and Philip of Spain. However, the fear that much of the abbey lands would be restored to the Church, led to legislation dealing with this as well as proposals to restore an old statute which would revive the old heresy laws,291 being defeated.292 During the summer of 1554, Mary begin the slow process of restoring papal supremacy. Mary married Philip and Cardinal Reginald Pole, the Papal legate, returned to England after twenty years of exile. To ease

289 Cf. Section 6. ibid.

290 Parliament had to deal with marriages contracted by the clergy, in defiance of their vow of celibacy and without any dispensation. According to canon law, they were void. Mary therefore ordered such persons to leave their wives and to vacate their livings. The remaining clergy, had the option of either remaining married and being laicised or, separating from their wives and retaining their positions. According to Leo Solt, Church and State in Early Modern England, p.58. All in all some 2,000 priests lost their livings.

291 The Statute De Haeretico Comburendo of 1401 and the Act of six articles of 1539

292 The proposed bill to reintroduce legislation to punish heresy, was passed by the House of Commons but defeated in the Lords. Those in the Lords were alarmed by the fact that Mary was considering dropping the title, Supreme Head as this could mean the restoration of monastic lands and a clerical majority in the House of Lords.
the restoration process with the Papacy, Pope Julius III had agreed to give up all rights to hear appeals regarding the monastic property which had been confiscated by Henry VIII, thus allaying the fears of all those who had benefited from their suppression.

3.3.4. Repeal of Legislation of Henry VIII; the Second Act of Repeal of 1554.

Mary's third Parliament in 1554, passed the Second Act of Repeal which restored the links between the Church in England and the rest of the Western Church, placing the former once again under papal jurisdiction. In the preamble, the Lords and Commons declared apologised for their actions and sought absolution for their faults. The Second Act of Repeal then repealed all the anti-papal legislation passed by Henry VIII since 1529, including the Restraint of all appeals to Rome, the Submission of the Clergy, the Act of Supremacy, the Appointment of Bishops and the abolition of all annates to Rome. The statutes of Henry VIII, which dealt with the dissolution of the Monasteries, were not revived, by the special papal dispensation obtained and all those persons who had benefited form their expropriation, were allowed to retain the such benefits.

The result of this important and all embracing Statute, was to restore the status quo between the State, the Church and the Papacy to that which it was in prior to 1529. All Papal bulls, dispensations and privileges obtained from Rome since that date were to be implemented, so long as they did not affect the temporal royal authority of the Crown. For the next three years, Mary strove to reintroduce Catholicism by various measures and relying upon the secular law and her royal authority. When she died in November 1558, she bequeathed in

293 "they were very sorry and repentant of the schism and disobedience committed in this realm...against the said See Apostolic"

294 "we may as children repentant be received into the bosom and unity of Christ's Church." See 1 & 2 P & M.c.8 See statutes at large (Vol 2).

295 This Act, specifically listed the Statutes by their title.

296 This concession was not to prevent Mary herself from returning Church lands in the hands of the Crown and restoring several monastic houses, such as Westminster Abbey to the Benedictine Monks.
turn, to her successor, Elizabeth a Church with its structure and hierarchy restored to Rome.

3.4. ELIZABETH I: THE ACTS OF SUPREMACY AND UNIFORMITY OF 1559.

Elizabeth became Queen in November 1558. Illegitimate in the eyes of the Church, according to its canon law, and in the eyes of the state, according to Common law, she was faced with the possibility of consolidating the settlement of Mary or reverting to the policy of her half brother, Edward. She chose the latter re-asserted her control over the Church. One of her first actions, was to abolish the various monasteries, re-endowed by Mary, and to reclaim for the Crown the payment of all annates which had been restored to the Church by Mary.297

3.4.1. The Act of Supremacy of 1558.

Elizabeth restored the supreme jurisdiction of the Crown over the Church, again to be the Church established by law, by her Act of Supremacy of 1558,298 the first Act of Parliament of her reign. This Act of Supremacy, repealed all the Marian legislation which had restored papal authority within England and resurrected the principal ecclesiastical statutes of Henry VIII. This was justified on the basis that these various Acts of Parliament had only restored the ancient rights of the Crown, and were designed to end unlawful foreign intervention, recently checked.299 Section 1 restored to the Queen her power and jurisdiction over the State and the Established Church, recently abolished by Queen

297 The new religious foundations were promptly terminated, their lands and endowments being forfeited to the Crown.

298 The full title of the first Act of Elizabeth; An Act restoring to the Crown the ancient Jurisdiction over the State Ecclesiastical and spiritual and abolishing all foreign Power repugnant to the same. 1 Elizabeth c.1 (1558). See Statutes at large (Vol 2).

299 Section 1 of the Act of Supremacy, in the preamble :"...until such time as all the good laws and statutes by one Act of Parliament made in the first and second years of the reigns of the late King Philip and Queen Mary, your Highness sister, entitled An Act repealing all statutes articles and provisions made against the see Apostolic of Rome since the twentieth year of King Henry the Eighth, and also for the establishment of all spiritual and ecclesiastical possessions and hereditaments conveyed to the laity were all clearly repealed and made void..."
Mary300 and Section 2, revived in great detail, all the major ecclesiastical statutes of Henry VIII with the exception of the Act of 1534, declaring Henry VIII to be the Head of the Church, and the Act of Six Articles of 1539. 301 Section 4 confirmed that apart from The Sacrament Act of 1547 under Edward VI, all other ecclesiastical legislation of Edward VI was repealed. Sections 7 and 8 formally abolished all foreign spiritual jurisdiction and consolidated this in the hands of the Crown, 302 which held absolute jurisdiction and authority over all matters spiritual and temporal with no appeals to Rome.

The Act of Supremacy of 1558, punished all those who refused to accept the spiritual and temporal jurisdiction of the Crown and penalised those writing or preaching against the rights of the crown and all who acknowledged any foreign spiritual jurisdiction within the realm. 304 It was confirmed that the Queen, and her Parliament possessed the competence to determine and adjudicate upon all heresies and schisms, and all such matters determined accordingly, were legally speaking not heretical. 305 With the royal supremacy and jurisdiction restored

300 "...for the repressing of the said usurped foreign power and the restoring of the rights jurisdiction and pre-eminences appertaining to the imperial crown of this your realm, that it may be enacted by the authority of this present Parliament, that the said Act ...and all and every branch clauses and articles therein contained...may by authority of this Parliament, be repealed, and shall...be utterly void and of none effect." Cf. Section 1 supra.

301 The Acts of Henry VIII revived and set out within Section were: the Ecclesiastical Appeals Act (24 Henry VIII c.12), the Submission of the Clergy Act (25 Henry VIII c.19), The Consecration of Bishops Act (25 Henry VIII c.20), the Ecclesiastical licences Act (25 Henry VIII c.21) and the Appointment of Suffragan Bishops Act( 26 Henry VIII c.14).

302 "...That no foreign prince person prelate state or potency spiritual or temporal shall at any time...use or exercise any manner of power jurisdiction superior authority pre-eminence or privilege spiritual or ecclesiastical within this realm or within any other your majesty's dominions or countries that now or hereafter shall be, but... the same shall clearly be clearly abolished..." Section 7. ibid.

303 "...such jurisdiction privileges superiorities and pre-eminences spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority hath heretofore been or may lawfully be exercised or used for the visitation of the ecclesiastical state and persons and for reformation order and correction of the same and of all manner of errors heresies schisms abuses offences contempts and enormities, shall for ever by authority of this Parliament be united and annexed to the imperial crown of this realm." Section 8.

304 Under Section 14.
over the English Church, Elizabeth and her advisors now re-introduced a book of Common Prayer by the Act of Uniformity of 1558.

### 3.4.2. The Act of Uniformity 1558.

The Act of Uniformity of 1558, which contained a total of 14 Sections, re-introduced the Service of Common Prayer prepared by Cranmer. In its preamble, it referred to the Act of Parliament that had authorised the New Prayer Book and lamented that its repeal had caused great disservice to religion. Approved by the Queen with the consent of her Lords Temporal and the commons, the New Book of Common Prayer was to be the only form of worship permitted within the Established Church. Penalties were imposed

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305 "... no manner of order act or determination for any matter of religion or cause ecclesiastical had or made by the authority of this Parliament, shall be accepted deemed interpreted or adjudged at any time hereafter to be any error heresy schism or schismatical opinion;..."

306 Its full title was; An Act for the Uniformity of Common Prayer and Divine service in the Church and the administration of the Sacraments. 1 Elizabeth c.2 (1558) See *Statutes at large (Vol 2).*

307 The Act of Uniformity revived the earlier Act of Uniformity under Edward VI, repealed by Mary.

308 The repeal had been the cause of "...great decay of the due honour of God and discomfort to those professing the truths of the Christian religion..."

309 Not the Lords Spiritual, i.e. the Bishops. Of the "Lords Spiritual" i.e. all but one had refused to give their consent. Bishop Kitchin of Landruff was the exception. All resigned from office and then went into exile, rather than accept the new regime. A remarkable contrast and change of attitude to that of the hierarchy under the reign of Henry VIII. The position caused a grave problem for Elizabeth who was forced to create a new hierarchy, from those who were to disposed to accept the New Order and the New Book of Common Prayer. The Established Church, both doctrinally and liturgically, was to move in a more puritan direction, more Calvinist under the governance of Elizabeth.

310 Section 2: "...all and singular ministries in any cathedral or parish church or other place within this realm of England Wales and the Marshes of the same, or other the Queen's dominions, shall from and after the feast of St John the Baptist next coming, be bounden to say and use the Matins Evensong Celebration of the Lord's Supper and administration of each of the Sacraments and all their common and open prayer, in such order and form as is mentioned in the said book so authorised by Parliament in the fifth and sixth year of the reign of King Edward the Sixth..."
upon those ministers who either refused or who preached in derogation of it. 311
Section 3 made it a secular offence for anyone to speak against the Book of
Common Prayer or who compelled a cleric to use any other form of service. 312
The Archbishops, the Bishops and all other ecclesiastical officials were obliged to
enforce the Act 313 and were given the appropriate power to punish
offenders 314 along with lay justices. 315

With the jurisdiction of the Crown firmly restored over all matters spiritual, the
Queen assisted by her ecclesiastical advisors, had the legal power restored to
govern the Established Church and the authority and discretion to determine all
issues relating to the use of ornaments for Church services. 316

311 A first conviction of a cleric signified that such an offender would "lose and forfeit to the
Queen’s highness, her heirs and successors for his first offence, the profit of all his spiritual
benefices or promotions coming or arising in one whole year next after his conversion." A second
offence would result that the offender should "suffer imprisonment during his life."

312 Persons who "...in any interludes plays songs rhymes or by other words declare or speak
anything in the derogation depraving despising of the same Book, or of anything therein
contained or any part thereof or shall by open fact deed or by open threatenings compell or
cause or otherwise procure or maintain any person vicar or other minister in any cathedral or
parish church or in chapel or in any other place, to sing or say any common or open prayer, or to
minister any sacrament otherwise or in any other manner or form then is mentioned in the said
book..."

A first offence would lead to a fine of 100 marks, a second 400 and a third, life imprisonment
and forfeiture of goods.

313 Section 4 stated "that they shall endeavour themselves to the uttermost of their
knowledge that the due and true execution hereof may be had throughout their dioceses and
charges..."

314 Section 4: they had "full power and authority by this Act to reform correct and punish
by censures of the Church, all and singular persons which shall offend within any their
jurisdictions..."

315 Section 5 gave to these civil magistrates the power to take proceedings against ministers
and parishioners who refused to use or who criticised the New Service, as if they had committed
a civil wrong.

316 Section 13 "...such ornaments of the Church and of the ministers thereof shall be retained
and be in use as was in the Church of England by authority of Parliament in the second year of
the reign of King Edward the Sixth until other order shall be therein taken by the authority of the
Queen’s majesty, with the advise of her commissioners...and also that if there shall happen any
contempt or irreverence to be used in the ceremonies or rites of the church by the misusing of
the orders appointed in this book, the Queen’s majesty may by the like advice of the said
As the Supreme Governor of the Established Church, a title which was assumed instead of Supreme Head, Elizabeth generally would prefer to exercise her "Potestas Jurisdictionis" over the liturgy and ceremonial of the Established Church, by her orders in council. These had legislative effect and related to not only the ceremonial and the liturgy, but also the doctrine of the Established Church and the conduct of the Clergy.

3.5. THE THIRTY NINE ARTICLES OF RELIGION.

As the Supreme Governor of the Established Church, Elizabeth had been forced to reconstitute its hierarchy, after the overwhelming majority of the Bishops who had been appointed under Mary, refused to accept these reforms and the New Book of Common Prayer and resigned. With the help of her advisers, Elizabeth installed a new hierarchy Matthew Parker being her new Archbishop of Canterbury.

Archbishop Parker faced the difficult challenge of consolidating the achievements of Elizabeth and of trying to create unity of belief and doctrine for the Established Church. With this in mind, a convocation of the clergy was summoned in London in 1562 to determine its doctrine and following various debates, a total of Thirty-nine Articles were prepared. Approved in their definitive form by the Archbishops and Bishops of the Established Church in their Upper House of Convocation and by the Lower House of Clergy in 1571, Elizabeth in her capacity as Supreme Head and Governor of the Church, gave her assent to them and by royal decree, ordered them to be promulgated.317 The Thirty-nine Articles, for this reason, assumed great legal importance for they were the equivalent of a formulary of faith. They were a test of orthodoxy of belief for the those of the Established Church, whether the clergy or laity and as such, had legal significance in that judges would look to the same as representing the official creed of the Established Church.

317 Until 1870, it was mandatory for all those wishing to matriculate at the Universities of Oxford and Cambridge to assent to them. Subscription to the Thirty Nine Articles of Religion was also a legal pre-requisite for ordination to the Church.
Although not intended to represent the total ambit of Christian doctrine in the form of an all embracing creed, the aim of the Articles was to define the position of the Established Church on a number of current doctrinal controversies, in such a way that they would alienate neither High nor Low Church members. The Articles set out the official position of the Established Church on doctrinal points such as Transubstantiation; the Sacrifice of the Mass; Justification by Faith alone; the authority of the See of Rome and General Council; they also defined more exactly the doctrine of Royal Supremacy. Above all, they confirmed the absolute supremacy and jurisdiction of the Queen within the realm., and the independence of the Established Church from any form of papal jurisdiction.

They first of all confirmed that the essential sources for the Christian faith were to be found only within Sacred Scripture- in the canonical books and the ancient creeds of the Church. The Church herself was a visible body of faithful men, where the Word of God was preached and the Sacraments administered and as such, she had limited power to determine upon liturgical and doctrinal controversies. Not all General Councils were infallible and furthermore, they could only be summoned by princes, not clerics. According

318 Article VI "Holy Scripture containeth all things necessary to salvation: so that whatsoever is not read therein, nor may be proved thereby, is not to be required of any man, that it should be believed as an Article of the Faith or be thought requisite or necessary to salvation..."

Article IV had listed the canonical books of the Old and the New Testament.

319 Article VIII: "...Nicene Creed, Athanasius's Creed and that which is called the Apostles' Creed, ought thoroughly to be received and believed; for they may be proved by most certain warrants of holy Scripture."

320 Article XIX: "The visible Church of Christ is a congregation of faithful men, in the which the pure word of God is preached, and the Sacraments be duly administered according to Christ's ordinances in all those things that of necessity are requisite the same. As the Church of Jerusalem, Alexandria, and Antioch have erred; so also the Church of Rome have erred, not only in their living and manner or ceremonies but also in matters of faith."

321 Article XX: The Church had the power "...to decree Rites or Ceremonies and authority in Controversies of Faith: And yet it is not lawful for the Church to ordain anything that is contrary to God's Word written, neither may it expound one place of Scripture, that it be repugnant to another..."

322 Article XXI: " General Councils...may not be gathered together without the commandment and will of princes. And when they be gathered together, (forasmuch as they be an assembly of men, whereof all be not governed with the Spirit and Word of God) they may err and sometimes have erred, even in things pertaining unto God. Wherefore things ordained by them as necessary
to the Articles, there were only two Sacraments, properly speaking, Baptism and the Supper of the Lord323 and in the Lord's Supper, it was superstitious to believe in the dogma of Transubstantiation.324

Clerics within the Established Church who had been ordained following the approved Ordinal, had been ordained properly and validly, so their orders and powers were legitimate.325 The doctrine of Royal Supremacy was clarified over the Church. It was explained that this doctrine did not give all monarchs (and so the Queen) the right to preach the Word of God and to administer the Sacraments, but only a right of general governance over the Church, which authority could be exercised over all matters, whether ecclesiastical or temporal.326 This Article, number XXXIX, concluded that therefore the Bishops of Rome have no jurisdiction in this realm of England.327

3.6. THE REFORMATIO CANONUM OF 1571.

After the Thirty nine Articles of Religion had been officially approved by Elizabeth, Archbishop Parker made his attempt to unravel the current and
confused status of the ecclesiastical law of the Established Church. Like Cranmer, his predecessor, he too prepared a code of canons to provide the legal framework for the views expressed within the Thirty Nine Articles, covering the liturgy and the ceremonial of the Established Church as well as the conduct of the clergy and procedure within the Ecclesiastical courts. The draft code compiled, was divided into eleven titles, each title in turn being subdivided into paragraphs. After being presented by Archbishop Parker to the Upper House of Convocation, the House of Bishops, it received their approval but failed to receive the sanction of the Lower House of Convocation. The Queen herself also declined to give them her royal approval, indicating that she preferred to legislate through her Archbishops, issuing Royal Injunctions and Orders. The next time that there would be yet another attempt to produce a code, would arise under Elizabeth’s successor, James I.

3.7. CONCLUSION.

From the death of Henry VIII to the end of the Sixteenth century, the Established Church had by a process of legal development, changed to assume the fundamental characteristics which would underlie its doctrinal, liturgical and legal position within the English State and Constitution.

These were the crucial years which saw important legislation being enacted that would influence her creed and her role throughout the centuries. The Book of Common Prayer, the Ordinal and the Thirty-nine Articles of Religion were sanctioned by The Acts of Supremacy and Uniformity first, under Edward and then under Elizabeth. The absolute jurisdiction of the Crown and Parliament over all matters of the Established Church, became enshrined within her creed. All matters, spiritual and temporal, as the Monarch was the supreme governor of the Church. The Thirty-nine Articles of Religion were to form the basis of the teaching of the Church and legal measures, backed up by the civil sanctions of the State, would be used to enforce them.

The status of the internal law of the Church became an urgent issue to address and to clarify. Her own internal lawyers as well as the civil lawyers faced the difficult job of reconciling two separate systems of law; the developing English Common law, based on the supremacy of the Crown and Parliament with legislation emanating from the King and Parliament as interpreted by the secular courts. Then the separate canon law and courts of the Church, with its juridical independence from the State and its dependence upon the papacy.
A code became desperately needed to clarify the position of the ecclesiastical law of the Church, and since 1532, the legal status of the numerous injunctions and court orders, whether royal or Episcopal. The Established Church as well as the State, faced the additional problem of explaining how all papal and episcopal decrees, canons and sentences of the Universal Church had been applied within the English Church prior to 1532, in such a way that they did not deny the royal supremacy. These issues will be examined in the next chapter.
Chapter 4

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Chapter 4

The position of medieval canon law and the development of Ecclesiastical law within the Established Church (1603-1952).

4.1. The position of pre-reformation canon law within the Established Church.

4.2. The emergence of Ecclesiastical law.

4.3. The background to the Canons of the Established Church of 1603.

4.3.1. The Code of Canons of 1603.

4.3.2. The addition of subsequent canons.

4.4. The legal nature of these canons.

4.4.1. Their binding force upon the laity.

4.4.2. On lay officers.

4.4.3. On the clergy.

4.5. Important Church and State legislation after 1603.

4.5.1. The Book of Common Prayer (1662).

4.5.2. The Bill of Rights (1688).

4.5.3. The Act of Settlement (1700).


4.6.1. Their competence and jurisdiction modified by Parliament.

4.6.2. The applicability of civil law principles-the supremacy of Parliament and judicial precedent.


4.8. Conclusion.

4.1. THE POSITION OF THE PRE-REFORMATION CANON LAW WITHIN THE ENGLISH CHURCH.328

In May 1532, the majority of the Bishops of the Church, sitting in their Convocation, had paved the way for the Act of Submission329 under which they gave a binding promise that they would never again attempt to legislate independently and without royal authority. By the Act of Submission they promised that they would not

"...presume to attempt allege claim or put in any way any Constitutions or Ordinances, Provincial or Synodal, or any other canons, nor shall enact..."

328 The Historical material to write this chapter has been taken principally from: The Report of the Archbishops Commission, The Canon Law of the Church of England and Hughes, History of the Reformation in England (Volumes 2 & 3). Also, we have relied heavily upon the legal material to be found in Halsbury’s Constitutional law (Vol 9) and Ecclesiastical law (Vol 14). All the statutes cited between the years 1533 and 1713 are to be found in Statutes at large Volumes; (Vol 2) (1461-1601), (Vol 3) (1604-1698) and (Vol 4) (1699-1713). The later statutes are to be found in Halsbury’s Statutes in force. The legal cases cited can be foundin the English Reports (E.R.) prior to 1869 and after that date in the official collections.

329 Act for the Submission of the Clergy. 25 Henry VIII, c.19. Statutes at large (Vol 2)
promulgate or execute any such canons Constitutions or Ordinances Provincial, by whatever Name or Names they may be called, in their Convocations in Time coming (which always shall be assembled by authority of the King's writ) unless the same Clergy may have the King's most Royal Assent and licence to make promulgate and execute such Canons Constitutions and Ordinances, Provincial or Synodal...”330

This submission to the Crown effectively removed the independent legislative function of the English episcopacy over the law of the Church, this power being transferred to the King and Parliament. By this important legal move, the Convocation of Bishops had accepted that neither they assembled as a group nor the bishops individually, had any independent legislative capacity. Their action prepared the way for the reassessment of the canon law of the Church as ecclesiastical law of the realm. Their action immediately called into question the status of all the canonical legislation contained within the vast Corpus Iuris Codici; the papal decrees and statutes, as well as court decisions from Rome; the legislative decrees and measures of the English Church in local synods and councils. What would be their status within the Church and what would be the nature of the law applied within the ecclesiastical courts? Were the previous papal decrees and the decisions of the General and Provincial Councils of the Church abrogated?

The pre-amble to the Act of Submission of 1532, referred to the surrender by the Convocation of the Clergy of their episcopal authority, a denial of papal jurisdiction and an admission of guilt that they and their predecessors had infringed the royal prerogative by enacting ecclesiastical laws without consent. They had also violated the rights of the Crown by assembling in Convocation without royal permission.331 Shortly afterwards, the Ecclesiastical Licences Act of 1533 would provide the justification for this theory of the Royal Supremacy over the Established Church and set out the legal theory underscoring the

331 “…the Clergy of this realm of England, have not only acknowledged according to the Truth, that the Convocations of the same Clergy is always, hath been and ought to be, assembled only by the King's writ, but also submitting themselves to the King's Majesty, have promised in Verbo Sacerdocii, that they will never from henceforth presume to attempt allege claim or put in use or enact or execute any new Canons Constitutions…” The Preamble 25 Henry VIII c.19 Statutes at large (Vol 2)
existence of the canon law of the Church. The introduction to the Ecclesiastical Licences Act proclaimed

"For where your grace's realm recognising no superior under God, but only your grace, has been and is free from subjection to any man's laws, but only to such as have been devised, made and ordained within this realm, for the wealth of the same, or to such other as by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, by their own consent to be used amongst them, and have bound themselves by long use and custom to the observation of the same, not as to the observance of the laws of any foreign prince, potentate or prelate, but as to the accustomed and ancient realm of this realm, originally established as laws of the same, by the said sufferance, consents, and custom, and none otherwise.” 332

In other words, the canon law which had been administered within the Church and the legislative decisions of the Roman Pontiffs only formed part of the general customary law within England. 333 This was not English Common law but Ecclesiastical Common law. The law of the Church which had developed and had been permitted to flourish by the authority of the King, with his consent and permission. On this theory, the canon law of the Church had never been independent of the state but had always formed part of the general common law or custom of the realm, received and sanctioned by the King and his subjects.

This was the legal fiction, which won acceptance by many civil lawyers, civil as well as ecclesiastical. Highly attractive and convenient, it explained how the former Roman canon law of the Mediaeval Church had been received and applied

332 See the Submission of the Clergy Act 25 Henry VIII c.19.

333 H.S. Box in his book, The principles of Canon Law, Oxford University Press 1949, chapter IV-on “the Governmental authority in the church”-refers to this theory of acceptance of canon law. The footnote on page 27 includes the salient comments of the Rev. P.G.Ward on the Preamble. The Rev. Ward points out that "there is a falsifying of history in the wording of the Act, and calls attention to the historical inaccuracy of the post-Reformation legal tradition which asserted that no rescript or decretal was valid in England until it had been received. “The Statute-makers of Henry VIII found a new doctrine...in asserting that although foreign laws were used they were only so by the people’s willing acceptance. This enabled Henry to get on with his reforming general plans, but the doctrine which gained currency was untrue. No notion of acceptance entered the churchman’s mind.”
within the Ecclesiastical courts. Building on this theory, a working committee of the Church of England in the last century, concluded that the ancient papal canon law and the decisions of the Roman Curia carried great weight and were treated with great respect, within the English ecclesiastical courts and the Church, on this basis. But the decisions of the Roman Curia and the papal decrees were never binding per se. The canon law of the universal Church was deemed to be applicable within the English Church as it had been incorporated within the law of the land as Ecclesiastical common law.

According to this legal analysis, the ancient canon law of the English mediaeval Church, necessarily had its own peculiar juridical characteristics, to differentiate it from the law applied within rest of the universal Church. Firstly, that the canon law had been received by the English canonists within the English Church on a voluntary basis; secondly, that the Church in England was juridically and legally independent from the rest of the universal Church; thirdly, that this canon law was equivalent to the English secular Common law, tolerated as legal custom and known as Ecclesiastical common law; fourthly, that it had been sanctioned by the Crown: and finally, this branch of the law dealing with the Church, was subject to the overall authority of the King and could not offend the royal prerogative. It was a legal theory which did not contradict the legal basis of Henry VIII as Supreme Head of the Church in England.

The theory was not, in fact, novel and had been originally propounded by Henry Standish, the Provincial of the Grey Friars in Oxford as early as 1518. Welcomed by Henry VIII and his advisors, it was used to explain why the papacy originally held no jurisdiction within England kingdom and why the Statutes of Henry VIII repealing papal power and jurisdiction, were returning to the Crown and the Church, their rightful freedom and independence. Both civil and ecclesiastical lawyers, would within subsequent generations, begin to refer to the ecclesiastical law of the Established Church as opposed to canon law. So in his


judgement delivered in 1591, in the Case of Caudrey, 337 Sir Edward Coke, the Lord Chief Justice, made reference to "the King's Ecclesiastical laws" instead of "the canon law". Possibly he was being deliberately provocative, emphasising that the old canon law of the Church was in reality custom, permitted by the Crown, and independent from the papacy. In his decision, he commented that:

"by the ancient laws of this realm, this Kingdom of England is an absolute empire and monarchy, consisting of one head, which is the king, and of a body politic, compact and compounded of many and almost infinite several and yet well agreeing members. All which the law divideth into two general parts, that is to say the clergy and laity, both of them, immediately next after God, subject and obedient to the head. Also the kingly head of this politic body is instituted and furnished with plenary and entire power prerogative and jurisdiction to render justice and right to every part and member of this body, of what estate, degree or calling soever, in all causes ecclesiastical or temporal; otherwise he should not be a head of the whole body. And as in temporal causes, the king by the mouth of his judges in his courts of justice, doth judge and determine the same by the temporal laws of England, so in its causes ecclesiastical and spiritual...the same are to be determined and decided by judges, according to the King's ecclesiastical laws of this realm." 338

According to which ancient laws of the realm England had always been an empire and a monarchy, with the King as its absolute head, was not made clear. Also, how and on what basis, the king possessed the full and entire judicial and legislative power to rule and to govern the clergy and the laity. Coke’s vision has no doubt been affected by the earlier legislation of Henry VIII and the Act of Supremacy of Elizabeth I. For this reason, he had concluded that within the realm, the old canon law of the English Church was tolerated as being custom "...proved, approved, and allowed here, by and with a general consent..." 339

Adopted to political expediency, this came to be the accepted view of ecclesiastical law, supported by future legal historians, civil lawyers and judges alike. So, Sir

337 Caudrey’s Case (1591) 5 Co. Rep 1a, p. 9. (E.R.)

338 This passage from Caudrey’s Case can be found in Mortimer’s Western Canon Law, Adam and Charles Black, London 1953. Pages 58-59.

339 The quote is from Lord Chief Justice Coke, in Cadurey’s case.
Matthew Hale in the seventeenth century was to write;

"But all the strength that either the Papal or Imperial Laws have obtained in this kingdom, is only because they have been received and admitted either by the Consent of Parliament, and so are part of the Statute laws of the Kingdom, or else by immemorial Usage and Custom in some particular Cases and Courts, and no otherwise..." 341

So the papal law of the universal Church and its canon law, only derived their legal efficacy by the will of the King and then by the authority of Parliament. This explains how in more modern times, Lord Chief Justice Tindal, was to advise the Judges in the House of Lords, in 1843, 342

"...that the Canon law of Europe does not, and never did, as a body of laws form part of the law of England..."

Nearly forty years later, in 1881, Lord Blackburn concluded that the old canon law of the Mediaeval Church, indeed formed a part of English law under the category of "customary" law 343 but interpreted in a wider sense, to include the pre-reformation canons and constitutions of the English Church allowed to exist as custom, by virtue of the Royal prerogative. Ecclesiastical Common law, in contradistinction to the secular Common law. A distinction which had already been drawn in an earlier court decision, in the judgement of Mr Justice Whitlock who in 1627 had said that

"...There is a common law ecclesiastical, as well as our common law. Ius commune ecclesiasticum, as well as ius commune laicum." 344

340 One of the greatest of English legal historians and an expert on the history of the English Common Law. He was born in 1605 and died in 1679. Orphaned at the age of five, he was the son of a barrister. He retained puritan sympathies throughout his life and was a supporter of the Monarchy. He helped to support King Charles II, after he was restored in 1660, and was a staunch supporter of the royal prerogative.


342 The House of Lords, sitting in its judicial capacity in the case of *R-v-Mills* (1843) 10 Cl.& Fin 534 at p. 680. (E.R.).

343 In the case of *Mackonochie-v-Lord Penzance* (1881) 6 App. Cas 424 at p.446.

344 *Ever-v-Owen* (1627), Godb.432. (E.R.).
The re-evaluation of the canon law of the mediaeval Church, and its reclassification as *Ecclesiastical Common law*, forming part of Ecclesiastical law, was really the logical consequence of the doctrine of royal supremacy over the Church. It greatly facilitated the legislative process and avoided the obvious embarrassment of otherwise having a Church, attempting to explain how it had been able to operate, prior to the Reformation and apparently dependent upon Rome. The immediate problems which civil lawyers as well as canonists faced in 1532 and the following centuries, was the precise determination of this *Ius Commune ecclesiasticum*—the ecclesiastical common law of the Church—and which parts of the old canon law were still in vogue.345

4.2. THE EMERGENCE OF ECCLESIASTICAL LAW WITHIN THE ESTABLISHED CHURCH.

Apart from the reassessment of the canon law of the Mediaeval Church as Ecclesiastical common law, the latter part of the reign of Henry VIII, witnessed the creation of Ecclesiastical law, as a branch of the secular law, statutes enacted by Parliament and the King to exclusively control and regulate the affairs of the Established Church. In 1535, Thomas Cromwell as the King’s vice-regent issued a number of injunctions to the universities of Oxford and Cambridge, prohibiting them directly from teaching the old canon law and substituted for it lectures in civil law. This was a major move to displace canon law and to explain the recent ecclesiastical policy of Henry.

Ecclesiastical law would henceforth rest upon three principles; that the recognised supreme legislative body over the affairs of the Established Church was the Crown, initially as the Supreme Head, but later as the Supreme Governor; that only the Crown and Parliament held the power to legislate on all matters of the Established Church, both spiritual as well as temporal; that the Convocations of the Clergy, of Bishops possessed limited legislative and judicial powers, but only exercisable under the authority of the Crown and subject to a double limitation—that no canons or measures could impugned royal authority and needed to be approved by the Crown before they were legally effective. Without such approval, any canons made by the Convocation of the Clergy, had

345 The relevance of Pre-reformation canon law within the Church was one of the matters upon which the Commission convoked in 1939 was asked to report. See The Report of the Archbishops’ Commission, *The Canon law of the Church of England*.
legal value and where they expressed the pre-reformation canon or ecclesiastical common law of the realm.

Acts of Parliament, which were to embody the Ecclesiastical law, became the principal method of regulating the legal affairs of the Established Church. Ecclesiastical law, as a branch of that part of the secular law administered by the State, came to displace the concept of canon law. In 1591, the Lord Chief Justice, Sir Edward Coke, in the case of Caudrey, was able to refer to the Ecclesiastical laws of the realm instead of canon law. By the nineteenth century, both ecclesiastical and civil lawyers had come to use such terminology. So in 1809, Sir John Nicholl, a judge in the Common law Courts, on giving his judgement on its diverse sources, referred to the law pertaining to the Church of England, and not its canon law.

With the passage of time and the growth of religious toleration in England, the term Ecclesiastical Law underwent a further development and was employed within the whole framework of English law either in a general or more specialised and precise sense. Originally in its general sense, Ecclesiastical law was deemed to refer to any matter concerning the Established Church and which was administered and enforced in any court (whether secular or spiritual): in a narrower sense, it was viewed as being that part of Ecclesiastical law

346 The code of Archbishop Parker of 1571—the Reformatio Legum Ecclesiasticarum—was never approved by Elizabeth I. Neither was the draft code of canons draw up earlier by Archbishop Cranmer.


348 In Caudrey’s Case (1591) “... so albeit the Kings of England derived their ecclesiastical laws from others, yet so many as were proved, approved, and allowed here, by and with a general consent, are aptly and rightly called, the King’s Ecclesiastical laws of England.” 5 Co. Rep 1 a, p. 9. (E.R.).

349 The case was Kemp-v-Wickes (1809), 3. Phillim. at p. 276. (E.R.).

350 In the above case, Sir John Nicholl said “The law of the Church of England and its history are to be deduced from (1) the ancient general canon law, (2) the particular constitutions made in this country to regulate the English Church, (3) our own canons, (4) the rubric, and (5) and other Acts of Parliament that may have been passed upon the subject, and the whole may be illustrated also by the writings of eminent persons.”

administered by the Ecclesiastical Courts and persons. The distinction was preserved, as different sanctions and different remedies were applicable, depending upon whether a case had been determined in the secular or the ecclesiastical forum.352

Nowadays, it should be mentioned, the concept of Ecclesiastical law has been further revised and has a wider legal ambit. It is no longer that part of English law, confined exclusively to the affairs of the Established Church. Ecclesiastical law is the common law, with its principles, the Acts of Parliament and case decisions, applied not only to the Established Church but also to all the other main Christian Churches and indeed non-Christian religions.353

4.3. THE BACKGROUND TO THE CANONS OF 1603.

Under Ecclesiastical law, the limited power to make any canons354 after 1534 in respect of the Established Church was retained by the Convocations of Clergy; the Upper House of Bishops and the Lower House of the Clergy, but with constitutional and legal limitations. These Convocations could only be convoked by royal authority. Furthermore, any draft canons approved by the Clergy in their Convocations could not infringe the royal prerogative and needed the approval of the Crown and Parliament.355

352 In the case of Attorney General-v- Dean and Chapter of Ripon Cathedral [1945] Ch 239, p. 244 Mr Justice Uthwatt surveyed the different objectives of ecclesiastical law from temporal in general. He stated that the aim of the temporal law was to punish the outward man, but on the other hand the purpose of ecclesiastical law (in its technical sense) was to reform the inner man.

353 The legal encyclopaedia, Halsbury’s laws of England, Vol 14 is dedicated to Ecclesiastical laws. The relevant statutes which afford legal protection to all religious bodies are included. Thus the Liberty of Religious Worship of 1855, granting religious freedom of worship to Jews.

354 One needs to distinguish between the canons of the Church and its Ecclesiastical laws. They are not coterminous. The former, the canons of the Church, were (and still are ) measures passed by its Convocation, which did not and do not have universal legal binding force. The Ecclesiastical laws, per se, are those laws which are of universal application to throughout the Established Church. See section 4.4. infra.


The Clergy had promised not to:— ”enact promulgate or execute any such canons constitutions or ordinance provincial, by whatsoever name or names they may be called in their convocations in time coming, which always shall be assembled by authority of the King’s writ...
Mention was made in Chapter 3 how draft new canons had been prepared by Archbishop Cranmer in 1553 and then by Archbishop Parker again in 1571, to underlie the changes in doctrine and the constitutional position of the Established Church, but these were never approved by the Crown. These were attempts to set out new canons to underlie the new juridical framework of the Established Church and were needed to clarify and define the doctrinal and liturgical changes as well as the ceremonies that had been fiercely and hotly debated, under King Edward VI and then Queen Elizabeth I.

New canons or measures had become desperately needed to deal with the conduct of the New Liturgy, the dress of the Clergy, their manner of life, their training and their Ordination—especially the oaths and declarations that they would now be required to make to the Crown on their ordination and admission to any ecclesiastical office: the furnishing of Churches, whether they should contain altars; the priests, which liturgical vestments and other liturgical utensils they were permitted to use; finally, the rules relating to the Ecclesiastical courts, their procedure and the qualifications necessary for all judges.

The new draft canons, prepared in 1571 by Archbishop Parker and agreed by the Upper Houses of the Convocation of Clergy, were initially laid before the Queen for her approval, but instead of sanctioning and promulgating this new code, the Queen indicated that she preferred personally to use her position as Supreme Governor of the Church and Parliament to control these matters. The process of making ecclesiastical law remained confined to the ecclesiastical statutes passed by Parliament, the royal injunctions issued by the Queen and (and) unless the same clergy have the king's most royal assent and licence..." and that they would not put into operation any "...canons constitutions or ordinance...which shall be contrary or repugnant to the king's prerogative royal or the customs laws or statutes of the realm..."

356 The Acts of Uniformity of 1551 of Edward VI and then 1558 of Elizabeth had prescribed the new liturgy. The Book of Common Prayer, contained the rubrics. There were no canons to enforce the rubrics. Enforcement could have been carried out by way of an injunction issued by the bishop.

357 By The Ministers Ordination Act.13 Elizabeth c.12 (1571) the general criteria was set out regarding Ordination, but not the specific detail.
supplemented by episcopal injunctions and orders made by the Archbishops and the Bishops.

In 1585, Archbishop Parker made a further attempt of producing a small collection of draft canons. This time, six canons, or articles, were prepared and were duly sanctioned by both the Houses of the Convocation of Canterbury. But again they failed to receive any approval of the Queen or Parliament and so lacked as a collection any legal validity.

4.3.2. The Canons of 1603.

Against this confusing legal background-of diverse collections of numerous Royal and Episcopal Injunctions as well as Orders and other instructions; confronted by the numerous Acts of Parliament on Ecclesiastical matters and the uncertainty of the applicability of the old canon law and two failed attempts to produce a complete code of canons-in 1603 the Bishop of London, Richard Bancroft decided to produce a definitive set of canons that would resolve the uncertainty. He collected all the Elizabethan draft canons, the various injunctions-both the royal and episcopal-as well as other orders and supervised the compilation of a draft new coherent code between 1603-1604. The codification was the work of a select committee of three ecclesiastical lawyers, members of the Doctors' Commons who were Sir Thomas Ridley, John Cowell

358 For example, Archbishop Parker, attempted to legislate in respect of the clergy by setting out, in a series of advertisements, regulations on clerical dress.

359 In 1597, these six Articles with additional material, were formed into a collection of twelve canons and were approved by both Houses of the Convocations. Later, they were confirmed by the Queen, although they did not receive Parliamentary assent. The absence of approval by Parliament, cast doubt upon their global validity, a problem which the complete set of revised canons in 1603 was not to be able to surmount.

360 A few months later to be elevated to the Archbishopric of Canterbury.

361 In 1511, a college was set up to train all those advocates practising in the ecclesiastical courts of the Church. Described as "an association of the doctors of the law and advocates of the Church of Christ at Canterbury" it was originally confined to clerics, who were conversant with canon law. When Henry VIII prohibited the teaching of canon law at the universities, substituting for it lectures in civil law and then allowing judicial positions within the Ecclesiastical Courts to be held by laymen (37 Henry VIII c.17), these lawyers began to study the discipline as Ecclesiastical law, at the same time retaining a working knowledge of the old medieval canon law and its
and Sir Edward Stanhope. It was then presented to the Convocation of the Clergy in Canterbury, for their approval.

The draft code was approved by the Convocation of Canterbury on 25 June 1604 and then confirmed on 6 September by the King, James I who ordered it to be promulgated with his Royal Seal. Afterwards, the King decreed the code to be observed within the Province of York, to which the separate Convocation of the Clergy at York protested as they had never had the opportunity to debate the code and to given them their approval. James I actually relented and gave them the opportunity to discuss and approve the canons, which the Convocation of York did between 1605-1606.

This code is generally called the Code of the Canons of 1603 and exercised considerable impact and influence over the Established Church until they were replaced by new canons in 1964 and 1969.362 The Code of canons of 1603, consisted of a collection of one hundred and forty-one canons in total, of which ninety-seven were adaptations of previous canons, orders and injunctions. Most of the new canons, regulated and reformed the procedure in the ecclesiastical courts. Of the old canons, twelve had been lifted from the Injunctions of Edward VI, twenty five from the Injunctions of 1559, twenty five from the canons of 1571 and twelve had been taken form the orders of Archbishop Parker. It also incorporated the collection of canons that had been approved by the Crown, Elizabeth I in 1597.

The Code additionally used other materials and sources from pre-reformation provincial councils of England and General Councils of the Universal Church, particularly the Third and the Fourth Lateran Councils. It did not attempt to cover every aspect of Church life, but only a few areas, in respect of which supplementary ecclesiastical legislation was badly needed.

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362 The Canons of 1603 were replaced by the New Canons of the Anglican Church of 1969, approved by the Convocations of Canterbury and York respectively. The new canons, were the fruit of various commissions, the first collection of revised canons arising from the working Committee constituted by the Archbishop of Canterbury in 1939. Cf. The Report of the Archbishop’s Commission. Op. cit.
The canons within the Code of 1603 were divided into fifteen titles or heads. The first three related to the constitution of the Church and its liturgy. The next five titles covered the ministers of the Church, schoolmasters, Church ornaments and lay officers of the Church. The following five dealt with the Ecclesiastical courts of the Church, their jurisdiction and their officers. The final title set out the nature and the role of Synods within the Church.

The Code of 1603 gave formal expression to legal concepts within the numerous Acts of Parliament and the collection of various royal and episcopal injunctions. The advantage was that all relevant material was now gathered within one code and easily accessible. The Archbishops' Commission of 1939, in


- **Canons 1-12**: Of the Church of England (it being part of the Universal Church with the Crown as its supreme Head).
- **Canons 13-29**: Of the Divine Service and the Administration of the Sacraments (Baptism and the Holy Eucharist).
- **Canon 30**: The lawful use of the Cross in Baptism explained. (This is a treatise on the sign of the cross).
- **Canons 31-76**: The three grades, their ordination, their functions and their charge.
- **Canons 77-79**: Schoolmasters
- **Canons 80-88**: Things appertaining to Churches.
- **Canons 89-90**: Churchwardens and sidesmen.
- **Canon 91**: Parish clerks.
- **Canons 92-108**: The Ecclesiastical Courts belonging to the Archbishop's jurisdiction.
- **Canons 109-126**: The Ecclesiastical Courts belonging to the jurisdiction of the Bishops and Archdeacons and the proceedings in them.
- **Canons 127-128**: On the Ecclesiastical judges and their surrogates.
- **Canons 129-133**: On proctors.
- **Canons 134-137**: On registrars.
- **Canon 138**: On apparitors.
- **367 Canons 139-141**: The authority of Synods.
their report 368 concluded that the new code of canons of 1603 gave that required definitiveness and cohesion to the Established Church in its reformed state, after the tremendous upheavals in the reigns of Edward VI and Elizabeth. It became much easier to define who were and who were not members of the Church of England, by excommunicating ipso facto all those who challenged or denied the King's supremacy, the Public Worship of God established in the Established Church, the Thirty-nine Articles, Episcopal government and the Ordinal. The objective of the Code was to ensure the loyalty of the clergy to the formularies, the liturgy and the discipline of the Established Church.

The new canons also incorporated several dogmatic definitions prepared by Archbishop Cranmer and then by Archbishop Parker. Canon 3 defined the Established Church as being established by the laws of the Realm and belonging to that founded by Christ. 369 Her creed, to which all ministers were to subscribe, could be founded in the Thirty-nine articles of Religion, 370 which were agreeable to the Word of God. The Church was anchored in the doctrine of the Supreme authority of the Crown, the highest power under God in the Realm and the government of the Church on that basis was agreeable to the Word of God. 371

For the first time since Henry VIII, the Established Church would possess a new code, specially adapted for its legal requirements. A code which had above all received the royal approval of the King, as the supreme governor of the Church, although never approved by Act of Parliament. Indeed, its failure to

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368 Cf. The Report of the Archbishops' Commission. Op.cit. page 74. The canons referred, have been extracted from their report,

369 The canon reads;—"The Church of England, established according to the laws of this realm under the King's majesty, belongs to the true and apostolical Church of Christ; and as our duty to the said Church of England requires, we do constitute and ordain that no member thereof shall be at liberty to maintain or hold the contrary."

370 Canon 5: "the Thirty Nine Articles of Religion are agreeable to the Word of God and may be subscribed unto with a good conscience by all members of the Church of England."

371 Canons 1 and 2: "We Acknowledge that the King's most Excellent Majesty, acting according to the laws of the realm, is the highest power under God in this kingdom, and has supreme authority over all persons in all causes, as well ecclesiastical as civil."

Canon 7: "The Government of the Church of England under the King's Majesty by Archbishop's, Bishops, Deans, Archdeacons, and the rest that bear office in the same, is agreeable to the Word of God."
receive Parliamentary approval, its legal force was to limit its legal application. Nevertheless, the Code overall was a considerable achievement.

Between 1603 and 1936, the code suffered a number of amendments. In 1865, changes were made to canons 36 to 38 and canon 40 373 and in 1887 and 1921 to canons 62 and 102. In 1892, following the Clergy Discipline Act, a new canon was inserted and in 1921, canon 143 was added, formally amending the constitution of the Lower Houses of the two Convocations.

4.3.3. Subsequent Canons added: the Canons of 1640.

In 1640, a total of seventeen new canons were to be added, having been approved by the two Convocations and confirmed by the royal licence of King, Charles I. However, as the Convocations had assembled after the short Parliament of Charles I had been dissolved in 1640, their legal value was doubted on the basis that the Convocations could not legally sit in the absence of Parliament being in session. They were later condemned by the Long Parliament of Charles I (1642) on the grounds that they included many matters of a High Church nature and were attempts by the High Church party to impose their views on the rest of the Church.377 After the Restoration, King Charles II and his Parliament, although restoring the Ecclesiastical law of the Church,378

372 See section 4.4. infra.

373 This concerned the declarations and subscriptions to be made by the clergy and those about to be ordained.

374 This related to the time of day at which marriages could be solemnised.

375 Canon 142.

376 This last canon was approved by the two Convocations of Canterbury and York in different versions, the circumstances in the two Convocations not being identical.

377 The canons, were extremely lengthy and dealt with the political and ecclesiastical situation of the Church before the English civil war. At this time, the Archbishop of Canterbury, Archbishop Laud was of very High Church sympathies. His aim was to restore much ceremonial and ritual within the Church, much to the horror of the Puritans. Canon 7 encouraged the laity to show reverence to the "Communion Table" by bowing their heads before it. They were also advised to call it an Altar.

formally abolished by Cromwell when he was the Lord Protector (1647-1658) when England had become a republic, specifically refused to confirm and treat these 1640 canons as having any binding legal force. The ecclesiastical courts never treated these seventeen canons as having any legal value, either on the hierarchy of the Established Church or its lay members. In a case decided in the Court of Arches in 1858, Sir H. Jenner Fust, said

"...these canons have never had any binding authority in these courts.”379

If the canons of 1640 have been considered by the courts not to be legally binding, the canons of 1603 by way of contrast, have always been treated by them with great respect. Their precise legal effect, has been the subject of considerable judicial discussion. How and on what basis, will now be examined.

4.4. THE BINDING NATURE OF THE 1603 CANONS.

Modern English Constitutional law, acknowledges that only Parliament has the authority to legislate and to bind all the subjects of the realm. All Acts of Parliament, must follow the process and procedure laid down by Parliament. First, a draft Bill must be introduced within the House of Commons and then be debated by both Houses. Once approved, it will then receive royal assent and become legally effective. Acts of Parliament can either be Private or Public, depending upon whether they bind a select group of people or are intended to bind the public at large. The same legal process has been deemed to apply to the law of the Established Church. For an ecclesiastical law to bind all her members, the hierarchy and the laity, it must be authorised by authority of Parliament.

After the end of the Tudor dynasty in England, following the death of Queen Elizabeth I in 1603, relations between the King and Parliament were frequently confrontational, especially as the Stuart kings tried to dispense with the authority of Parliament and to govern by royal decree. When Parliament assumed in 1689 its constitutionally ascendancy and supremacy380 over the

379 Cooper-v-Dodd (1850) 7 Notes of Cases 514. (E.R.).

380 There were bitter and acrid confrontations between the Crown and Parliament, first during the reigns of James I (1601-1625) and then during the reign of Charles I (1625-1649). Cromwell and his generals had set up a constitutional republic with himself as the Lord Protector.
Crown, ecclesiastical lawyers felt able to question the legal value of the 1603 canons. They had been made by Royal licence, they had been passed by the two Convocations of Canterbury and York and their contents did not offend the Royal prerogative. But they had never been debated and authorised by the two Chambers of Parliament, the House of Lords and the House of Commons. On that basis, were they on the same footing and did they have the same validity as an Act of Parliament? Were they binding on the Established Church, per se?

Traditionally, the legally binding effect of these canons was viewed from two different angles. Their authority over the clergy of the Established Church and then over its lay members Furthermore, within the class of laity, the courts drew a distinction between the general laity, her practising members, and those who had a special relationship with the Church structure. Within the latter, would be her lay officers, personnel acting within her ecclesiastical courts, such as lay officers-Registrars, Proctors etc.

With regard to the clergy, the ecclesiastical judges made two careful distinctions. They singled out for special treatment those canons which related exclusively to the spiritual office and role of the clergy and contrasted these with the canons which only concerned the temporal possessions of the clergy.

4.4.1. The Authority of the 1603 Code over the Laity.

The leading decision which examined the juridical status and authority of the 1603 Code of canons over the laity is the case of Middleton-v-Crofts determined in 1736. The Lord Chief Justice of the King's Bench, Lord Hardwicke delivered an authoritative interpretation of the 1603 canons which represented the opinion of the whole court. He concluded that to the extent that the Code of 1603 canons contained provisions or matters which declared the ancient law and usage382 of the Established Church, then they bound the laity. Where they departed from expressing the old custom of the Church, then they were not

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between Parliament and the Crown reached a critical phase during the period when James II (1685-1688) who was King, tried to dispense with the authority of Parliament. The Bill of Rights of 1688 (see later) settled once and for all that Parliament was supreme.

381 (1736) 2 Atk.650 (E.R.).
382 i.e. The ecclesiastical common law or the custom of the Church.
legally enforceable. The legal process started in an ecclesiastical court and went on appeal to a Common law court.

The facts were that a certain John Middleton had been summoned to appear before the Hertford Consistory Court, being charged with not only marrying in a private house without having obtained the necessary banns or licence from his relevant parish church but also for having contracted a marriage outside the canonical hours, between 8.am and 12 noon. A statute of William III, had imposed penalties which were recoverable within the temporal court from a cleric who solemnised a marriage without banns or a licence. The Code of 1603 canons, had added the rule of it being illegal to marry between 8.am and 12 noon. John Middleton had applied to the King's Bench Court for (a) a declaration that the Ecclesiastical Court had acted illegally and (b) an order to restrain the court from further acting. He argued that it was only the 1603 Code of canons which had imposed the obligation to issue marriage banns or a licence as well as defining the precise hours within which a marriage could be solemnised. As these requirements were legislated within the 1603 Code and this Code had never been ratified by Parliament, then they must be void.

Lord Hardwicke agreed that the marriage hours' rule did not bind the laity, as this had been specifically added by the 1603 Canons and did not have the authority of Parliament. However, the 1603 canons which specified the need to obtain marriage banns or a licence, were valid because they only contained matters or declarations of the ancient law of the Church. The Consistory Court had been entitled to punish the applicant for being in breach of Ecclesiastical law. On the general principle in issue, on the binding effect generally of the 1603 canons on the laity, Lord Hardwicke said:

"We are of the opinion that the Canons of 1603,not having been confirmed by Parliament, do not proprio vigore bind the laity; I say, proprio vigore, by their own force and authority: for there are many provisions contained in these canons, which are declaratory of ancient usage and law of the Church of England, received and allowed here which in that respect, and by virtue of such ancient allowance, will bind the laity; but that is an obligation antecedent to, and not arising form this body of canons.”383

Seventeen years after this decision, this case was considered in an ecclesiastical court, by a different Judge, Sir George Lee, in the Court of Arches. He confirmed that Lord Hardwicke’s decision was correct and accurately represented the law. In 1868 this view was definitively approved in the House of Lords.

4.4.2. The authority of the 1603 canons in respect of the lay officers of the ecclesiastical Courts.

The Code of 1603 canons, included a number which contained the rules to control the Ecclesiastical courts. As laymen could now assume judicial appointments within these courts as well as other legal positions, the new rules were necessary to meet the changed circumstances. There were no legal precedents to be found within the old canon law and these 1603 canons were clearly novel. As they lacked Parliamentary sanction, were they valid?

In the absence of any case decision, a leading authority on the Ecclesiastical law of the Established Church, Richard Burn concluded in 1767, in his preface to his manual on Church law that the Ecclesiastical Church had the power to apply the rules abstracted from the 1603 canons to her courts and to exercise her authority over its lay officers. This legal reasoning has been considered to be correct, on the basis that every court has the inherent right to control its own officers, a right derived from and recognised by the Common law. As the Ecclesiastical Courts were on the same level as the civil courts, then they had the power to apply their rules, derived from the 1603 canons.

4.4.3. The Authority of the 1603 canons over the Clergy.

When considering the legal authority of the 1603 canons over the clergy, the secular courts approached the problem from a different legal perspective and on the basis that the clergy had entered into a special type of relationship with the

384 Lloyd-v-Owen (1753) 1 Lee 434. (E.R.).
Established Church by receiving Orders. Their status was different to that of the laity as they had voluntarily bound themselves by a special agreement, to preach the Word of God and administer the Sacraments, according to the Thirty-nine Articles and the Book of Common Prayer.

Those 1603 canons which covered the temporal possessions of the clergy, in so far as they confirmed the ancient usage and custom of the law of the Established Church, whether they concerned spiritual or temporal matters, were considered to bind the clergy like the laity. The 1603 canons, which were new but which covered *spiritual matters*, the secular courts also recognised as being legally binding on the Clergy. They reasoned that the Convocations held the legislative power to exercise authority over the internal administration of the Church and to make rules in respect of those persons who held and exercised spiritual offices. The only restriction was that such canons (a) needed to receive royal approval and (b) once approved, remained in force until subsequently abrogated by Parliament.

This limited legal power of the Convocations to make new canons on matters "spiritual" was examined in 1703 in the case of *Matthew-v-Burdett*. The judge affirmed that;

"If the King and Clergy make a canon it binds the clergy in re Ecclesiastica."

Canon 68 of the 1603 Code, for example, had ordered all curates not to refuse the burial of any member of the Established Church, unless that person died unbaptised or, being baptised, had taken his or her own life without showing any repentance. A fine and a punishment could be imposed upon the clergyman who refused to comply. Although a new canon, and not being declaratory of the old ecclesiastical law, it was ruled to be legally binding on the clergy, as it concerned a spiritual matter. This was later reaffirmed by Lord Chelmsford and Lord Westbury in 1868. They agreed that this represented the law and that on matters temporal of the clergy, i.e. their temporal possessions, those 1603 canons also bound the clergy.

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387 Cf. According to the dictum in the case of *Middleton-v-Crofts*, as above.

388 (1703) 2 Selkent 412. (E.R.).

389 This canon was examined in *Cooper-v-Dodd* (1850) 7 Notes of Cases 514. (E.R.)

canons were only binding to the extent that they contained the earlier customary law of the Church and not otherwise.391


Charles I had been beheaded in 1649 and between this time and 1660, England was a republic under the protectorate of Oliver Cromwell. Cromwell and his generals greatly resented the attempts made by the Established Church, to use Parliament to enforce unity on liturgy and doctrine. Under the Republic, with the proliferation of religious opinions, the Established Church briefly lost its privileged legal status as the Ecclesiastical laws enforcing religious uniformity were relaxed.392 On Cromwell’s death, his son Richard was unable to govern, and the son of Charles I returned to England as king-Charles II who was to reign from 1660 until his death in 1685.

Charles II faced a confusing ecclesiastical situation in England, following the rapid growth of Puritanism and non conformity within the country. Many individuals no longer neither belonged to the Established Church nor were prepared to assist at its liturgy, prescribed by the Book of Common Prayer. Many liturgical services were conducted, not in conformity with the prescribed rubrics. On the advice of his ecclesiastical advisors, Charles took legal steps to end this chaos and to impose uniformity.


Politically astute, Charles had learnt from the mistakes of his father, and neither tried to antagonise Parliament nor disturb the equilibrium of the Established Church. As Supreme Governor of the Established Church, he was disposed to act with great moderation and to use whatever means to consolidate

391 The same observations that have been made on the binding nature of the 1603 Canons, on the Laity and the Clergy, apply to the current Canons of the Church of England; those of 1964 and 1969. See the comments of Peter Smith in "The Authority of Canon Law within the Church of England" in Ius Ecclesiae Vol VII Number 2. 1995 page 533. Op.cit.

392 It would be under Cromwell that the Jews would be permitted to return for the first time since their expulsion in the reign of Edward I.
his position as king. The Puritan revolution within England between 1643 to 1660 had seriously weakened the Established Church, both doctrinally and from the point of view of its liturgy and ceremony. The Act of Uniformity of 1662 was another attempt to re-establish throughout the Established Church and England, uniformity of liturgy by the compulsory use of the Book of Common Prayer and the Ordinal. Also, to try and restore doctrinal uniformity by requiring all clerics to make a confession in the doctrine of the Established Church as expressed within the Thirty Nine Articles of Religion.

The Act of Uniformity393 in the preamble, referred to the existing situation and state of the Established Church especially the lack of order and discipline therein; the widespread neglect of use of the authorised Book of Common Prayer;394 the de facto schism within the Established Church, with many ministers neglecting to use the officially authorised liturgy contained within the Book of Common Prayer; finally the necessity for the compilation and then use of a new version, such revision being produced by a royal commission395 to review the 1558 Book of Common Prayer. This royal commission had been established by Charles II on 25 October 1660.

The Act of Uniformity of 1662, had twenty six sections, containing detailed provisions relating to the frequency and the use to be made of the new Prayer Book, the form of the oath and the assent to be made by all ministers using the same and prescribed heavy penalties for those who refused to use the Prayer Book. In some cases, this could include a sentence of suspension and imprisonment. Section 1, arguably the most important, made it obligatory that:

"...all and singular ministers in any cathedral collegiate or parish church or chappell or other place of publique worship within this realm of England dominion of Wales and town of Berwick-upon-Tweed shall be bound to say and use the morning prayer evening prayer celebration and administration of both the sacraments and all other the public and common prayer in such order and

393 Known as An Act for the Uniformity of Public Prayers and Administration of Sacraments and other Rites and Ceremonies and for establishing the Form of making ordaining and consecrating Bishops priests and Deacons in the Church of England 14 Chas.2. c.4 (1662). See Statutes at large (Vol 3).

394 Under the Act of Uniformity of 1558 of Elizabeth 1.

395 Such commission being composed of members of the two Convocations of Canterbury and York.
form as is mentioned in the said book annexed and joined to this present Act and entitled the Booke of Common Prayer and Administration of the Sacraments and other rites and ceremonies of the Church according to the use of the Church of England together with the Psalter or Psalms of David pointed as they are to be sung or said in churches and the form or manner of making ordaining and consecrating of bishops priests anddeacons..."

All ministers were ordered to read the morning and evening prayers from the Book of Common Prayer, as prescribed on Sundays and other prescribed days396 in all public churches and chapels.397 On at least one public occasion, they were also required to make before their congregation a solemn act of faith,398 giving their assent to the Book of Common Prayer and the Thirty-nine Articles of religion.399 Clerics who refused to read the morning or evening prayers, or who neglected to do so, within their parishes were liable to be deprived of their spiritual benefices400 and on conviction before lay magistrates could either be imprisoned or fined five pounds.401

396 "...on every Lord's day and upon all other days and occasions and at the times therein appointed..." Section I.

397 Section 2: "...every parson, vicar or other minister whatsoever who now hath and enjoyeth any ecclesiastical benefice or promotion within this realm of England or places aforesaid shall in the church chappell or place of publique worship belonging to his said benefice or promotion upon some Lord's day before the feast of St Bartholemew...openly and publiquely and solemnly read the morning and evening prayer appointed to be read and according to the said book of Common Prayer at the times thereby appointed..."

398 "... and after such reading thereof shall openly and publiquely before the congregation there assembled declare his unfeigned assent to the Book of Prayer and the Thirty Nine Articles of religion." Section 2. The Act of Uniformity, supra.

399 The form of the oath was as follows;— I A.B., do declare my unfeigned assent and consent to all and every thing contained and prescribed in and by the booke intituled The Booke of Common Prayer and administration of the Sacraments and other rites and ceremonies of the Church according to the use of the Church of England together with the Psalter or Psalms of David pointed as they are to be sung or said in churches and the form of manner of making ordaining and consecrating of bishops priests anddeacons. Contained within section 2.

400 Cf. Section 3. In fact over 2,000 ministers refused to comply.

401 Section 5.
The detailed provisions of the Act of Uniformity of 1662, like those statutes passed during the reign of Queen Elizabeth, applied as well to teaching and academic posts at the Universities of Oxford and Cambridge as well as the colleges of Eton, Winchester and Westminster. All teachers were obliged to subscribe to (a) the Thirty-nine Articles of Religion and (b) the Book of Common Prayer. Formal adherence to the Thirty-nine Articles of Religion as well as the Book of Common Prayer, was also made mandatory for all ministers, before receiving ordination and before being able to preach as a lecturer.

The detailed provisions of the Act represented a triumph for those who wanted to steer the Established Church back to a middle position and away from the direction of Puritanism. Its hierarchy, aimed to consolidate its doctrine and worship, built upon the ecclesiastical settlement achieved by Elizabeth I, with the position of the Crown once again restored as the Supreme Governor.

To what extent Charles II, as Supreme Governor of the Established Church, genuinely believed in the efficacy of this Act is difficult to know. Its general tone was certainly consistent with the policy of the Corporation Act of 1661, which had confined all public offices of any Corporation, City or Town only to the practising communicants of the Established Church. They were likewise obliged to take an oath of allegiance and supremacy to the Crown. Twelve years later, the Test Act of 1673, passed in the wake of anti-Catholic hysteria, restricted all important civil and military positions of the realm to the members of the Established Church, by making it compulsory for them to take an oath denying the dogma of Transubstantiation.

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402 Section 13, thereof.

403 Section 15. This was a repetition of the Elizabethan legislation.

404 The Act for well governing and regulation of Corporations 13 Charles II c.1 (1661) See Statutes at large. (Vol 3)

405 The Test Act 25 Charles II c.2. (1672). See Statutes at large (Vol 3). This referred to; "...preventing dangers which may happen from popish recusants, and quieting the minds of his majesty's good subjects..."

406 Section I of the Test Act. "....All and every person or persons, peers as well as commoners, that shall bear any office or offices, civil or military, or shall receive any pay, salary, fee, or wages by reason of any patent or grant from his majesty...or shall be in the household or in the service or employment of his majesty...all and every of the said person and persons shall personally appear before the end of the said term, or of Trinity term next following, in his majesty's high Court of Chancery, or in his majesty's Court of King's Bench, and there in public..."
4.5.2. The Bill of Rights of 1689.

On 6 February 1685, Charles II died and there succeeded to the throne his Catholic brother, James. With the accession of a Catholic Monarch, many Protestants and bishops of the Established Church feared that the whole structure of the Established Church would be weakened. Nevertheless, for the time being, they had no alternative but to accept the new King as their monarch as the Supreme-Governor of the Established Church. On 19 May 1685, King James II summoned for the first time his new Parliament, which by legislation gave him the same revenues as his brother, Charles II, declaring its loyalty to James. After the summer months, James II recalled Parliament endeavouring to obtain more finance, to maintain his army and also to secure the repeal of the Corporation Act of 1661 and the Test Act of 1672. Parliament refused.

Determined to abrogate the penal laws, and with little sympathy for the position of the Established Church, James did hope to gain greater religious toleration for the nation. With Parliament showing itself not prepared to repeal the penal legislation, James took the matters into his own hands and exercised his Royal Prerogative. He would disapply the application of the Corporation and the Test Acts in individual cases. The legality of this action was to be tested in April 1686 in the famous case of Godden-v-Hales, where the King’s judges ruled that the Crown had the power, by virtue of the royal prerogative, to dispense with the provisions of the Corporation and the Test Acts, without the

and open court, between the hours of nine of the clock and twelve in the forenoon, take the several oaths of supremacy and allegiance—which oath of allegiance is contained in a statute made in the third year of King James by law established...

407 The Test Act made it mandatory for all such office holders to make a declaration against this dogma, in section IX.;—"...I, A.B., do declare that I do believe that there is not any transubstantiation in the Sacrament of the Lord's Supper, or in the elements of bread and wine, at or after the consecration thereof by any person whatsoever."

408 Parliament was prorogued by James II on 20 November, for refusing to repeal the penal laws against Catholics.

409 The laws enacted by Edward VI and then Elizabeth against Catholics.

410 This laid him open to the charge that he was making himself above the law,

411 2 Show K.B 475. (E.R.) The majority of the judges, including the Lord Chief Justice, sided with the King.
consent of Parliament. No Act of Parliament could take this power away. Relying upon this court judgement, James II proceeded to introduce Catholics into the Army, the Universities and even positions within the Anglican Church. On 15 July of the same year, an ecclesiastical Commission was established with power to deprive clergy of their functions. One of its first acts, was to suspend the Bishop of London, who had refused to suspend a clergyman who had delivered a sermon attacking Catholicism.

On 5 April 1687, King James II published a Declaration of Indulgence, which suspended the operation of all the religious penal laws. In it, King James II proclaimed that

"We cannot but heartily wish, as it will easily be believed, that all the people of our dominions were members of the Catholic Church, yet we humbly thank Almighty God that it is...our opinion that conscience ought not to be constrained nor people forced in matters of mere religion."

The Declaration of Indulgence was re-issued by James II on 27 April 1688 and ordered to be read by all Clergy from their pulpits to their congregations on two consecutive Sundays. On 18 May, the Archbishop of Canterbury and six other bishops, refused to read it and were subsequently arrested and then sent to the Tower of London to face trial. Two days afterwards, James' wife gave birth to a son, Francis Edward, Prince of Wales, who was baptised as a Roman Catholic. The prospect of another Catholic on the throne, led many to fear that the position-of the Established Church was greatly threatened. Following the acquittal by a jury of the seven bishops on 30 June 1688, several prominent politicians acted quickly and sent a letter of invitation to William of Orange, the Protestant son in law of James II, to intervene and to save both the Established Church and the nation.

William of Orange, landed with a small army at Torbay, in Devon on 5 November and entered London on 19 December. Within a few days, James II

412 To this commission was delegated the King's powers as Supreme Governor of the Church of England.

413 Known as the Old Pretender, James III and to be distinguished from his son, James IV, the Young Pretender.

414 Including the Bishop of London, and Lords Shrewsbury, Devonshire, Danby and Lumley.
had fled the country for France. In January 1689, a new Parliament was summoned, the Convention Parliament which issued the Declaration of Rights of 1689. When William’s wife, Mary, arrived in London on 12 February, the Leader of the House of Lords, Lord Halifax read to William and Mary, this Declaration of Rights as a condition sine qua non, for their acceptance of the throne. The Declaration of Rights of 13 February 1689, was more of a protest by Parliament and the ruling families against the attempts by James II to govern without their help and authority than a co-ordinated and systematic attempt to preserve at whatever cost the legal position of the Established Church. Parliament had resented the ability of James II to dispense with the laws, by the use of his royal prerogative, and the declaration set out a total of twelve grounds of complaint, by which James had tried to "...subvert and extirpate the Protestant religion and the laws and liberties of the kingdom." The first three, openly challenged the right and ability of any Monarch to upset and destroy the legal position of the Established Church, by removing the effects of the anti-Catholic laws. By his behaviour, Parliament proclaimed, James had indicated he was unfit to govern and that the throne was vacant. Parliament thereby offered the crown to William, the Prince of Orange, on condition that the ancient rights and liberties of the Lords spiritual and temporal and Commons were safeguarded.

William and Mary accepted the Declaration of Rights, which was later to be embodied in the Bill of Rights made by Parliament in December 1689. The two most important clauses of the Bill of Rights made it clear that (a) the Crown

415 This was not a Parliament, constitutionally speaking, as it had not been convoked by the King, but by William of Orange.

416 The Clauses of complaint were as follows, that James had been guilty of:—

(1) assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without the consent of Parliament.

(2) committing and prosecuting divers worthy prelates for humbly petitioning to be excursion to the said assumed power.

(3) issuing and causing to be executed a commission under the Great Seal for erecting a court called the Court of Commissioners for Ecclesiastical Causes."

417 A total of thirteen declarations were set out. The document referred to the ancient rights and liberties of the people which had been damaged by the conduct of the King.

418 Although it was described as a "Bill" it was an Act of Parliament.
was to be vested jointly in William and Mary, and the succession, upon their children; in the event of there being no children, then upon Mary's sister, Anne and her children and (b) no Catholic nor any person married to a Catholic could ever succeed to the throne. The Bill of Rights, represented the triumph of Parliamentary power over the King and safeguarded the position and the supremacy of the Established Church. Henceforth, Parliament would assume the legal responsibility for safeguarding the constitutional position of the Established Church, despite the fact that the Crown would still be its Supreme Governor. The Act of Settlement of 1700 was to contain further constitutional safeguards in favour of the Established Church.

4.5.3. The Act of Settlement of 1700.

The subsequent Act of Settlement 419 which was approved by Parliament and given the royal assent in 1700, 420 was designed to ensure that the succession to the Crown would never again be exposed to any danger and that it would only devolve along the "Protestant line" of William III, that is to say, only to his Protestant heirs. 421 The Act provided for the Crown of England, upon the death of William and Princess Ann of Denmark, without issue, to pass to the Protestant heirs of the Duchess of Hanover and her Protestant issue. 422 It made it illegal for any person inheriting the Crown to convert to Roman Catholicism or to marry a Roman Catholic. 423 Every new monarch was obliged to publicly take an oath

419 12 & 13 William III c.2 See *Statutes at large (Vol 3)*

420 Its full title was "An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subjects."

421 Cf. The Preamble to the above Act.

422 The Act of Settlement, textually stipulated that the throne should pass to:— "The most Excellent Princess Sophia Electress and Duchess Dowager of Hannover Daughter of the most Excellent Princess Elizabeth late Queen of Bohemia...is hereby declared to be the next in Succession in the Protestant Line to the Imperial Crown and Dignity of the said Realms of England France and Ireland...and the heirs of Her Body being Protestants..."

Cf. Section I of the above Act.

423 "...every Person and Persons who shall or may take or inherit the said Crown by virtue of the limitation of this present Act and is or shall be reconciled to or shall hold Communion with the See or Church of Rome or shall profess the Popish Religion or shall marry a Papist shall be subject to such Incapacities as in such Case or Cases are by the said recited Act {*}provided
swearing to uphold the Act of Settlement424 and by virtue of section III, to join in Communion with the Church of England as by law Established, so as to secure the “Religion, laws and liberties of the realm.”


Throughout the seventeenth and eighteenth centuries, the Ecclesiastical courts of the Established Church, retained their importance, administering its ecclesiastical law, without any major changes being made to their structure. Their wide jurisdiction was extensive, exercised not only over the Clergy but also the laity, and this included all Protestant dissenters, Catholics and Jews. All cases of matrimony425 and nullity, testamentary issues and the payment of tithes as well as offences of blasphemy, defamation and public conduct, remained within their competence.426 All appeals from these Ecclesiastical courts were processed direct to the King in Chancery, the jurisdiction of the Roman rota having of course been abolished by Henry VIII in 1532.427 To facilitate this appeal process, a High Court of Delegates had been created, so called, because the judges sat there by virtue of the King's commission under the Great Seal.

The High Court of Delegates remained the Supreme court in all ecclesiastical matters until it was superseded on 1 February 1833 by the creation of a new

enacted and established.” {*})The recited Act is "An Act for declaring the Rights and Liberties of the Subject and for settling the Succession of the Crown". 1 William & Mary 2.c.2. Statutes at large (Vol 3).

424 "...according to the Act of Parliament made in the first Year of the Reign of His Majesty and the said late Queen Mary...and shall make subscribe and repeat the Declaration in the Act...in the Manner and Form thereby prescribed." Cf. Op.cit.

425 Under the Marriages Act of 1753 (known as Lord Hardwicke's Act), all marriages contracted otherwise than with the ritual solemnities of the Established Church, were deemed to be null and void. See T.A. Lacey, Marriage in Church and State, London. S.P.C.K 1947 (Revised by R.C. Mortimer) p.72. This meant that for a valid marriage to be contracted, the parties had to marry according to the rites of the Established Church.


427 By the Submission of the clergy Act 1532 and the Restraint of Appeals to Rome Act 24 Henry c.12.

After the creation of a new court of final appeal for the Ecclesiastical courts, they were to suffer further changes with their competence over several areas of ecclesiastical law being transferred to the courts of Common law. In 1855 all cases concerning defamation were transferred to the Common law courts and two years later, in 1857, all testamentary issues and cases of intestacy passed to the newly created Court of Probate. In the same year, a newly constituted Divorce court, took over the jurisdiction that the Ecclesiastical courts had previously exercised over marriage, the legitimacy of issue, divorce and nullity. Finally, in 1936, the Ecclesiastical Courts were deprived of their jurisdiction over disputes concerning the payment of tithes, tithes being abolished by Act of Parliament.

4.6.2. The doctrine of Parliamentary sovereignty and judicial precedent to Ecclesiastical law.

The general reforms carried out to the Ecclesiastical Courts by Parliament in the nineteenth century, demonstrate clearly Parliamentary sovereignty over the Established Church and its law. Neither a secular court nor any ecclesiastical court has the power to disregard or ignore any ecclesiastical statute. Just as Parliament is supreme in the secular legislative process, so Parliament possesses the same powers over the law of the Established Church.

428 By the Privy Council Appeals Act 1832.
429 By The Ecclesiastical Courts Act 1855, Section 1.
430 By The Court of Probate Act 1857 20 & 21 Vict.c.77
431 By The Matrimonial Causes Act 1857 20 & 21 Vict. c.85
432 By The Tithe Act 1936, 26 Geo. V & Edw. VIII, c.43
Apart from being subject to much greater Parliamentary influence, the nineteenth century saw Ecclesiastical law develop in two areas. On the one hand, with the great quantity of ecclesiastical statutes emanating from Parliament, ecclesiastical law itself became to be considered that branch of law applicable to all religious opinions and groups, permitted by the State. On the other hand, and being influenced by the development of English common law; it began to incorporate as a characteristic the doctrine of the binding force of judicial precedent.

In the eighteenth century, a judge by the name of Sir William Scott, had initially arranged for the systematic reporting of cases on ecclesiastical matters to be done on an ordered basis and with this, it soon became much easier for the most important precedents to be followed by the Ecclesiastical courts. When the old High Court of Delegates was replaced by the Judicial Committee of the Privy Council, its judges well versed in the common law, would be more exposed to this doctrine which was to crystallise in the latter part of the nineteenth century. The principle and the extent of the binding nature and force of precedent, is today recognised Parliament over those parts of the Ecclesiastical law which remain exclusive to the Established Church.433


The general re-organisation of the ecclesiastical courts of the Established Church in the nineteenth century, with the streamlining of their competence and jurisdiction, were all part of the widespread reforms being conducted by the government under Queen Victoria. After the Reformation, the legislative powers of the Church had passed to the King and then to Parliament, Parliament to a large extent permitting the Church to develop its ecclesiastical common law through its own courts. From 1832, with the number of Acts of Parliament on ecclesiastical matters reaching a high level, Ecclesiastical law became more and more based upon statutes. Lawyers now found it difficult to come to terms with its rapid development and to define its essential traits as well as its chief sources? Was Ecclesiastical law, as applied to the Established Church, properly speaking "Canon law"? Where did that leave the old canon law of the mediaeval Church?

433 By the Ecclesiastical Jurisdiction Measure 1963.
In 1939, a Commission was set up by the then Archbishops of Canterbury and York to deal with these questions and to report on the precise status of canon law within the Established Church and the possibility of producing a comprehensive code akin to the C.I.C. 1917.434 The Commission did find it particularly difficult to define what was meant by "canon law" for the Established Church.435

The Commission found the task difficult, taking into account that the sources for the ecclesiastical law of the Established Church were so varied. Sources which included all the pre-reformation papal legislation not conflicting with the royal prerogative; the old Corpus of Canon law and the provincial constitutions and the pre-reformation canons of the medieval English Church, before the Reformation; then the ecclesiastical laws made by Henry VIII and his successors, as well as the Code of canons of 1603; finally, the ecclesiastical common law of the Church, being the canon law of the mediaeval Church not abrogated at the Reformation (permitted to operate under royal will) and the case law developed within the Church courts afterwards.

It concluded that for two reasons, the formal codification of the law of the Established Church along the lines of the 1917 Code of Canon law for the Catholic Church, was impossible. Firstly, because English law had an aversion to codification and secondly, because the process for the Established Church would be too complicated and impossible, bearing in mind its close links with the State and the Crown. The Commission decided to proceed on the basis that they should prepare a new collection of up to date draft canons, which were annexed to their report.436

4.8. CONCLUSION.


436 These canons were to form the basis of the 1964 and 1969 canons.
The period between the reigns of King James I and George VI saw the emergence of Parliament as the ultimate supreme legislative organ in respect of all matters, both ecclesiastical as well as temporal. A constitutional monarchy, with the Monarch continuing to be the Supreme Governor over the Established Church. The Monarch furthermore, and by an Act of Parliament, being vested with the specific role of preserving and maintaining the Protestant Settlement and the supremacy of the Established Church.

From the eighteenth century onwards, the English Parliament exercised more control over the ecclesiastical matters of the Established Church and particularly over her legislation. In the last century, when carrying out extensive reforms to the whole state court structure, the ecclesiastical courts of the Established Church were greatly reformed. Their jurisdiction was drastically reduced, to meet the declining influence of the Established Church and the growing atmosphere of greater religious freedom and toleration. The growth of Parliamentary supremacy was accompanied, at the same time, by the emergence of judicial precedent within English Common law, a concept which was to find its way within the Ecclesiastical law of the Established Church.

During this epoch, the legal influence of the Established Church was reduced as religious toleration gained a strong hand and a legal foothold. With the rapid development of different religious groups and movements and their breaking away from the Established Church, inevitably, the jurisdiction of the Church's own courts would be challenged and then transferred to new Courts of the State. The loss of the legal influence of the Established Church was not confined to its judicial structures for in 1869, its links with the Protestant Church of Ireland were legally severed when the Irish Protestant Church was dis-established and in 1914, the Church in Wales.

With the gradual growth of the secularisation of English Society in the last century and the added fact that many members of Parliament no longer belonged to the Established Church, it came to be resented that a secular body like Parliament still came to exercise so much influence over the legislative matters of the Established Church. In 1919, Parliamentary influence over its affairs was reduced by the creation of a new assembly, the Church

437 By the Irish Church Act 1869. The Churches of England and Ireland had been united by the Union of Ireland Act 1800. s.1 art 5

438 By The Church of Wales Act.1914.
Assembly, and to which was transferred the limited power of passing ecclesiastical legislation, but still subject to the consent of Parliament and the Crown. The doctrine of Royal Supremacy still remains, exercised in a constitutional manner by the Crown and Parliament.

439 By The Church of England (Assembly) Powers Act 1919. Its powers and capacity are discussed in greater detail in the next chapter.
Chapter 5

THE PRESENT LEGAL POSITION OF THE ESTABLISHED CHURCH: THE MONARCH AS THE SUPREME GOVERNOR AND HER ECCLESIASTICAL LAW.
Chapter 5

The present legal position of the Established Church: the Monarch as her Supreme Governor and her Ecclesiastical law.

5.1. Introduction. 5.1.1. The present legal position of the Established Church. 5.1.2. Her own canons and internal constitution. 5.1.3. Under English law. 5.1.4. Parliamentary duty to conserve the Established Church. 5.1.5. The present position of the Monarch as Supreme Governor. 5.2. The working government of the Church 5.2.1. The Church Commissioners. 5.2.2. The General Synod. 5.2.3. The limited legislative powers of the General Synod. 5.3. The New Canons of 1964 and 1969 and subsequent amendments: their binding force. 5.4.1. The Ecclesiastical Courts—their structure and jurisdiction. 5.4.2. Their control by the common law courts. 5.4.3. Judicial precedent within the Ecclesiastical law of the Established Church. 5.5. The legal position of the Clergy within the Established Church. 5.5.1. Archbishops and Bishops. 5.5.2. Priests and Deacons. 5.6. Privileged status of the Established Church in the law of Blasphemy. 5.7. Conclusion.

5.1. INTRODUCTION. 440

440 The following legal text books have been consulted to write this chapter:— Halsbury’s laws of England, Constitutional law (Vol 9); Halsbury’s laws of England; Ecclesiastical law (Vol 14); Smith, Bailey, Jones, Civil liberties; cases and materials: The Archbishops’ Commission, The Canon Law of the Church of England; St John Robilliard, Religious liberty and the law, Manchester University Press, 1984 (chapter 5); E.Garth Moore, English Canon law, Oxford University press, 1967; and Mark Hill, Ecclesiastical law, Butterworths, London 1995. In addition, The Thirty Nine Articles of Religion, as they are still relevant and officially represent the teaching of the Established Church; the current code of canons of the Church of England, being the Canons of 1964 and 1969 and officially known as The Canons of the Church of England, published by its General Synod, London (fifth edition 1992). The most important canons are referred to within this chapter. The statutes are found within Halsbury’s Statutes of England, Butterworths, London 1995 and the reported cases in either the Law Reports or the All England law reports.
Chapter 5

This chapter will concentrate on the present legal position of the Established Church. How it is legally structured, the pre-eminent position that it still enjoys under English law and the legal status of the Queen as its Supreme Governor. How the office of Supreme Governor is exercised in a modern constitutional democracy, respecting the supremacy of Parliament. This chapter will also analyse the working government of the Established Church-and in particular, her General Synod—the legal powers that it has; to what extent it can make canons and how these still bind the hierarchy and the laity. In the middle of the last century, the Courts of the Ecclesiastical courts were drastically overhauled. They were again reformed in 1963 and their current structure will also be examined, since these courts are part of the overall state court system where the Ecclesiastical law of the Established Church is specifically administered. The last part of this chapter will study the unique position of the Established Church in the law of blasphemy.

5.1.1. The present legal position of the Established Church.

The internal documents of the Established Church, that is to say, her Thirty-nine Articles of religion as well as her current canons, set out the close and unique connection that she occupies within the English constitution and in particular, her legal relationship with the Crown. Externally, the judges of the Common law courts have accepted this legal relationship and have acknowledged that because the Established Church has been constituted by the law of the land, she therefore deserves special protection over and above all other religious bodies. That protection is guaranteed by the modern current British constitution.

For a definition of the constitutional status of the Established Church, one can look to that internal formulation prepared by her clergy in the sixteenth century, set out primarily within the Thirty-nine Articles of Religion. This is now encapsulated within the current canons of the Church. We will see how that internal definition has been accepted under English law, as this explains the integral relationship which subsists between Church and State.

5.1.2. The Constitutional status of the Established Church; according to her canons.
According to her own internal doctrine and her current canons, the Established Church defines herself as being that body which has been established by the laws of the realm within England under the authority and power of the Queen's majesty. This is her constitutional status, a juridical person recognised as such by English law and under the jurisdiction and absolute authority of the Crown.

As a Church, she is a visible body, a congregation of faithful men to which the Word of God and the Sacraments are administered. A visible body with a hierarchical structure of Archbishops and Bishops and clergy, with an appropriate system to preach the Word of God and to administer the Sacraments.441 Although established by and for that reason having unseverable links with the Crown, her canons state that she is not separated from the Universal Church nor distinct from her, but is a part of the universal apostolic Church of Christ.442

5.1.3. The constitutional position of the Established Church under present English law.

The close relationship that has for centuries traditionally existed between the Common law courts and the ecclesiastical courts of the Established Church, has naturally influenced the secular courts and their judges when they have explained the legal position of the Established Church and its relationship with the Crown and the State. To a large extent, they have relied upon the doctrinal analysis set out within the Thirty-nine Articles and the canons of the Established Church, to define its constitutional position. But to this doctrine, they have added principles abstracted from common law and have re-interpreted the status and the role of the Established Church, in terms of modern constitutional theory.

441 The Thirty-nine Articles of Religion, Article 19. See chapter 3.5.

442 The Revised Canons Ecclesiastical.

"The Church of England, established according to the laws of this realm under the Queen's Majesty, belongs to the true and apostolic church of Christ; and, as our duty to the said Church of England requires, we do constitute and ordain that no member thereof shall be at liberty to hold to maintain or hold the contrary".

See also, Canon B 19. "Ye shall pray for Christ's holy Catholic Church, that is, for the whole congregation of Christian people dispersed throughout the whole world, and especially for the Church of England".
Parliament being supreme, the Established Church is subject to the control and the jurisdiction of Parliament.

The Established Church teaches that she is a part of the Universal Church as founded by Christ and, within England, is the natural successor to that organisation constituted by Saint Augustine. This teaching came to be considered in 1907 in the case of *Marshall-v- Graham*. In his decision, the judge accepted this to be the constitutional position in English law of the Established Church; that she was the lawful and proper branch of that church, founded in England between the years 597 and 687, after the arrival of Saint Augustine and his Benedictine missionaries. Her legal separation from the rest of the Western Church, through the ecclesiastical legislation of Henry VIII, was explained on the basis that Henry VIII had intended only to restore the nature of the Established Church to its rightful true and independent position. The statutes of Henry VIII which abolished papal supremacy and jurisdiction were never designed to vary her original constitution but only to rid the Established Church of unlawful interference. The judge cited in particular the relevant Acts of Parliament of Henry VIII and the earlier Statutes of Edward III and Richard II, which had legally curtailed papal jurisdiction within the English Church.

By Parliament, the jurisdiction of the Established Church over the whole of the United Kingdom and Ireland has been curtailed and confined to England. Her Ecclesiastical territory remains divided into the two Provinces of Canterbury and York, each province in turn comprising a number of dioceses centred around the archiepiscopal see of Canterbury or York. She is no longer the Established Church in Ireland, nor in Wales, with her ecclesiastical jurisdiction only being exercised within "England."

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443 [1907] 2 KB 112

444 For example, the Statute of Provisors of 1351 and as well, the Statutes of Praemunire of 1353 and 1393. (considered in chapter 1) They were royal attempts to control the Church and to prevent the Popes from nominating their right to appoint prelates. A closer look at these statutes makes it clear that jurisdiction of the Papacy was never denied, but was only limited.

445 In 1870, the Established Church in Ireland was dis-established by The Irish Church Act 32 &33 Vict. 1869 see Statutes in force.


447 See The Interpretation Measure 1925, Section 2, which has defined the territorial applicability of Measures passed by the General Synod of the Church of England. By the Welsh Church Act 1914, the Church of England was dis-established in so far as it existed in Wales and
With its jurisdiction delineated, the courts have defined that the Established Church legally includes, not only its hierarchy but both its hierarchy and the laity; who are its members and are all bound by the rules which determine the basis of its membership. Although the term “church” is no longer interpreted narrowly and exclusively to her, as this terminology can be applied to all the Christian Churches and non-Christian religions and bodies and includes the Muslim religion, it does have a specific legal meaning, when applied to the Established Church. In such case, it can either refer to the aggregate of all the individual members or to its hierarchical structure, established by the law of the land and by virtue of which there is a special State and Church relationship.

The special position of the Established Church under English law and her close relationship with the Crown, continues to be exemplified by the legal role exercised by the sovereign, over her members. From time to time, the courts have been asked to rule on legal issues relating to her composition and membership. One case decided in 1910, held that she is legally, an aggregate body of individuals comprising both the clergy and the laity. As such, she

Monmouthshire. On 31 March 1920, by Section 1 of the aforementioned Act, the Church of England in Wales and Monmouthshire, became the Church of Wales and ceased to be established by law. The Church of Wales now has its own constitution and consists of (a) a number of chapters or Committees comprising inter alia a Governing Body, which has supreme legislative powers (b) any further chapters or amendments made by the Governing Body (c) all canons of the Church of Wales and (d) all rules and regulations made form time to time by the Governing Body. For further details and information, see Halsbury's Ecclesiastical Laws Vol 14. paras 324 et Seq.

448 The problem is not as academic as it might seem. Where testators, for example, have bequeathed legacies to the Established Church or to the Anglican Church or to various named individuals on condition that they be members of the Anglican Church or be practising members, the courts have faced the task of defining who is meant by an Anglican and then a practising Anglican.

449 Ibrahim Esmael-v-Abdool Carrim Peermamode [1908] A.C.

450 The Established Church's own internal canons, reaffirm this unique position. So Canon A 1 (of the 1964 and 1969 Revised Canons), confirms that

"The Church of England, (is) established according to the laws of this realm under the Queen's Majesty..."

451 The present constitutional status of the Sovereign is discussed within the next section.

452 R-v- Dibdin [1910] P 57
includes all baptised persons giving general allegiance to the ordinances and liturgy of the Church of England, as established by law and not owing allegiance to any religious body whose tenets or creed are inconsistent with the Established Church. She is neither a corporation created by Common law or under statute,453 but a part of the apostolic Church of Christ, governed by the Crown.454

Her constitution remains externally regulated by the Ecclesiastical law of the land455 and whilst the various reformation statutes which were enacted systematically during the reign of Henry VIII, to set up the Established Church, have largely been repealed,456 their legal effects and principles are now to be found within her canons of 1969. All her civil and ecclesiastical causes remain subject to the ultimate jurisdiction and control of the Crown.457 Her current canons,458 continue to give great importance to the Thirty nine Articles of Religion.

453 Under English Common law, corporations are recognised as distinct legal entities, from the persons who represent the same. They can either be organisations (such as a local municipal authority) or person with official status (such as the Crown). As such, they exist independently of the actual individuals forming the same. They enjoy perpetual succession (i.e. their duration does not depend upon the actual life of their members) and they hold a Common Seal. Corporation can also be created by Acts of Parliament, by statute. For example, London Regional Transport, a Corporation set up by an Act of Parliament, under the London Regional Transport Act 1984. Corporations established by Parliament, have the same characteristics of Corporations at Common law. They have perpetual succession and hold a Common Seal.

454 “The government of the Church of England is organised under the Queen's Majesty...” See Canon A 6, the provisions of which shall be examined in greater detail, within this chapter.

455 The Ecclesiastical law comprising (a) all the old (i.e. not repealed) pre-reformation canon law, re-interpreted as Ecclesiastical Common law (b) Acts of Parliament (c) case law of the Ecclesiastical courts and (d) the special canons of the Church.

456 For Example, the Ecclesiastical Appeals Act 1532 (repealed), The Submission of the Clergy Act 1533 (largely repealed), the Appointment of Bishops Act 1533 (partly repealed), the Ecclesiastical Licences Act 1533 (largely repealed) and the Supremacy of the Crown Act 1534 (repealed).

457 See Canon A.7

458 Canon A.5 states that the doctrine of the Established Church is “grounded in the Holy Scriptures and in such teachings of the ancient Fathers and Councils of the Church as are agreeable to the said Scriptures. In particular, such doctrine is to be found in the Thirty-nine Articles of Religion, the Book of Common Prayer, and the Ordinal."
religion, and as these have all been formally approved by the Crown and the General Synod of the Church, are to be treated with great respect. These canons are cited in the standard legal textbooks, to illustrate the constitutional position of the Established Church.

5.1.4. Parliament under a legal duty to conserve the Established Church.

By law, Parliament is under a legal duty to guarantee that the establishment of the Church of England be maintained. Under the Act of Union with Scotland 1706, Parliament covenanted that she would preserve the Established Church, together with its doctrine, worship, discipline and government. Preservation of the status of the Established Church was deemed and still continues to be a fundamental and essential condition for the union of the two countries, England and Scotland. This Act also, guaranteed that Parliament would maintain the Protestant Religion and Presbyterian Church Government in Scotland.

There are certain safeguards, to maintain the establishment of the Protestant religion and the Established Church contained within every Declaration oath that a new monarch is required to take on his or her accession to the throne.

5.1.5. The Nature of Royal Supremacy-over the Church;-the position of the Monarch.

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459 Canon A.2: They are deemed to be "...agreeable to the Word of God and may be assented unto with a good conscience by all members of the Church of England."

This canon gives great flexibility. It makes the giving of an assent to the Thirty-nine Articles an option, hitherto a formal requirement for ordination to the Anglican priesthood under the Clerical Subscription Act 1865 Ss. 1, 4 and 5 (now repealed).


461 Section 3, Act of Union with Scotland Act 1706

462 See The Accession Declaration Act 1910 10 Edw. 7 & 1 Geo. 5 c.29. See Statutes at large.
The Act of Supremacy of 1534, had made by law, Henry VIII "the only supreme head on earth of the Church in England." 463 By the settlement of Elizabeth I, her Act of Supremacy in 1558, altered the position and office of the Crown over the Established Church to that of its "Supreme Governor." 464

As the Supreme Governor of the Established Church, Elizabeth was thus the "Highest Power" under God in the Kingdom. 465 The 1969 Revised Canons of the Established Church, confirm that the monarch is the highest power in the land and so exercises supreme power. This is the doctrine of Royal Supremacy. 466 The Sovereign acts according to the laws of the realm over all causes, temporal as well as ecclesiastical. 467 This is the triple power of governance - executive, judicial and legislative. 468 Its jurisdiction extends over the whole Church, in matters doctrinal, liturgical and disciplinary, and this royal prerogative is today exercised in a constitutional manner whether by her ministers or judges.

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463 The Act of Supremacy. 26 Henry VIII c.1 (1534).

464 The Crown is "the Supreme Governor of the Realm in all spiritual and ecclesiastical causes as well as temporal." Cf. Section 8 The Act of Supremacy 1558 1 Elizabeth 1. c.1.

465 The Thirty-nine Articles of Religion of 1571, although they had declared that the Sovereign was the "Supreme Governor of the Church of England" had actually anticipated this further amendment. It had later affirmed that the Queen had:"...the chief power in the realm of England, and other her dominions, unto whom the chief government of all estates of this realm, whether they be ecclesiastical or civil, in all causes do appertain..." Article 37.

466 It is enshrined within Canon A.7: Dealing with "the Royal Supremacy" the legal principle is stated that:- "We acknowledge that the Queen's excellent Majesty, acting according to the laws of the realm, is the highest power under God in this kingdom, and has supreme authority over all persons in all causes, as well ecclesiastical as civil."

467 Section 8 of the Act of Supremacy of Elizabeth 1558 which has not been repealed and so remains in full force, defined the extent of this royal power, which extends to:— "all such jurisdictions, privileges, superiorities and pre-eminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority had theretofore been, or might lawfully be, exercised or used for the visitation of the ecclesiastical state and persons, and for the reformation, order and correction of the same, and all manner of errors, heresies, schisms, abuses, offences, contempts and enormities..."

468 This triple power of the Sovereign, which had been set out under an old Elizabethan Statute, had been judicially interpreted and considered by Lord Chief Justice Coke in 1591. He had declared that this supreme power of the Crown was no more than that traditionally enjoyed at Common law. Cf. Caudrey's Case (1591) 5 Co. Rep 1a 12 Op.cit. (E.R.)
5.1.5.1. Theory of the Royal Power over the Church:

After the Reformation, the precise nature of the Royal Supremacy was subject to great debate. The new legal and ecclesiastical theory underlying the new relationship was to be examined and elaborated, at great length. Gradually, it became the accepted position and theory that the Sovereign was and to this day, is considered to be a persona sacra but not the equivalent to a minister of the Word of God as such. It was not claimed that the Crown had and continues to claim the status of an ordained minister, whether under common or ecclesiastical law. The Crown recognised that it did not have and has no power to preach the Word of God nor administer the Sacraments. Instead, a right to govern being based on the proposition that all princes had and have the right to govern, which is a divine right.

With this royal right and prerogative—the doctrine of royal supremacy—came the ability to control the Church, as part of the structures within the Crown’s absolute control. To this day, this reasoning underlies the theory which supports the doctrine of the Royal Supremacy within the Established Church. On this basis, the Sovereign remains the highest power in the realm, although and as has been mentioned, this power of governance is exercised now in a constitutional manner, through Parliament and the Queen’s ministers.

5.1.5.2. The Sovereign to be in communion with the Established Church.

469 Enjoying a sacra potestas, deemed to be of divine origin. See Halsbury’s Ecclesiastical Law, the constitution of the Church of England.

470 Henry VIII first claimed this general right to control and rule the Church, based on royal prerogative. The legal theory of royal prerogative was to come later, and would be found most clearly set out within the Thirty-nine Articles of Religion. See Article 37 of the Thirty Nine Articles of religion.

471 This theory was to be elaborated and developed by such personages as Hooker, in his famous work on "Ecclesiastical laws." It would also be justified to support the theory of the divine right of kings.
English law accepts that Parliament is the supreme legislator. The Sovereign is the head of State and to be able to exercise her office, is required to be in and to maintain her communion with the Established Church, the Church of England. To make it clear that he or she is not personally and secretly a Roman Catholic, the Sovereign is required on accession to the crown to make a declaration, solemnly and sincerely in the presence of God, professing, testifying and declaring that she is a faithful Protestant. That he or she will, according to the true intent of the enactments which secure the Protestant succession to the throne, uphold and maintain those enactments to the best of her powers according to law. As the Head of State and possessing the supreme power over all causes, spiritual and ecclesiastical, this power cannot be exercised by a Roman Catholic.

5.1.5.3. The Sovereign as the Supreme Ordinary.

As the Sovereign remains the highest power in the realm, then he or she is the equivalent of the Supreme Ordinary. Being the Supreme Ordinary, the Sovereign has the right to visit the sees of all archbishops and the immediate power to visit all places which are exempt from Episcopal visitation, exercising within England the function previously enjoyed by the Pope. The Sovereign also has control over the granting of certain licences and dispensations (e.g. in respect of marriage) by virtue of the Act for exoneration for Roman exactions, but since 1688 has no power to dispense from the laws ecclesiastical. This right of dispensation, belongs to Parliament alone.


473 The Act of Settlement of 1700, Section 3 is still in force.

474 The Accession Declaration Act 1910 prescribes this. In the schedule, there is the form of the declaration to be taken. This has been made by George V, George VI and Elizabeth II

475 This power would be akin to that exercised by the Roman Pontiff under the 1917 and 1983 Code of Canon law, but with such power being confined to England. See Halsbury’s Ecclesiastical law.

476 Known as Royal Peculiars. Originally, these would have included for example, monasteries and convents, by papal decree, excluded from the jurisdiction and control of the local ordinary.

477 By the Ecclesiastical Licences Act 1533, the relevant sections of which are still in force.
5.1.5.4. The Sovereign's legislative function over the Church.

Apart from the executive functions over the Established Church, the Sovereign has the power to alter its ecclesiastical law but only with the consent of Parliament, i.e. by an Act of Parliament. Today, much ecclesiastical legislation is effected by Measures of the General Synod of the Church of England. These Measures are the equivalent of Acts of Parliament, but do not become law until they have first been approved by Parliament, then presented to the Queen and have received the royal assent. Once they have received the royal assent, these Measures form part of the ecclesiastical law of the realm and are as much a part of the law of the land as any other part of the law.

The limited power of the Sovereign to otherwise pass and make ecclesiastical legislation, through canons or royal orders and not by Acts of Parliament, is now exercised through the Established Church, by her General Synod. The Sovereign in theory, has the right to veto what is in effect, subordinate legislation. Even if they are approved by the Queen, there are legal limitations on the binding nature of these canons.

5.1.5.5. The Sovereign's judicial functions.

By virtue of the doctrine of Royal Supremacy, the Sovereign is still the ultimate court of appeal in all ecclesiastical suits. By convention, this judicial function is exercised through the General Synod.

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478 Under the Bill of Rights Act 1688, section 1.
479 See Halsbury's Ecclesiastical laws and the commentary on the Bill of Rights ante..
480 By the Church of England Assembly (Powers) Act 1919 Section 4 and the Synodical Government Measure 1969 section 2.
481 Martin-v-Mackenochie (1868) LR 2 A & E.
482 Discussed later in 5.3. below.
483 The Act of Supremacy of 1558, section 8. Restated as well within the Revised Canons Ecclesiastical, Canon A.7 and Article 37 of the Thirty-nine Articles of Religion.
power is no longer exercised in person, but through the judges, whether they be ecclesiastical or lay.484

5.1.5.6. References to be made to the Sovereign in the Liturgy.

The liturgy of the Established Church, remains subject to the overall controlled and regulation by the Crown and Parliament.485 The Ecclesiastical law lays down the form of and the names to be mentioned in the prayers and services of the Established Church. The name of the Sovereign as the highest power in the land and therefore the effective Head of the Established Church, is required by law to be cited in the Church's liturgy. Any references to other members of the royal family in any form of Church service authorised for use in the Established Church, can only be made with specific sanction of the Queen, by royal warrant. This is generally done by means of an Order in Council. Prayers so altered, must be used thereafter.486

5.1.5.7. The Sovereign's Right of Patronage.

The Sovereign is patron paramount of all the archbishoprics, bishoprics and benefices in the Established Church. This widespread power of patronage, includes the appointment of bishops and deans and the appointment to a certain number of cathedral positions and benefices. As patron paramount, the Sovereign is entitled to the right of presentation to all benefices, when they become vacant487 and are not regularly filled by the patron. The Queen is also

484 The various types of judges and their respective jurisdiction as well as the ecclesiastical court structure are set out in 5.4.1.


486 Changes by Order in Council, were made on 21 May 1953, on the death of Queen Mary and on 30 July 1958, upon the Duke of Cornwall becoming Prince of Wales. See Halsbury’s, Ecclesiastical law.

487 In some cases, the right to appoint an individual to an ecclesiastical office, belongs to a layman. This right to present and appoint an individual to a "living", is known as an advowson. It can be sold under the general common law.
the guardian of the temporalities of a bishopric during its vacancy,\textsuperscript{488} and has the right to present to all livings in place of the incumbent when he is appointed to a diocesan bishopric in England. During the vacancy of an archbishopric or bishopric, she has the same right to present the benefice of an advowson to a person of her choice. This general ecclesiastical right of overall patronage, as well as other rights of visitation are not exercised by the Monarch, personally but by convention through her royal ministers. The Lord Chancellor exercises this prerogative on behalf of the Crown, nominating clergy to benefices and carrying out the right of Visitation.\textsuperscript{489}

As a general rule, no person can be consecrated in England to the office of bishop without the specific licence of the Crown for his election to that office and unless the royal mandate under the great seal for his confirmation and consecration has been given. Formerly, every person to be consecrated was required to take the oath of allegiance and supremacy and of due obedience to the Archbishop of Canterbury, but now that is no longer the case in the event of any person being consecrated in England to exercise his Episcopal functions outside the realm.\textsuperscript{490}

Whilst under English ecclesiastical and common law, and as part of the constitution, all Archbishops and Bishops are still in theory appointed by the Crown, in practice and by convention, all appointments are now made on the advice of the Prime Minister. Since 1977, the Church of England Crown Appointments Commission has existed and which puts forward two candidates in order of preference (if it thinks it appropriate) for the consideration of the Prime Minister. The understanding is that he (or she) will normally recommend one of the candidates to the Crown for election and generally the first. The Crown will

\textsuperscript{488} She no longer is entitled to the profits of the diocese, i.e. the revenue-income from taxes, from property etc.

\textsuperscript{489} When the Lord Chancellor is a Roman Catholic, then by the Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions) Act 1974, these functions are performed by the Prime Minister.

\textsuperscript{490} The Appointment of Bishops Act 1533, section 3 still governs the procedure. The Archbishops of Canterbury and York have the discretion to dispense with the oath of due obedience under the provisions of the Colonial Clergy Act 1874.
simply agree to the nomination recommended. This arrangement and procedure, only applies to the nomination and the election of Archbishops and Bishops of the Established Church. Suffragan bishops are otherwise made on the basis of a recommendation from the diocesan bishop.

5.1.5.8. Convocations and the General Synod.

The power to convoke and to dissolve the Convocations of Canterbury and York remains vested in the Crown and the Sovereign alone has the supreme authority to make and to ratify its decisions. The Sovereign does not now convene or prorogue the General Synod of the Church of England and all the Measures of the General Synod (equivalent to statutes—see later) are not binding until they have been laid before Parliament. They must be passed by both Houses, by a resolution and then presented to the Sovereign for her royal assent. When this has been given, then the draft becomes a Measure and has the full force and effect of an Act of Parliament.

5.1.5.9. The Sovereign cannot be advised on matters concerning the Established Church by Roman Catholics or Jews.

491 Generally, this is the case. However, in 1981, the second candidate was controversially put forward by the Prime Minister to fill the office of the bishop of London.

492 This remains the position, under Section 1 of The Submission of the Clergy Act 1533, examined in detail in chapter 2. Confirmed by the Synodical Government Measure 1969, section 1

493 The power of enacting draft canons has now been transferred from the Convocations to the General Assembly of the Church of England.

494 A distinct legal entity to the Convocations of Canterbury and York. Under the Church of England Assembly (Powers) Act 1919, section 4 a more representative form of Church Government was provided for the Established Church. It was renamed and reconstituted as the General Synod of the Church of England under the Synodical Government Measure of 1969 op.cit. For more details on this organisation, see infra.

The Sovereign is helped to exercise her overall right of governorship of the Established Church over all matters, temporal and spiritual, through Parliament and her ministers and assisted by her advisors. It is illegal and a criminal offence for any person professing the Roman Catholic Faith or the Jewish religion to advise directly or indirectly the Crown on the disposal of any office or preferment in the Church of England or the Church of Scotland. In the case where it pertains to the general office of a minister to exercise such functions (such as the Lord Chancellor) then these duties are performed by the Prime Minister or the Archbishop of Canterbury.

5.2. THE WORKING GOVERNMENT AND LEGISLATIVE POWERS OF THE CHURCH OF ENGLAND.

The present system of the Government of the Established Church, its various structures and number of working committees, is the necessary result of its subordination to the State and to Parliament. The ecclesiastical canons of 1969 proclaim that;

"the government of the Church of England under the Queen by Archbishops, bishops, deans, provosts, archdeacons and the rest of the clergy and of the laity that bear office in the Church is not repugnant to he Word of God.”

but does not explain the details and give the present machinery used by the Established Church to govern itself.

The present system of government utilised by the Established Church, has been determined and moulded by Parliament, through ecclesiastical legislation. In addition to the Archbishops and the Bishops, who carry out limited executive functions.

496 Under the Roman Catholic Relief Act 1829 Section 18.
497 Under the Jews Relief Act 1858. Section 4
498 As where the Lord Chancellor is a Roman Catholic, under the Lord Chancellor (Discharge of Ecclesiastical functions) Act (1974), supra. It is interesting to note that this bar or prohibition does not apply to a person holding any other religion or indeed no religion. This specific restriction is covered in greater detail in the second section of this thesis. See infra.
and judicial functions within their dioceses, various other bodies have been created to facilitate the process, the most important of which is the General Synod of the Church of England. Other entities, have also been set up by statute, and their decisions are generally subject to control by the ecclesiastical and common law courts.

5.2.1. The working government of the Church of England.

The working government of the Established Church is carried out by various committees, to enable it to carry out its temporal and spiritual functions. The most important are (a) the Church Commissioners and (b) the General Estates Commissioners. These work together with and assist the General Synod of the Church of England, the successor to the Church Assembly which was created in 1919.

5.2.2. The Church Commissioners, and the General Estates Commissioners.

One of the immediate effects of the Reformation, was that the Crown become entitled to all the first fruits and tenths, the revenue, that had been previously payable to the Papacy. Henry VIII made it a treasonable offence to make such payments to the Papacy and directed that all this revenue should be paid directly to the Crown. In 1704, Queen Anne granted all this revenue to a Corporation called "the Governors of the Bounty of Queen Anne for the Augmentation of the Maintenance of the Poor Clergy" and in addition, this fund was later authorised, under statute, to receive other revenue, for example the profits of a non resident bishop. By the Church Commissioners Measure

500 But not legislative. Archbishops and Bishops do not have any power to make particular laws.

501 See below. These entities are examined in great detail in Halsbury's Ecclesiastical law.

502 Set up by the Church of England (Assembly) Powers Act 1919.

503 Prohibited by Henry VIII, under The First Fruits and Tenths Act 1534 26 Henry VIII c.3.

504 Under The Queen Anne's Bounty Act. 1704.

505 Under The Pluralities Act 1838, section 54.
of 1947,506 all these assets were transferred and are now managed by a Board of Governors and an Assets Committee, under the general charge of the Church Commissioners. The Church Commissioners are Commissioners, appointed under the Ecclesiastical Commissioners Acts 1836 to 1840, and are responsible for the management and maintenance of this fund.507

The Church Commissioners are helped with their task, of the management of the temporal goods of the Established Church (its lands and assets) by a General Assets Committee and the General Estates Commissioners. The latter has the general statutory task of safeguarding the property portfolio of the Established Church and the former, a wider duty which entails not only the duty to manage those assets but also the power to sell, purchase, and exchange lands and to change and realise investments. The General Assets Committee has in addition, other statutory duties, ranging from giving advice and

506 Under Section 10 of this Measure.

507 Under the original terms of the Trust Deed, holding these assets, the Moines were to be applied "for the augmentation of the maintenance of such parsons, vicars, curates and ministers officiating in any church or chapel within the United Kingdom of England, Dominion of Wales and town of Berwick-upon-Tweed where the liturgy and rites of the Church of England are or shall be used and observed".

Following the decision of the General Synod of the Church of England to ordain women to the Priesthood and then their actual ordination, the right of the Commissioners to distribute these assets to women priests was challenged. See the case reported in The Times 11th November 1994, Williamson-v-Archbishop of Canterbury and others. The plaintiff, an Anglican priest, had argued that the Court should restrain the Church Commissioners from applying the assets of the fund to women priests, as this would be otherwise illegal. Under the Ecclesiastical Commissioners Acts, between 1835 and 1840, the purposes of the general fund had been amplified to include provision for "the cure of souls in parishes where such assistance is most required." The Court decided that (1) the applicant had locus standi to challenge the Church Commissioners; (2) the assets could only be applied to all those who had the cure of souls; (3) as the Church had now permitted women to be ordained to the priesthood, then they too had the cure of souls; (4) those women ordained to the Anglican priesthood could therefore receive financial help. The Commissioners could therefore distribute assets accordingly. The fact that in 1704, the Anglican priesthood was only reserved to men, did not make the current activity of the Church commissioners illegal, as the Church had changed her rules, in accordance with the legal process, laid down by law.

508 Under the Church Commissioners Measure. Passim.
recommendations on investments and the general application of Church funds to the examination of any matter entrusted to it by the General Commissioners.509

5.2.3. The General Synod of the Church of England:

Under the Church of England (Assembly) Powers Act 1919, an entirely new body was created to include representatives of the laity. This new body had extensive powers of legislation in all matters concerning the Church of England and was called the "National Assembly of the Church of England" or more simply "the Church Assembly." The legislative powers of the Church Assembly was subject to the control and the authority of the Sovereign and the two Houses of Parliament, i.e. the House of Commons and the House of Lords.510 This body also had concurrent power, together with the convocations of Canterbury and York, to make canons.

The existence of three organisations within the Established Church, the Church Assembly and then, two Convocations of Canterbury and York, meant the duplication of some of the functions of government. It also, at least in theory, gave rise to the possibility of church canons being passed by not only the Church Assembly but the separate Convocations as well. In 1969 it was felt that this dual system should be ended and that there should be given to the Church one system of synodical government for the whole of the Church of England. This is now the system of government in operation. By the Synodical Government Measure 1969, the Convocations of Canterbury and York were authorised by canon to make provision for the vesting of their own functions, authority, rights and privileges in the Church Assembly.511 By the same enactment, it was provided that the Church Assembly should, from the date of the transfer, be reconstituted and be renamed as the General Synod of the Church of England with the power to make canons, for the whole of the Church of England and not just for one of the provinces.

509 See Church Commissioners Measures 1947 and 1964.
511 The Synodical Government Measure 1969, section 1 (1) (a), Sch. .
The General Synod remains the current competent body to amend existing and make new canons for the whole of the Established Church. In 1970, the Revised Canons for the Church of England, which had been authorised by the Convocation of York in 1964 and the Convocation of Canterbury in 1969, were formally approved by the General Synod.

The Synodical Government Measure 1969, in addition to the establishment of the General Synod, also provided for the creation of deanery synods and diocesan synods, which have replaced the former diocesan conferences and ruridecanal conferences. The measure likewise contained the Church Representation Rules, setting out the conditions and qualifications for membership to these groups as well as the rules for the election to and the membership of the House of Laity to the General Assembly.

5.2.4. Legislative and deliberative functions of the General Synod of the Church of England.

The General Synod of the Church of England has legislative and deliberative powers, but cannot act in a judicial nor executive capacity. It is currently composed of the Convocations of Canterbury and York, joined together in a House of Bishops and a House of Clergy. It has added to this a House of Laity. The House of Bishops and the House of Clergy comprise the Upper and the Lower House of the Convocations and the House of Laity is an elected body, constituted according to the Church Representation Rules. The Archbishops of

512 No longer just for the Convocations of Canterbury and York.

513 See the next section of this chapter on the exact legal status and the binding force of those canons, which have never either been submitted to or approved by Parliament.

514 Before the General Synod had given its approval to these canons, a new Canon H1 (added 7 October 1969), had been passed by the respective Convocations of Canterbury and York. Canon H1 had modified the functions of the two Convocations and had transferred their powers to make canons to the New Assembly. After royal assent had been given, on 4 November 1970, the General Synod of the Church of England, was duly constituted, leaving in existence the two Convocations of Canterbury and York, but now with greatly reduced powers.

515 Section 5 (2) of the above measure.

516 Section 2(1). Sch 2. art.1. ibid.
Canterbury and York are the joint presidents of the General Synod and the registrars of the provinces of Canterbury and York are its joint registrars.

The General Synod is required by law, to appoint a legislative Committee from members of all three Houses to which must be referred all Measures passed by the Synod which are desired to have the force of an Act of Parliament. The duty of this committee is to take the necessary action required for that purpose following the procedure set down by statute. Apart from a legislative Committee, the General Synod may be assisted by other standing committees and since 1923 there has existed a Legal Advisory Commission. This has comprised a body of persons learned in ecclesiastical law and the law of England generally. Its function is to give advice on legal questions and issues referred to it by the General Synod, its Boards and councils, the Church Commissions, diocesan authorities and others. There is also a Central Board of Finance, to act as the chief financial executive of the General Synod.

Under the terms of its constitution, the General Synod of the Church of England has two functions. The first is to consider matters concerning the Church of England and to make suitable provision for them by:- (a) Measures which are intended to have the force of an Act of Parliament; (b) canons made in the exercise of the power given to it by the Convocations; (c) such orders, regulations or other subordinate instruments as may be authorised by Measures or Canons and (d) such acts of the General Synod, regulations or other instruments or proceedings as may be required, where provision by a Measure or canon is not felt to be necessary.

5.2.5. The current legislative powers of the Church of England.

Until 1919, the normal legislative process used by the Established Church had been to use Parliament directly. After that time, the Established Church was

517 Under schedule 2. art. 4.


519 See paras 393 and 394 of Halsbury's Ecclesiastical law.

520 See Schedule art 6 (a) (i) to (iv) of the Synodical Government Measure of 1969.
given limited power to propose legislation by way of Measures and this power is now vested in the General Synod as the successor body to the Church Assembly. These legislative powers are limited in the sense that they need to be sanctioned by Parliament and by the Crown, and without this approval, the draft measures do not become law.

5.2.5.1. Legislation by Measures.

The General Synod is empowered to propose Measures relating to any matter concerning the Church of England. A "Measure" is defined as a legislative Measure which is intended to receive royal assent and to have effect as an Act of Parliament, in accordance with the provisions of the Church of England (Assembly) Powers Act 1919. It may extend to an amendment or to a repeal in whole or in part to any Act of Parliament but cannot amend or alter the composition or the powers or the duties of the Ecclesiastical committee of Parliament or the procedure prescribed by Parliament for its own consideration of Measures reported on by the Ecclesiastical committee.

5.2.5.2. Legislation by canons.

The General Synod, also has the power to legislate by enacting new canons, using the power formally exercised by the Convocations of the Provinces of Canterbury and York. This power to enact new canons, as has been mentioned, is exercisable for the whole of the Established Church and not just for one of the Provinces. Canons made by the General Synod must be made, promulgated and executed in the same way as the canons previously made by the


523 An example of a relatively recent Measure, submitted by the General Synod to Parliament and then approved, is the Clergy (Ordination) Measure 1990. 1990 No 1. The heading of this Measure is "A Measure passed by the General Synod of the Church of England to amend the law relating to the impediments to admission into Holy Orders". This removed the bar to the ordination of a man who had remarried, whilst his first wife was still alive.

524 Synodical Government Measure 1969 s. 1 (1)
convocations. The royal assent and licence is required for their making and execution and no canons can be made or put into execution which are contrary or repugnant to the royal prerogative or the customs, laws or statutes of the realm. The legal binding force of these canons is limited, unlike Church Measures, which is one of the reasons why in general, the General Synod prefers to pass Measures.525 They are likewise more restrictively interpreted by the courts, whether civil or the ecclesiastical, on the basis that they cannot offend parliamentary sovereignty or royal supremacy.

5.2.5.3. Interpretation of Measures.

Another feature of the legislative aspect of the General Synod, is that all of its Measures are generally subject to the same strict rules of interpretation, as would be any Act of Parliament526 but with greater flexibility.527

5.2.5.4. Types of Legislation.

The General Synod has limited powers to propose Measures on all ecclesiastical affairs. Where any such provision touches the doctrinal formulae or the services of the Established Church or the administration of its sacraments or sacred rites, then this must be referred to the House of Bishops and for such final approval to the House of Bishops.528 There are detailed rules and regulations which govern the discussion and the debating of all such matters by the other constituent parts of the General Synod, such as the House of Laity529 and furthermore, it is prescribed that all canons which relate to worship or

525 See the next section of this chapter.

526 Normal statutory interpretation is governed by the Interpretation Act 1889. Measures of the Church of England are in addition, also subject to The Interpretation Measure 1925, sections 1 & 3. Also see the Synodical Government Measure of 1969, section 2(2).

527 Under the rules of interpretation of English Statutes, until relatively recently, it was never permitted to consult Parliamentary journals, recording the speeches made by members of Parliament, whilst a bill had been debated and before it had become law.

528 This would include Measures as well as canons, proposed by the General Synod. See Synodical Government Measure 1969. Section 2 and Schedule 2.

529 See Halsbury's *Ecclesiastical law (Vol 14).* pp. 191-192.
doctrine must have the majority in each House of not less than two thirds of those present and voting, before being submitted for royal licence and approval.

5.2.5. Submission of all draft Measures to Parliament for approval.

When the General Synod desires to pass a measure, it must first of all refer the proposed draft to its own Legislative Committee which in turn must then submit the draft measure to the Ecclesiastical Committee of Parliament. It submits to this committee such comments and explanations that it deems fit or thinks expedient upon the draft Measure.

This Ecclesiastical Committee of Parliament comprises members of both Houses, and consists of fifteen members of the House of Lords, nominated by the Lord Chancellor and fifteen members of the House of Commons, nominated by the Speaker. The Committee has the function of examining any draft Measure, and then after having considered the same, to draft a report to Parliament, stating the nature and the legal effect of the measure, together with their own views as to its expediency. This committee reports to Parliament and lays before it, their own report together with the text of the proposed draft Measure. If resolutions are passed by both Houses, approving the draft measure, then this is then directed to be laid before the Queen, for her consent. Upon the royal assent being signified, then the draft becomes a Measure and has the same legal force and effect as if it were an Act of Parliament. They cannot be challenged or impugned and have universal applicability, unlike the canons of 1964 and 1969 and any subsequent canons made by the General Synod.

530 Under the Church of England (Worship and Doctrine) Measure section 1.

531 This for example occurred when the General Synod in 1992, permitted the ordination of women to the priesthood.

532 Cf. Under The Church of England Assembly (powers) Act 1919, section 3(1)

533 Section 3 (2). ibid.

534 Section 4. ibid.

535 In Brown-v-Runcie (Court of Appeal) dated 13 February 1991 there was an attempt to challenge the validity of the measure which permitted the ordination of women to the diaconate, under the deacons (ordination of women) Measure 1986. This failed. A further attempt was made...

What is therefore, the precise legal status of the ecclesiastical canons of 1964 and 1969? The new collection of canons, was officially approved by the Province of York in 1964 and the Province of Canterbury in 1969. In 1970, they were promulgated by the General Synod of the Church of England. Since 1970, there have been several editions and some of the 1969 canons have been amended. Nearly all of the code of 1603 canons have been replaced.

There are eight collections or titles within this collection of 1969 canons, lettered from A to H respectively. The titles cover diverse matters, ranging from the constitutional and doctrinal position of the Church of England; the Sacraments; the requirements for ministerial ordination; the working of the ecclesiastical courts and the synods of the Church. Like the 1603 canons, they define internally the position of the Established Church. They include a canon in the case of *R-v- Ecclesiastical Committee of the House of Parliament, Ep Parte the Church Society* 28 October 1993 to challenge the validity of the priests (ordination of women) Measure. In all these cases, the courts held that provided the due process established by law had been followed, then Measures of a General Synod, once passed could not be impugned. See Mark Hill, *Ecclesiastical law*, pp. 68-77.

536 The current edition of the latest Canons is the fifth.

537 For example, following the decision of the General Synod to ordain women to the Church of England priesthood, Canon 4 B was added on 22 February 1994. Entitled "of women priests" it amended Canon 4 which had only referred to the office of the priesthood as being open to men. The text of this canon is as follows;—

1. A woman may be ordained to the office of priest, if she otherwise satisfies the requirements of Canon 4 as to the persons who may be ordained as priests. 2. In the forms of service contained in the Book of Common Prayer or in the Ordinal words importing the masculine gender in relation to the priesthood shall be construed as including the feminine, except where the context otherwise requires.

538 Of the 1603 Canons, only canon 113 remains if force.

539 The actual titles are as follows:—

Section A: The Church of England. (Canons A1 to A8); this sets out the characteristics of the Church-Royal Supremacy, the basis of the Church's doctrine being founded upon the Thirty-nine Articles of Religion, the Ordinal, the Book of Common Prayer

Section B: The Divine Service and the Administration of the Sacraments. (Canons B1 to B44)
lifted from the 1603 collection, canon 113.540 Recently there have been added regulations to deal with new pastoral problems, such as the divorce and remarriage of individuals, whilst a first partner is still alive.541

The canons set out within A.1. to A.8. refer to the apostolic foundation of the Church of England-founded by the law of the realm under the power of the Queen (the doctrine of Royal Supremacy);542 the importance of the Thirty Nine Articles of Religion and the Book of Common Prayer within the doctrine of the Church;543 the place of the Book of Common Prayer, which contain all things agreeable to the Word of God, that is the Sacraments and the rites and ceremonies of the Church;544 the ceremonial and the form of ordination to be

Section C: Ministers, their ordination, functions and charge. (Canons C1 to C28)
Section D: The Order of Deaconesses. (Canons D1 to D3)
Section E: The Lay officers of the Church. (Canons E1 to E8)
Section F: Things appertaining to Churches. (Canons F1 to F18)
Section G: The Ecclesiastical Courts. (Canons G1 to G6)
Section H: The Synods of the Church. (Canons H1 to H3)

540 and which deals with the confessing of sins and the general obligation not to reveal those sins confessed

541 The latter known as "Regulations concerning marriage and divorce" sets out the current pastoral practice and doctrine of the Established Church concerning the administration of the sacraments to those who have divorced and remarried, whilst their first spouse is alive.

542 Canon A.1.: "The Church of England, established according to the laws of the realm under the Queen's Majesty, belongs to the true and apostolic Church of Christ..."

543 Canon A.2: "The Thirty-nine Articles of Religion are agreeable to the Word of God and may be assented unto with a good conscience by all members of the church of England".

Canon A.5: the doctrine of the Church of England being "...grounded in the Holy Scriptures and in such teachings of the ancient Fathers and Councils of the Church as are agreeable to the said Scriptures. In particular such doctrine is to be found in the Thirty-nine Articles of Religion, the Book of Common Prayer and The Ordinal."

544 Canon A.3. "1. The doctrine contained in the Book of Common Prayer and Administration of the Sacraments and other rites and Ceremonies of the Church according to the Use of the Church of England is agreeable to the Word of God."
used, in compliance with the ordinal; 545 and the government of the Church, that of the Queen with her hierarchy. 546

Like those of 1603, the 1964 and 1969 canons are not intended to provide a complete statement of the internal ecclesiastical law of the Church of England. Their objective was to deal with the situation of the Church in the light of the conditions of modern day life. They are interpreted with the assistance and a knowledge of English law as well as the pre-reformation canon law of the English Church. They can be amended either by Act of Parliament or by a Measure of the General Synod, approved by Parliament. They are subject to the same limitations as the 1603 canons in that they do not per se, bind the laity of the Church unless they declare the custom of the Church. Upon the clergy, they are binding and can form the basis of a legal obligation in the case of lay persons who have accepted office in the Church. 547

5.4. THE ECCLESIASTICAL COURTS AND THEIR PRESENT JURISDICTION.

The curtailment of the jurisdiction of the Ecclesiastical courts in the nineteenth century, was followed by a growing demand for the reform of the whole judicial system of the Church. Many members of the clergy had resented that the final appellate authority in ecclesiastical causes was to a non-ecclesial body, the

"2. The form of God's worship contained in the said Book, forasmuch as is not repugnant to the Word of God, may be used by all members of the Church of England with a good conscience"

545 "not being repugnant to the Word of God: and those who are so made, ordained or consecrated bishops, priests or deacons, according to the said ordinal, are lawfully made, ordained or consecrated..."

546 Canon A.6. : the Queen, who has"...the highest power under God in this kingdom and has supreme authority over all persons in all causes as well ecclesiastical as civil."

Canon A.7. "...the Queen is ...the highest power under God in this Kingdom and has supreme authority over all persons in all causes as well ecclesiastical as civil."

547 The original reason for which it was deemed that the 1603 canons were not binding was that the laity were not represented in Convocation. Although the laity are now in fact represented in the General Synod, it is the legal view expressed in Halsbury's Ecclesiastical law, that the general force of their non binding nature has been held for far too long for any alteration to be made. To make them binding per se, they would need a measure or an Act of Parliament. Cf. Halsbury's, Ecclesiastical law. p. 143. Footnote 10.
Judicial Committee of the Privy Council, a court competent to determine matters of a liturgical and doctrinal nature, composed in the majority of secular judges. The great variety and number of courts having different jurisdiction, also caused widespread dissatisfaction and following a report commissioned in 1954, widespread reforms were made by the Ecclesiastical Jurisdiction Measure 1963.548

5.4.1. The Ecclesiastical Jurisdiction Measure of 1963.

The Ecclesiastical Jurisdiction Measure of 1963, reformed and reconstructed all the ecclesiastical courts of the Established Church. It abolished certain obsolete jurisdictions, such as the Archbishop of Canterbury’s powers to cite a bishop for an ecclesiastical offence or any other person for heresy549 and all criminal jurisdiction previously exercised over the laity. In the case of the clergy, a clear distinction was created between those offences which involved matters of doctrine, ritual or ceremonial and those which did not.550

5.4.2. The existing jurisdiction of the Ecclesiastical Courts of the Established Church.

The present jurisdiction of the Ecclesiastical courts is limited and confined to (a) the protection of land which is consecrated for ecclesiastical purposes and everything on or in such land by the grant or refusal of faculties to authorise works in connection with it, and by making appropriate orders against any persons who execute any such works without a faculty;551 (b) the adjudication upon and the enforcement of some other civil rights in connection with

548 A report was commissioned on the status of Ecclesiastical Courts in 1954. The then existing system was described as a "jungle of courts." See page 696, footnote 4, Halsbury’s, Ecclesiastical law.

549 See section 82 (1) Ecclesiastical Jurisdiction Measure of 1963

550 The two categories of offences are generally called "reserved cases" and "conduct cases". See section 14 op.cit.

551 The Faculty Jurisdiction Measure of 1964, section 5. This section provides for an order to be made against a party in breach, to pay the costs.
ecclesiastical business and property and (c) the enforcement of the discipline of
the clergy, in both doctrine and ritual.

The jurisdiction of the ecclesiastical courts does not cover the whole spectrum
of ecclesiastical law. Part of this law—that which specifically relates to the
Established Church—is enforced within the temporal courts. Appeals relating to
clergy pensions are now dealt with in the temporal courts552 as well as
proceedings (a) where a bishop refuses to admit to a benefice553 (b) to enforce
a liability to repair a chancel554 (c) to enforce an order relating to the deposit of
parochial registers and records.555 The Ecclesiastical courts do not now have
any jurisdiction over plaints and suits of marriage or cases of nullity. All such
issues are determined within the civil courts.556

5.4.3. Constitution and jurisdiction of Ecclesiastical Courts.

A number of courts have been set up on a permanent basis under the
Ecclesiastical Jurisdiction Measure of 1963.557 The most important four
comprise (1) a Consistory court in each diocese, (2) a court for each of the two
provinces called the Arches Court of Canterbury and the Chancery Court of York
respectively, (3) a court of Her Majesty in Council and (4) the Court of
Ecclesiastical Causes Reserved. This Measure also provided for the constitution of
two more courts, when required; a Commission of Convocation, appointed by the
Upper House of Convocation of the relevant province or by the Upper House of
the convocations of both provinces; and a Commission of Review appointed by
Her Majesty.

552 See the Clergy Pensions Measure of 1961, section 38(3).
553 He can be compelled to do this by the temporal courts under The Benefices Act 1898.
554 By virtue of The Chancel Repairs Act 1932.
555 By the Matrimonial Causes Act 1857, the jurisdiction of the Ecclesiastical courts in
marriage, separation, divorce and annulment was transferred to the newly established Divorce
Court.
557 The various courts which are constituted, are set out within canon G1 of the revised 1969
canons.
There are also other courts, specially designated to hear matters and questions on issues of the Established Church. They too meet, as and when required. Under the Benefices Act 1898, a presentee to a benefice who has been refused admission by a bishop, when such refusal is not based on reasons of doctrine or ritual, can appeal to a specially constituted court. In such case, the court consists of the Archbishop of the Province, and a judge of the Supreme Court, nominated by the Lord Chancellor.558 By the Pastoral Measure of 1968, another appeal tribunal has been created for the two provinces of the Established Church, in cases concerning the compensation payable to clergy suffering loss in consequence of pastoral re-organisation.559 Finally, there is a Court of Faculties of the Archbishop of Canterbury which has jurisdiction over the appointment and the removal of notaries public and the general issuing of faculties and licences.560

5.4.3.1. Consistory Courts.

For each diocese, there is a court of the bishop which is called a Consistory court (except in the diocese of Canterbury, where it is called the Commissary Court). The judge of this court is called the Chancellor or, in the case of Canterbury, the Commissary General of the diocese. The Chancellor acts in the capacity of the bishop, but his authority is derived from the law.561 He is a Queen's judge in one of the Queen's Courts and is also at the same time, the Vicar General of the diocese.562 He acts in this court as an Ordinary,563 is independent and uncontrolled by the bishop.

558 See section 3 (1).

559 The Pastoral Measure of 1968 s.25

560 The Word "Faculty" here being a privilege or special favour or dispensation from the law. The origin of this power arises from the transferral to the Archbishop of Canterbury, the legatine powers under the Ecclesiastical Licences Act 1533.

561 Principally under the Ecclesiastical Jurisdiction Measure of 1963.

562 He can be a layman, who has exercised high judicial office or a barrister of at least seven years standing.

563 "Quia habet ordinariam jurisdictionem in jure proprio et non per deputationem." Ex Parte Medwin (1853) 1 E & B 609.
Chapter 5

The Consistory court of each diocese has original jurisdiction to hear and determine within its territory;-(1) proceedings in which a priest or deacon is charged with an offence under the Ecclesiastical Measure of 1963, not being of doctrine, ritual or ceremonial; (2) any case concerning a faculty (a permission) for the authorising of any act relating to land within the diocese, or anything on or in such land, being an act for which the doing of which a faculty is needed; (3) proceedings upon a ius patronatus awarded by the diocesan bishop; (4) certain proceedings under the Pluralities Act 1838 and (5) all other proceedings in which it had power to act and not being specifically abolished by the Ecclesiastical Jurisdiction Measure of 1963.564

5.4.3.2. The Arches and Chancery courts.

For the two provinces of Canterbury and York, there is in each a court of the Archbishop, having appellate jurisdiction and called the Arches Court of Canterbury and the Chancery Court of York respectively. The organisation of these courts is regulated by the Ecclesiastical Jurisdiction Measure of 1963, the judges being in each five in number. One of them, the Dean of the Arches and Auditor, is a judge of both courts. Of the other judges, two are persons in Holy Orders and two are laymen. The Arches Court of Canterbury and the Chancery Courts of York, have appellate jurisdiction only; jurisdiction to hear and to determine appeals from judgements, orders or decrees of Consistory courts of dioceses in any proceedings, other than those concerning a faculty involving matters of doctrine, ritual or ceremonial or proceedings concerning the ius patronatus.565 Thus a priest or deacon found guilty of an ecclesiastical offence, not involving ritual, ceremonial or doctrine but his general conduct such as failing to carry out his priestly duties, can appeal from a Consistory court to this Ecclesiastical Appeal Court..

5.4.3.3. Her Majesty in Council.

The Judicial Committee of the Privy Council is a further appeal court, with jurisdiction to hear and to determine appeals from judgements of the Arches Court of Canterbury and the Chancery Court of York in cases of a faculty, not

564 See Section 6 (1) (b) (i) and (ii) and (c), (d) and (e).
565 ibid. s.7(1)
involving matters of doctrine, ritual or ceremonial. So, for example, where there is a dispute regarding a faculty relating to the carrying out of any act on land dedicated for ecclesiastical purposes, then if such dispute does not involve the doctrine, ritual or ceremonial of the Established Church, then there may be appeal to the Judicial Committee. In addition, this court, has jurisdiction to hear appeals against pastoral schemes prepared by pastoral committees and by Cathedral's Commissions.

5.4.3.4. Court of Ecclesiastical Causes Reserved.

The Court of Ecclesiastical Causes Reserved has both original and appellate jurisdiction in respect of both provinces of Canterbury and York. It was brought into being by the Ecclesiastical Measure of 1963 and consists of five judges appointed by the Queen, of which three persons must be or have been diocesan bishops. The court has original jurisdiction to hear and determine proceedings in which a priest or deacon or an archbishop or bishop is charged upon articles with an offence ecclesiastical involving doctrine, ritual or ceremonial. Its appellate jurisdiction is exercisable in respect of appeals from judgements, orders, or decrees of Consistory courts in cases of a faculty, involving matter of doctrine, ritual or ceremonial.

5.4.3.5 Commissions of Convocation.

The Ecclesiastical Jurisdiction Measure of 1963 has constituted separate Commissions to exercise original jurisdiction with respect to the trial of Archbishops or Bishops charged with offences against the laws ecclesiastical other than offences involving matters of doctrine, ritual or ceremonial. The Commission consists of the Dean of the Arches and the Auditor and four diocesan bishops. Any decision is subject to review by a Commission of Review.

566 Ibid. section 1(3).
567 See The Pastoral Measure of 1969 s.8 and The Cathedrals Measure of 1963, s.3 (8).
568 Ecclesiastical Jurisdiction Measure of 1963 s.10.(1)(a).
569 ibid. s.9.
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5.4.3.6. Commissions of Review.

The findings of the Court of Ecclesiastical Causes reserved and of any Commission of Convocation can be scrutinised by appeal courts called Commission of Review. Any party can apply to this court for the determination of a question of law or fact, previously considered by the Court of Ecclesiastical Causes or the Commission of Convocation. Upon application to the Queen, five persons are summoned to act as judges, of which three must be Lords of Appeal and two Lords Spiritual sitting in Parliament.

5.4.4. Offences against the laws ecclesiastical.

Legal actions which can be commenced in the various Ecclesiastical courts, comprise civil matters as well as criminal. Offences committed by the clergy where these involve (a) doctrine, ritual and ceremonial of the Established Church and (b) where they do not. Offences falling within (a) are determined by the Court of Ecclesiastical Causes Reserved, at first instance and (b) include general offences against the ecclesiastical of the Established Church such as conduct unbecoming the office and the work of a clerk in holy orders and serious, persistent or continuous neglect of duty.

5.4.5. Persons subject to disciplinary Ecclesiastical Jurisdiction.

Those members of the Established Church who are subject to all criminal proceedings under the Ecclesiastical Jurisdiction Measure of 1963 are archbishops, diocesan bishops, any suffragan bishop commissioned by a diocesan bishop or a priest or deacon who when the offence was committed, held or holds preferment in any diocese or resides or resided there. Laymen of the Established Church, even churchwardens, deaconesses, readers and lay

570 Where there are questions of law ecclesiastical, only the defendant can challenge questions of fact. The three Lords of Appeal in Ordinary, must be Communicants of the Church of England.

571 See Halsbury's Ecclesiastical Law especially paragraphs 1357 to 1361. The examples range from officiating without permission, simony to unlawful trading.
chancellors would seem to be outside the criminal jurisdiction of the Ecclesiastical courts.572

5.4.6. Ecclesiastical Courts subject to administrative law remedies:

As the Ecclesiastical Courts form part of the English court structure, their judgements can be enforced by the civil courts.573 Their decisions can also be controlled, under English administrative law, by the Higher Courts which have the power to grant discretionary remedies against public bodies which exceed their jurisdiction or decline to act in a matter in which they are competent. Known as prerogative orders, they are the prerogative orders of (a) certiorari, (b) prohibition and (c) mandamus.574

The prerogative order of certiorari-is the legal way that the High Court can quash a decision of an inferior court, when it has decided a case ultra vires. The prerogative order of prohibition, lies to restrain a court where it is about to act ultra vires. The prerogative order of mandamus is an administrative remedy, to compel the performance of a public duty.

However, not all of these administrative law remedies are available against the Ecclesiastical courts. In the absence of any precedent, the Court of Appeal declined to grant the order of Certiorari against a Consistory court on the basis that this was not an inferior court.575 On the other hand, an order of prohibition will lie against an ecclesiastical court, if it exceeds its jurisdiction by misconstruing a statute or by determining a matter according to rules which are contrary to the common law of the realm or by violating the rules of natural justice. Any ecclesiastical Court can be restrained by a prohibition from the High Court of Justice. The High Court can also compel an ecclesiastical court to act,

572 See Ecclesiastical Jurisdiction Measure of 1963 s.14 (1).

573 See the case of R-v- Editor, Printer and Publishers of the Daily Herald and another, Ex Parte the bishop of Norwich [1932] 2 K.B. The Anglican Bishop of Norwich was able to prevent in a secular court the publication of a newspaper article, the effect of which could have prejudiced disciplinary proceedings in a court.


575 R-v-Chancellor of St Edmundsbury and Ipswich Diocese, Ex Parte White [1947] K.B.
when it has competence to do so but has declined to act. In this case, an order of mandamus will be issued.576

5.4.7. The binding force of precedent in Ecclesiastical Courts.

The doctrine of the binding force of judicial precedent, which had become an integral part of the Ecclesiastical law of the Established Church in the nineteenth century, was given statutory recognition within the Ecclesiastical Jurisdiction of Measure 1963.577 In general, all Ecclesiastical courts are bound to follow decisions of those exercising a superior jurisdiction and so decisions of the Arches Court of Canterbury and the Chancery Court of York are binding upon the Consistory courts of those provinces respectively. The Arches Court of Canterbury and the Chancery Court of York are bound by decisions of the Judicial Committee of the Privy Court.

A decision which is given by a court of equal jurisdiction, although it may carry great weight, has no binding force. Thus a decision of the Arches Court does not bind the Chancery Court, nor vice-versa. A Consistory court is not bound by a decision of another Consistory court in another diocese. Where the decision of the same court is cited as a precedent, there is uncertainty as to its binding effect.578

The Ecclesiastical Jurisdiction Measure of 1963 declares that in relation to matters of doctrine, ritual and ceremonial neither the Court of Ecclesiastical Cases Reserved nor a Commission of Review is bound by any decision of the Judicial Committee of the Privy Council. A decision of any subsequent Commission of Review will be bound by a decision of a previous commission, except when new evidence is adduced.579

576 See Halsbury's, Ecclesiastical law, the paragraphs on the Ecclesiastical courts.

577 See section 45 (3) thereof.

578 In Grosvenor chapel, South Audley Street (1913) 29 Times Law Reports, the chancellor considered himself to be bound by a decision given by a predecessor in the same court. In another case, in Re: Rector and Churchwardens of St Nicholas, Plumstead [1961] 1 All E.R. the Chancellor took a different approach.

579 Ibid. S 48(6)
5.5. THE GENERAL LEGAL POSITION OF THE CLERGY WITHIN THE ESTABLISHED CHURCH.

The revised canons ecclesiastical of the Established Church, lay down the three orders of the Established Church; bishops, priests and deacons. Before executing these functions, every person is required by law, to be called, tried, examined and admitted to them according to the Form and Manner of Making, Ordaining and Consecrating of Bishops, Priests and Deacons.580

The new canons set out the spiritual obligations of the clergy, what their pastoral office requires them to do and how they are to serve the Church. Every bishop, priest and deacon of the Established Church is under an obligation, apart from cases of sickness or other urgent reason, to say daily Morning and Evening Prayer, either privately or openly and to celebrate Holy Communion or be present at it, every Sunday and other principal feast day.581 The clergy are also required to be diligent in daily prayer and intercession, in examination of his conscience and in the study of Holy Scripture and other studies which relate to their ministerial duties.

Does this mean that legally the Clergy are employees of the Church and therefore are entitled to the protection of the Employment legislation? Can the clergy, for example, claim damages for unfair dismissal and for breach of Contract? The English Courts have considered the legal position which exists between the Church and a cleric and have concluded that under law, the pastoral office of the minister is vocational rather than contractual. In the event of having pastoral activities changed or redefined, then the minister cannot sue for unfair or constructive dismissal.582

580 Canon A 4.

581 Cf. Canon C.26 and the Book of Common Prayer. For failing to do this, a cleric can be punished on a disciplinary offence, before a Consistory Court or the Court of Ecclesiastical Causes

582 "Constructive dismissal" is a concept devised by the courts. It applies where an employee has resigned his employment, because of new working conditions imposed but without his consent. If those new conditions are deemed to be unreasonable, then the employer is deemed to have acted in such a way as to have unfairly dismissed the employee. In the case of Macmillan-v-Guest [1942] A.C. 61, Lord Atkin raised the issue as to whether a cleric who performed his duties as a minister in the Church, by a specific calling, had a contract of service. He concluded that he did not. In 1986, the House of Lords reached a similar conclusion in a case concerning the Church of Wales. See Davies-v-Presbyterian Church of Wales [1986] 1. W.L.R.
200 Chapter 5

5.5.1. The legal status of Archbishops and Bishops.

As the Established Church is still regulated by the law of the land, specific legal privileges are afforded to its senior clergy. The Archbishops of Canterbury and York, the Bishops of London, Durham and Winchester and twenty one other diocesan bishops, by seniority in office, have the privilege of being members of the House of Lords, the second chamber of Parliament. They are known as "Lords Spiritual" and sit in the House of Lords with the other Lords Temporal of the land. 583 The active presence of the senior members of the clergy of the Church of England in Parliament, as "Lords Spiritual", has been constitutionally justified on the basis that in return, Parliament is able to control the Church. The Lords Spiritual are able and are free to vote and debate upon any matter of the House of Lords, not only upon ecclesiastical issues. In 1968, the then government of the day, commissioned a report on the position of the Lords Spiritual in the House of Lords. It recommended that they should remain, but that their number could be reduced in the future to sixteen. 584 There has been recent discussion on the possibility of opening this chamber to other religious leaders, so as to include "virtute officii" the religious leaders of the other Christian Churches and the non-Christian religions and reducing the number of Church of England bishops. 585

5.5.2. The Status of Priests and deacons.

Under the Established Church’s own canons, every person about to be ordained priest or deacon, before ordination, must make and subscribe in the prescribed form a declaration of assent, affirming his loyalty to the Church’s inheritance of faith as his inspiration and guidance under God in bringing the grace and truth of Christ to his generation and making Christ known to those in his care. He is also required to declare his belief in the faith which is revealed in

584 Cmd Paper 3799.
585 In January 1998, Lord Irvine, the Labour Lord Chancellor, indicated that he would now like to see the number of Church of England Bishops reduced. The possibility was also raised of creating Cardinal Hume, the Roman Catholic Archbishop of Westminster, a Lord Spiritual in the House of Lords. See article in The Times, January 1998, by Lord Rees-Mogg.
the Holy Scriptures and set forth in the Catholic creeds and to which the formularies of the Church of England bear witness (defined as being within the Thirty-nine Articles of Religion, the Book of Common Prayer and the Ordinal).  

All priest and deacons are required by law to take and to subscribe to the oath of allegiance to Her Majesty and as well, in the presence of the bishop of the diocese, to take the oath of canonical obedience. By law, all members of the clergy are protected when they perform their clerical duties, against any violence, force or obstruction used by other persons and are also privileged from being arrested in a civil matter, whilst going to, attending and returning from Episcopal visitation, divine service or other clerical duties. They cannot be elected to the House of Commons and if elected and attempt to take their seat, are liable to forfeit the sum of five hundred pounds for every day during which they presume to sit or vote in that House. The Clergy of the Established Church are also specifically subject to restrictions on their lifestyle, unbefitting to their sacred calling and are subject to a number of restrictions upon farming and trading.

### 5.6. The Law of Blasphemy and the Established Church.

Because the Established Church retains its links with the state, it is protected at law in one way that is not available to the other Christian Churches and

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586 See Canons A.2 and A.3.
587 The Clerical Subscription Act 1865, section 4 and Canon C 13.
588 Ibid. s.12
590 Under the House of Commons (Clergy Disqualification) Act 1801, on the legal basis that their spiritual office would be incompatible with the political position of a member of the House of Commons. This prohibition extends to all episcopally ordained clergymen, such as members of the Church of Ireland and the Church of Scotland. R-v-MacManaway [1951] A C 161.


591 Canon C 26
indeed other faiths. This is in the law of blasphemy. Blasphemous libel is a common law offence and had been dormant for over half a century, when it became public news in 1979, after a private prosecution had been brought against a newspaper and its editor, for printing a scurrilous poem, calculated to offend the sensibilities of Christians and others. It carried an offensive poem written against Christ, written in a homosexual newspaper. There was no doubt that the poem was in extremely bad taste and offensive to not only Christians but to non-Christians alike. The lawyers acting for the newspaper and its editor, argued not only that the law of blasphemy had become defunct but that to prevent them from publication would be an unreasonable interference with their freedom of speech.

The case in question\(^{593}\) raised issues of public importance, since the teaching of Christianity was being openly ridiculed. The House of Lords held, following the traditional view, that the law of blasphemous libel had not been abolished but continued to exist to protect Christianity, as the law of the land. Christianity as taught by the Established Church. Thus to hold to ridicule the tenets of the Established Church, was to commit the criminal offence of blasphemous libel. To ridicule the beliefs of the other Christian Churches, only becomes blasphemous when the teachings so ridiculed corresponded to those held by the Established Church and set out within the Thirty-nine Articles of Religion, the Common Prayer Book and the other formularies of the Church. Otherwise the offence is not committed. Nor is the offence committed when other faiths are held to ridicule, such as the Muslim religion.\(^{594}\)

Against the legal climate, that the common law offence of blasphemy should be abolished as being outdated and a restriction on the freedom of speech, Lord Scarman said:--

"My Lords, I do not subscribe to the view that the common law of blasphemous libel serves no useful purpose in the modern law. On the contrary, I think that there is a case for legislation extending it to protect the religious beliefs and feelings of non-Christians. The offence belongs to a group of criminal offences designed to safeguard the internal tranquillity of the kingdom. In an increasingly pluralistic society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also

\(^{593}\) Whitehouse-v-Lemon [1979] A.C.

\(^{594}\) Cf. R-v-Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury [1991] 1 All E.R.
to protect them from scurrility, vilification, ridicule and contempt. My criticism of the common law of blasphemy is not that it exists but that it is not sufficiently comprehensive. It is shackled by the chains of history.”595

It is worth noting, that since that speech, Lord Scarman has changed his view and is now in favour of the abolition of the offence because of the uncertainty about the meaning of religion and a general preference for freedom of speech.596 In 1994, a House of Lord's amendment to a bill which would have abolished the offence of blasphemy was withdrawn in the face of government opposition. Subsequently, an Archbishop of Canterbury's Working Group chaired by the Bishop of London, felt that the offence should be extended to other religions. For the time being, the offence of blasphemous libel remains, but exists only to protect the teaching and the doctrine of the Established Church.

5.7. CONCLUSION.

The Church of England, as the Established Church remains legally regulated and controlled by Parliament. For historical reasons, it retains a special privileged status over and above the other Christian and non-Christian bodies. The Archbishops of Canterbury and York, as well as the senior bishops of the Established Church have seats in the House of Lords and form a body known as "the Lords Spiritual." They play a part in the law making process, laws not only relating to the ecclesiastical matters of the Established Church. The Supreme Governor, remains the Sovereign.

The price that the Established Church pays for her special status is that she remains legally controlled by and subject to the jurisdiction of the Crown. Nowhere is this more evident than in the area of ecclesiastical legislation, where although there is much greater freedom than in the past, all Ecclesiastical Measures must still be approved by Parliament and the Crown. The General Synod of the Church of England is its chief law making body and has other limited powers to pass without the approval of Parliament canons, of limited

595 See R-v-Lemon [1979] A.C.

596 See Bailey, Harris Jones op.cit. p. 593.
legal effect since these canons cannot infringe the royal prerogative, must be approved by the Crown and do not bind the laity per se.

The two essential characteristics of the Church of England being the doctrine of (a) the royal supremacy of the monarch and flowing from that (b) the subordination of the Church to Crown and Parliament remain entrenched within her constitution and the ecclesiastical law which applies to the Established Church. Following the development of a constitutional monarchy, the royal supremacy is now exercised in a constitutional manner, through Parliament and the ministers of the Crown, especially the Prime Minister and the Lord Chancellor. By convention, the Prime Minister now appoints the Archbishops and Bishops of the Established Church. The monarch is required by law to be solemnly crowned by the Archbishop of Canterbury and by the coronation oath, to swear to hold and maintain the Protestant religion. The monarch cannot be a member of the Roman Catholic faith nor marry a Roman Catholic.

The special status of the Established Church has been questioned over the years and attempts have been made to dis-establish by legislation in Parliament.597 Some have argued that its close links with the state obscures its

597In 1988, the Labour Member of Parliament, Tony Benn, introduced a bill to dis-establish the Church. This never became law. The private member’s bill read; “On the day after the expiration of six months, or such extended period as Her Majesty may fix by Order in Council, no being more than twelve months after the passing of this Act, the Church of England, shall cease to be established by law, and no person shall, after the passing of this Act, be appointed or nominated by Her Majesty or any person, by virtue of any existing right of patronage, to any ecclesiastical office in the Church of England.”
rightful nature as she should be subjected only to Christ and that the state imposed shackles should be removed to restore it to its rightful nature. 598 Others have opposed any attempt at her disestablishment and have stated that her position should be maintained. As the Church of the nation, she offers an historic cohesive role to the state, existing for the benefit of all and is able to give a Christian input to the Government. 599

598 This was the view of Bishop Mark Santer. Referred to in the article “By law established: the Church of England and its place in the constitution” in, Constitutional Studies; contemporary issues and controversies. Edited by Dominic Grant, Mansell Publishing Limited 1992.

599 This was the conclusion of the Chadwick Report, the contents of which were cited in the above mentioned article.
Chapter 6

RELIGIOUS DISSENT UNDER ENGLISH LAW BETWEEN 1532-1777.
Chapter 6

Religious Dissent under English Law between 1532-1777.


6.1. INTRODUCTION.

When Parliament in 1534 declared Henry VIII to be "rightly, justly and ought to be the Supreme Head" of the Church in England,601 the political theory of the two separate and independent orders existing side by side, the Church and the State, came to an end. Henry VIII, by his domestic ecclesiastical policy, fused and concentrated these two orders into one, that of the Crown. Religious belief and devotion was to be exercised under his supreme jurisdiction and authority. Nowhere can this be more clearly demonstrated than in the way that Henry used the old heresy laws and the new provisions within his Acts of Parliament, to eliminate opposition and dissent to his religious measures. Under the old canon law of the Church, anyone convicted of heresy by a Church tribunal, could be


601 The Act of Supremacy 26 Henry VIII c.I (1534) Statutes at large (Vol 2)
handed over to the secular courts for punishment602 and be punished by the laws of the State. This was a separate procedure, independent of the state. Once the independence of the Church courts had been terminated, then the two jurisdictions came to be exercised by one ultimate authority; the Crown and the Established Church, under the King and with the authority of Parliament, using the secular law to punish religious non-conformity and dissent. By law, the King as Supreme Head of the Church, now had the power to determine and punish all heresies. Henry VIII revealed the extent to which he was prepared to use this power against those who challenged his position.

6.2. THE LEGAL BASIS FOR HENRY VIII’S MEASURES AGAINST RELIGIOUS DISSENT.

Before being declared by Parliament to be the Supreme Head of the Church in England, Henry VIII had ensured the submission of the clergy. Once the clergy had legally submitted their authority to the King, by The Submission of the Clergy Act of 1533, Henry was able to press ahead with his policy and proceed to abolish all papal jurisdiction over the English Church. One year earlier, all appeals in canon law suits to Rome were abolished.603 The Ecclesiastical Licences Act of 1533, legally vested within the King, the exclusive right to nominate all Bishops and other ecclesiastical positions within the Established Church and the power to grant and withhold ecclesiastical licences under canon law. The judges in Ecclesiastical courts who could determine these matters, were soon to include doctors of the civil law and who were married.604

The authority for all the ecclesiastical legislation of Henry VIII, was firmly rooted in his claim that he was the duly authorised head of the Established Church. Only as Supreme Head of the Established Church in England, could he by the royal prerogative and his office, assume the legal right to govern it. This


603 The Act to abolish all appeals to Rome. 24 Henry VIII c.12 (1532) Statutes at large (Vol 2).

604 Laymen Exercising Ecclesiastical Jurisdiction Act. 37 Henry VIII. c.17 (1545) Statutes at large (Vol 2)
was acknowledged within the Act of Supremacy of 1534605 which stated in clear terms the position and power of the King. He was

“...the only Supreme Head in Earth of the Church of England, called Anglicana Ecclesia, and shall have and enjoy, annexed and united to the imperial crown...dignity of the Supreme head of the same Church.”

As such, he had the power to reform all errors and heresies and to punish by appropriate means, all religious dissent.

6.2.1. Legislative measures against the Higher Clergy.

The Act of Submission of the Clergy of 1533,606 legally brought within crown control, the Higher clergy; the Archbishops and the Bishops of the realm and the senior prelates-the Provincials, the Abbots, Priors and Superiors of the religious orders. Their submission was the legal admission that Henry VIII was legally their Supreme Head of the Church in England and that they enjoyed no independent rights to legislate in respect of Church law, without the permission of Crown.607 Threatened with civil penalties for attempting to bring canon law appeals to Rome608 similar sanctions were to be imposed on any person recognising the jurisdiction of the Pope by paying to them taxes, instead of to the King, under the Appointment of Bishops Act of 1533609 or by making any application for a licence to Rome as opposed to the Crown under the

605 An Act concerning the King’s highness to be supreme head of the Church of England and to have authority to reform all errors, heresies and abuses in the same. 26 Henry VIII c.1 (1534) Statutes at large (Vol 2).


607 The Act of Submission of the Clergy acknowledged that only Henry VIII had the right to (a) summon the clergy in convocation (b) be the head of the Church in England (c) veto and approve all constitutions, canons and ordinances made by the clergy and (d) begin the task of purging from the ecclesiastical laws, all canons which denied or lessened the his royal prerogative.

608 Cf. The Act to abolish all appeals to Rome. See Clause X.

609 An Act restraining the Payment of Annates. 25 Henry VIII c.20 (1533) Statutes at large (Vol 2).
Ecclesiastical Licences Act of 1533. 610 Those who flouted the provisions within these Act, faced confiscation of their assets and their lands to the Crown under the statute of Praemunire of Richard II of 1393.

The Act of Supremacy of 1534, which confirmed the position of Henry VIII as Supreme Head over the Church in England, brought with it the power

"to visit repress redress reform correct and amend all such errors heresies abuses, whatsoever they be, which by any manner spiritual authority or jurisdiction ought or may be lawfully be reformed....to the pleasure of almighty God, the increase of virtue of Christ’s religion.“611

By virtue of this Act of Parliament, Henry VIII possessed the legal power to punish all heresy and all those who dissented the doctrine and the worship of the Established Church. Prior to the Act of Supremacy of 1534, there had been the Act of Succession of 1533, 612 which had fixed the succession to the throne to the male heirs of Anne Boleyn. This was shortly followed by an Act which required from all subjects, an oath of obedience to the King, as Head of the Church.613 This oath of loyalty was not only to be a manifestation of religious orthodoxy but at the same time, a demonstration of civic loyalty and patriotism, to the King as Supreme Head of the nation. This Act did not then give the specific text of such oath.

6.2.2. The initial opposition to Henry VIII.

On 16 May 1532, one day after the clergy had made their formal submission to Henry VIII by giving their assent to what would become the Submission of the Clergy Act, Sir Thomas More, the Lord Chancellor and successor to Cardinal Wolsey, resigned from office. For him this action of the English bishops signified that he could no longer serve as Henry’s minister. He was to retire from public


611 Cf. The Act of Supremacy, supra.


613 An Act requiring the oath of obedience to the King and to the heirs of his heirs begotten by Queen Anne 26 Henry VIII. c..2 (1534). Statutes at large (Vol 2).
life. Unable together with John Fisher, Bishop of Rochester, to accept as a matter of conscience the detailed provisions of the Act of Submission of the Clergy, he consistently refused to take any oath of succession and supremacy, which declared that Henry was the Supreme Head of the Church.

Sir Thomas More and Bishop John Fisher, watched with growing despair the legislative measures of Parliament and the action of the English clergy, as the legislative process was used to cut off the Church from Rome. Between 1532 to 1535, both More and Fisher were subject to a number of governmental investigations, requiring them to explain why they were refusing to take the oath of loyalty to Henry VIII as Supreme Head of the Church. A special Commission to try and examine the conduct of Sir Thomas More was to sit intermittently from 1532 to 1535 and to be chaired by Thomas Cromwell.

The Act of Succession which was passed in 1533, and which had determined the question of succession to Henry VIII on his death, had not only stipulated that the heirs of his marriage with Anne Boleyn were to succeed to the throne. Apart from requiring an oath of loyalty to the successor of Henry, the Act had also declared within its clauses, that the marriage between the King and Catherine was void, that his marriage with Anne was valid, that the Pope had no jurisdiction within the realm and that Henry was the lawful head of the Church in England.

The specific textual wording of the oath of loyalty to be taken, was devised under the provisions of an Act of 1534 requiring an oath of obedience. This Act set out the manner in which such an oath was to be taken and that a certificate was to be made of all who refused to take the oath, and deposited with the King’s Bench. The contents of the oath, largely concerning the succession, made it clear that the person taking the same assented to the whole effects and contents of the Act of Succession, thus repudiating papal authority and accepting

614 Thomas More also faced various allegations on his professional conduct as a lawyer and his exact involvement as a minister of State, when Henry had complied his defence of the Seven Sacraments. Cf. Chambers, Thomas More.

615 For a detailed account of the investigation, see R.W. Chambers Thomas More. Especially Act V.

616 See the Act of Succession above. Under section XIV, provision was made for the oath.

617 The Oath of Obedience to the King. 26 Henry VIII c.2. (1534).
Henry VIII as Supreme Head of the Church in England. For this reason, Thomas More refused to take the oath, as drafted and preferred to remain silent.618

One year later, by the Act of High Treason of 1535, it was made an offence of high treason for any person after 1 February 1535 by words or writing to maliciously to deprive the king of his dignity, title, or name of his royal estate.619 This Act incorporated within it, the 1352 statute of Treason, and extended the offence of treason to maliciously denying the King’s title to include not only things said or done but also things thought.620 Acts of Attainder were to be brought against both Sir Thomas More and Bishop John Fisher, on the grounds that their refusal to take the oath of supremacy, even for reasons of conscience, amounted to a malicious denial of the King’s title. Relying upon the exact words within the Act of Treason of 1535, Sir Thomas More, Bishop John Fisher, several Carthusians and a group of Franciscans Friars of the Rule Observant, defended their position and pointed out that although they had refused to take the oath, they were only following the dictates of their conscience, and so were not maliciously denying the King's supremacy, according to the intent of the statute. Sir Thomas More argued that the Act specifically used the word "maliciously" and the burden of proof lay upon the Crown to prove that those who did not swear the oath, were by malicious intent denying the title of the King.

Unfortunately for Thomas More and his colleagues, this was held to be no valid defence. The King’s chief adviser, Thomas Cromwell stated that the word "maliciously" should be disregarded when construing the text of the statute, so the offence would be committed by the simple refusal to take the oath. Contemporary evidence of the time, from the account of the circumstances in which this Act gained the approval of Parliament, does present a different picture to the view held by Cromwell and that Parliament meant exactly what was intended by the Act. One of the biographies of the life of Sir Thomas More, written by his nephew, Judge Rastell, wrote that the draft bill in the Parliamentary session of 1534/35 had only been given approval by the House of Commons, after the word "maliciously" had been specifically inserted within the

619 The Act of Treason" 26 Henry VIII c. 13. (1534).
bill, to mitigate its onerous provisions. It was only the King and his advisors, who considered it to be null and void and so provided no legal defence.621

In the Spring of 1534, at the same time that Sir Thomas More and Bishop John Fisher were imprisoned, the King's Commissioners demanded the oath of supremacy from the Prior of the London Charterhouse, John Houghton. John Houghton was the Prior, the Visitor of the English Province and the Head of the Carthusians of England. It seems to be the case, that before the Act of Treasons came into force in 1535, John Houghton had sworn some sort of oath with the saving clause "so far as lawful."622 One year later, John Houghton, with three other Carthusian monks, Robert Laurence, Richard Reynolds and Augustine Webster were to face proceedings on 26 April 1535. All four monks appeared before a special commission, chaired by Cromwell and refused to take the new oath of loyalty which not only related to the succession but also to the title of the King as Supreme Head of the Church in England. They protested their innocence and denied that they were acting maliciously. The trial proved to be a test case and demonstrated from a legal angle, the extent to which those opposed to Henry could plead justification for their actions by recourse to conscience and the precise way that the judges and the jury would interpret the word "maliciously". Judge Rastell in his vivid account of the trial, wrote that their conduct amounted to no defence. They were found guilty and executed.623

621 Judge Rastell, was to write;—

"Note diligently here that the bill was earnestly withstood, and could not be suffered to pass, unless the rigour of it were qualified with this word maliciously; and so not every speaking against the supremacy to be treason, but only maliciously speaking. And so, for more plain declaration thereof, the word maliciously was twice put into the Act. And yet afterwards, in putting the Act in execution against Bishop Fisher, Sir Thomas More, the Carthusians, and others, the word maliciously, plainly expressed in the Act, was adjudged by the King's Commissioners, before whom they were arraigned, to be void."

Quoted in Rastell Fragments, Harpsfield. p 320 in Chambers, Thomas More.

622 This incident is referred to within Chambers, Thomas More p. 320.

623 "The Four religious persons were arraigned, and the Carthusians by the mouth of John Houghton, their Prior, confessed that they denied the King's supremacy, but not maliciously. The jury could not agree to condemn these four religious persons, because their consciences persuaded them they did it not maliciously. The judges hereupon resolved them that whoever denied the Supremacy denied it maliciously; and that the expressing of the word "maliciously" in the Act was a void limitation and restraint of the construction of the words and intention of the
With the Carthusians condemned to death and being deprived of any defence within the Act, it was only a question of time before the same fate fell upon first Bishop John Fisher and then Sir Thomas More. Bishop Fisher had been created a Cardinal on 20 May 1535 by Pope Paul III, in an attempt to save him. An act of diplomacy which backfired as it only increased the wrath of Henry VIII who on learning of the recent honour, commented "I will so provide that if he wear it, he shall bear it on his shoulders, nor any head shall he have to put it on". Bishop John Fisher was found guilty of high treason and hanged on 22 June 1535. Thomas More, was also found guilty of high treason and was beheaded on 6 July 1535.

6.2.3. The Dissolution of the Monasteries and the Pilgrimage of Grace 1536.

The example of the Carthusian monks of Charterhouse in London, who had refused to take the oath of Supremacy and so had been beheaded, had made Henry VIII and Cromwell realise more than ever that they needed to eliminate all opposition to the ecclesiastical policy by destroying all opposition which could be found within the monasteries. Being "garrisons of the Pope", Cromwell in 1534 ordered a general visitation of the religious houses. If he were able to demonstrate that these were places of ill repute, then he worked on the basis that their wealth and properties could be confiscated and the communities disbanded. Those who were to form part of the team of visitors, were supporters of Cromwell.

The reports which this commission produced about the state of affairs of these religious houses, were highly favourable to Cromwell, and confirmed that they were in a general state of decay and disrepute. Laid before Parliament in the session of 1536 and using the evidence of these reports, Cromwell introduced a bill to suppress all religious houses of an income of less than two hundred defender. The jury, for all this could not agree to condemn them; whereupon Cromwell, in a rage, went unto the jury, and threatened them, if they condemned them not. And so, being overcome by his threats, they found them Guilty..." Rastell Fragments, from the life of Harpsfield. See Chambers. Op.cit. p. 323.

624 They included Legh, layton and Ap rice.
pounds a year and which became law. All the properties, the lands and buildings and wealth, passed into the hands of the Crown.625

The legal expropriation of the smaller religious foundations, was not to pass without some lay and clerical opposition. Violent disturbances broke out in the country and Lincolnshire and the north of England rose up in open rebellion in 1536. The rebels demanded the dismissal of Cromwell, the punishment of those bishops who had openly abandoned Catholicism, such as Cranmer and Latimer, and the restoration of papal authority. In the North, the rebellion was led by Robert Aske and was to be known as the "Pilgrimage of Grace". The rebels were met by the Duke of Norfolk who to buy time, acceded to some of the demands of the rebels. On the authority of Henry VIII, he promised that a free Parliament would be assembled and that a Commission would be set up to examine their complaints. On the strength of these promises, the insurgents disbanded and the civil dangers that had threatened the country were averted. With revenge, the Duke of Norfolk and Henry VIII seized their opportunity and punished all those who had participated.626 The overall result, was that Henry and Cromwell pushed ahead with their policy to dissolve all the remaining religious properties. Further Parliamentary powers were obtained in 1539 and all the remaining religious houses within the realm were expropriated by the Crown and dissolved by another Act of Parliament. The legal result was that by the end of his reign in 1547, Henry had succeeded in destroying a monastic tradition which had existed in England for nearly a thousand years.627

6.2.4. Doctrinal dissent punished under the Act of Six Articles 1539.

Deliberately deprived of their contact with Rome, very soon Thomas Cranmer, as the Archbishop of Canterbury and the rest of the hierarchy of the Established Church were soon unable to reach uniform agreement upon discipline and a number of doctrinal matters within the Church. Henry had prohibited all the

625 Act for the Dissolution of certain Monasteries and Abbeys. 28 Henry VIII c.13 (1536) Statutes at large (Vol 2).

626 The ringleaders were executed, including four the senior abbots and several landed gentry who had all joined in the opposition.

627 This last Act was An Act for the Dissolution of all monasteries and abbeys. 31 Henry VIII c.13.
clergy from having any contact with the See of Rome and by participation in any assembly outside the realm, whether in a general or local council. Maintaining any contact or participating in a council outside England would have been viewed as denying the King’s royal supremacy and supremacy. Henry therefore decided, as Head of the Church, to use his royal power and through Parliament to define the orthodox beliefs of the Church.

The Pandora’s box which Henry opened, when he separated the Church from Rome, can be seen by the rapid growth and proliferation of doctrines which were at variance with the Catholic faith, of which he was now the Supreme Head in England. By 1539, matters had come to such a crisis that by Act of Parliament, Henry VIII was forced to intervene and to use his royal power, with the help of Parliament, to enact a number of definitions to represent the orthodox teaching of the Church. The Act of Six Articles of 1539 was to re-affirm a number of doctrinal and disciplinary issues: the traditional Catholic doctrine on Transubstantiation and Holy Communion under one kind was now by secular confirmed: as belonging to divine law, the requirement of celibacy for the priesthood; the licitness of private vows of chastity; the validity of private Masses and auricular confession. Those who denied these religious tenets and the discipline of the Established Church, were guilty of heresy and were to be punished, in some cases with the death penalty.

The Act of Six Articles demonstrated that at heart, Henry retained most of the most basic dogmas of the Catholic faith. His most liberal advisors were forced to bide their time before purging and amending the doctrine and discipline of the Established with more far reaching radical legislation.

6.3. EDWARD VI AND MARY.

After Henry VIII’s death in 1547, the legal way religious dissent would be dealt with, would change according to the views of the monarch and Parliament. When its doctrine and liturgy swung in a more Calvinistic direction, then the pattern of religious orthodoxy changed and laws would be utilised to suppress any divergencies.

628 The Act for the abolition of the payment of Annates to Rome forbade the clergy to attend general councils, summoned outside England under clause XX. 25 Henry VIII c.21. (1533)

629 The clauses have already been referred in chapter 2.

630 Twenty seven people were executed for denying the dogma of Transubstantiation.
6.3.1. Religious dissent under Edward VI.

Edward VI, the weak nine year old son of Henry VIII, who reigned from 1547 until 1553, had been reared up with strong Calvinist sympathies. Subject to the guidance of his two chief advisors, Lord Seymour and Archbishop Cranmer, under his reign the doctrine and the liturgy of the Established Church was to be purged and reformed. Within his short reign of barely six years, the ecclesiastical legislation passed by his Parliament covered a great variety of ecclesiastical matters; ranging from the imposition of penalties and punishments upon those who spoke irreverently against the Sacrament, to the abolition of divers books and images and the prescription of Holy days and Fasting days. These laws were of course part of the general reforms being pioneered, and were closely associated with the New Book of Common Prayer and the New Articles of Religion compiled by Cranmer.631

In 1547, by his first Act of his Parliament, Edward had laid down heavy penalties for all those who spoke unreverently against the Catholic doctrine of the Sacrament of the Body and Blood of Our Lord, called "The Sacrament of the

631 The Acts, by name, were:—

*An Act made against those such as shall speak unreverently of the body and blood of Christ. 1 Edward VI c.1 (1547)

*An Act touching the election of bishops. 1 Edward VI c.2 (1547)

*An Act concerning the Uniformity of Service and Administration of the Sacraments. 2 Edward VI c.1 (1548)

*An Act to take away all positive laws ordained against the marriage of priests. 2 & 3 Edward VI c.21 (1548)

*An Act made for the abolitioning of divers books and images.3 & 4 Edward VI c. 10 (1548).

*An Act made for the ordering of ecclesiastical ministers. 3 & 4 Edward VI c.12 (1548)

*An Act made for the Uniformity of Common Prayer and Administration of the Sacraments. 5 & 6 Edward VI c.1 (1549)

*An Act made for the Keeping of Holy days and Fasting days. 5 & 6 Edward VI c.3 (1549)

*An Act touching the Marriage of priests and the legitimatisation of their children. 5 & 6 Edward VI c.12 (1549)
Altar." Those found guilty of treating the Blessed Sacrament with contempt, were to be imprisoned or fined. This Act also ordered that all people should receive Holy Communion under both kinds.632

During the same Parliamentary session, Parliament legislated against the doctrine of the Sacrifice of the Mass, Purgatory and the custom of celebrating Private Masses for the dead. These beliefs were prescribed in The Act to abolish Chantries collegiate of 1547, which abolished the Chantry Chapels which existed in the Realm and had been endowed by generous benefactors, to enable Priests to celebrate Masses for their souls. The Act to Abolish these Chantry foundations provided for the confiscation of their revenue to the Crown.633 A small part of this revenue was used to endow new colleges and schools named after Edward.

The Book of Common Prayer, which had been compiled by Cranmer, was to be used as part of the New Liturgy of the Church by law.634 This Act prescribed heavy penalties for those who refused to use the same and made it an offence for ministers to disregard it. Lay magistrates were given the power to arrest and imprison disobedient clerics.635 Three years later, the Second Book of Common Prayer was introduced and its use was made mandatory by another Act of Parliament.636 This by law ordered that all ministers of the Established Church were to use the liturgy in the new authorised form, or to face civil penalties and sanctions. It was also made mandatory, for the first time, for all persons of the realm to attend public worship on Sundays and holidays, on pain of spiritual

632 Sections 1 and 8 of "An Act against such as shall unreverently speak against the Sacrament of the Body and Blood of Christ commonly called the Sacrament of the Altar and for the receiving thereof in both Kinds". 1 Edward VI.c.1. This is the first Act referred to in the previous footnote.

633 The Act for Chantries Collegiate. 1 Edward VI c.14 (1547). The pre-amble to this Act referred to;— "The King's most loving subjects...considering that a great part of superstition and errors in Christian religion hath been brought into the minds and the estimations of men, by reason of their very true and perfect salvation through the death of Jesus Christ and by devising and phantasying vain opinions of Purgatory and Masses satisfactory, to be done for them which be departed..."

634 An Act for the Uniformity of Service and Administration of the Sacraments throughout the Realm. 2 & 3 Edward VI. (1548) Statutes at large (Vol 2).

635 Under sections 1 and 4 of the above Act.

censures. Failure to attend, resulted in a punishment, whether by a fine and/or imprisonment.637

6.3.2 Religious dissent under Queen Mary.

Edward VI died in 1553 and he was succeeded by his eldest half sister, Mary. A devout Catholic, Mary used her authority to undo the reforms of Cranmer and to disarm his support and hoped to be able to bring about the reconciliation of England and the English Church to Rome.

Her first Act of Parliament, declared her own legitimacy and repaired the harm and the damage that had been done to her mother, Catherine of Aragon.638 Her second Act of Parliament repealed all the ecclesiastical Acts of Edward VI, notably the Acts which (a) provided for the compulsory reception of the Holy Eucharist under both kinds, (b) the nomination of Bishops directly by the Crown,639 (c) permitted the clergy to marry and (d) made mandatory the use of the Book of Common Prayer and Administration of the Sacraments. Mary laboured hard by using the secular law to restore the jurisdiction and authority of the Papacy over the Church. She in fact gained great support and help from her clergy to such an extent that with one notable exception, all the archbishops and bishops appointed by her remained faithful to her policy on her death. Towards the laity who had benefited from the expropriation of the monasteries, Mary acted with prudence and caution. They were permitted by Parliament and by a specific papal dispensation, to retain these lands.

In January 1553, Mary revived the state heresy laws, to try to stamp out all opposition to her ecclesiastical policy. In course of the next three years, nearly three hundred persons were put to the stake for heresy, including Archbishops Cranmer and Ridley. All the recent historical evidence has indicated that the legal measures which she used to eradicate religious dissent, were generally popular and would have succeeded in restoring Catholicism, had she lived a long

637 Cf. Section 1 of the above Act.

638 An Act declaring the Queen's Highness to have been born in a most just and lawful Matrimony and also repealing all Acts of Parliament and Sentence of Divorce had or made to the contrary. 1 Mary c.1. (1553) Statutes at large (Vol 2).

639 An Act touching the election of Bishops 2 Edward VI c.1.
time. 640 It was only her early death that put a stop to her process of general reconciliation, which was portrayed by her half sister and successor, Elizabeth, as well as her enemies, as an attempt to make England subject to a foreign power.


When Elizabeth became Queen in 1558, it was still unclear as to which direction she would take. Whether she would keep the settlement newly created by Mary or whether she would return to the position of the Established Church as existing under Edward VI. Her exact religious convictions were a mystery, especially as she had outwardly confirmed to Catholicism during the reign of Mary. When she became Queen, she was in fact illegitimate by English law and by the canons of the Established Church. Within a few months, she soon made that she intended to press ahead with her own independence and re-create the Established Church. 641

Elizabeth encountered, from the time when she became Queen, opposition and dissent to her religious policy, from two separate sources. From the evangelical, more Protestant wing of the Established Church, which wanted a far more radical liturgy and Book of Common Prayer and from those Catholics who were hopeful that the Church would return to Rome or at least respect their liberty of worship.

Elizabeth also faced a grave crisis of confidence in her position as the Spiritual Head of the nation, from the hierarchy of the Church which she had inherited from Mary. All the bishops, with one exception, refused to officiate at her coronation and after being summoned, Parliament and the convocation of the clergy, declared that were only prepared to accept the Settlement made by Mary. 642 Elizabeth used her Parliament, to remove all dissent and to restore her


641 Cf. The article in the Catholic Encyclopaedia on Elizabeth I, Queen of England, gives a brief description of her character and the problems that she was to face throughout her reign.

642 A series of Articles, declaring the belief of the Clergy in Transubstantiation, the papal supremacy, and the Sacrifice of the Holy Mass was passed unanimously and accepted by the Universities of Oxford and Cambridge. See Wyatt-Davies History of England. Pp. 234-235.
supremacy over the Church. Fresh legislation swept away the celebration of the Mass and the Sacraments and replaced the old Missal, with a New Book of Common Prayer, sanctioned by the Acts of Supremacy and the Uniformity of Prayer and Divine Service, both of 1558.643 By the former, the absolute supremacy of the Crown and the resumption of its jurisdiction over all matters, including those spiritual was restored.644 All the bishops were ordered by Elizabeth, to take a fresh oath of loyalty to the Crown: one bishop co-operated, the rest of the bishops refusing and so being deprived of their sees.645 With her royal supremacy restored, Elizabeth replaced the hierarchy with bishops of her own choice, with Matthew Parker being appointed her new Archbishop of Canterbury.646

The Act of Uniformity of 1558, re-introduced the Book of Common Prayer as the official liturgy to be used by the Established Church,647 and made the celebration of the Mass illegal. The act of Uniformity at the same time gave to the bishops, statutory power to punish religious dissent. They were able to impose fines upon those ministers who refused to conduct services according to the new rite.648 Under the Act of Supremacy of 1558, the supremacy of the Crown was restored over all matters, including spiritual and again all appeals to Rome were forbidden. Using this legislation, Elizabeth and her advisers compelled her subjects to use and attend the services of the Established Church,

643 The Act of Supremacy 1 Elizabeth c.1 (1558) and The Act of Uniformity 1 Elizabeth c.2 (1558). These Acts have been referred to within chapter 3. Their legal effect was to restore the doctrine of Royal Authority and the New liturgy prepared by Cranmer.

644 Under Section 7 of the Act of Supremacy, which also abolished once again all foreign spiritual jurisdiction, i.e. that of the Roman Pontiff.

645 The Act of Supremacy had also revived all the other ecclesiastical legislation which had been revoked by Queen Mary, especially that relating to the royal appointment and nomination of bishops.

646 As to whether Matthew Parker was ever validly consecrated, much discussion has taken place. The Ordinal which was used to consecrate him was that drawn up by Edward VI. This specifically excluded the Catholic Doctrine of Priesthood. Pope Leo XIII, in his Apostolic Exhortation "Apostolicae Curae" of 1894 ruled that the Edwardian rite of Anglican ordination was therefore invalid.

647 This Act was not approved by the Lords Spiritual and was only narrowly approved by the House of Commons.

648 Sections 3 and 4 The Act of Uniformity 1 Elizabeth c.2. (1558).
laid down by the new Book of Common Prayer. Her power would also be used to eradicate religious dissent.

The sanctions and punishments contained within these Acts, were intended to destroy the opposition to her ecclesiastical policy, from Puritans and Catholics. Against the latter, from 1570 onwards, Elizabeth and her successors enacted by specific legislation, a series of laws known as the recusancy laws. Their chief ambit was to threaten and punish directly Catholics and Catholic priests and to eliminate Catholicism within England. These recusancy laws, of varying degrees of severity, were to be enacted by Parliament with regularity until well into the eighteenth century. The next section of this chapter, will trace their progress from 1570 until 1777.

6.5. THE RECUSANCY LAWS.

From 1570 until the end of the reign of Elizabeth in 1603, the recusancy laws, designed to eliminate Catholicism varied in their strictness. They fell within two classes; (a) laws which were designed to bring back those individuals who had fallen away from the Established Church and to penalise priests who had been ordained in England or who had been ordained in exile, returning to England to minister to their Catholic flock and (b) laws which were to punish and prevent Catholics from exercising their civil and public rights.

The statutes passed by Elizabeth’s Parliament were diverse and as the years of Elizabeth's reign drew to a close, they were characterised by the imposition of harsh sanctions including the death penalty, heavy fines and the confiscation of property. Further recusancy laws were made, after Elizabeth, and were the direct response of the monarch and the Government of the time, against a perceived threat which Catholics represented to the peace and the stability of the state and the Established Church.649

6.5.1. THE RECUSANCY LAWS UNDER ELIZABETH (1570-1603).

649 The most important recusancy laws of first Elizabeth and then her successors will be examined. Not all the Acts of Parliament will be cited, but only the most important which give an adequate picture of the legal measures taken against Catholics.
Elizabeth and her advisors saw that the settlement that had been reached by Parliament, in 1558 must be preserved at all costs. Her chief adviser, Robert Cecil, detected the threat to this settlement as coming from two areas: the rapidly growing group of Puritans and those Catholics who had refused to acknowledge Elizabeth as head of the Established Church. Cecil considered Catholics as posing the greater danger that could ruin his theory and view of Church and state relations, especially since they refused to accept the Crown as the Supreme Governor.

On 25 February 1570, Pope Pius V in a papal bull solemnly excommunicated and deposed Queen Elizabeth. In this papal document, he chided Elizabeth for having abolished the practice of the Catholic faith excommunicated her and absolved her subjects from her obedience. Hardly surprisingly this was bitterly resented by Elizabeth, who retaliated by trying to stem the conversions back to the Catholic faith. In the same year, her Parliament declared as traitors, all who brought into the realm, any papal document and writings as well as all those who were reconciled to the Catholic faith. Shortly afterwards, it was made by Act of Parliament, a criminal offence for anyone to deny the regal jurisdiction of the Queen in spiritual matters; to accuse her of being a schismatic and for any Catholic to take refuge abroad, without permission so as to avoid the harsh effects of this legislation and submission to the Established Church.

650 Document No 9 Regnans in Excelsis in Barry, Readings and Documents in Church History (Vol 2).

651 "She...has suppressed the followers of the Catholic faith, appointed shameful preachers and ministers of impieties, and abolished the Sacrifice of the Mass, prayers, fastings, choice of meats, celibacy and Catholic ceremonies...she has dared to eject bishops, rectors of Churches and other Catholic priests from their churches and benefices and to bestow these and other ecclesiastical things upon heretics. And she has also presumed to decide legal cases within the Church. She has forbidden the prelates clergy and people to acknowledge the Roman Church or to obey its orders and its canonical sanctions. She has forced most of them to assent to her wishes and laws, to abjure the authority and obedience of the Roman Pontiff and to recognise her by oath as sole mistress in temporal and spiritual affairs..." Op.cit.

652 Sections 7 and 8. An Act to make it an treacherous offence to receive a papal bull or to be reconciled to the Roman Religion. 13 Elizabeth c 2 (1570).

653 Acts to make it an offence to deny the Queen's title and to take refuge abroad without permission. 13 Elizabeth c.1 and c3 (1570).
Eleven years later in 1581, Parliament made it an offence of high treason for any person (a) to withdraw from the Established Church and be reconciled to Rome (b) to knowingly help or aid a person being so reconciled. It was also made again obligatory for all to attend the services of the Established Church. This Act of 1581654 imposed severe penalties for either the saying or hearing of the Mass and penalised school teachers who taught contrary to the Act. Clauses IV and VII stated

"And be it likewise enacted that, that every person which shall say or sing Mass, being thereof lawfully convicted, shall forfeit the sum of two hundred marks, and be committed to prison in the next Gaol, there to remain by the space of one year, and from thenceforth till he have paid the said sum of two hundred marks: And that every person which shall willingly hear Mass, shall forfeit the sum of one hundred Marks and suffer imprisonment for a year..."655 and any "such School-master or Teacher, presuming to teach contrary to this Act, and being thereof lawfully convicted, shall be disabled to be a Teacher of Youth, and shall suffer Imprisonment without Bail or Maniples for one year."656

Elizabeth I and her counsellors became increasingly concerned with the missionary activity of the Society of Jesus and its success, as well as the quality, on both an intellectual and spiritual level, of some of its members.657 In 1585, a statute was passed by Parliament naming specifically, the Jesuits and seminary priests, and other such like disobedient persons who had entered the realm for the purposes of spreading Catholicism.658 This Act of 1585 referred to the

654 An Act to retain the Queen's Majesty's Subjects in their due Obedience. 23 Elizabeth c.1. (1581)
657 By 1829, when most anti-Catholic feelings had subsided and legal relief was given to Catholics, onerous legislative measures were still left intact, specifically against the Society of Jesus. One of the most outstanding members at this time was St Edmund Campion, a convert to Catholicism and subsequently a member of the Society of Jesus. Caught in this country, he was executed as a traitor. See his life by Evelyn Waugh, Edmund Campion. Longmans, Green and Co. London 1935.
658 An Act against Jesuit priests and such disobedient persons. 27 Elizabeth c.3 (1585)
missionary activity of the secular priests and the Jesuits, proclaiming it to be illegal and subversive, and a threat to the nation.659

The Act of 1585 ordered all Jesuits and priests to leave the realm, by a certain date, and made it a treasonable offence for them to stay or return to the Queen's dominions. It contained widespread provisions, requiring those laymen and clerics in foreign seminaries660 to return to England, to submit to the Established Church by taking an oath of supremacy or to otherwise face heavy penalties.661 Furthermore, the Act made it illegal to send any financial help or relief to the Jesuits or to the missionary priests, for Catholic parents to send any of their children abroad to receive a Catholic education. Those who disregarded its measures risked the possibility of forfeiture of their assets and goods.662 The Act offered, at the same time, generous incentives to all those who were prepared and well disposed, upon entering the realm, to abandon their priestly activity and to take the oath of supremacy to the Crown.663

In 1587, Parliament felt that the recusancy laws needed to be tightened up and further measures introduced for the more speedy and due execution of the punitive measures contained within the Act of 1585. By the Act of 1587, all gifts and conveyances of lands made over to recusants who had refused to attend the divine services of the Established Church and for the purposes of helping them either to assist at Mass or to pay the fines for non-attendance at the services of the Established Church, were deemed to be void. The Crown was given the

659 "of purpose (as it hath appeared, as well by sundry of their examinations and confessions, as by divers other manifest means and proofs) not only to withdraw her highness' subjects from their due obedience to her Majesty, but also to stir up and move sedition, Rebellion and open hostility within the same her highness realms and dominions, to the great endangering of the safety of her most Royal Person, and to the utter ruin desolation and overthrow of the whole realm, if the same be not the sooner by some good Means foreseen and prevented." Cf. the pre-amble.

660 Such as the English Colleges in Valladolid and Rome. Foundations, endowed by Catholic benefactors.

661 Section V. The specific wording of the oath of loyalty was devised, to be taken before a magistrate.

662 Sections VI and VII. So families were prevented from helping financially the apostolic activities of these priests. Those caught sending funds, could be imprisoned and be fined.

663 Under Section X, they would receive a pardon.
power to confiscate all such lands and assets, conveyed for such purposes. Also increased by this law, were the statutory fines imposed upon those who refused to attend the Divine Service of the Established Church. By 1593, the law had again been modified, compelling persons to either attend the Divine Service of the Established Church or to face the threat of imprisonment. Its provisions also made every householder, personally responsible for the absence of any members of his family, at any service of the Established Church.

A second Act that year made by Parliament, contained further and harsher provisions to compel recusants to attend the Divine Service of the Established Church. Where they refused, they could be ordered to return to their homes and upon being convicted were forbidden to move outside a distance of five miles from their homes, without a special licence obtained from the authorities. Catholics were branded as being "Wicked and seditious persons" and "Spies and Intelligences not only for her Majesty's foreign Enemies, but also for rebellious and traitorous Subjects."

By the time Elizabeth I died in 1603, the new ecclesiastical regime had been firmly put into place. Not only were there Acts of Parliament, to control and to determine the Established Church, but Parliament had enacted a whole series of

664 Sections I, III and IV of An Act for the more speedy and due Execution of certain Branches of the Statute made in the twenty-third Year of the Queen's Majesty's Reign, entitled, An Act to retain the Queen's Majesty's Subjects in their due Obedience. 29 Elizabeth c.6. (1587).

665 A record of those who did not attend was to be kept by the parish registry. Where People had refused to attend the Divine service and then repented then the Act provided the form of submission to be made by those who were contrite.

"I, A.B., do humbly confess and acknowledge that I have grievously offended God in contemning her Majesty's godly and lawful Government and Authority, by absenting myself from Church and from hearing Divine service, contrary to the said Godly laws and statutes of this Realm, and in using and frequenting disordered and unlawful conventicles and Assemblies, under pretence and Colour of religion; and I am heartily sorry for the same and do acknowledge and testify in my conscience, That no other Person hath or ought to have any power or authority over her majesty..."

666 Sections I and VIII An Act to retain the Queen's Majesty's subjects in their due obedience. 35 Elizabeth c.1 (1593).

667 An Act for Restraining Popish Recusants to some certain Places of Abode.35 Elizabeth c.2. (1593). Cf. the Preamble and section 1. Like the previous Act, it promised relief to all who were prepared to submit to the Established Church using the same Form of Submission, the text of which was set out in the first Act of 1593 as above.
recusancy laws, on a piecemeal basis, to eliminate religious dissent from Catholics and especially priests. These penal laws, denied to Catholics freedom of cult and worship and imposed upon them severe penalties for attending Mass. Sending children abroad to receive a Catholic education and helping financially Priests was made a crime. The effect was slowly but surely to make the Queen’s Catholic subjects second class citizens.

6.5.2. The Recusancy laws from 1603-1688.

On the death of Elizabeth I in 1603, the English throne passed to the House of Stuart. Between King James I and James II (1603-1688) Parliament passed further recusancy laws, although their number was greatly reduced. By 1688, bowing now to the inevitable, the first Act of Religious Toleration was passed but it only granted relief to Protestant dissenters and left intact the recusancy laws. For political reasons, religious toleration to Catholics would not be granted until a century later.

6.5.2.1. Under James I (1603-1625).

King James VI of Scotland and at the same time, King James I of England was a staunch Presbyterian. His government, so as to make it clear that there was to be no shift in policy or any alleviation of the political or legal situation with regard to Catholics, re-enacted the major recusancy laws passed under Elizabeth, against Jesuits, seminary priests and recusants. The old penalties were reimposed, but at the same time, the legislation continued to grant suitable relief and provide incentives to those prepared to submit and be reconciled to the Church of England.

Following the failure of the Gun-powder plot in 1605, Catholics were to be subject to a new law, to attend the services of the Established Church or to face increased fines, calculated on a sliding scale, reaching higher levels with the proceeds being channelled to the Crown. A new Act, passed in that session,

668 His mother was Mary Queen of Scots, executed by Elizabeth’s Government.

669 An Act for the due execution of the Statutes against Jesuits, seminary Priests and recusants. 1 James 1 c.4 (1604).
contained a total of forty two clauses, the vast majority of which set out the procedure to govern a new oath of loyalty to be taken to the Crown. This Act of 1605 described who was to administer the new oath, when it was to be tendered and how those were to be treated who refused to take the oath. The text of the oath was set out within clause XV and contained five sub clauses, asserting the absolute spiritual supremacy of the King within the realm and denying the authority of popes to depose him.

A further Act, in the same session of Parliament contained more onerous sanctions against Catholics. It forbade them from attending at the Royal Court; from living within a radius of ten miles from the City of London; from holding any public office and deemed them to be legally excommunicated. This had the legal effect of debarring them from commencing a civil action in the common law courts. All marriages, contracted according to the rite of the Catholic faith were not recognised and unless recusants were prepared to marry according to the

670 An Act for the better discovering and repressing of popish recusants. 2 James c.4. (1604)

671 The first two sections of this oath were as follows:—

"I, A.B., do truly and sincerely acknowledge, profess, testify and declare in my conscience before God and the world, that our sovereign Lord King JAMES is lawful and rightful king of this Realm, and of all other his majesty's dominions and countries: and that the Pope neither of himself nor by any other Authority of the Church or the See of Rome, or by any other means with any other hath any power or Authority to depose the King, or to dispose any of his Majesty's kingdoms or dominions, or to authorise any foreign Prince to invade or annoy him or his countries, or to discharge any of his subjects of their allegiance and obedience to his Majesty, or to give licence or leave to any of them to bear Arms, raise Tumults or to offer any Violence or Hurt to his Majesty's Royal Person, State or Government or to any of his majesty's Subjects, within his Majesty's Dominions.

(2) Also I do swear from my heart, that notwithstanding any Declaration or Sentence of Excommunication, or deprivation made or granted, or to be made or granted, by the Pope or his successors or by any Authority derived or pretended to be derived from him or his See against the said King, his heirs or successors, or any absolution of the said subjects from their obedience: I will bear Faith and true allegiance to his Majesty, His heirs and Successors and him and them and will defend to the uttermost of my power, against all conspiracies and Attempts whatsoever which shall be made against his or their persons, their Crown and Dignity, by Reason or colour of any such sentence or Declaration or otherwise, and will do my best Endeavour to disclose and make known unto his majesty, his heirs and successors, all treasons and traitorous Conspiracies which I shall know or hear of to be against him or any of them."

672 An Act to prevent and avoid Dangers which grow by Popish Recusants. 3 James c.5 (1605).
rites of the Established Church, they were legally prevented from inheriting the freehold interest of any estate under a will. A married woman, who was a recusant, was unable to inherit the property of her husband and was legally disbarred from acting as Executrix or Administratrix under any will.

6.5.2.2. Under Charles I (1625-1649).

Facing these legal disabilities in civic life, many Catholics had hoped that their legal position might improve under Charles I, who succeeded his father James I in 1625 and that he might relax some of the more severe recusancy laws. Unable to do this, Charles in 1627, in fact but although reluctantly, gave his consent to an Act which penalised those parents who sent their children out of England to be educated as Catholics.

This Act of 1627, caught anyone who sent his or her children abroad to be educated by "any Jesuits, seminary priests, Friar, Monk or other Popish Person." Such a person, whether parent, relative or guardian, found guilty was henceforth unable to commence any legal action in the courts; unable to act as the administrator under a Will and deprived of the loss of his life interest in his lands and goods.

Involved with bitter struggles with his Parliament, Charles I found himself unable to ease or modify the effects of the recusancy laws. Engaged in a campaign to reform the Established Church and trying to introduce within its liturgy, many catholic practices there were frequent clashes between Charles and his Parliament. These led to the outbreak of the English civil war (1642-1651).

673 Sections II, VIII, X, XI and XIII. Ibid.

674 An Act to restrain the Passing or sending of any Popishly-bred beyond the Seas. 3 Charles 1 c.3 (1627).

675 Section I: which "disabled from thenceforth to sue or use any Action, Bill, Plaint, or Information in any Court of Law, or to prosecute any suit in any Court of Equity, or to be committee of any Ward, or Executor or Administrator to any Person, or capable of any legacy or deed or gift or to bear any office within the realm and shall lose and forfeit all his goods and chattels, and shall forfeit all his lands, tenements and hereditaments, rents, annuities, offices and estates of freehold, for an during his natural life."

676 During this time, the Archbishop of Canterbury was the high churchman, Archbishop Laud.
1648) and then his eventual execution in 1649. Faced with the choice of supporting the armed forces of the Government, being largely Puritan and the royalist army of the King, who had done little to ease the recusancy laws, many Catholics found themselves in a real dilemma as to which side they could support.

6.5.2.3. Under The Commonwealth (1649-1658).

With the triumph of the Parliamentarian forces over the King, the Parliamentarian army published an Agreement of the People, being a scheme for a republican constitution for England. One of its objectives was that it would embrace a public profession of Christianity "reformed to the greatest purity in doctrine, worship and discipline." Those who differed from its tenets were not to incur secular penalties but were to be allowed, for the first time, a measure of limited religious toleration, but this not extending to "popery or prelacy." 677 In Ireland, following a series of military campaigns led by Oliver Cromwell, and the country being subjugated to English rule in 1649, Catholic worship was officially suppressed and a whole series of harsh laws against Catholicism was passed by Parliament.678

6.5.2.4. The Recusancy laws under Charles II (1660-1665) and James II (1685-1688).

After Cromwell, the Lord Protector of the Republic had died in 1658, anarchy broke out within the Country. Cromwell's son Richard who had succeeded to his father, proved to be incapable of controlling and governing the country and in 1660 the eldest son of Charles I, was invited back to England. He returned and became King Charles II. During his reign, legislation was made by Parliament to

677 During the period of the Republic, Parliament did not pass any major recusancy laws.

678 The Irish recusancy laws were much severer than the recusancy laws in England, and kept in power, a small minority Protestant population over an overwhelming Catholic populace For further details of their extent and severity, see the article on the recusancy laws in Ireland in the Catholic Encyclopaedia. The Protestant Episcopalian Church became the official Church and in 1801 until 1870, after its union with the Church of England, became the Established Church of Ireland.
restore the influence and the position of the Established Church, which had inevitably a penal effect upon Catholics.

The Corporation Act of 1661\footnote{679 The Act for the well governing and regulating of Corporations. 13 Charles II c.1. (1661).} had confined all posts of any magistracy or office within any Corporation or City or Town, to those who took the oath of allegiance and supremacy to the King and who also received the Sacrament of the Lord's Supper according to the Rites of the Church of England. Catholics were therefore unable to hold these positions, although this Act affected Catholics and non-conformists alike. The Act of Uniformity of 1662\footnote{680 "An Act for the Uniformity of Public Prayers and Administration of the Sacraments and other Rites and Ceremonies and for Establishing the Form of making ordaining and consecrating Bishops, Priests and Deacons in the Church of England." 14 Charles II c.4 (1662).} which tried to restore harmony of doctrine and worship within the Established Church after the English Civil war, made it legally impossible for anyone to become a head of any college or lecturer at a University, unless the individual subscribed to the Thirty Nine Articles of religion. Again, Catholics, as well as all those who dissented from the teaching of the Established Church, were barred from these teaching posts.

In 1672, the taking of the oath of Allegiance and Supremacy and the reception of the Sacrament of the Lord's Supper, according to the Rites of the Church of England was made a mandatory requirement for all those who bore

"...any office or offices civil or military, or shall receive any pay, salary, fee or wages by reason of any patent or grant from his majesty, or shall have any command or place of trust...."\footnote{681 Section 1 of An Act for preventing Dangers which may happen form popish recusants. 25 Charles II c.2 (1672).}

Failure to take the oath and to make the necessary act of allegiance (the times for doing this and before whom, as well as the issuing of all certificates all being regulated within the Act) rendered every person incapable at law of assuming such an office or receiving any advantage. This Act, made it also a mandatory
requirement for all to take an oath, specifically denying the Catholic dogma of Transubstantiation.682

In 1677, Catholics by law were to be prevented from sitting in either House of Parliament. An Act of 1677, prescribed that every Lord or member, before taking his seat, should make a specific declaration which denied the dogma of Transubstantiation, the invocation of the Virgin Mary and the Sacrifice of the Mass.683 Those Catholics who refused to take the oath or who did anything contrary to this Act, whether as a peer or member of the House of Commons, were deemed to be Popish recusants, subject to all the existing disabilities imposed by Parliament and debarred from entering Parliament.684

6.5.2.5. James II (1685-1688).

James II, whose reign was brief, was a convert to the Catholic faith. Unfortunately, he lacked the political sensitivity and acumen to govern and by his manner and style of government, managed to offend the ruling families and the higher echelons of the Established Church. By his Declaration of

682 The text of this oath was contained within clause Section IX. "I, A.B. , do declare that I do believe that there is not any Transubstantiation in the Sacrament of the Lord's supper, or in the elements of Bread and Wine at or after the Consecration thereof by any person whatsoever."

683 An Act for the more effectual Preserving the King's Person and Government, by disabling Papists from sitting in either House of Parliament. 30 Charles II c.2. (1677).

The oath was set out within section III. It went as follows:"I, A.B. , do solemnly and sincerely in the presence of God profess, testify and declare, That I do believe that in the Sacrament of the Lord's Supper there is not any Transubstantiation of the elements of bread and wine into the body and blood of Christ at or after the consecration thereof by any person whatsoever: and that the invocation or adoration of the Virgin Mary or any other saint and the sacrifice of the Mass, as they are now used in the Church of Rome, are superstitious and idolatrous and I do solemnly in the presence of God profess, testify and declare, That I do make this declaration and every part thereof, in the plain and ordinary sense of the words read unto me, as they are commonly understood by English Protestants without any evasion, equivocation or mental reservation whatsoever..."

684 These disabilities included:—the Incapacity to hold any place or position of office or profit: a disability from voting or sitting in Parliament: the inability to sue in a court of law or Equity: being barred from being a guardian or acting as Executor or Administrator or receiving any legacy or gift or deed. Cf. Section VI.
Indulgence, James proclaimed his ideals of religious toleration and his desire to remove all the oaths of allegiance and supremacy for the assumption of persons employed in any civil or military position of trust. Boldly, he declared "that it is our royal will and pleasure that the oaths commonly called "the Oaths of supremacy and allegiance", and also the several tests and declarations mentioned in the Acts of Parliament made in the five and twentieth and thirtieth years of our late royal brother, King Charles II, shall not at any time be required to be taken, declared or subscribed by any person or persons whatsoever, who is or shall be employed in any office or place of trust, either civil or military under us or in our government. And we do further declare it to be our pleasure and intention from time to time hereafter, to grant our royal dispensations under our great seal to all our loving subjects so to be employed, who shall not take the oaths..."  

It was James in fact proclaiming that he had the constitutional right to govern without Parliament and to negate the legal effects of Acts of Parliament. Relying upon his royal power of dispensation, James disapproved in favour of his Catholic subjects, the sanctions of the recusancy laws. By granting a free pardon to recusants and non-conformists alike, his style of government was a direct challenge to the constitutional authority of Parliament and the supremacy of the Established Church. James was forced to flee the country in 1688 and his daughter and son-in-law, Mary and William of Orange who assumed the throne, pledged to govern in co-operation with Parliament, to uphold the Protestant Settlement and maintain the full effect of the recusancy laws.

6.5.3. The position of Catholics between 1688-1780.

The Bill of Rights of 1689 set out the terms upon which Mary and William were to govern England, specifically referring to the Declaration of Indulgence of James II as being illegal from the point of view of the constitution. The Bill of

685 Dated 4 April 1687.

686 The Declaration, can be found in Barry, Readings and Documents in Church History (Vol 2). p. 251.

687 See Chapter 4.
Rights proclaimed that the only entity which had the legal power to repeal the recusancy laws or to suspend their legal effects, was Parliament.

Far from granting any general religious toleration, Parliament in 1688 tightened up the legal process and in the same year, passed a law which gave to the Lord Mayor of London as well as Justices of the Peace, the right to arrest Catholics within a ten mile radius of London. For disobeying this law, Catholics could be arrested and brought before the Lord Mayor or Justices of the Peace, and if found guilty, subject to all the penalties and disabilities prescribed by the earlier recusancy laws. Eleven years later in 1699, the Parliament of William, enacted that Catholic Bishops and priests could not exercise their religious duties and that Catholics in general were legally prohibited from keeping schools, inheriting landed interests and from being involved in litigation. In 1700, the Act of Settlement, legally prevented the Catholic heirs of James II from ascending the English throne by confining the succession to the Protestant heirs of the Princess Sophie of Hanover, in communion with the Established Church.

William III died in 1702 and was succeeded by his sister-in-law Anne. She in turn died childless in 1714 and legal effect was given to the Act of Settlement of 1700, the crown passing direct to George, prince of Hanover, the next Protestant in line of succession and in precedence over the Catholic son of James II, James III. Refusing to renounce his Catholicism, James attempted to seize the throne by invading England with an army from Scotland. His efforts were a failure and spurred Parliament into passing the last major recusancy laws against Catholics. In 1715, by an Act of Parliament, Crown Commissioners were empowered to draw up a list of the estates owned by Catholics and especially those used for "superstitious purposes" so that they could be especially

688 An Act for the moving of Papists and reputed papists, from the Cities of London and Westminster and ten miles Distance form the Same. 1 William and Mary c.9 (1688).

689 An Act for the further preventing the growth of popery 11 & 12 William III (1699).

690 The legal aspects of the Act of Settlement, have already been considered in chapter 4.

691 His wife, Queen Mary had died in 1694.

692 Buildings which had small chapels and Churches, used for the celebration of the Mass.
taxed by the Crown. Catholics were obliged to register their names and the freehold interests of all properties that they owned, failure to do so risking forfeiture of such interests to the Crown. They were also required to take an oath of loyalty to swear to uphold the Protestant succession. The registration of the landed estate interests of Catholics, was intended to give to the Crown the legal right to raise a double tax upon Catholics.

**6.5.4. The Catholic hierarchy between 1532-1777.**

From the time of Henry's breach from Rome in 1532 and to become definitive in 1534, when the Act of Supremacy became law in 1534, the majority of the English Bishops sided with the King and resumed their office as bishops within the Established Church. With the exception of John Fisher, Bishop of Rochester, all had accepted the settlement of Henry and when Henry died in 1547, the majority followed the directions and indications given by the new young King, Edward VI and his council of advisers, led on the ecclesiastical front by Thomas Cranmer. Those priests who retained their loyalty to the See of Rome, had of necessity to disobey the secular law and incur its sanctions. From the viewpoint of canon law, the Church in England was in a state of schism and her hierarchical structure had been excommunicated.

The ecclesiastical situation suffered a brief respite in 1553, when Mary restored the Catholic hierarchy, but this did not survive the Elizabethan settlement of 1558. Elizabeth returned to the ecclesiastical position of her half brother, Edward VI, and re-established the Church, under her supreme governance. The overwhelming majority of the Catholic bishops refused to comply with the new legislation and most preferring going into exile, compelling Elizabeth to reconstitute a complete new hierarchy for the Established Church. The series of recusancy laws after 1570, made it impossible for any Catholic bishop and priest to operate openly and unhindered, so all activity was

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693 An Act for appointing Commissioners to enquire of the Estates of certain traitors and of popish recusants and of Estates given to superstitious Uses, in order to raise money out of them severally for use of the public. I George I c.50 (1715).

694 An Act to oblige Papists to register their names and Real Estates. 1 George I c.55 (1715).

695 For further details, see the condensed account of the History of the Catholic Church in England in The Catholic Encyclopaedia. The Article "England".
basically carried out in secret. In 1574, there began to arrive in England the first of a series of missionary priests from Douai, a seminary set up by William Allen and after 1580, there were supported by a small group of Jesuits. During this time, the Catholic hierarchy consisted of one Catholic Bishop, Thomas Goldwell, under whom English Catholics were subject until 1585 when he died. After Cardinal Allen died nine years later in 1594, Catholics in England were effectively left without any hierarchy. England had by then become missionary territory, and a Cardinal Protector of England was created in the person of Tommaso Gaetani. He was given canonical powers to appoint an archpriest to govern the ecclesiastical territory of England, and so until 1850, Catholics in England were placed under the immediate authority of apostolic vicars or archpriests.

Cardinal Gaetani, in 1598, appointed George Blackwell as archpriest with full power and authority over all the clergy in England, with instructions to seek the help and the advice of the members of the Society of Jesus, under their superior in England. This led to a tremendous controversy, between the secular clergy and the religious, especially the members of the Society of Jesus, between the years 1598-1602. A group of the secular clergy, resented this ruling and asked specifically for a bishop to be appointed and in 1601 made their third appeal in 1601 to the Pope, their case being led by a secular priest, Thomas Bluet. Pope Clement VIII, agreed to defuse the crisis, by absolving the archpriest from any obligation to consult the Society of Jesus.

From 1623 to 1624, a more permanent form of episcopal government was erected canonically for the existing Catholic population, by the Papacy, tacitly


698 For an interesting account of the life and the conditions in Elizabeth England, during the penal times, which affected Catholics and under which laboured the catholic clergy, especially those missionary priests of the Society of Jesus, see the autobiography written by John Gerard. Entitled "The Hunted Priest", written in Latin and translated into English (published by Fontana Press), Fr. Gerard gives a glimpse of the troubles and the difficulties faced by the religious with the secular clergy. The secular clergy looked with suspicion at the missionary success and efforts of clergy like St. Edmund Campion.
tolerated by the English Government as part of the marriage negotiations between Charles I and Henrietta Maria of France. A priest called William Bishop699 was consecrated as titular bishop of Chalcedon, to look after Catholics and on his death, was succeeded by another Bishop called Richard Smith (1566-1655). Unfortunately he became involved in a conflict with the regular clergy and in 1631 was compelled to retire to France. For the next fifty four years, there were no Vicars Apostolic in England until 1685. From that year until 1850, England resumed being an Apostolic Vicariate, with one Apostolic Vicar being placed in charge of the whole of England, and later other Apostolic Vicars being set up to look after the Midland, Western and London districts.700

The various forms episcopal structures were merely tolerated by the Crown and Parliament and were never juridically recognised in their own right. Whilst they remained on the statute book, recusancy laws could always be invoked and applied against either the clergy or the Catholic laity. The domestic and foreign situation, inevitably determined the policy of the Government towards Catholics and whether it would apply the penal provisions of the recusancy laws.

6.6. RELIGIOUS DISSENT GENERALLY BETWEEN KING JAMES I AND CHARLES II. (1603-1660)

The dangers to the Elizabethan religious settlement came from not only Catholics but also from those Protestants who had resented Parliament trying to dictate by law, the religious creed and the liturgy of the Church. Right from the time of Archbishop Cranmer, during the short reign of Edward VI, well know ecclesiastics of the Established Church such as Bishop Latimer, of strong puritan sympathies, had refused to swear any oath of loyalty to the Crown, for reasons of conscience.

Opposition to the New Liturgy and the Service of Ordination as laid down by law, under the Act of Uniformity of 1558, came not only from Roman Catholics but also faith puritans who refused on grounds of conscience to accept the law

699 (1544-1624).

700 On of the most distinguished Apostolic vicars was Bishop Richard Challoner (1691-1781). Remarkable and distinguished for his piety and learning, he compiled an account of the missionary priests who served in England from 1577 to 1684. See "Memoirs of missionary priests" by Richard Challoner. London Burns and Oates 1924.
and attend the religious services of the Established Church. Protestant clergy and laity alike, were subject to the same penalties, punishments and fines as papal recusant for non-attendance. Puritan clergy who disobeyed Episcopal injunctions issued by the hierarchy of the Established Church, were punished accordingly.

Under James I, the Crown and the hierarchy of the Established Church attempted to control religious dissent and non-conformity, by the application and enforcement of the law on ecclesiastical worship; there were sufficient provisions within the Elizabethan legislation, including the Recusancy Acts, to punish those not prepared to use the Book of Common Prayer nor assist at the services of the Established Church. As the Puritan movement increased, so did their defiance to the ecclesiastical law, much to the alarm of Charles I, the son of James I, who was a staunch high Anglican and who genuinely believed that he had a divine right to govern the Established Church as its King. The Canons of 1640, enacted by the House of Convocation and approved by him, were fervent attempts to make the Established Church and its clergy far more ritualistic. They failed and contributed to the reasons for the outbreak of the English Civil war.

The success of the Parliamentarians and the defeat of the King after 1648, led to the first movement for religious toleration within Parliament. Oliver Cromwell, as Lord protector under the Republic, took legal measures to repeal the Act of Uniformity of 1558 and granted limited religious toleration to all Protestant dissenters. For the time being, the Ecclesiastical law of the Established Church was suspended.

6.7. RELIGIOUS DISSENT UNDER CHARLES II; THE CORPORATION ACT 1661 AND THE ACT OF UNIFORMITY OF 1662.

The Restoration of the monarchy under Charles II in 1660, was followed by his new Parliament repealing the measures of religious toleration granted by Cromwell, and restoring the position of the Established Church. The Corporation Act of 1661 effectively prohibited all Protestant dissenters from participating in the most important civic positions in the country. They were prohibited from

701 By imprisonment and the imposition of fines.
702 The legal effect of these canons has been considered in Chapter 4.
703 An Act for the well-governing and regulation of Corporations. 13 Charles II c.1 (1661).
holding any magisterial or civil office in any Corporation, City or Town unless they were prepared to take an oath of allegiance and supremacy to the King, as the Supreme Governor of the Church, and to receive the Anglican Sacrament. Being a member of the Established Church was legally a requirement of the office.

In 1662, by the New Act of Uniformity, Parliament launched a new offensive to eliminate religious dissent on the doctrine and liturgy of the Established Church. All Protestant dissenters were by law compelled to use the New Prayer Book and all ministers were obliged to be episcopally ordained under the Rite of the Ordinal and to subscribe to the Thirty-Nine Articles of Religion. Many ministers who had been ordained during and after the civil war, but not according to the Rite and the Ritual of the Book of Common Prayer, refused to comply, and resigned from their office; over two thousand ministers in total.

In 1672, religious dissenters, along with Catholics, were made subject to further measures of religious discrimination, being unable to hold civil and military positions by reason of the Second Test Act, which made the reception of the Anglican Sacrament and the declaration of an oath of allegiance and supremacy. A law passed ostensibly to prevent Catholics from holding such positions of authority, this Act was directed also at those Protestant dissenters who felt unable to take an Oath so worded, or whose religious beliefs prevented them from taking any oath at all.

When Charles II died in 1685, his brother James II, in his Declaration of Indulgence of 1687 made it clear that he would open all civic and military offices to Catholics and to Protestant dissenters, by abolishing the oaths of supremacy and allegiance. By 1688, this royal power of dispensation was to be declared unlawful although this had one important effect. It led to Parliament, by the Bill of Rights, granting definitively limited religious toleration to Protestant dissenters.

704 The Act of Uniformity.14 Charles II c.4. The positive obligations of this Act were considered in Chapter 4. The negative provisions caught Catholics and all dissenters.

705 As every Person was to take an oath against Transubstantiation.

706 The full title of this Statute was An Act for preventing dangers which may happen from popish recusants. 25 Chas II. C.2. (1672). See statutes at large (Vol 4).
6.8. CONCLUSION.

The Act of Supremacy of 1534 and by virtue of which Henry declared himself to be the Supreme Head of the Church in England, concentrated within the office of the Crown not only all the legislative powers of Church government but also all judicial authority; the ability to determine and to define religious matters and belief and the authority to punish dissent. As Henry had been given these legal powers by Parliament, he did not shy away from using the same, when it soon became necessary. In 1539, the Act of Six Articles was the legal response of Henry VIII, endeavouring by Parliament to stamp out religious dissent. It was not just a case of the secular authority, the State, punishing religious dissent by civil sanctions. It was Parliament determining by law, the doctrine of the Church and then punishing dissent.

Henry VIII had assumed and exercised such judicial powers to proclaim the creed and the liturgy of the Church as well to punish those religious opinions and beliefs which were contrary to the tenets of the Church. His son Edward VI, through his advisers, was able by law to build and consolidate the Established Church on that power. The Ecclesiastical laws made under Edward and then Elizabeth, which punished religious dissent, were all anchored on this regal power to define orthodoxy and to punish heresy and dissent. Without this doctrine, which was continually supported and defended by her advisors and by many of her judges, Elizabeth would have been unable to justify using the secular legislative authority of Parliament to punish religious dissent.

Under Elizabeth, Parliament increasingly legislated against all dissent from the Established Church. Religious dissent was deemed to be the equivalent of an act of disloyalty and unpatriotism. For the reason that Catholics were not prepared to give complete and unconditional loyalty to the Crown over all matters, spiritual as well as temporal, Parliament enacted the recusancy laws. Catholics were considered to be disobedient subjects and so the penal were justified as being necessary for the protection of the State.

New recusancy laws were passed and applied with differing degrees of success from the times of Elizabeth I until King George I, nearly two centuries later. By the end of the eighteenth century, all types of penal legislation were in force to punish the adherents of the Catholic faith. Discriminatory measures existed in the field of politics, the law and the armed forces—the navy and the army. Catholics could not hold civil positions in local government as well as in Parliament. Even in their private life, they faced discrimination; they were unable
to give their children a religious education; they could not act in private civil lawsuits, whether as plaintiff or defendant; they could not inherit property or buy lands. Several Acts of Parliament furthermore imposed upon them, as a condition precedent for the removal of such limitations, the taking of oaths which were specifically anti-Catholic.

As the phenomenon of religious dissent was by no means confined to Catholics, Elizabeth and her successors, used the law making process against Protestant dissenters. The Act of Uniformity of 1558 of Elizabeth I and then the Act of Uniformity of 1662, over a century later of Charles II, were passed to try and eradicate Protestant dissent—the religious dissent of those who were not prepared to either accept the legal jurisdiction of the Crown or the See of Rome in spiritual matters. By 1688, the numbers of Protestant dissenters, who like those of the Catholic faith, were unable to participate in civil and military life, had reached high proportions. The new Parliament of William and Mary, took legislative action to ease their position and to grant them toleration under the law.
Chapter 7

RELIGIOUS TOLERATION FOR PROTESTANT DISSENTERS AND OTHER RELIGIONS UNDER ENGLISH LAW
(1688-1974).
Chapter 7

Religious Toleration for Protestant Dissenters and other religions under English Law (1688-1974).

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7.1. INTRODUCTION

The secular legislation of the Tudors, Henry VIII then Edward VI and Elizabeth I, which had set up by law the Established Church, could not permit religious non-conformity. Once the principle was accepted that the monarch was the Supreme Head and then the Supreme Governor, affairs of the Church and State became so closely intertwined that any religious diversity was seen to threaten the Crown. For this reason, the Tudor and then Stuart legislation inflicted harsh legal penalties and sanctions, civil as well as legal, upon all those who for whatever religious motives were not prepared to acknowledge the royal supremacy of the Crown over questions of the faith and the liturgy of the Established Church as enshrined within the Thirty-nine articles of Religion and the Book of Common Prayer. So long as the influence and the constitutional

707 The following legal works of authority have been used to write this chapter: Halsbury’s, Ecclesiastical law, (Vol 14); St John Robilliard, Religion, and the Law; Bailey, Harris, Jones, Civil liberties; cases and materials. Most of the Acts of Parliament are to be found within Statutes at large, (Vol 3) 1604-1698, (Vol 4) 1699-1713, and (Vol 12) 1774-1776; the other Acts of Parliament will be found in Statutes in force and in Halsbury’s Statutes. The law decisions are quoted from the English Reports (E.R.), the Weekly Law Reports (W.L.R.) and the All England Law Reports (All E.R.). For the historical background: Christopher Hollis, History of Great Britain in Modern Times, G.Bell & sons Ltd, London 1965, J.H.Plumb, England in the Eighteenth Century, Penguin Books, London 1950.
position of the Crown was strong and it retained the respect and the command of Parliament, then religious toleration remained an impossible dream.

The absolute sovereignty of the Crown as against the limited powers of Parliament was to be fundamentally shaken first by the rule of King James I and then by his son, Charles I who had tried to rule the Country and the Church, without the consent and without the co-operation of Parliament. His repeated attempts to impose uniformity of belief and a more ritually orientated liturgy on the Church, led to wide resentment and in 1642 he had been forced to assent to an Act which removed the bishops of the Established Church from the House of Lords. The confrontation between King and Parliament, leading to the English Civil war (1642-1649) and then the abolition of the monarchy in 1649, fomented the growing demand for religious toleration, which was formally included with the Agreement of the People of 1649, published by the council of the Army, before the execution of Charles I. This provided a written constitution upon which the rule of Parliament would be bound and one of its guiding principles was that there was to be a public profession of Christianity, reformed to the greatest purity in doctrine, worship and discipline. Those who differed from it were not to incur penalties but their opinions were to be tolerated.

This Agreement of the people was the response to what would become legally inevitable; the acceptance of the legal principle of religious toleration, the State gradually withdrawing its right to compel its subjects to worship in a particular way and to subscribe to a set of beliefs, against their conscience. The republican army which had defeated the King, and the royalist forced, had consisted of many Protestant dissenters and it had become legally impossible to impose upon them a set of religious values and a liturgy which they had identified so closely with the Stuart monarchy, and so had come to resent.

The principle of limited religious toleration was addressed by Charles II in 1661, on the Restoration of the monarchy, but Parliament, dominated by royalist

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708 The Long Parliament of Charles I, (1640-1641) extracted from Charles a number of constitutional guarantees. The first being that Parliament should meet every three years under the Triennial Act 1641 and that Parliament should not be dissolved without its consent. See Wyatt, History of England. pp. 278 et Seq.

709 The Clerical Disabilities Act. 1642. This Act was repealed by Charles II in 1661.

710 This Article on Religion was to be so fundamental that it would be placed outside the legislative powers of Parliament. "Popery and prelacy" were not included.
sympathies, was unwilling to abandon the concept of there being officially only one state church and liturgy. 711 All Protestant dissent was to therefore remain illegal and a crime, prohibited by law and punishable within either the secular or the Ecclesiastical courts. Protestant Dissenters were to be prohibited from organising and assisting at meetings in 1664, by a law which made it illegal, apart from members of a family, for more than five people to assemble. 712 Paradoxically, Protestant non-conformism did not decrease but grew, which meant that the numbers of adherents to the Established Church fell. By the year 1688, after James II had fled the country and abandoned the throne, Parliament had asserted its supremacy and had realised that it was legally impossible to enforce religious uniformity and eliminate religious diversity. The new King, William III was a Calvinist and had little sympathy with the Established Church and favoured a broad policy of religion for all Protestants, but the High Church clergy of the Established Church opposed all concessions. They were unable to prevent religious toleration being given, by law, to Protestant dissenters and removing from such class of people, the civil and criminal disabilities to which they had been subject.

7.2. THE TOLERATION ACT 1688.

The Toleration Act of 1688713 was the first Act of Parliament on a permanent basis, to decriminalise religious dissent. It led to the law slowly and gradually evolving, so as to grant greater religious freedom to wider sections of the populace, so that nowadays all religious bodies within England enjoy the same recognition under English law. 714 This is strengthened in the case of the Church of England by the special circumstances of its close connection with the State.

Historically speaking, those Protestants who had refused to go to the services of the Established Church and receive the Anglican sacrament, were labelled as

711 Parliament therefore had passed the Act of Uniformity of 1661, which made it again illegal for clergy to use any other service other than that authorised by the book of Common Prayer.


713 Halsbury’s Ecclesiastical law, section 9, paragraph 1386 gives the legal background, in greater detail.

714 See paragraph 1386, Section 9, op. cit. “Religious Bodies other than the Church of England.”
"non-conformists" because they refused to conform to the ritual and the liturgy as well as the creed formulated of the Established Church. They were legally placed in a different category to Catholics who had been termed as recusants. As we have seen within chapter 6, the recusancy laws often applied their punitive sanctions to both religious non-conformists and Catholics with equal severity. Before the Toleration Act of 1688 became law, Parliament had to decide how to approach these two movements of religious dissent and whether to grant them both toleration. Another legal issue to resolve was how to grant legitimate religious dissent in such a way that the position of the Crown and the Established Church would not be weakened. Parliament opted for a religious toleration, given under certain conditions, to prevent the spreading of unorthodox opinions which would deny the infallibility of the Sacred Scriptures and the dogma of the Blessed Trinity.

Protestant dissenters had long clamoured for freedom to worship in a different way to the only official liturgy prescribed by the law of the land, as stipulated within the Book of Common Prayer. They also wanted to be released from the legal necessity of subscribing to the creed of the Established Church, as elaborated within the Thirty nine Articles of Religion and to be absolved from the taking of an oath of loyalty and declaration to the King, as Supreme Governor of the Church. As a condition precedent to being appointed to any important civic or military post, they had been required to prove that they received the Anglican Sacrament715 and to take such an oath of loyalty to the King, as Supreme Governor of the Established Church. They had refused to do so, on grounds of conscience.

The Toleration Act 1688716 granted to Protestant non-conformists, religious toleration which freed them from the disabilities which had been imposed upon them for their religious dissent under previous legislation. The Act would excuse them from the obligation to attend the liturgy of the Established Church and from the taking of the traditional oath in favour of the Crown, which had acknowledged the monarch to be the Supreme Governor of the Established Church. The general preamble to the Toleration Act, spelt out the reasons for the grant of religious toleration to Protestant dissenters;


716 Its full title was An Act for exempting their majesty’s Protestant subjects, differing from the Church of England, from penalties of certain laws. 1 William and Mary c. XVIII. See Statutes at large (Vol 3).
"Forasmuch as some ease to scrupulous consciences in the exercise of religion may be an effectual means to unite their Majesties' Protestant subjects in interest and affection..." 717

It was the legal acknowledgement by Parliament, that Protestant dissenters in the future should be permitted to follow their consciences in religious matters and that the State was not competent to compel its Protestant subjects to subscribe to the creed and liturgy of the Established Church.

It must be pointed out that the Toleration Act of 1688, only removed various penalties for religious dissent, in return for the taking of a modified oath of loyalty to the Crown. The Act was a way of ensuring and fostering national unity, but at the expense of weakening the doctrine and the authority of the Established Church and abandoning the doctrine of the Divine Right of kings. 718 The Act disapplied the legal obligation upon Protestant dissenters to attend the services of the Established Church and absolved them from all penalties for non-attendance, which had been principally imposed by the Act of Uniformity of 1558719 and other ecclesiastical legislation of Elizabeth I.

Section XIII of the Toleration Act, set out the new modified oath of fidelity to be taken by all such Protestant dissenters. By this oath of fidelity, every person formally rejected the teaching that princes could be excommunicated and then deposed by Popes and furthermore that the Popes had any type of jurisdiction within the realm. The Protestant dissenter was then to make a modified declaration of faith, as follows:-

“I, A.B. , profess faith in God the Father, and in Jesus Christ his eternal son, the True God and in the Holy Spirit, one God blessed for evermore, and do acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration.”

717 The Toleration Act (preamble) quoted in Halsbury's *Ecclesiastical law*, paragraph 1419.

718 Many of the Clergy resented the abandonment of this doctrine and refused to take the oath of allegiance to the Crown. Archbishop Sancroft and about three hundred clergymen, who would not take any such oath, would be expelled from their office. They were to form the Non-Jurors of the Church of England. See Hollis, *History of Great Britain in Modern Times*. pp. 28-29

719 The Act referred to the Act of Uniformity of Elizabeth I (1 El. c.2) as well as other Elizabethan and Jacobean statutes: 23 El. c.1; 29 El.c.6; 3 Jac. 1 c.4, and 3 Jac. 1.c.5.
This was the legal requirement under the Act, that all such individuals should believe and make an oath of their belief in the Blessed Trinity, the divinity of Jesus Christ and the sacred importance of the Bible. The Act was not of any benefit either to Catholics or those who denied the dogma of the Blessed Trinity, for it was not the intention:

“to apply to give any ease, benefit or advantage to any Papist or Popish recusant, whatsoever or any person shall deny in his preaching or writing the doctrine of the Blessed Trinity as it is declared in the aforesaid Articles of Religion.”720

The Toleration Act of 1688 was the fruit of political circumstances, bowing to the inevitable legal re-assessment of the position of the crown and its powers. This limited legal protection given to religious dissent under English law, would soon facilitate the legal position of all Protestant non-conformists and would lead to the judges of the Common law courts applying this principle of religious freedom and liberty within the civil law in general. The civil right of all dissenters to give and bequeath property and assets to their religious communities for the purposes of their religious cult and education, would be recognised at law.721 So long as religious dissenters could demonstrate that their beliefs represented no threat to the political power of the government-proven by their subscription to the doctrine of the Trinity and the taking of the modified oath,722 then they would be legally able to participate in civil life.

7.3. RELIGIOUS TOLERATION EXTENDED BY PARLIAMENT BETWEEN 1689 TO 1812.

The ambit of limited religious toleration, permitted under the Act of 1688 was not available to non-conformists who belonged to the Society of Friends, otherwise known as Quakers. The Society of friends, apart form dissenting from the Thirty-nine Articles of Religion and refusing to use the New Book of Common Prayer for their form of religious worship, held the view that it was morally

720 Section XVIII of the Toleration Act of 1688.
721 See later on in this section, under paragraph 7.8.
722 The granting of religious legal toleration for Catholics is considered in chapter 8.
wrong to take any form of religious oath. They could not escape prosecution under the 1662 Act of Uniformity. For this reason, the law passed under the Act of 1688 needed to be amended for them, on grounds of conscience. An Act of Parliament of 1697 permitted them to solemnly affirm, instead of taking any oath, and on that basis, afforded them the same protection as all other religious dissenters. 723

### 7.3.1. The Blasphemy Act 1698.

Parliament under the Toleration Act of 1688 had made it legally clear that all dissenters were to subscribe to the doctrine of the Trinity. This was a provision within the Act, insisted upon by the leaders of the Established Church, so as to ensure that the minimum tenets of Christianity would be held by those not of their Church. By this condition, Unitarians were outside the terms of toleration, because they denied the doctrine of the Trinity. The Blasphemy Act 1698, laid down further penalties and imposed fines and sentences of imprisonment for those who were caught blaspheming and denying the essential dogmas of Christianity, as held and taught by the Established Church, 724 offences which were to include the denial of the belief in the doctrine of the Trinity. 725

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723 An Act that the solemn affirmation and declaration of the People called Quakers shall be accepted instead of an oath in the usual form 7 & 8 William and Mary c.XXXIV. (1696). The affirmation was "I. A.B. do declare, in the presence of almighty God, the witness of the truth of what I say."

Because they were afforded special treatment under this Act, they were later to be exempt from subsequent restrictions imposed by later Acts of Parliament upon Protestant dissenters. Under The Places of Religious Worship Act 1812, it was a condition that any building used for religious worship, should be made open to the public. The provisions of this Act were not applicable to the Society of Friends.

724 By reference to the Thirty Nine Articles of Religion.

725 Under the guidance and the ambit of this Act, the Common law offence of blasphemy would develop. The Common law offence of blasphemous libel-under criminal law-remains within English Criminal law. See chapter 5.
The Blasphemy Act of 1698,726 punished all those who denied the dogma of the Trinity and the sacred character of the Bible, whether by the spoken or written word or by teaching. All such persons found of blasphemy, under the terms of the Act, were by law incapable of holding any ecclesiastical, civil or military employment. In section I, Parliament had legislated that

“if any person or persons having been educated in or at any time having made profession of the Christian religion within the realm, shall by writing, teaching or advised speaking deny any one of the persons in the Holy Trinity to be God or shall assent or maintain that there are more Gods than one or shall deny the Christian religion to be true or the Holy Scriptures of the Old and New Testament to be of divine authority...and shall upon indictment or information...be thereof lawfully convicted...shall be adjudged incapable and disabled in law, to all intents and purposes...to have and to enjoy any office or offices, employment ecclesiastical, civil or military.”

Section II contained certain safeguards, to prevent frivolous actions and stipulated that every prosecution for the offence of Blasphemy, had to be by way of information, sworn on oath. On a first conviction, provided that the guilty party renounced his opinion, then he could be discharged from all offences within four months.727

7.3.2. The Non Conformist Relief Act 1779.

Parliament had granted limited religious toleration to various groups of Protestant dissenters, enabling them to refrain from attending the services of the Established Church. But by law, they were not permitted to hold meetings for religious purposes nor were their ministers nor laity able to carry out any educational activity to help the young. This was seen as being a threat which could undermine the position of the Established Church.

In the eighteenth century, new religious groups appeared, especially Methodism through the evangelising efforts of John and Charles Wesley. John Wesley formally broke away from the Established Church and eventually created

726 An Act for the more effectual suppressing of Blasphemies and Profanities 9 & 10 William c.32 (1698). Statutes at large (Vol 3).

727 Section III of the Act of 1698.
his own ecclesiastical structure, with unparalleled success. 728 His movement led to a growing demand for the law giving religious toleration to be extended 729 to other areas of religious activity. The Non-Conformist Act 1779, was to give such relief to all Non conformist ministers who were permitted to preach and to teach in certified places of worship, on the condition that they made a declaration of their faith before a justice of the peace. 730 Under Section 1 of the Non-conformist Act of 1779, relief was given to

"every person differing from the Church of England, in holy orders or pretended holy orders or pretending to be in holy orders, being a preacher or teacher of any congregation of dissenting Protestants, who if he scruple to declare such and subscribe as aforesaid (the reference here is to the Thirty Nine Articles of Religion) shall take the oaths and make and subscribe the declaration against popery required by the said Act in the first year of the reign of king William and Queen Mary and shall also make and subscribe a Declaration in the words as follows: -

"I A.B. do solemnly declare in the presence of Almighty God that I am a Christian and a Protestant and as such that I believe that the Sacred Scriptures of the Old and New Testament as commonly received by the Protestant Churches do contain the revealed Word of God: and that I do receive the same as the rule of my doctrine and practice"

shall be and every such person is hereby declared to be intitled to all the exemptions, Benefits and privileges and advantages granted to Protestant dissenting ministers."

728 John Wesley (1703-1787). By 1784, in a span of twenty five years, three hundred and fifty six Methodist Chapels were built throughout the country. See J.H. Plumb, England in the eighteenth Century.

729 See the tolerant views of the eighteenth century lawyer and lexicographer Samuel Johnson on religious toleration. In the life written of him by his biographer, Boswell, Johnson supported the principle of liberty of conscience and religion, subject to safeguards to preserve peace and order. "Every man has a right to liberty of conscience, and with that the magistrate cannot interfere" See James Boswell, The Life of Johnson. Oxford University Press 1980. pp. 538-539.

730 An Act for the further relief of Protestant dissenters, ministers and schoolteachers. 19 George III c.44 (1779). Statues at large (Vol 13).
Section II enabled all dissenting ministers to instruct the young, but no such person could hold the mastership of any college or school of royal foundation, under section III.

**7.3.3. The Places of Religious Worship Act 1812.**

Although Protestant dissenters, their ministers and their ordinary folk had been absolved from conducting and attending the services of the Established Church, they had not been granted any legal protection to hold and attend their own liturgical services in any buildings or places. They were bound by various restrictions on assembling for meetings, imposed under an Act called the Conventicle Act of 1664. This made it impossible for large groups to assemble in buildings for the purposes of holding religious services.

The Places of Religious Worship Act 1812 removed this legal impediment and would enable all religious dissenters to hold meetings in any building or place for religious worship. The Act of 1812 imposed the condition that every building to be so used, first of all had to be registered and that the doors to any such place be not locked, barred or bolted to prevent the entry of any person. Any minister before preaching, in such a place had to make a declaration of his faith before a magistrate, or would otherwise commit an offence.

The following year, Unitarian ministers who denied the dogma of the Blessed Trinity, and who faced prosecution for blasphemy, were able to take advantage of this Act. In 1813, the law of Blasphemy was changed by The Doctrine of the Trinity Act, which repealed all oaths in favour of the Blessed Trinity, previously demanded by the law.

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731 The provisions of which would be extended to Catholics and to Jews.

732 This applied to a congregation of more than twenty persons but did not apply to meetings organised by the Quakers. Sections 2 and 14.

733 Section 5, which made it an offence to preach without a declaration. Section 8, made it compulsory for the magistrate to issue a certificate that a declaration had been given.

734 The Doctrine of the Trinity Act. 53 Geo. III c.160 (1813). Its full title was;-An Act to relieve persons who impugn the doctrine of the Holy Trinity from certain penalties. It repealed
7.4 RELIGIOUS TOLERATION FOR THOSE OF THE JEWISH FAITH.

By the end of the eighteenth century, English law had been substantially modified to remove most of the penal provisions and liabilities against Protestant dissenters and the increasing number of other religious sects. With religious freedom being granted and permitted for these groups, it became increasingly difficult to justify the withholding of religious toleration to other Christian groups and then to non-Christian religions. Thus in 1791 and then later in 1829, freedom of worship was extended to Catholics and a great number of the restrictions and liabilities which had been imposed upon them by the recusancy laws were repealed.735

Relief for those holding the Jewish faith was to arrive in the early part of the nineteenth century. Formerly, they had been prevented from exercising their civil and political rights, because they had not been prepared to make or take any oath of loyalty to the Crown. In a case decided in 1608 by Lord Chief Justice Coke they had been described as infidels and so perpetui inimici regis et religionis, perpetual enemies of the king and of religion, and as such enjoying no better status than that of alien enemies during a time of war. They were subject to a number of legal restrictions with respect to marriage, the ownership of property and education. By the nineteenth century, these judicial prejudices were being dispelled.

7.4.1. The Religious Disabilities Act 1846.

In 1846, Parliament granted religious toleration on a statutory basis for those of the Jewish faith, and relieved them of certain penalties and disabilities. This Act, the Religious Disabilities Act of 1846737 granted legal relief to all

Section 1 of the Toleration Act of 1688 (1 William and Mary Session 1 c.XVIII) and the Blasphemy Act of 1698 (9 & 10 William and Mary c.32.). See Statutes at large (Vol 3).

735 See chapter 8.

736 Calvin's Case (1608) 7 Co Rep (E.R.).

737 The Full title was An Act to relieve Her Majesty's Subjects from certain Penalties and Disabilities in regard to Religious opinions. The date of Royal Assent was 18 August 1846.
"Her Majesty's subjects professing the Jewish religion, in respect to their schools, places for religious worship, education and charitable purposes, and the property held therewith, shall be subject to the same laws as her Majesty's Protestant subjects dissenting from the Church of England are subject to and not further or otherwise." 738

All lands and properties already owned by Jews or to be acquired by them for the purposes of their Jewish faith, whether for religious cult or education or for any other charitable purposes, henceforth would be governed by the same rules and enjoy the same charitable status and advantages as those charitable institutions of the Protestant dissenters.

7.4.2. The Jews Relief Act 1858.

Further relief was given to those professing the Jewish religion by the Jews Relief Act of 1858739 which made accessible to those of the Jewish faith, certain offices within the Government and with the Crown. These governmental posts had previously been reserved to members of the Established Church, as their civil functions involved the exercise of ecclesiastical rights within the Established Church—a right of presentation to benefices of the Church of England. The Jews Relief Act of 1858 removed such a disability, by providing that in such circumstances, where the holder of such an office was a person of the Jewish faith, then:

"...the right of presentation shall devolve upon and be exercised by the Archbishop of Canterbury for the time being; and it shall not be lawful for any person professing the Jewish religion, directly or indirectly to advise Her Majesty...or any person or persons holding or exercising the office of guardians of the United Kingdom, or of Regent of the United Kingdom...touching or concerning the appointment to or disposal of any office or preferment in the Church of England...or in the Church of Scotland; and if such person shall offend


739 The Jews Relief Act. 21 & 22 Victoria c. 29 (1858)

Its full title was:— An Act to provide for the Relief of Her Majesty's Subjects professing the Jewish religion.
in the premises, he shall, being thereof convicted by due course of law, be deemed guilty of a high misdemeanour, and disabled for ever from holding any office, civil or military under the Crown..”740

The relief afforded by this Act741 was a sensible compromise to enable those professing the Jewish faith to hold civil positions, which for historical reasons had been confined to those members of the Established Church.

7.4.3. The removal of other legal disabilities.

The effect of the Religious Disabilities Act of 1846 was to legally make the Jewish religion, one of the recognised religions of the country. No longer were the Jews to be treated as aliens and enemies of the State. Whereas prior to that date, any legacies left by testators for Jewish purposes ran the risk of being have declared void by the courts for reasons of public policy, by the end of the nineteenth century legal attitudes had changed. In 1889, a court had no legal difficulty in enforcing a provision contained in a will, stating that a beneficiary would forfeit his interest if he should forsake the Jewish religion or marry a person who did not profess the Jewish faith. Such a condition was no longer deemed to be illegal or void at common law, in keeping with religious toleration.742

Since the latter part of the seventeenth century, the common law had in fact tried to comply with, as much as possible, the form and the ritual of the Jewish faith. From 1688, Jews were permitted to be sworn as witness upon the Old Testament, instead of the New Testament.743 Wherever possible, arrangements had been made, for parties or witnesses in any legal action who were Jews, not

740 Under Section 4. The right of presentation to an ecclesiastical benefice would pass to the Archbishop of Canterbury.

741 There were similar provisions enacted within the Catholic Emancipation Act of 1829, where the nature of a civic post, involved the exercise of a presentation to a benefice within the Established Church.

742 Hodgson-v-Halford (1879)

743 Robeley-v-Langston (1668) 2 Keb 314. (E.R.) This was also recognised under the Oaths Act 1909. Section 2.
to be called to give evidence on a Saturday or other Jewish holiday. In 1949, under the Representation of the People Act, those of the Jewish faith were specifically given certain concessions, so that if a poll is taken on the Jewish Sabbath, they can have their vote recorded by the recording officer.

7.5. LIBERTY OF RELIGIOUS WORSHIP ACT 1855.

All places of worship, used by Protestant non-conformists, had been since 1812 regulated by and were subject to the detailed provisions of the Places of Worship Regulation Act 1812. This Act of 1812 granted to Protestant dissenters legal liberty to worship, without fear of being molested and being prosecuted by the state, the Established Church or any individual. Registration of such a building, for religious worship, was a prerequisite so that (a) all such premises could be used for religious worship and (b) all buildings and premises could be used by the adherents of such a religious group. The Act made it also a conditions that all religious meetings were conducted in such a way that they were open to the general public, with the doors of the buildings not being bolted or barred.

The provisions and the benefits of this Act of 1812 were originally confined solely to Protestant Dissenters. All places of religious worship used by Roman Catholics and Jews were given the same protection, by The Liberty of Worship Act of 1855, which by section 2 extended the statutory protection given by the Act of 1812, to the buildings and premises used by Catholics and Jews. By doing this, the Act of 1855 extended to those of the Jewish religion

744 Barker-v-Warren (1677) 2 Mod. (E.R.) A person of the Jewish faith had also been excused from failing to honour a bill of Exchange on a Jewish holiday. Lindo-v-Unsworth. 2 Camp. (1811) (E.R.).


746 Regulated by The Roman Catholic Charities Act. 1832. See chapter 8.

747 Under The Religious Disabilities Act. 1846

748 18 & 19 Victoria (1855). The full title of the Act was;— An Act for securing the Liberty of Religious Worship. This was given royal assent on 14 August 1855.

749 Section 2: "So much of the Roman Catholic Charities Act 1832 as enacts that Her Majesty's subjects professing the Roman Catholic religion, in respect to their places for religious worship, shall be subject to the same laws as the Protestant Dissenters are subject to, and so
and the Roman Catholic faith, the same right of religious worship, in respect of their places, hitherto confined to Protestant Dissenters. Both those of the Catholic and Jewish faith, would be able to meet and assemble for religious purposes, whether for instruction or for religious cult, in their own Churches, chapels or synagogues places.

7.6. THE PLACES OF WORSHIP REGISTRATION ACT 1855.

All religious buildings of the Established Church-Churches, chapels and cemeteries—had long been given special legal protection as being buildings set aside for the public cult of the Church of England. The Ecclesiastical statutes of Edward VI and then Elizabeth had specified that the approved liturgy of the Established Church was to be held within its churches and chapels. Liturgical services, included the Book of Common Prayer and the administration of the Sacraments as well as the contraction of all marriages. This meant that only those marriages made according to the Book of Common Prayer and within the ecclesiastical premises of the Established Church, were valid at law and recognised. When the Places of Worship Act 1812 permitted Protestant Dissenters to register their buildings for religious reasons, Protestant dissenters could marry according to their own religious creed.

The Places of Worship Registration Act of 1855 amended the general law and placed on the same legal footing, all buildings and chapels of the Roman Catholic Church as well as buildings and synagogues of the Jewish religion. The Act under section 2 said that

"every place of meeting for religious worship of Protestant Dissenters or other Protestants, and of persons professing the Roman Catholic religion...and every place of meeting for religious worship of persons professing the Jewish religion...

much of an Act passed in the ninth and tenth year of Her present Majesty, chapter fifty-nine, as enacts that Her subjects professing the Jewish religion Majesty's, in respect to their places for religious worship, shall be subject to the same laws as Protestant Dissenters are subject to, shall be respectively read as applicable to the laws to which Protestant Dissenters in England are subject for the time being after the passing of this Act."

750 For example, The Act of Uniformity of Edward VI and the Act of Uniformity of Elizabeth I (1558).

751 The Places of Worship Registration Act. 18 & 19 Victoria c.81.
may be certified in writing to the Registrar General of Births, Deaths and marriages in England, through the Superintendent registrar of births, deaths and marriages of the district in which such place may be situate…”752

The voluntary legal registration of such buildings for religious purpose, extended to Catholics and to those of the Jewish faith, the privileges and advantages, previously enjoyed by the Established Church and members of the other Christian groups. It facilitated greater religious worship and enabled them to marry according to their own religious ceremony.753 Registration, now brings with it tax advantages.754

7.7. THE ECCLESIASTICAL JURISDICTION ACT OF 1860.

All premises and buildings which were registered as a place for religious worship, under the terms of the Places of Worship Registration Act of 1855,- whether by Protestant dissenters, Catholics or Jews-were to be given broadly the same protection under the Ecclesiastical Jurisdiction Act of 1860, that Cathedrals, Churches and chapels of the Established Church enjoyed. The purpose of this Act was to extend the religious and common law protection then only available to the Established Church, so that non-dissenting ministers, priests and other religious denominations would be able to carry out religious worship in peace. This Act would punish all forms of indecent behaviour occurring on premises used for religious worship, whether by the Established Church, Protestant dissenters, Roman Catholics, Jews and other faiths. Its protective provisions were extended to cover all churches, chapels, churchyards and other religious places of whatever religious denomination.

752 See Section 2. op.cit.

753 By the relevant provisions of the Marriage Act 1949, section 41 and the registration of Births, Deaths and Marriages (fees) Order, Statutory Instrument 1972 (A statutory instrument is subordinate legislation), marriages can only be solemnised and be valid, if the ceremony takes place in a building, registered for the purposes of solemnising marriages.

754 Buildings registered as places of worship, can be exempt from the payment of general rates under the Rating and Valuation Acts. For example, under the Rating Act 1967.
The Ecclesiastical Courts Jurisdiction Act 1860,755 first of all abolished the jurisdiction of the Ecclesiastical Courts of the Established Church over such offences. The Act then transferred to the secular courts the power to punish all conduct and misbehaviour in respect of all places used for religious worship, provided that such places had first been registered. The Act contained seven sections and set out the way that offenders were to be prosecuted. Proceedings were to be commenced before a magistrate and the local police constable or churchwarden, where an offence had been committed, was given the power to arrest the offender.756

Under section 2 of the Act of 1860, the offence and the circumstances in which an offence could be committed were specified. This stipulated that:

"Any person who shall be guilty of riotous, violent, or indecent behaviour in England or Ireland in any cathedral church, parish or district church or chapel of the Church of England and Ireland, or in any chapel of any religious denomination, or in England in any place of religious worship duly certified under the provisions of the Places of Worship Registration Act 1855, whether during the celebration of divine service or at other time, or in any churchyard or burial ground, or who shall molest, let, disturb, vex, or trouble, or by any other unlawful means disquiet or misuse any preacher duly authorised to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament, or any divine service, rite, or office, in any cathedral, church or chapel or in any churchyard or burial ground, shall on conviction...be liable to a penalty...or...be committed to prison for any time not exceeding two months."

This section contained two parts. The first related to general misbehaviour. Against any such misconduct, premises used for the religious purposes of the Established Church, by Protestant non-conformists, Catholics or Jews were all protected. The second part of this section referring to the molesting or

755 23 & 24 Vict. c. 32 (1860). Its full title was; An Act to abolish the jurisdiction of the Ecclesiastical courts in England and Ireland in certain cases of brawling. It was given royal assent on 3 July 1860.

756 Under section 3. ibid.

757 ibid. Section 2.
disturbance of any preacher celebrating any divine service on any religious premises, was limited to protecting only the Divine Service of the Church of England under the Book of Common Prayer.

7.8. ENGLISH COMMON LAW DECISIONS ON RELIGIOUS TOLERATION.

All the above Acts of Parliament were passed chiefly to remove existing criminal sanctions against those who refused to practise Christianity according to the way prescribed by the law of the land. They also had the effect of passing on to various religious bodies, other than that of the Established Church, the same benefits and advantages that the latter enjoyed under the criminal law. For so long as the Established Church had remained the only legal way of expressing religious belief, there was no way of permitting religious dissent, and all other religious activity was deemed to be illegal. Once this theory had been relaxed, then greater religious freedom would follow. In line with Parliament, the judges of the common law courts were to recognise this principle of religious toleration in their judgements, especially in the area of Charity law and in Testamentary succession.

As the ranks of the judiciary became available to men of all religious persuasions—made possible by the modification of the oaths of loyalty in favour of the Crown, greater judicial freedom and more liberal reasoning began to be reflected in court decisions. Old common law cases, which had closely identified religion with that of the Established Church and so had felt unable to extend religious freedom to Protestant dissenters, Catholics and Jews were soon distinguished and then overruled. Once the law had been liberalised on the criminal front, then the courts would extend charitable status to religions non-Christian groups.

The new approach taken by the Common law courts, initially related to testamentary dispositions and bequests; lands, goods and chattels left as pious dispositions to religious denominations and bodies other than the Established Church. The courts had to determine whether such gifts or donations were void on grounds of public policy. In a case decided in 1860, a bequest of ten pounds per annum had been given by a Jewish Testator so that the people in college could learn every year on the anniversary of his death a certain Jewish prayer. As the testator was Jewish and had left money for the propagation of a religion which was not that of the Established Church, the legal point in issue was whether this gift was illegal. It was held that this was a valid gift and not void, notwithstanding that the purposes were not for the promotion of the religion of
the Established Church. An earlier common law decision in 1837 had anticipated this, by ruling that a gift for the Jewish religion generally was valid.

Gifts for other Christian bodies and denominations had been ruled to be valid at the beginning of the nineteenth century, in favour of the Presbyterians, then the Unitarians in 1846, in 1874 to the Methodists, and in 1898 to the Plymouth Brethren. Other common law court decisions extended the general validity of testamentary dispositions to not only religious cult but also to all other aspects of religion. So legacies were ruled to be valid to cover the maintenance and support of Jewish Synagogues, dissenting ministers, dissenting missionary establishments and Roman Catholic bishops and chapels, although not until 1917 for the celebration of the Mass.

The above cases exemplified how the courts had permitted their decisions to reflect the growing mood for religious toleration and to rule as valid bequests to further a particular religion other than that of the Established Church. The result was different where the courts detected a purpose, within a will, hostile to or deemed to undermine the Christian religion, as taught by the Established Church. For example, in 1867, the owner of a room refused to honour a letting, when he discovered that the room was to be used by the Liverpool Secular Society, for a lecture questioning Christian doctrine. This refusal was held to be justifiable as to attack Christianity was to attack the law of the land.

By 1917 judicial reasoning had come to a rather different conclusion in a case concerning the bequest under a will to the Secular Society, whose avowed

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758 Re: Michel's Trust (1860) 28 Beav. (E.R.)
759 See Straus-v-Goldsmit (1837) 8 Sim. (E.R.)
760 Att-General-v-Wansay (1808) 15 Ves. (E.R.)
761 Shrewsbury-v-Hornby 5 Ha.406 (1846) (E.R)
762 Dawson-v-Small (1874) L.R.
763 Re: Brown (1898) 1.L.R.
764 For a more detailed examination of these cases, see pp. 64 and 65 of Tudor on Charities. The exception to trusts being valid for whatever type of religious cult concerned legacies or bequests for the celebration of Holy Mass. Until 1919, they were invalid. See chapter 8.
765 Cowan-v-Milbourn (1867) L.R. 2 Exch.
purpose was to implicitly undermine the beliefs of Christianity. Was such a legacy valid? The beneficiaries under the will attempted to have this legacy set aside since they maintained that the objects of the Secular Society were illegal as they tried to undermine the doctrine of the Established Church. The objects of the Secular Society were

"to promote...the principle that human conduct should be based upon natural knowledge, and not upon supernatural belief, and the human welfare in this world is the proper end of all thought and action."

The majority decision of the House of Lords, ruled that the constitution and the objects of the Secular Society were no longer contrary to English law and therefore this was a valid gift. In the leading judgement of Lord Sumner, he summarised the current approach of English law to those organisations which openly attacked the Established Church, but not in a blasphemous or scandalous manner. He commented that

"...English law may well be called a Christian law, but we apply many of its rules and most of its principles, with equal justice and equally good government, in heathen communities, and its sanctions, even in courts of conscience, are material and not spiritual...In the present day reasonable men do not apprehend the dissolution or the downfall of society because religion is publicly assailed by methods not scandalous...Accordingly, I am of the opinion that acts merely done in furtherance (of the objects of the Secular Society)...are not now contrary to the law..."766

Accordingly, the legacy was a valid gift to the Secular Society.

7.9. The Universities Tests Act of 1871.

The Elizabethan Settlement of 1558, had imposed upon all students wishing to take a degree at the Universities of Oxford, Cambridge and Durham and the halls of these colleges and also for all those intending to take up any executive or
teaching post thereat, the legal obligation to subscribe to the Thirty nine Articles of Religion and to assist at the prayer and services of the Established Church. This had the effect of preventing all Protestant dissenters as well as Catholics and Jews from going to these universities and from holding any executive or teaching post at these places of education. The benefits of these universities were confined to a select group of people, those prepared to show their allegiance to the Established Church. In 1871, it was felt that this legal restriction should be removed as it unnecessarily restricted tertiary education. The Prime Minister, at that time, William Gladstone presented a bill to remove this general condition of entry, but with certain safeguards to protect the position of the Church of England.

The Universities Tests Act referred to the

"divers restrictions, tests, and disabilities (which) should be removed, under proper safeguards for the maintenance of religious instruction and worship in the said universities and the colleges and halls now subsisting within the same."769

Section 3 of the University Tests Act, changed the whole system of entry and the granting of positions of government and teaching posts within these universities. With the exception of those wishing to study or teach divinity, the condition was abolished for either those wishing to enter or to graduate or to teach at any college or hall, that they should subscribe to any formulary of faith or make any declaration of religious belief or profession. This section also removed any legal obligation or duty to conform to any religious observances or to attend or abstain from any form of public worship or to belong to any specified church, sect or denominations. The Act recognised that any person

767 He had introduced a bill to disestablish the Church of England in so far as it existed in Ireland, in 1869.

768 The full title was: An Act to alter the law respecting Religious Tests in the Universities of Oxford, Cambridge, and Durham, and in the Halls and Colleges of these Universities. 34 Victoria c.26 (1871) See Statutes in force.

769 Cf. The pre-amble.

770 Section 3. The requirement was also abolished for anyone wishing to exercise any rights or privileges at these places of university education.
could abstain, for religious reasons, from attending any lecture, if he or in the case where he was not of age, his parent or guardian objected. 771

7.10. CONCLUSION.

The Declaration of Rights of 1688 followed by the Bill of Rights of the same year, was the beginning of a new phase within Church and State relations in England. It led to the Toleration Act of 1688, which definitively granted religious toleration for the first time to a limited group of Protestant dissenters. It was the de facto recognition by the State, by the King and Parliament, that no longer could they control and try to impose uniformity of religion on the nation. The objective of Parliament was to secure a limited uniformity upon religious matters, on what it considered to be the fundamental essentials and to otherwise permit diversity on all religious opinions but confined to Protestant dissenters.

Whilst the King wielded great influence and commanded substantial support within the Government and the Church, then the judiciary and the legislature could be used to eliminate religious dissent. All dissent could be represented as a destabilising influence upon the power of the King and especially a threat to the position of the Crown as Supreme Governor of the Church. The weakening of the power of the King, the abandonment of the doctrine of the Divine right and the emergence of the superiority of Parliament, had all contributed to making it impossible for the King alone to rule as absolute monarch and to eliminate diverse religious views. This was the constitutional significance of the Act of Toleration of 1688.

Parliament was to still claim the legal right to monitor the essential beliefs of the nation and whilst the majority of her representatives came from the Established Church, it would not abandon that role until much later. The

_The requirement to subscribe to the Thirty-nine Articles of religion, as well as the other formularies of the Church of England and to attend the services of the Established Church was kept obligatory for all those offices, rights or privileges to be exercised by those who held holy orders (see section 3(1) of the Act). Likewise, all such offices confined to members of the Church of England, remained restricted to such persons (section 3(2) of the Act)._

771 _Section 7: No person shall be required to attend any college or university lecture to which he, if he be of full age, or, if he be not of full age, his parent or guardian, shall object upon religious grounds._
punishment of religious dissent would continue to be justified on grounds of public policy. Thus the Blasphemy Act of 1697 aimed punished all Unitarians who denied the Dogma of the Trinity and religious toleration would not be extended to Catholics or to Jews until much later.

In the eighteenth century, the historical and religious circumstances of the country had changed dramatically, with the influx of new religious groups and movements which all influenced government policy, mirrored in English Common law. By 1813, the Unitarians were no longer subject to penal measures and in 1846 religious toleration was formally granted to Jews. By the close of the nineteenth century, Parliament had effectively stepped aside and abandoned the right to determine by legislation the religious views of subjects and to punish dissent by fines and imprisonment. The protection and the benefits of the civil law and criminal law, enjoyed by the Established Church were therefore extended to all the Christian Churches and the Non-Christian religions.
Chapter 8

Chapter 8

Religious Toleration for Catholics and the Catholic Church
(1778-1974).


8.1 INTRODUCTION: THE HISTORICAL BACKGROUND TO THE BEGINNING OF THE REPEAL OF THE RECUSANCY LAWS.772

The eighteenth century in England for the Catholic Church, was a time of great hardship and decline. With the overwhelming Protestant revolution and settlement secured in 1688, and then in 1700, by the Act of Settlement, followed by the enactment of further recusancy laws,773 Catholics found themselves

772 The chief legal works which have been consulted to write this chapter have been: Halsbury’s Ecclesiastical law (Vol.14), A. St, John Robilliard, Law and Religion; David Matthew, Catholicism in England; E.Gareth Moore, Introduction to English Canon law and Bailey, Harris, Jones, Civil Liberties: cases and materials. For the historical background, Hollis, History of England in modern times and The Catholic Encyclopaedia. The earlier statutes are to be found in Statutes at large (Vol 13) (1777-1780); and (Vol 16) 1790-1794) and, after this period in Halsburys, Statutes in force. The case decisions, before 1869 are reported within the English Reports Series (E.R.), and after that date within the Law Reports (L.R.), the Weekly law Reports (W.L.R.) or the All. England Law Reports (All E.R.).

773 Which also, inter alia, prohibited Catholics from bearing arms, owning a horse of the value of five pounds (!), voting in general elections and from practising as lawyers. In 1699, a further Act of Parliament had contained sanctions against Catholic priests, as well as restrictions preventing Catholics from keeping schools and acquiring land. Cf. The Act for the further preventing of the growth of Popery. 11 William III c.4. See Statutes at Large (Vol 3). This Act had made it obligatory for all persons over the age of 18 to take the oath of loyalty and declarations of allegiance and against the dogma of Transubstantiation. Without this, those holding or professing the Catholic faith could not inherit or buy land. This Act also imposed prison sentences for life upon (a) all Catholic clergy exercising their sacerdotal functions and (b) all Catholics keeping schools.
more than ever impeded by legislation which legally debarred them from participating in civic life. By the latter half of the eighteenth century, this had left its mark, with the numbers of Catholics reaching very levels. It has been estimated that at the beginning of this period, the numbers of Catholics probably amounted to about five per cent of the population. By 1780, their numbers had decreased to approximately seventy thousand people, with a total number of three hundred priests serving this community.774

The reduction in numbers can be explained by a series of events. The extinction of many Catholic families who had traditionally given much support to the Church. The apostasy of other Catholic families, who had under pressure began to conform to the Established Church. The great multiplicity of penal laws, which affected just about every aspect of the life of a Catholic, whether in his public or private life. All these factors contributed to facilitating this decline. During this period, Parliament gave no indication that it intended to repeal the recusancy laws and whilst there were no further additions made to the penal code, the existing penal laws were enforced from time to time. As late as in 1767, a Protestant informer John Payne, had denounced to the civic authorities a certain Catholic Priest, John Baptist Maloney under the Recusancy laws. He was found guilty and was sentenced to life imprisonment. Although this punishment was later to be reduced to a prison sentence of four years and banishment, it did demonstrate that the penal laws were no dead letter and their provisions and effects could still be invoked against Catholics if the political climate was ripe.

Yet the Government and the civil authorities, were prepared to modify their policy and pursue a more lenient approach if it suited their convenience, especially towards the Catholic hierarchy. At the same time that proceedings were brought against John Baptist Maloney, similar charges were levelled against the Apostolic vicar for London, Bishop Challoner who was indicted. The proceedings against him actually failed.

The historical background for the beginning of the repeal.

It was in 1777, with the revolt of the American colonies that the English Government was forced by historical circumstances to rethink and to re-examine its position and overall policy. Needing more troops and in particular, the help of the Catholic clansmen in Scotland, the Government began negotiations. What had been the stumbling block, in particular for many Catholics had been the

774 See the article "England" in the Catholic Encyclopaedia.
necessity that they should take oaths of allegiance and supremacy in favour of the Crown, and as well, a particular oath against the dogma of Transubstantiation. These were all legal conditions as entry into both military and civil life.

Catholics were also subject to numerous other legal restrictions, for refusing to comply with the ecclesiastical law and attend the services of the Established Church. Parliament prevented them from exercising public or private cult. They were denied the right to keep schools and to educate their children according to their religious beliefs. They were unable, at law, to buy or lease land unless they took the Anglican Sacrament and the oath of Supremacy.775

Furthermore as religious toleration had already been granted to Protestant non-conformists and dissenters, since 1688, it was becoming increasingly more difficult to justify the non extendence of toleration to Catholics. As a condition of giving any support to the Government, Catholics wanted the same rights and privileges as the Protestant dissenters; nothing more and nothing less. Nor were Catholics alone in asking for the repeal of the draconian effects of the Recusancy laws.776

Taking the initiative, the Government first made an approach to Bishop Richard Challoner, the Apostolic Vicar of the London district, who was considered to be the proper representative of the Catholics in England. As Bishop Challoner hesitated, the Government continued the discussions with a select committee of Catholic laymen, to take over the negotiations. The Government indicated that it was disposed to grant limited relief to Catholics and to free them from some of the effects of the recusancy laws, it they were prepared to take a modified oath of allegiance in favour of the Monarchy. Such modified oath would not include a specific statement, denying the dogma of Transubstantiation.

For over two centuries, English ecclesiastical legislation had attacked papal jurisdiction as being a denial of the absolute temporal and spiritual power of the Crown. All the oaths of allegiance and supremacy which were prescribed by Acts of Parliament and were to be sworn by the citizens of the realm had contained

775 For the relevant Acts of Parliament imposing these restrictions, see chapter 4.
776 The legal evolution of religious toleration for Protestant non-conformists and dissenters has been set out in chapter 7. One of the leading champions for equal rights for Catholics and for the repeal of the Recusancy laws, was the eighteenth century leading Parliamentarian Edmund Burke.
(a) an acknowledgement that the Crown held absolute supreme power and jurisdiction in matters both temporal and spiritual (b) a denial that either the Roman Pontiff or any other person had any jurisdiction within the Realm, in affairs temporal and spiritual and finally (c) a rejection of the doctrine that monarchs could be deposed by the Roman Pontiff and murdered by their subjects. The reason for the last, was largely historical and followed the formal excommunication of Elizabeth by Pope Pius V.

8.1.1. The First Repeal Acts.

The fruit of the negotiations between the Government and the Committee of Catholics would be the passing of the first Acts of Parliament which would give limited relief to Catholics. These were the Catholic Relief Act of 1778 and 1791.

8.1.1.1. The Catholic Relief Act of 1778.

The Catholic Relief Act of 1778 disappled the provisions of a law made by Parliament in 1699, which contained legal measures to prevent the growth and spread of popery. The Act of 1778, abrogated so much of the Act of 1699

"...as relates to the apprehending, taking or persecuting, of Popish Bishops, Priests, or Jesuits and also so much of the said Act as subjects Popish Bishops, Priests or Jesuits and Papists or persons professing the popish religion and keeping school, or taking themselves the Education or government or boarding of youth within this realm, or the dominions thereof belonging to perpetual imprisonment; and also so much of the said Act as disables Persons educated in the popish religion or professing the same, under the circumstances therein mentioned, to inherit or take by decent, devise, or limitation, in possession, reversion or remainder any lands tenements...and gives to the next of kin, a Protestant, a right to have and enjoy such lands, tenements or

777 See the wording of the new Oath of Allegiance set out in clause 11 of The Act for the abrogating of the Oaths of Supremacy and Allegiance. 1 William and Mary c.8 (1688). Statutes at large (Vol 3).

778 An Act for relieving his Majesty's Subjects professing the Popish religion from certain penalties and disabilities imposed on them by an Act, made in the eleventh and twelfth years of the Reign of king William the Third, entitled An Act for the further preventing the growth of popery. 18 George III c.60. (1778) Statutes at large (Vol 13).
In essence, the Act abolished the law which permitted the arrest and punishment of Catholic bishops and priests caught carrying out of their religious duties. It permitted Catholics to keep schools and be actively involved in education as well as making it possible for them to buy and own landed interests without being penalised for their religion. Henceforth Catholics were enabled to inherit any lands, not subject to any present litigation proceedings, free of all of the legal impediments imposed by the 1699 Act, as if the restrictions which had stipulated that lands should pass preferentially to the Protestant in lieu of the Catholic next of kin did not exist. Those lands and matters which were being litigated at the time of the Act, were to be prosecuted as quickly as possible.

To take advantage of the above, and so to escape the liabilities and penalties under the 1699 Act, every Catholic Bishop, seminary priest or Jesuit was obliged to demonstrate his loyalty to the crown. This was to be done by the swearing of an oath, in a modified version, declaring loyalty to the Crown and to no other temporal prince (specifically the Catholic descendants of the House of Stuart), denying the temporal (not the spiritual) jurisdiction of the papacy and rejecting the opinion that persons who were deemed to be heretics could be murdered and that princes could be deposed by Popes and General councils. The modified oath was to be taken before a duly authorised state department and a note of such oath being duly recorded.

779 Section I of the above Act.

780 Sections II and III. Ibid.

781 Section IV.

The text of the oath was as follows;— "I. A.B., do sincerely promise and swear, that I will be faithful and bear true allegiance to his majesty King George the Third, and him will defend, to the utmost of my power, against all Conspiracies and Attempts whatever that shall be made against his person, crown or dignity; and I will do my utmost endeavour to disclose and make Known to his majesty, his heirs and successors, all treasons and traitorous conspiracies which may be formed against him or them; and I do faithfully promise to maintain, support, and defend, to the utmost of my power, the succession of the Crown in his majesty's family, against any person or persons whatsoever; hereby utterly renouncing and abjuring any obedience or allegiance unto..."
The legal consequences of this 1778 Act for Catholics were of enormous significance. For the first time since the latter part of the sixteenth century, they were relieved from the provision of taking an oath and an omni-comprehensive declaration of allegiance to the monarch, affirming that the monarch had supreme temporal and spiritual power. In return for the taking of a greatly simplified oath, purged to a large extent of its anti-Catholic sentiments and largely simplified, it was acknowledged that they held certain civic rights: the legal right not to be arrested and convicted for simply exercising and performing their religious duties and attending Catholic services; the legal right to keep a school and a limited right to become involved in education generally; finally, the right to buy and inherit interests in property. Apart from these provisions, the relief was limited. The Act of 1778 did not repeal but in fact still left intact, all the old penal laws requiring Catholics to attend the services of the Established Church and could be invoked so as to punish absenteeism from Church Services with fines and imprisonment.

It is true that by 1778, most of the punitive functions of the old recusancy laws were seldom invoked, yet their civil effects remained. The old oaths of allegiance and the specific declaration against the dogma of Transubstantiation, likewise remained and continued to be mandatory for all those who wished to serve in any type of public office; whether as a functionary or dignitary in a public Corporation (such as a mayor, alderman or town councillor) or within civic...
(a government official or one of her majesty’s judges) or military life (an officer in the armed forces). 782 Catholics were neither able to vote in or to enter either of the Houses of Parliament, whether the House of Commons or Lords and remained subject to the onerous provisions of a double land tax, for professing and holding the Catholic religion. 783

This first Act, in the meantime, did give that desired limited measure of relief to Catholics in England and was promoted by Sir George Saville. If in Parliament it was enacted, with very little opposition, in the country the mood was not so receptive. Severe riots broke out in Scotland and the homes of Catholics and Protestants sympathetic to the Relief Act of 1778 were ransacked. Faced with such a reaction, the Government decided to abandon any attempts to pass a similar bill which would have applied the same relief to Scotland. Two years later, a Protestant Association was formed under Lord George Gordon, with the avowed intention of repealing the Act. Anti-papal mobs rioted in London, causing widespread destruction and several Catholic chapels were destroyed. 784 The riots were eventually quelled by the prompt and decisive action of King George III. They delayed by over ten years the granting of any further relief to Catholics, moderate members of Parliament being too frightened to take any further action during this period.

8.1.1.2. The Catholic Relief Act of 1791.


783 In 1722, there was an Act passed by Parliament and entitled An Act for granting an aid to his majesty by levying a Tax upon Papists. The Catholic Encyclopaedia states that this extracted one hundred thousand pounds from Catholics. See the article on the PENAL LAWS.

784 The deep discontent of the working classes was used by a small group of anti-Catholic fanatics who were able to play on and use to their advantage anti-Catholic hysteria. For a brief account of the conditions which then existed in England and in London, see by J.H.Plumb, *England in the Eighteenth Century*. Penguin Books 1953. The chapter on Radicalism and Reform. A lively description of these riots can be found in the novel of Charles Dickens. *Barnaby Rudge*. 
A second Catholic Relief Act was passed in 1791 with the help of several important and influential politicians, including Edmund Burke. Two years earlier, with the outbreak of the French revolution in 1789, many Catholics in France had fled the bitter religious persecution taking place in their country and had been given generous refuge and help in England. The environment within England was generally inclined to be more sympathetic towards Catholicism and Parliament was prepared to continue enact further measures to grant greater relief for those who professed Catholicism.

The Catholic Relief Act of 1791 contained a total of twenty three sections, to improve and remove further legal impediments and disabilities suffered by Catholics. As with the first 1778 Act of Relief, it stipulated that as a condition for individual Catholics to able to take advantage of the relief, they first had to take an oath of allegiance and declaration of loyalty to the Crown. All such oaths were to be duly sworn before one of the King's courts and once done, were to be registered accordingly.

Apart from setting out the detailed procedure for the taking of this new oath, the Act of 1791 removed the effect of all those penalties and legal sanctions imposed by the recusancy laws upon Catholics for (1) not attending the services of the Established Church and (2) meeting for the purposes of exercising religious cult, whether the saying of or the participation at the celebration of the Mass. The Act gave further relief in the field of education, permitted the construction of buildings for religious purposes and opened up certain public positions in civic life for those of the Catholic faith.

The pre-amble to this second Relief Act, made detailed reference to the generous allegations of misconduct and ill-fame which had been levelled against Catholics. The Attribution to them of certain principles which "are dangerous to Society and civil liberty, and which they are willing to disclaim." 786 The Act did

785 An Act to relieve, upon conditions and under restrictions, the persons therein described, from certain Penalties and Disabilities to which Papists, or Persons professing the Popish Religion are by law subject. 31 George III c.32 (1791) Statutes at large (Vol. 16).

786 Cf. The Preamble to this Act.

This echoed and reflected the widespread general opinion and prejudice that Catholics were generally disloyal and untrustworthy, because they did not acknowledge the Monarch as Supreme Head and Governor of the Church. Other general misconceptions which were still very much in vogue related to the powers of the Roman Pontiff: that the papacy held unlimited and unfettered spiritual power, being devoid of any boundaries; that the Catholic Church denied
not comment as to the veracity of these allegations. It provided a simple formula to overcome these charges; the taking of a slightly amended oath by Catholics which would demonstrate their loyalty and in return, release them from the multitude of penalties and disabilities prescribed by the recusancy Acts. The Act made it first necessary for all Catholics to make a solemn declaration that they were Catholics, to be made before a duly authorised official of the Court of Chancery or any other of the King's courts. Once this declaration was made, all Catholics were to take a new oath, in the form prescribed by the Act. By this oath, like that of the Relief Act of 1778, the person taking the same, swore to (a) be faithful and defend the King, (b) maintain the Protestant succession, descending upon the Protestant heirs of the Princess Sophia, Electress and Duchess Dowager of Hanover, (c) renounce obedience to any other person claiming the right to the Crown of England787 and (d) renounce the belief that kings could be deposed and then murdered. The juror also had to deny that the Roman Pontiff had temporal power in the Realm.788

liberty of conscience. It was to clarify and to explain concisely these notions that within the nineteenth century, Cardinal Newman would write in 1864 his Apologia pro vita sua, in response to a pamphlet written by Charles Kingsley. Although in his original pamphlet, Kingsley had confined his attacks on the Catholic clergy—Truth had never been a virtue with the Roman Clergy—it was evident that this view was by no means confined to be only applicable to the clergy but to Catholics in general. Cardinal Newman was able to brilliantly demonstrate that such a view was pure prejudice. He examined and set out the precise powers of the Roman Pontiff, their limitation and the general issue of whether it was ever licit not to tell the truth "ex justa causa" and to indulge in equivocation.

In his Letter written to the Duke of Norfolk, written in 1878 in response to a bitter attack made by Gladstone, Newman was to expand on theme of conscience, and to give an explanation of the true nature of Catholic doctrine on the nature of oaths, the civic duties of a Catholic and the rights and the rights and duties generally of conscience. Cf. Newman, A Letter to the Duke of Norfolk. Longmans Green London. 1885.

787 The oath set out in the 1778 Act had specifically required the juror to renounce by name the right claimed by the son of James II, the old Pretender, to the English throne. Had he reigned, he would have been known as Charles III. His son, if he had succeeded to the throne of his father, would have been King as Charles IV. The young Pretender had by 1791 died and his brother, Henry had become a priest. Henry was later to be Cardinal Archbishop of York.

788 Section I of the Act. The oath is virtually the same as that already recorded in footnote 8, slightly be adapted. The text is:— I, A.B., do sincerely promise and swear, that I will be faithful and bear true Allegiance to his Majesty, King George the Third, and him will defend to the utmost of my Power, against all Conspiracies and attempts whatever that shall be made against his Person, Crown or Dignity; and I will do my utmost endeavour to disclose and make known to his
For those Catholics who took the above oath, the relief was automatic from all the penalties, the fines and other disabilities which had been fixed under a whole range of named recusancy Acts (those which have in fact been referred to within Chapter 6), which had made it compulsory to attend the Services of the Established Church and had punished dissent and other forms of religious worship. The Act repealed, within two separate sections, those fines and penalties imposed by the earlier recusancy laws on Catholics, which had been designed to secure their attendance at the services of the Established Church and those which had penalised them for practising their faith.

Section III of the Act, made reference to all those statutes which had made it a legal necessity for Catholics to attend the Services of the Established Church, and the fines and the penalties for non-attendance. The legal obligation was removed and the penalties were abrogated. The statutes in question, were Acts of Parliament, passed chiefly during the reigns of Elizabeth and James I and were individually listed, being the following:

2. 23 Elizabeth c.1: An Act to retain Her Majesty's subjects in due obedience.
3. 27 Elizabeth c.2: An Act against Jesuits, seminary priests and other disobedient persons.
4. 29 Elizabeth c.1: An Act to contain further provisions to secure the obedience of her Majesty's Majesty, his Heirs and Successors, all Treasons and traitorous conspiracies which my be formed against him or them: And I do faithfully promise to maintain, support and defend, to the utmost of my power, the Succession of the Crown; which Succession, by an Act entitled "An Act for the further limitation of the Crown, and better securing the Rights and Liberties of the Subjects is and hence limited to the Princess Sophia Electress and Duchess Dowager of Hanover, and the Heirs of her body, being Protestants; hereby utterly renouncing and abjuring any Obedience or Allegiance under any other person claiming or pretending a Right to the Crown of these Realms... (the wording in italics, is an additional section, which did not appear in the 1778 Act).
subjects.

35. Elizabeth c.2. An Act for restraining popish recusants to some certain places of abode.

1 James I c.4 An Act against Jesuits, seminary priests and recusants.

3 James 1 c.4. An Act for the better discovery and repression of popish recusants.

3 James 1 c.4. An Act for the prevention of damage from Popish recusants.

7 James 1 c.1 An Act for administering the Oath of Allegiance and Reformation in married women, Recusants.

After 24th June 1791, no Roman Catholic who had taken the oath, could or would be convicted or prosecuted for non attendance at the divine service according to the rites and worship of the Church of England.

Section IV made it clear that those citizens who were or became Catholics, including those who received Holy Orders, and who practised their religion by attending Mass and providing for the religious education, would no longer be penalised. Every Catholic, including convert, who took the oath, would not be "prosecuted, indicted, sued, impeached, prosecuted, or convicted in any Civil or Ecclesiastical court of this realm, for being a papist, or convert papist, or for professing or being educated in the Popish Religion or for hearing or saying Mass or for being a priest or deacon, or entering or belonging to any ecclesiastical order or community of the church of Rome, or for being present at or performing or observing any Rite, Ceremony, Practice or observance of the Popish religion, or maintaining or assisting others therein."
Again, as with section III, those recusancy laws which had all provided penalties for the above, the effects of which were to be abolished, were set out by name. They included those Acts already referred to within Section III and cited two further Statutes, that is to say:-

3 Charles I c.2. An Act restraining the passing of any to be popishly bred beyond the seas.

25 Charles 2. c.2 An Act from preventing dangers which may arise from popish recusants.789

The Act of 1791 not only removed the penalties for Catholic worship, but also permitted for the first time, Catholics to erect new buildings and to assemble in any place dedicated for religious worship, without breaking the law. The only condition being stipulated, that all buildings or places to be used for such purposes, beforehand had to be properly registered with the civil authorities and then, had to be open for access to the general public, without its doors being barred or bolted.790 Certain civic offices were made open and available for Catholics, for the first time, such as the office of High Constable or Petty Constable791 and Roman Catholic Priests were exempted from the carrying out of jury service and the performance of other public offices.792

The Act allowed all those of the Catholic religion to become schoolteachers and confirmed that Catholics could set up and own schools for general religious education. This was conditional upon all such schools being appropriately registered and the names and the religion of such an individual intending to set

789 This had re-imposed further restrictions upon Catholics suing in law or at Equity and had prevented them from acting as guardians or Executors, unless they took the oath of allegiance and against Transubstantiation.

790 Sections V and VI of the Act.

791 Under Section VII.

792 Section VIII.
up a school, registering himself as a schoolmaster and a Roman Catholic. Restrictions of abode, preventing Catholics from living within a defined mile limit of the City of London and the City of Westminster were likewise repealed and Catholic peers were to be permitted to sit in the House of Lords. Finally, the double taxation provisions placed upon Roman Catholics under the legislation of George I were repealed.

The Act was to specifically retain two important restrictions against the external practice of Catholicism. Firstly, the prevention of Catholic priests from wearing their clerical habits in public and outside their normal abode. Secondly, the restriction on the founding of any religious order or society of persons bound by monastic or religious vows and the founding, endowment or establishment of any school professing the Catholic faith.

The Second Relief Act of 1791, was again of enormous legal importance. The onerous conditions, the penalties and fines as well as the threat of imprisonment all set out under the old recusancy laws, were removed in return for those of the Catholic faith giving a greatly simplified oath of loyalty to the Crown. This second Act of Relief thus went a long way to free Catholics from religious discrimination. It granted to them greater individual religious freedom and rights of education and opened up for them the possibility of embarking upon the highest military and judicial careers within the land. For the first time in over a century, Catholics would be able to vote and sit in the House of Lords.

Other restrictions that were left intact and not repealed by this Act, related to the participation by Catholics in political and civic life; they were still unable to vote in general elections and to be elected to the House of Commons; they were barred from the most important positions in the Government and the armed forces—the army and the navy—unless they were prepared to take an oath of allegiance to the Crown, as the Supreme Governor over all matters temporal and spiritual, and to make a declaration against Transubstantiation. The making of

793 Clauses XIII and XVI.
794 Under I William and Mary Session c.I.
796 Section XXI,
797 Sections XI and XVII.
such an oath and declaration was still mandatory under the provisions of the Second Test Act of Charles II.798

Another notable feature of the Act was that it only removed the *criminal* penalties attached to acts of Catholic cult and worship, enabling Catholics to attend the Mass, without the threat of being prosecuted for treason. It did not give any civil recognition to Catholic worship, so under English Charity law, all donations and moneys left upon trust within a will, for the purposes of celebrating the Mass were not recognised and deemed to be illegal. They were gifts, declared to be void for reasons of public policy, as they were bequests set up for superstitious purposes.799 The imposition of other petty conditions by the Act upon all Catholic priests and bishops, would legally prevented them from wearing vestments and their clerical attire in public; prohibit any Catholic from founding any society of persons for religious or monastic purposes and bar him from founding or endowing any foundation or college to provide such a religious formation. These penal provisions all show that there existed amongst certain sectors of English society, a deep seated prejudice and hostility to Catholicism. The dread of the religious and monastic life, which had been legally eliminated by Henry VIII, had not yet vanished.

8.1.1.3. The Administration of Oaths Act of 1817.

By 1817, after the Napoleonic wars, the legal restrictions upon Catholics entering the higher positions in the armed services, had in practice long since fallen out of use. To remove any doubts upon these posts being open to Catholics and other dissenters, the above Act was passed to resolve the uncertainty.800 This Act modified the conditions of entry for all high military and naval offices and prescribed a modified oath of loyalty. No officer was to be required, as a prerequisite for entry into such a post, to take the Anglican Sacrament and the oaths and declarations that had been previously imposed by the Corporation and Test Acts. As a result, all commissions in the army and the navy, became open to those of all religious persuasions, including Catholics.

798 See Chapter 6.

799 The Act of Edward VI which abolished Chantries had not been revoked. Cf. The Act for Abolishing Chantries. 1 Edward VI c.3. See chapter 6.

800 An Act to regulate the Administration of Oaths in certain cases to officers in His Majesty's Land and Sea force. 57 George III c.92 (1817). See Statutes at large.
8.2. Catholic Emancipation 1829.

The historical background to the passing of the Catholic Emancipation Act of 1829 is complicated and outside the scope of this study. It is intricately and closely linked with the foreign and ecclesiastical policy pursued by the English Parliament towards Ireland and which since 1801 had legislated for that country. William Pitt, the then Prime Minister, had persuaded the Catholic population in Ireland to support his policy to create a new Protestant Church for Ireland with one Parliament in Westminster. This to rule and to legislate for Ireland, as for England. In return, Pitt had promised to give greater relief to Catholics and to entitle them, by changing the law, to vote and sit in Parliament.801

Misjudging the times, that neither the Government nor the King were disposed to grant any further relief and extend political rights to Catholics, Pitt was forced to abandon his promises and subsequently resigned office. King George III had declared that he was not prepared to renege on his coronation oath. When Pitt became Prime Minister again in 1804, the King insisted that all further measures for Catholic emancipation be dropped and so it was not until after the death of King George III, that the issue was to be raised within Parliament in 1828. In the face of intense opposition, even from his own Conservative party, a bill was introduced in Parliament by the Duke of Wellington to grant further relief to Catholics. Originally against any changes to the law and extending voting rights to Catholics, he foresaw that if the franchise were not to be extended to the Catholic population, there would be an outbreak of civil war in Ireland.802 Against this threat, the bill which he introduced in the session of 1828 became law, as the Catholic Emancipation Act of 1829.

801 In the years 1791 and 1793, similar relief had been given to the overwhelming Catholic population in Ireland by two Catholic Relief Acts. Notwithstanding that the Protestant population was in the minority in Ireland, they were able to manipulate and to monopolise all the chief positions of government. In 1801, in the wake of the threat by Napoleon, William Pitt was able to push through the legislative union between the Parliaments of Ireland and Great Britain. When the Protestant Episcopalian Church became the United Church of England and Ireland, it became the established Church for Ireland. It was to be dis-established in 1870, by the English Parliament.

802 For more background and details, see the article on "Catholic Emancipation" in the Catholic Encyclopaedia. Also, Hollis, The History of Britain in Modern Times, London, G. Bell and Sons. 1965. Especially Chapter 11.
Chapter 8

The Catholic Emancipation Act of 1829 was of great legal and political significance, in that for the first time in centuries, Catholics had the right to vote in general elections and to sit in the House of Commons and participate in the legislative process of the nation. The full title of the Act was "An Act for the Relief of His Majesty's Roman Catholic Subjects." Its chief purpose, as described within the preamble, was to give further relief to Catholics by the abolition of certain oaths and declarations called "the Declaration against Transubstantiation" and "the Declaration against Transubstantiation and the Invocation of Saints and the Sacrifice of the Mass, as practised in the Church of Rome", without the taking of which no Catholic had been able to vote or sit in Parliament, nor accept any office and position of trust in Government as well as in any Town and other public Corporation. The Act of 1829, pronounced that "from and after the commencement of this Act all such Parts of the said Acts as require the said Declarations, or either of them, to be made or subscribed by any of His Majesty's Subjects, as a qualification for sitting and voting in Parliament, or for the Exercise or Enjoyment of any Office, Franchise, or Civil Right, be and the same are (save as herein after provided and excepted) hereby repealed."804

This Act contained forty sections. Sixteen were to make specific reference to the oath of loyalty referred to within section II of the Act, which all Catholics were to take as the condition precedent for them to be able to vote and to sit in Parliament, and to hold this civic office. One new feature of the new oath was that every person swore:

"...That I do hereby disclaim, disavow and solemnly abjure any Intention to subvert the present Church Establishment as settled by Law within the Realm: And I do solemnly swear that I will never any exercise any Privilege to which I am or may be entitled, to disturb or weaken the Protestant religion or Protestant Government in the United Kingdom..."805

803 10 George IV c.7 (1829).
804 Cf. Section I of this Act.
805 Apart from the additional above paragraph, the oath was similar to that contained within the Catholic Relief Act of 1791. So the juror, in addition to the above, swore to (a) be faithful to George IV and to defend his person (b) maintain the Protestant succession of the Crown, (c) declare that it was not an article of his faith that princes excommunicated by Popes could be
After taking this new oath, any Catholic could vote in general elections and if elected as a member of Parliament, could sit in the House of Commons. He or she, was also able to hold and enjoy all civil and military offices and places of trust, with certain exceptions and to become a member of any lay body corporate and to hold a great variety of civil offices and positions of profit, including the office of Mayor, Provost, Alderman, Recorder, Bailiff, and Town Clerk.

As with all previous Acts of Relief, the Act was careful to include elaborate provisions which would regulate the manner of taking the new oath of loyalty and set out the procedure for the registration of all those who took the oath. Within Section XX, the manner and the way that the oath was to be administered was explained. All oaths were to be taken before His Majesty’s courts or before any judge of Assize or other competent person, between the hours of nine in the morning and four in the afternoon. Once sworn, a note was to be made of that fact within the records of the court and a certificate was to be handed over to such person. The certificate was sufficient evidence that the oath had been taken.

The 1829 Relief Act, at the same time that it legally made possible greater Catholic participation in civic life, within Parliament and central and local Government, was careful to contain provisions which would prohibit Catholics from holding a number of positions of authority which involved the exercise of functions in close connection with the Crown and the Established Church. So, all Catholics were specifically declared to be legally unable to exercise the Office of Guardians and Justices of the United Kingdom or of Regent and to occupy the office of Lord High Chancellor and other positions such as the Lord Commissioner of the Great Seal. If a Catholic were to become a member of a lay body

deposed and murdered and (d) deny the temporal jurisdiction in the realm of the pope and any other foreign prince.

806 By section IV and V.

807 By section X.

808 Section XIV.

809 Under section XII, the complete list of posts was enumerated. It also included the Lord Keeper of the Great Seal.
corporate (a corporation, whether civil or ecclesiastical) then he was unable to participate in the voting, election, presentation and appointment of any person to an ecclesiastical benefice of the Established Church. Catholics were likewise disbarred from exercising or holding any office or dignity in the Established Church (whether in any ecclesial body as well as the Ecclesiastical courts) and educational establishments connected with the Established Church (such as universities or the colleges of Eton, Westminster or Winchester). If a Catholic occupied any lay position or held any legal title, which carried with it the right of Presentation to an Ecclesiastical Benefice, then such right to nominate, passed automatically to the Archbishop of Canterbury. Apart from being unable to hold such positions, the Act made it illegal for any Catholic to advise the Crown on any appointment to the position of Office of Guardians of the United Kingdom or Regent or to any ecclesiastical office within the Established Church.

The Act of 1829, retained a series of other legal prohibitions, directed against the Catholic Hierarchy and the public manifestation of Catholicism and Catholic worship. It made it illegal for the Catholic episcopate to assume the title or office to any Episcopal see already in use by the Anglican Church. As with the 1791 Act, no Catholic Bishop, priest nor member of a religious order, was to be

810 Section XV set out this bar. In such case, the vote or indications of the Catholic party would be disregarded. The Act distinguished between (i) the public patronage of an Ecclesiastical Benefice, i.e. where the right of patronage was attached to a public office and in respect of which when held by a Catholic, could not be exercised by him and (ii) the private patronage, i.e. the personal private right of a patron to nominate an individual to an Ecclesiastical Benefice. In the latter case, the right could not be exercised by a Catholic, but would devolve to the appropriate Anglican authority.

811 Section XVI set out in full, the extent and the nature of this limitation. The Universities were the old universities of Oxford, Cambridge and Durham. Also included were those schools or educational establishments, which denied the entry thereto of Roman Catholics. These were the Royal foundations, often set up with revenue confiscated from the dissolution of the monasteries, or the revenue from the abolishment of the Chantries in the sixteenth century.

812 Sections XVII and XVIII categorised these restrictions. Section XVIII made it a high misdemeanour for a Catholic to offend these provisions.

813 Section XXIV. This made it clear that all those current Sees, in the ownership of the Established Church, belonged legally to the episcopacy of the Anglican Church. Titles to the same, could not be created for the Catholic hierarchy. The issue was to come to a head in 1850, with the restoration of the Catholic hierarchy. In 1829, the county was divided into four Apostolic Vicariates.
permitted to wear his ecclesiastical attire or religious habit save within those places designated for religious worship or in private residences and no person holding any judicial or civil office, would be able to wear his ceremonial insignia at a Catholic act of worship.814

The other rather unusual dimension of the 1829 Act, unusual in the sense that it certainly went against the winds of general religious toleration, was that it contained specific provisions against the male Religious Orders of the Catholic Church, especially the Jesuits. It made it illegal for any person to join the Society of Jesus or any religious order and aimed to provide for their gradual suppression and elimination. It also intended to place restrictions on all those individuals who were members of the Society of Jesus, any male Catholic Religious Order or Community or society bound by religious vows. Those already living within the Realm, were to be permitted to stay upon certain conditions. Those living outside, were to be subject to restricted entry into the United Kingdom.

The Act contained eleven sections, to put into practice these measures; it made it mandatory for every Jesuit or member of any Religious Order residing within the United Kingdom, to register his name with the civil authorities815 and in the event of such person failing to register, imposed a fine of fifty pounds. It made it a misdemeanour for any foreign Jesuit or member of any Religious

814 Sections XXV and XXVI. These conditions were imposed to appease the Protestant and evangelical interests of the House and the Church of England. Under these sections, civic functionaries occupying central or local government—such as the local Mayor, a Justice of the Peace, a judge—could not wear their ceremonial dress at a service of worship of the Catholic Church.

815 Under section XXVIII, which stated "That every Jesuit and every member of any other Religious Order, Community, or Society of the Church of Rome, bound by monastic or religious vows, who at the Time of the Commencement of this Act shall be within the United Kingdom, shall, within six calendar months after this commencement of this Act, deliver up to the Clerk of the Peace, of the County or Place where such person reside, or his deputy, a Notice or Statement, in the Form and containing the Particulars required to be set forth in the schedule..."

The Schedule required registration of the following; (a) the name of the party, (b) his age, (c) his place of birth, (d) the Name of the Order, Community or Society to which he belonged, (e) the name and Residence of the immediate superior and (f) the usual place of residence of the party.
Order, Community or Society to enter the Realm without a licence and a misdemeanour not only for any member of the Society of Jesus or any Member of any Religious Order, Community or Society to admit any person into their company but also for the person who had permitted them to join. These draconian sections—in theory, for in practice, they were never implemented, were not applicable to the women religious orders or congregations, for they were specifically exempt from such restrictions under this Act.

The 1829 Act was the legal culmination of years of struggle. Although paradoxically it was to contain a number of sections which were out of keeping with religious toleration, aimed at diminishing the role and influence of the Catholic hierarchy and the religious orders, it made it possible for Catholics to vote in elections and to enter the House of Commons. Yet the price extracted for the extension of such rights, was the closure to members of the Catholic faith of certain civil positions. These offices were felt to be so closely connected with the Crown and the Established Church, that they could not be held by any adherent of the Roman Catholic faith. Not only could they not be held by a practising

816 Section XXIX: "And be it further enacted that if any Jesuit or Member of any such Religious Order, Community, or Society as aforesaid shall, after the commencement of this Act, come into the Realm, he shall be deemed and taken to be guilty of a misdemeanour, and being thereof lawfully convicted shall be sentenced and ordered to be banished from the United Kingdom for the Term of his natural Life."

Section XXXI, provided for Her Majesty's Principal Secretaries of State, being a Protestant, to grant permission to an foreign Jesuit or Member of Religious Order, Community or Society to enter and to stay within the realm under a licence for a period not exceeding six months, such licence being revocable at any time.

Section XXXII laid down that each year, a general account was to be laid before Parliament, setting out details of all licences granted.

817 Section XXXIV: "...That in case any person shall, after the commencement of this Act, within any part of this United Kingdom, be admitted or become a Jesuit, or Brother or Member of any other such Religious Order, Community or Society as aforesaid, such Person shall be deemed and taken to be guilty of a misdemeanour and being thereof convicted shall be sentenced and ordered to be banished from the United Kingdom for the Term of his natural Life."

818 These were evidently included to allay the fears of extreme Protestants against the Society of Jesus and the Catholic religious life in general.

819 Section XXXVII. "Provided always, and be it enacted, That nothing herein contained shall extend or be construed to extend in any manner to effect any Religious Order, Community, or Establishment consisting of Females bound by Religious or Monastic Vows."
Catholic but no Catholic could advise on any appointment, in connection with such a post.

8.3. THE ROMAN CATHOLIC CHARITIES ACTS OF 1832 AND 1860.

The 1829 Act of Relief, as well as the earlier Acts of 1778 and 1791, had all made it possible for Catholics to carry out religious worship and to educate their children without being criminally liable under the recusancy laws. From 1791, there were to be no legal restrictions in force that could prevent a Catholic from buying land or using property, in a personal capacity so that these lands could be used for the purposes of the Catholic religion. Neither the 1829 Act nor the earlier Acts, dealt with the question as to whether such properties could be owned on trusts for the purposes of the Catholic faith and if so, whether these purposes could be charitable and on what basis.820

Where landed property (whether freehold or leasehold) and other donations in the form of money or chattels had been made over to the Catholic Church for the purposes of education and religious worship, the legal issue which was to arise was on what basis such assets were held and which laws regulated their acquisition and ownership? Were they and the people employed in such places, entitled to the same protection and charitable status as trusts set up by other religious dissenters? Could such trusts be used, at least in theory, to circumvent the sections of the 1829 Act which made it illegal to help male religious orders and to set up new educational foundations?

8.3.1. The Roman Catholic Charities Act of 1832.

The Roman Catholic Charities Act of 1832, was to partially provide a legal solution to some of the legal problems raised. 821 The Act of 1832 declared that henceforth

820 In Chapter 9, we will study Charity law in detail, and set out the various categories of trusts which are valid under English law, and which criteria courts use to determine the validity of a charitable trust.

821 Its full title was; An Act for the better securing the Charitable Donations and Bequests of his Majesty's subjects in Great Britain professing the Roman Catholic Religion. 2 & 3 William c.115. (1832). See Statutes in force.
"...His Majesty's Subjects professing the Roman Catholic Religion, in respect to their Schools, Places for Religious Worship, Education, and Charitable Purposes, in Great Britain, and the Property held therewith, and the Persons employed in or about the same, shall in respect thereof be subject to the same Laws as the Protestant Dissenters are subject to in England in respect to their schools and Places for Religious Worship, Education and Charitable purposes..”822

All properties and donations specifically given for the purposes of the Catholic religion, whether-for religious worship, education-or other charitable purposes, were to be governed by the same laws which had been applied to properties and charitable trusts held by Protestant dissenters. All people working in such places were also subject to the same conditions. The legal regime would not, however, apply to any trusts set up for new religious endowments or male religious orders, which were contrary to public policy, being illegal under the Catholic Emancipation Act of 1829.823

The Act of 1832 also changed the law with respect to the employment of Catholics as schoolmasters or in other capacities were employed in either private or public, non-Catholic schools and not being such entities of the Established Church. Catholics were made eligible for such employment, by removing as a condition for such employment, the taking of the Oath of Supremacy and Declarations under the Test Act of 1672 and the substitution for such oath and declaration, the new oath referred to within the Catholic Emancipation Act of 1829.824

The Act of 1832, did not define or attempt to give any definition of what was legally covered by the phrases "religious worship" and "charitable purposes".

822 Section I. The Act was not in fact retrospective and did not affect any current dispute being litigated (section III).

823 Section IV. "Provided always, and be it further enacted, That nothing in this Act contained, shall be taken to repeal or in any way alter any provision of an Act passed in the Tenth Year of the Reign of His late Majesty King George the Fourth, intituled An Act for the Relief of His Roman Catholic Subjects, respecting the Suppression or Prohibition of the Religious Orders or Societies of the Church of Rome bound by Monastic or Religious Vows."

824 Section II. "...any such Schoolmaster, or other Master, professing himself a Roman Catholic, shall in lieu of the qualification, take the oath contained in the Statute passed in the tenth year of His late Majesty (i.e. the Act of 1829)...."
Were they the same? At that time, not all Catholic acts of religious worship fell within the legal concept of being charitable. As Charity law was in a continuing process of evolution and development, on par with religious toleration, the courts in the nineteenth century gradually approved as being charitable, trusts for all types of religious belief. But whilst a number of common law case decisions would approve trusts set up for various purposes of the Catholic religion825 not all aspects of the Catholic religion would be legally recognised. Since 1547, by Act of Parliament, the Mass had been declared to be superstitious. As this Act of Edward VI 826 had never been repealed, a trust set up for the saying of Masses was held to void. Where money or property was bequeathed for this and other purposes, the other purposes being charitable, then the trust would overall fail, as being for a superstitious purpose. The same result would happen where a bequest had been made in favour of a cause, some of whose objects were declared illegal by statute e.g. by the Catholic Emancipation Act of 1829 such as for new male religious orders or to support the members of the Society of Jesus.

8.3.2. The Roman Catholic Charities Act of 1860.

To overcome the effects of having a legacy or bequest being declared completely void, the Roman Catholic Charities Act of 1860 was passed. This Act of 1860, contained specific validating provisions which conserved and preserved a trust set up for the purposes of the Catholic religion, where part of the assets were left for a use otherwise deemed to be superstitious or illegal. The offending clauses were to be ignored and the gift be used for charitable purposes recognised by the law. As and from 28 August 1860 (the date when the Act was passed), the law was amended so that

"...No existing or future gift or disposition of real or personal estate upon any lawful Charitable Trust for the Exclusive Benefit of Persons professing the Roman Catholic religion shall be invalidated by reason only that the same estate has been or shall be also subjected to any Trust or Provision deemed to be

825 In the nineteenth century, there were a number of litigated cases, concerning the validity of trusts set up for the saying of Masses. They had been judged to be "superstitious".

826 This was The Act to abolish Chantries Collegiate, op.cit.
superstitious or otherwise prohibited by laws affecting Persons professing the same Religion...”827

In the case where there was some doubt or dispute as to the validity of a trust, with the possibility of its income being used for purposes considered to be superstitious, an application was to be made to the High Court of Chancery to re-apportion the income of such trust. The High Court was given the power to order a scheme to be drawn up and apply all the income exclusively for the lawful charitable purposes of the Catholic religion.

8.4. THE RESTORATION OF THE CATHOLIC HIERARCHY IN 1850.

With the majority of the legal restrictions and sanctions imposed against Catholic individuals being removed, the growth of the Oxford Movement and the conversion of many leading scholars, notably John Henry Newman in 1845828 and at the same time the influx in England of many destitute Irish Catholics from Ireland as a result of the terrible potato famine of 1846-47, Pope Pius IX deemed that the time was opportune for a normal ecclesiastical structure to be restored to England. In 1850 the ecclesiastical government in England was changed, from apostolic vicariates to a normal Episcopal hierarchy, the Holy See creating twelve dioceses with Westminster being the chief Metropolitan See. The previous Vicar Apostolic of the London District, Nicholas Wiseman was created the first Archbishop and then Cardinal of Westminster.

As Vicar Apostolic, Nicholas Wiseman had written a pastoral letter from Rome, announcing the restoration of the hierarchy. This roused a flood of protest and vehemence led by no less that the Prime Minister of the day, Lord John Russell. Throughout the country, effigies of the Pope and Cardinal Wiseman were burnt and there were cries of "No Popery". Reacting quickly, Cardinal Wiseman issued an appeal to the British People, published this in all the leading newspapers. In


828 He was to be created a Cardinal in 1879. For the general involvement of Newman in the Oxford Movement, his conversion to Catholicism and his later contribution to intellectual and Catholic thought, see the recent biography of Newman written by Ian Kerr. John Henry Newman, Oxford University Press.
this, he explained the nature of the new hierarchy, and the spiritual limitations of his own jurisdiction as archbishop. He also emphasised the poverty and the destitution that he faced within his diocese and his pastoral programme to combat these problems. Religious opposition did subside, but the Government passed an Act which not only did not recognise the restored Catholic hierarchy but made it a criminal offence for any Catholic bishop to usurp the name, style or title belonging to any bishop or ecclesiastical holder of the Established Church.829

An Act of Parliament was passed in 1851830 which, using hostile language, revealed that this was considered to be provocative. It openly attacked the decision of Pope Pius IX to restore the Catholic hierarchy (although not mentioning him by name). In the pre-amble to the Act it stated that:—

" Whereas divers of Her Majesty's Roman Catholic Subjects have assumed to themselves the Titles of Archbishop and Bishops of a pretended Province and of pretended Sees of Dioceses, within the United Kingdom, under colour of an alleged Authority given to them for that purpose by certain Briefs, Rescripts, or Letters Apostolical from the See of Rome, and in particular by a certain Brief, Rescript, or Letters Apostolical purporting to have been given at Rome on the 29th of September 1850...but the attempt to establish under colour of Authority from the See of Rome or otherwise, such pretended Sees, Provinces, Dioceses or deaneries is illegal and void."

The Act of 1851 declaring that the Apostolic Brief of 29th September 1850 to be unlawful and void,831 made it an offence for anyone to publish any Bull or Brief or Rescript from the Apostolic See, for the purposes of constituting any Archbishop or Bishops of any province and for any ecclesiastic to assume the

829 See the Section on "England" in the Catholic Encyclopaedia.

830 An Act to prevent the Assumption of certain Ecclesiastical Titles in respect of Places in the United Kingdom. 14 & 15 Victoria c.60 (1851).

831 Section I of the Act declared this to be void as well as every jurisdiction and title conveyed by virtue of the Apostolic brief.
title or name or style to any archbishopric or bishopric of the Established Church in England.832

The Act was in fact to be repealed twenty years later in 1871, by the Ecclesiastical Titles Act.833 The Act of 1871, removed the anti-Catholic provisions of the Act of 1851, but did not give any legal recognition to the restored Catholic hierarchy. It deemed it to be merely inexpedient to impose any penalties upon Catholic bishops who had designated their office by reference to a town or place within the realm. There was nothing to prevent them from doing so, for the purposes of convenience, but these titles, the Act firmly stated, had no legal effect. The Crown and only the Crown had the legal authority to grant such appellations.834

8.5. LEGAL PROTECTION OF PLACES FOR CATHOLIC WORSHIP.

The Catholic Relief Act of 1791 had contained various clauses which would enable Catholics to construct new buildings and use existing places for worship. So that Catholics could also carry out their religious duties unmolested, the Act gave legal protection to all such worship835 so that any person who molested or interrupted any religious assembly, could be prosecuted.836

The benefit of these provisions were in operation until 1855, all buildings used for Catholic Worship were given the same protection given to those places of worship.

832 Section II. This imposed a fine of one hundred pounds, upon any offender. However, by a specific provision within the Act, no proceedings could be taken without the consent of the Attorney-General (the latter part of this Section).

833 34 & 35 Victoria c 53. (1871).

834 Section I. "...such repeal (of the 1851 Act) shall not nor shall anything in this Act contained be deemed in any way to authorise or sanction the conferring or attempting to confer any rank, title, or precedence, authority, or jurisdiction on or over any subject of this realm by any person or persons in or out of this realm, other than the Sovereign herself.

835 Under Section V. The legal protection arose when a place for religious worship, a building or a church, had been registered. Registration was an essential legal prerequisite for without it, no assembly would be legal.

836 All religious acts of worship had to be carried out, with the premises being open to the public (Section VI), the doors not being locked or barred. Section X prescribed the penalty for molesting any such meeting.
worship used by Protestant dissenters. So Catholic Cathedrals, Churches and other places of worship, were all given the same protection under The Liberty of Religious Worship Act of 1855, The Places of Registration Act of 1855 and The Ecclesiastical Jurisdiction Act 1860. The Places of Registration Act of 1855, would permit marriages to be solemnised in Catholic Churches, according to the Catholic rite.

8.6. THE COMMON LAW RECOGNITION OF TRUSTS SET UP FOR THE PURPOSES OF THE CATHOLICISM.

The Roman Catholic Charities Acts of 1832 and 1860 had set out the law to apply to all properties held by Catholics for the purposes of religious worship and education, so that the general principles and provisions of charity law were to apply. The courts adjusted their approach to define what aspects of religious worship and Catholic education were charitable and which were precluded. In 1791, it was no longer a criminal offence for a Catholic to keep a school (but not to set up a new foundation or endowment for the use of Catholics) nor to hold property nor a building for a Catholic service of religious worship. Yet, decriminalising these activities, did not automatically give at civil law, charitable status for every trust which had as its purpose the intention of spreading the Catholic faith whether through religious worship or education.

English Judges would apply the notion of charitable status, to trusts set up by Catholics and by a series of case decisions, recognise various purposes as being charitable. In 1854, a trust set up for the purposes of a Catholic chapel was held to be charitable and in 1875 that a trust for the maintenance of Catholic Bishops was equally valid. Thirty two years earlier, a judge had ruled as being valid, a trust established for a Catholic college and another case.

837 For their operative provisions, see Chapter 7.
838 De Windt-v-De Windt (1854) 23 L.J. Ch 776. (E.R.)
839 Robb-v-Dorian (1875) I.R. There had been an earlier case that a bequest for Catholic bishops was invalid, as such persons did not exist at law. Att-Gen-v-Power (1809) 1 Ball & B. (E.R.) This decision is no longer good law.
840 Walsh-v-Gladstone (1843) 1 Ph. (E.R.)
decision in 1852, had ruled that a legacy for the maintenance of an organ and an organist in a Catholic Chapel was good as law.841

The courts took a different approach for all bequests and gifts left for the celebration of Masses. Until 1919, all such purposes were void as being gifts for superstitious uses842 and so contrary to public policy. In 1919, the law was changed by the House of Lords. By a majority of four to one, the highest court within English law, overruled the previous case authorities and decided that personal bequests left within a will, for the purposes of saying Masses were not void for being superstitious and such gifts were no longer contrary to public policy. They could be even be charitable.843

For different reasons, the courts had decided in the nineteenth century, that trusts established for enclosed communities for Catholic nuns were not charitable, not because the nuns were performing a religious activity which was illegal but because no charitable benefit arose from their religious activity.844 However, if the nuns were engaged in corporal works of mercy, then their community and work as a whole could receive charitable status. Male religious of the Catholic Church were not recognised as the Catholic Emancipation Act of 1829 aimed to suppress all the male contemplative orders.

8.7. **The Roman Catholic Relief Act 1926.**

Ninety seven years after the Catholic Emancipation Act of 1829, Parliament passed the Roman Catholic Relief Act of 1926 to remove those restrictions which had been originally imposed by the Catholic Relief Act 1791 and maintained in force by the Relief Act of 1829; those legal provisions which prevented the Catholic hierarchy from wearing their clerical attire in public places and which aimed to eliminate not only the Catholic education by but also the presence of the Male religious orders within England, especially that of the Society of Jesus.

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841 *Carberry-v-Cox* (1852) I.R. Ch.

842 There were several cases in the nineteenth century which had decided this. *West-v-Shuttleworth* (1835) 2 My & K and *Re Blundell’s Trusts* (1861) 30 Beav.360 (E.R.)

843 The case is *Bourne-v-Keane* [1919] A.C. 815 and is considered in greater also within chapter 9, as part of the general approach taken by English Trust law on bequests left for the saying of Masses.

844 Cf. *Cocks-v-Manners* (1871) L.R.
By 1926, it was realised that these restrictions, should be removed as they belonged to a previous age. Parliament no longer judged that it had the legislative right and the competence to interfere with the personal beliefs of its Catholic subjects and agreed to repeal the offending sections.

The Roman Catholic Relief Act of 1926 set out in a schedule, all the enactments that were to be repealed. They included section twenty six and twenty eight to thirty six of the Act of 1829, and those sections of the Acts of 1832 and 1860 which specifically kept the sections of the 1829 Act alive. All related to the wearing by the clergy of their ecclesiastical attire in public and the prohibitions on the male religious orders of the Catholic Church. As and from 1926, the male religious of the Catholic Church and the Society of Jesus, were legally placed on the same level as their fellow Catholics. Trust and schools specifically set up by and for them, were recognised by the civil law and capable of being charitable.

The Act of 1926 abolished these restrictions and intended to give to Catholics the same religious status and rights as any other subject but without upsetting or affecting the special position of the Established Church. To make it clear that nothing was being ceded to affect its legal status, section three of the Act preserved all properties which were legally vested in the Church of England in 1558 and its right of presentation generally.

Onerous as they originally were, it should be pointed out that the sections of the 1829 Act repealed, were never in fact applied. In a case decided in 1929, R. Barclay, Gardner-v-Barclay the Court of Appeal had to consider the provisions of a will made in September 1903, under which a testatrix on her death, had bequeathed the major part of her estate to the person who should be the Superior of the Society of Jesus at the Church of the Immaculate Conception at Farm Street, London. The running of this church had been entrusted to the

845 the full title was; An Act for the further relief of His Majesty's Roman Catholic subject. 16 & 17 Geo V c.55

846 Also repealed, were the like sections contained in the Relief Act of 1791: sections eleven to seventeen,

847 Under Section 3, the legal title to all properties which had become vested in the Crown. by virtue of the Statute of 1 Eliz. c.24. (1558)

848 [1929] All E.R.
Society of Jesus. The court was asked to rule whether this was a actually a legacy to the Society of Jesus, which would have been rendered void by the relevant sections of the 1829 Act, or a general legacy for this particular Catholic church building, which would be valid. If interpreted as being a legacy to the Society of Jesus, then the gift would have been void and would have passed to the Testatrix's next of kin.

The three judges of the Court of Appeal, unanimously held that the legacy was not for the benefit of this religious order per se, but for the maintenance and upkeep of the particular church building. The legacy was therefore valid. Turning to the 1829 Act, the Master of the Rolls, Lord Hanworth commented that

"...It is satisfactory that this court is not compelled to defeat the Testatrix's wish's expressed in 1903, but taking effect in 1928, more than fifteen months after the Relief Act received the Royal Assent, by reason of a section in a statute now a hundred years old *which has never been enforced in its apparent strictness or severity.*"

Throughout this period, the courts ahead of Parliament had taken appropriate steps and measures not to enforce the provisions of an Act, the spirit of which was entirely out of step with the growing respect and freedom for religion.


Section 12 of the Roman Catholic Relief Act 1829, had prevented a number of civil offices from being available to Roman Catholics; various Governmental positions which had ecclesiastical responsibilities in connection with the Church of England. This included that of the Lord Chancellor, whose functions included that of carrying out ecclesiastical visitations, on behalf of the Monarch as well as the making of ecclesiastical appointments. By 1974, it had come to be doubted as to whether the office of the Lord Chancellor was unavailable for members of the Catholic faith, even though the ecclesiastical functions remained attached to the office. There was no bar on the Lord Chancellor holding any other or indeed no faith at all and at least one Lord Chancellor had been an atheist.

To remove any legal doubt, the Lord Chancellor (Tenure of office and discharge of Ecclesiastical Functions) Act of 1974 was passed. In the event of any Catholic becoming the Lord Chancellor, it addressed the legal situation as to
who would exercise the ecclesiastical functions normally performed by the Lord Chancellor. By Section 1 of this Act, it first of all declared that for the avoidance of doubt:-

"The office of Lord Chancellor is and shall be tenable by an adherent of the Roman Catholic Faith."

Where the Lord Chancellor was a Roman Catholic, then the Act of 1974 stated, under section 2:—

"...it shall be lawful for Her Majesty in Council to make provision for the exercise of any of the visitation or the ecclesiastical functions normally performed by the Lord Chancellor, and any patronage to livings normally in the gift of the Lord Chancellor, to be performed by the Prime Minister or any other Minister of the Crown."

So if the Lord Chancellor is a Roman Catholic, then the ecclesiastical functions are to be exercised by the Prime Minister or other Crown Minister. If the Prime Minister is a Catholic, then presumably they will be exercised by a Minister who is a member of the Established Church, although the Act is silent on this point. The provisions of the Act are welcome in that they have virtually removed all specific anti-Catholic discrimination.

8.9. CONCLUSION.

Within two centuries, the legal position of Catholics within English law has dramatically changed. Most of the most important restrictions and the effects of the harsh recusancy laws of a different epoch, have been repealed. Legal discrimination exists within English law against Catholics, but relating to the Crown, the assumption of certain offices within the Established Church and the exercise of certain rights relating to ecclesiastical offices in respect of the Church of England.

The gradual repeal of the recusancy laws, more often than not dictated by political expediency, has been in keeping with the general concern to extend the legal principle of religious toleration. Before 1778 and even until 1871, Catholics were perceived as being a threat to the nation, with a divided loyalty. The oaths
that they were asked to give so as to prove their civic loyalty and to be able to participate in all sectors of civic and military life, at heart revealed the prejudice which had existed for centuries. Partly this was due to a misunderstanding and a failure to distinguish between the temporal and the spiritual order. Until 1871, that oath of loyalty, contained a declaration that allegiance to the Crown would be maintained and that the person taking the same would not subvert the Protestant faith.849

From 1829 until 1926, with old prejudices dying hard and in spite of the general mood of toleration, it is remarkable that specifically there were preserved legal provisions against the Catholic hierarchy and the male religious orders of the Catholic Church. They reflected the deep seated fear of certain aspects of Catholicism that had been fostered for centuries.

Once the criminal sanctions attached to Catholicism had been removed, Parliament and the Civil courts felt well disposed to recognise that trusts set up for Catholicism should be given the same civil legal status as other Christian and non-Christian bodies. The last century saw the same privileges and benefits which had been earlier granted to Protestant dissenters being extended to Catholics. The only legal doubt which existed, concerned the legal status of the Mass and whether it was still caught by the Parliamentary legislation of Edward VI. The House of Lords in 1919 finally removed that anachronism.

In 1974, Parliament, opened the position of Lord Chancellor to a Catholic, by definitively removing any legal disability based solely on the person being a Catholic. Having removed one of these last pieces of legal discrimination against Catholics, on religious grounds, Catholics in England are now on the same level as their fellow citizens. With the exception of the Monarch and certain positions of governance within the Established Church, there are no laws specifically against Catholic or the Catholic Church. Unlike the Established Church, but similar to all other religious groups, the Catholic Church does not possess any special legal status with English law. To carry out her mission, she uses the principles of English law, especially Charity law. How the Catholic Church currently operates, will be examined in the next chapter.

849 This oath was in fact to be repealed by the Promissory Oaths Act 1871.
CHAPTER 9
THE CURRENT POSITION OF FREEDOM OF RELIGION UNDER ENGLISH LAW.
Chapter 9

The current position of freedom of religion under English law.


9.1. INTRODUCTION.

Freedom of religion, the right of every citizen to choose whatever religious beliefs no matter how unorthodox and irrational those views may be, is considered to be one of the fundamental rights that every citizen is entitled to enjoy. A modern democratic society should treat with respect the opinions of its citizens and guarantee liberty of religion for all-the legal and moral right-subject

850 The legal textbooks used to research this chapter have been:- Bailey, Harris, Jones: Civil Liberties, cases and materials; A. St John Robilliard, Religion and the law: The standard work on Charity law, Tudor on Charities, Sweet and Maxwell, London 1995; Halsbury's Constitutional law.; S.Micnichol, The Law of Privilege, Law Book Company Ltd. and E. Garth Moore, An introduction to English Canon law. The statutes are to be found within Halsbury's Statutes. The English law cases before 1870 appear in the English Reports (E.R.). Those after that date, in the Law Reports (L.R.), the Weekly law Reports (W.L.R.) or in the All England law Reports (All E.R.)
to certain safeguards and restrictions to preserve public order and morality. What is the function of the State? To assume a supervisory role upon its citizens and to moderate the life and the conduct of all by legislation with necessary proper and adequate safeguards and limitations? Or should the State only intervene to protect, public order and public morality. This leads to a further problem. How does one define public order and public morality. Which morality?

Civil liberties is a recognised field of law with the English legal system. Traditionally, the safeguarding of civil and political rights has been seen as a way to protect the individual from oppressive acts of the state. In the United Kingdom, because there is no Bill of Rights against which Acts of Parliament can be tested, all such civil rights are designated as being residual. Residual in the sense that they are the rights left to a citizen, once all the legal limits have been defined. So, the Master of the Rolls, Sir John Donaldson, in a legal decision of 1988, involving freedom of expression commented that;

"the starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the Common law or by Statute."

The above criteria can be applied to liberty of religion under English law. The legal starting point is that every person has the prima facie right to practice and follow his religious beliefs and to express them by religious cult, in the absence of any Statute or common law decision to the contrary. Religious liberty, like all other rights, can thus be considered a negative right, a right that every citizen has and cannot be reduced or extinguished in the absence of a statute or a rule of the Common law. All religions, whether they belong to the traditional


852 See Halsbury's, Constitutional law and Human Rights. para 105.

853 Arguments for and against a Bill of Rights were discussed in a government discussion paper. Bill of Rights: a discussion paper. Standing Advisory Commission on Human Rights, March 1976, paras 10 and 11. (Cmd paper 7009). The debate and discussions still continue on the necessity of having a Bill of Rights and as to whether this would be compatible with a legal system in England which differs from that in the rest of Europe.

854 See the case of A-G-v- Guardian Newspapers Limited (No 2) [1988] 3 All E.R. 545. This was the famous Spycatcher case, involving The former MI 5 Agent, Peter Wright who had published his memoirs. The Government attempted to restrain publication.

855 The above case. His comments were made in the Court of Appeal judgement.
branches of the Christian Church or Judaism or Mohammedism or the new sects and religions, are placed and on the same legal level, apart from the Established Church, which has special status because of its essential link with the Crown.

Freedom to follow a religion and to worship according to its rules and rite—freedom of cult. The freedom to give and bequeath money, chattels and land to a religious body. The ability to express religious opinions and proselytise and to give and receive a religious education. The right of every religious believer to receive equal treatment under the law, equal to those who hold different or no religious beliefs.

English law approaches these issues in a number of different ways whether under Charity law, Education law, the law of Testamentary succession or criminal law. Before we proceed to elaborate in detail, by reference to case decisions and Parliamentary legislation, a useful starting point is the European Convention on Human Rights. The Articles which deal with religious freedom and the rights which are considered to be associated with the same. Also, the specific limitations which can are often invoked to curtail and in some cases to eliminate such rights.

9.2. THE EUROPEAN CONVENTION ON HUMAN RIGHTS—RELIGIOUS FREEDOM.

The European Convention on Human Rights, to which the United Kingdom is a signatory, has set out the rights and the freedoms that all citizens should equally enjoy. In terms of religious freedom, the Convention has established that every citizen has the right to embrace and to follow as well as to abandon his own religion without fear of discrimination. This right to freedom of religion is furthermore to be not only exercised in private but also in a public. It includes freedom of cult, assembly and freedom in religious education.856

This right to freedom of religion is expressed, not in isolation, but in conjunction with the general right to freedom of conscience, religion and thought. Article 9 within the Convention, after having defined this basic right, then considers as proceeding from this, the freedom to manifest such views on religion in private or in public; to express them without undue limitation and to assemble for the purposes of peaceful assembly in connection with the same.857

856 The exact status of the Convention within English law of the Convention, will be examined later.

857 Under Articles 10, 11 and 14. All examined and quoted in greater detail below.
In essence, under Article 9, the freedom of religion is guaranteed; the liberty to practice a religion in private and in public, but subject to certain limitations defined by the convention, the applicability and the determination of which are not always easy to define.

It is worth while quoting the full text of Article 9 of the Convention;-

1. Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or beliefs and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

A legal right, guaranteed by the State, to freedom of conscience and to freedom of religion and the legal right to express that religious freedom in private or in public. A right to be exercised individually or communally and which extends also to freedom of worship, teaching, practice and observance. Such a right is not defined as being unlimited and unrestricted, but capable of being prescribed for good genuine reasons. For the protection of public order, health or morals and the freedom of others.\(^{858}\) The wide protection given to the right to freedom of religion, but without defining what constitutes a religion, has been applied by the English Courts and interpreted liberally by Parliament.\(^{859}\)

\(^{858}\) As one would expect, the difficulty arises where states have had to draw the line between genuine religious freedom and abuses. The problem lies with defining just exactly where the holding of religious views could and would constitute a threat or danger to the public order, health or morals. In some cases, the European Court of Human Rights, has interpreted the various Human Rights guaranteed under this Convention very liberally, especially with regard to sexual issues. It has been difficult to obtain a consistent reasoning and elaboration of what has been meant by the protection of "public order, health or morals." The judgements of the European Court will naturally depend upon the particular views and the criteria of interpretation given by the participating judges.

\(^{859}\) But even so, not in such a way so as to conflict with other statutory measures to outlaw certain forms of discrimination. For example under English law, a religion or creed which promoted racial hatred or discrimination, under the Race Relations Act 1976, or fomented sexual
Subject to certain safeguards, in favour of public order and morality, there is the general legal right to "freedom of expression" within section 1 of Article 10. Under section 1, it is stated that:-

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

This is the right to externally express religious views and to promote these by imparting and distributing information relating to the same. This is accompanied by a legal right to use the means and the media of mass communications, but subject to the limitations and protective provisions broadly similar to those within Article 9 (2) which are necessary for the protection of a democratic society, including national security and the protection of health or morals.860

Any freedom to embrace religious beliefs, the legal right to express those views and disseminate the same, unless supported by a general right of assembly and of formation of association, would be relatively worthless. Article 11 guarantees within section 1 that:-

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

These rights are subject to the same limitations as those within Articles 9 and 10, and so can be curtailed for reasons of public policy, for the protection of the state, the lawful protection of health or morals, or the protection of the rights and the freedoms of others.

Religious freedom, the right to practise this internally as well as externally, is viewed as being a fundamental legal right, which every state should respect and not curtail, unless there are serious valid reasons. This legal right to religious discrimination, under the Sex Discrimination Act 1975 would no doubt be deemed to be unlawful and so prescribed.

860 See Article 10, (2).
liberty, is amongst other rights specified by the Convention, which under Article 14:-

"...are to be secured *without discrimination* on any ground such as sex, race, colour, language, *religion*, political or other opinion..."

No where does the Convention define what is meant by a religion; to distinguish between the tenets of one religious group from another, nor to give any preferential status to any particular religious body. The Convention does not address the phenomenon of new religious movements and new religious cults. This is an issue that has been left to the freedom of each particular state to resolve, subject to the safeguards already mentioned. What is clear is the legal principle that there is freedom of religion. Each State must apply and safeguard that principle, in accordance with the Convention.

9.3. THE CURRENT APPROACH OF THE ENGLISH COURTS TO FREEDOM OF RELIGION.

One of the most difficult and recent problems that English Courts have had to face, especially within the area of Charity law, is in fact the growing phenomenon of new religious movements and groups. The case decisions and the Acts of Parliament referred to within chapters seven and eight, have illustrated how religious freedom has been extended to all the Christian faiths as well as to the non-Christian, the Jewish and Muslim religions. These are no longer prescribed, but are equally recognised and protected by the criminal and the civil law.

But what is the current approach of English law to other religious groups and the growing religious sects? Religious groups such as the Hindus, Buddhists and Sikhs and new organisations such as the Unification Church and the Church of Scientology? England is now a multi-racial and multi-religious society and according to statistics issued in 1992\(^{861}\) there were in the United Kingdom 39 million Christians, 1.2 million Muslims, 0.5 million Sikhs, 0.3 million Hindus and 0.3 million Jews. The English Courts have been asked to adjudicate upon these newer religious groups and movements, which promulgate and disseminate views in stark contrast and in opposition to the teachings of the Christian Church as represented by the Established Church. They adopt the legal presumption

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\(^{861}\) Quoted by Bailey, Harris and Jones in *Civil Liberties: cases and materials*. 
that, prima facie, all religions are equal before the law and that neither Parliament nor the courts are presumed to outlaw a creed simply because those views do not coincide with those of the traditional religions.

In a House of Lords decision in 1949, this legal principle of equality had been recognised by Lord Reid who in the case of *Gimour-v-Coates*\(^{862}\) said;-

"The law of England has always shown favour to gifts for religious purposes. It does not now in this matter prefer one religion to another. It assumes that it is good for man to have and to practise a religion but where a particular belief is accepted by one religion and rejected by another, the law can neither accept nor reject it. The law must accept the position that it is right that different religions should each be supported irrespective of whether or not all its beliefs are true. A religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true, and a religious service can be regarded as beneficial to all those who attend it without it being necessary to determine the spiritual efficacy of that service or to accept any particular belief about it."

Lord Reid, in the House of Lords, laying down the legal doctrine of religious toleration and equality within English law. Also, wisely ruling on the general non-competence of the secular courts to interfere with and to determine religious beliefs.

So English judges have declared that they have no expertise to decide whether religious views are unorthodox or absurd. They work and proceed on the basis that it is for the individual to form and to follow his conscience and to elect the religion of his or her choice. Only if the tenets of a particular sect were to be judged to inculcate doctrines which were adverse to the very foundations of religion and subversive of all morality, would such a religious organisation then be proscribed and its activity be declared to be unlawful. Such beliefs could, of course, extend to political or moral opinions outlawed by the State, under statute. For example, a religious group which as part of its creed promoted racial hatred or violence or sexual discrimination, as part of its religious tenets, would fall foul of the Race Relations Act 1976 and the Sex Discrimination Act 1976 and no doubt, would be declared to be automatically unlawful. The religious tenets have to be considered overall. The English Courts will not rule that a religion is unlawful and that a gift to it will fail, simply because the opinions sought to be

\(^{862}\) *Gilmour-v-Coates* [1949] A.C.
propagated under the religious group or body are deemed to be foolish or even devoid of any foundation.863

How to define what exactly are the essential tenets of a religion has been an issue that English Courts have judicially considered. In a case decided by the House of Lords in 1917, concerning whether a gift to the Secular Society was void on public policy, Lord Parker of Waddington commented:-

"Trusts for the purposes of religion have always been recognised as good charitable trusts, but so far as I am aware there is no express authority dealing with the question what constitutes religion for the purposes of this rule."864

Religion has been defined within the Oxford English Dictionary as being "A particular system of faith and worship" and the "Recognition on the part of man of some higher unseen power as having control over his destiny, and as being entitled to obedience, reverence and worship."865 This criteria has been accepted by the English courts and applied to the new religious groups which claim to be a religion. Belief in a supreme being, in a deity and then accompanying that belief in the supernatural, a suitable act or acts of worship and due reverence.

In 1980, a judge, was asked to determine upon whether the objects of a certain organisation, the South Place Ethical Society, were charitable as being for the advancement of religion. The Society had abandoned prayer in 1869 and the general objects of the society were for the "study and dissemination of ethical principles and the cultivation of a rational religious sentiment." The organisation existed to foster the general study of ethical principles, but this was not to be accompanied by any religious act or worship. Did the objects of this Society fall within the whole concept of religion? The judge, using the definition of what constitutes a religion, by referring to that within the Oxford Dictionary, concluded that the society was not carrying out a religious purpose;—

"It seems to me that two of the essential attributes of religion are faith and worship; faith in a god and worship of that god...The society therefore

864 Bowman-v-Secular Society Limited [1917] A.C. 426
fails in my judgement to make out its case to be charitable on the ground that its objects are for the advancement of religion."\(^866\)

Originally, it was thought that a religion had to be essentially monotheistic for it to be capable of being charitable at law and so polytheistic religions were not covered. In 1970, in a case concerning the Church of Scientology and specifically its attempts to register its chapel in East Grinstead as a “place of meeting for religious recognised" within the Places of Worship Registration Act 1855, the (then) Master of the Rolls, Lord Denning, considered the question in some detail. He refused to grant to the Applicants a judicial order of Mandamus, which would have compelled the Registrar-General to register the chapel as a building for religious purposes. On the Church of Scientology, he concluded that this was a movement which promoted a philosophy and not a religion. As such, their building was not being used for a religious purpose as:-

"...the combined phrase a place of meeting for religious worship...connotes to my mind a place of which the principal use is a place where people come together as a congregation or assembly to do reverence to God. It need not be to the God which the Christians worship. It may be to another God, or any unknown God, but it must be a reverence to deity. There may be exceptions. For instance, Buddhist temples are properly described as places of meeting for religious worship..."

Lord Denning in his passing commentary, extending the concept of religion, from monotheism to include Buddhism. He went on to describe the creed of the Church of Scientology. He concluded that it was not a religion;—

"Turning to the creed of the Church of Scientology, I must say that it seems to me to be more a philosophy of the existence of man or of life, rather than a religion. Religious worship means reverence or veneration of God or a Supreme Being. I do not find any such reverence or veneration in the creed of this church, or indeed, in the affidavit of Mr Segerdal. There is considerable stress...on the spirit of man and not of God. When I look through the ceremonies and the affidavits, I am left with the feeling that

\(^866\) Re: South Place Ethical Society [1980] 1. W.L.R.
there is nothing in it of reverence for God or deity, but simply an instruction for philosophy."\textsuperscript{867}

Lord Denning re-affirming the requisites of any religious creed, to be recognised as such under English Charity law. Whatever the religion, its tenets have to be based upon the existence of a deity or a divine system. What is essential is that it be not focused upon man but orientated to a divine being or beings.

\textbf{9.3.1. Limitations on Freedom of Cult and the Charitable status of religion.}

The general right to liberty of religion and freedom to express this, has been defined under the Convention as being a qualified right. That has been the approach adopted by the English courts. If a new religious movement or sect, describes itself as being religious then it will be treated as such, provided that it can prove that it contains the essential elements of a religion. Once this has been demonstrated, the Courts will be slow to interfere with its activities and its members, unless there are serious and cogent reasons.

Legal limitations put upon religious freedom for the new religious groups and sects-their right to exist and to proselytise-began to attract much publicity within the United Kingdom after the Second World War. Specifically within Charity law and the law of Immigration, Parliament and the English Courts had to consider whether these new religious groups should be allowed to work unhindered within the United Kingdom and whether they should be granted charitable status. Where they morally dangerous and subversive?

In the past, Governmental policy was to control and place restrictions upon the new cults and religions and to prevent the entry of their members into the United Kingdom.\textsuperscript{868} It was felt that they were pernicious and dangerous and that they would have a destabilising affect on the country. It was an example of the Government taking a cautious attitude and arriving at a decision that a religious organisation was socially and morally harmful. This raised the problem as to how

\textsuperscript{867} R-v-Registrar General, ex parte Segerdal [1970] 2 QB 697

\textsuperscript{868} Such as the Church of Scientology.
the Government, the Minister or his department, had arrived at such a decision and what criteria were used.

Current Government policy favours a different, a more relaxed approach which is reflected within court decisions. Merely because a set of views or religious opinions are deemed to be absurd or even dangerous by a parent, an association, a church, a newspaper or a television company, will not prevent a religious group or sect from existing in England and indeed being given recognition under English law, as a charity. Parliament and the courts are slow to proscribe religious views and opinions, taking the view that it is not their role to police and to protect the religious views of its citizens.

**9.3.2 Attempts to remove religious charitable status of some religious movements.**

In 1981, in a well publicised defamation case, the leader of the Unification Church (also known as the "Moonies", after their founder, Sun Myung Moon) had sued the Daily Mail for defamation, when this newspaper asserted and claimed that the Unification Church broke up families and brainwashed its adherents. The leader lost his expensive libel case and the jury not only returned a verdict in favour of the defendants but also added a rider, calling for the charitable status of the organisation to be investigated. It was felt that the group was a political organisation.\(^{869}\) The Charity Commissioners, the Government Department which has the responsibility for the supervision of all organisations registered with charitable status in the United Kingdom\(^{870}\) after considering the matter, decided to permit the sect to continue to be registered. Four years earlier in a debate in Parliament, a Minister for the Home Office, responding to allegations of brainwashing and kidnapping and obtaining funds by fraud, had said

"If the Government as a Government took action against organisations which they regarded as wrong headed or even worse, we should be living in a rather different kind of society. The cost of such freedom is that some people will spend their money foolishly, be led astray by charlatans and even misunderstand the motives and feelings of their families and true friends. But when we decide that people should be treated as adults form the age of

\(^{869}\) The Times, 1 April 1981.

\(^{870}\) The Commission and its powers are studied within the next section
18, this meant that they had the right to make their own choice on the way they wished to lead their lives and to make their own mistakes."\textsuperscript{871}

The Government and Parliament laying down the general rule, already reflected in judicial decisions, that a person who has reached the age of eighteen, is free to make his or her decision and that it is not the function of the State to determine what is a genuine or a false religion. In a pluralistic society and a parliamentary democracy, different religions will be generally tolerated. A free press and freedom of speech, used responsibly, should provide the necessary safeguards and remedies to enable adults to follow their consciences and make their own choice.

In 1976, the charitable status of another charity fell under scrutiny, namely a religious group calling itself the "Exclusive Brethren". This religious organisation adhered to the principles laid down by an American called James Taylor Junior. It was alleged that a proportion of this sect preached views which were socially divisive, applying the "separation from evil" doctrine in such a way that "the advancement of such a religion, far from being beneficial to the community, was inimical to the true interests of the community.\textsuperscript{872} The religious group had tried to prevent the British Broadcasting Corporation from re-broadcasting a programme, extremely hostile to it and which coincided with an application made by them to have their properties exempt from rates in a local valuation court. The organisation had argued that the broadcast was in contempt of court, since it would prejudice their claim. Rejecting their request for an injunction, Lord Salmon, one of the Judges in the House of Lords, said that:

"...The broadcast was extremely hostile to the sect; it made it plain that the sect taught that anyone who is not one of its members is necessarily evil, and accordingly decreed that the sect's members must dissociate themselves from any such persons whosoever they may be—husband, wife, father, mother, brother or sister. They must not even talk to them nor eat with them. According to the broadcast, this doctrine was applied so strictly

\textsuperscript{871} See House of Commons Debate. 926 HC 23 February 1977.

\textsuperscript{872} This was the view of a report, prepared by the Charity Commissioners, under the auspices of Mr H. Francis QC in 1976.
that it caused the deepest distress amongst many and led in Andover to two deaths which the Coroner described as murder and suicide.\textsuperscript{873}

Before this court action, a different court had already granted the Exclusive Brethren a declaration to the effect that they were a religion and as such were entitled to be regarded as a charity. The judge of that court, Mr Justice Walton, said that the Brethren were clearly a religion and so their purposes were presumably charitable. The evidence presented to the Court was not sufficient to demonstrate that the principles and the tenets of the group were contrary to public policy.\textsuperscript{874}

9.3.3. Religious Freedom-Immigration Cases.

Under the Rules of Entry re-issued by the Secretary of State for the Home Department, made pursuant to the Immigration Acts 1971 and 1988, non-work permit entries can be issued to ministers of religion, missionaries and members of religious orders.\textsuperscript{875} People who desire to enter the United Kingdom as ministers of a new religion and as missionaries of that group, not belonging to the various branches of Christianity nor to Judaism, Islam nor Hinduism will generally be allowed to do so, unless the religious movement to which they belong or represent is engaged in criminal activity. If it is engaged in criminal activity, then the policy of the Home Office is to deny such person the right to enter the United Kingdom, as the particular religious group is socially undesirable.

In 1946, the Home Secretary, Mr Ede refused to prevent the entry into England of a number of members of a movement founded by a Dr Buchman called "Moral Re-Armament". These individuals intended to spread their message within the United Kingdom. Whilst they held views and opinions which no doubt offended some people, they had in fact committed no crime under English law. Mr Ede elaborated upon the Home Office's policy on Religion and Immigration, when he said:-

\textsuperscript{873} Attorney-General-v-B.B.C. [1981] A.C.


\textsuperscript{875} The Current Rules 136-193 were issued in 1994
"I am not prepared to apply religion or political tests to people who desire to come into this country unless it can be established that they desire to come here to carry on subversive propaganda as defined by the Acts concerned with seditious practices... I desire that the ancient record of this country as a place of free speech, where the flow of ideas from all parts of the world is welcome, may be maintained: and while I will not guarantee that some of the people I admit may not be charlatans, may not...even be false profits on occasion, I desire to impose no censorship other than that which the law entitles me to impose against subversive propaganda..."^876

This represented the general rule and policy of the Home Office. If there was nothing under United Kingdom law, to prevent a citizen of the United Kingdom from practising the religion of the minister or missionary hoping to enter the country, then normally such minister or missionary will be entitled to enter the United Kingdom. Even if the religious ideas are felt to be socially harmful, the Government will permit the ministers and the missionaries of that religious group to enter the United Kingdom. Provided that the religious activities of the group are not illegal per se nor subversive under the criminal law, UK citizens must be left free to decide whether to permit themselves to be influenced by the religious views.

An example of what type of organisation has been considered to be morally subversive and socially harmful is the Church of Scientology. In 1969 the Home secretary had decided that this group was not prima facie a good influence on English society as it was promoting activities and a doctrine which was morally harmful. The Home secretary refused to grant extension of stay to a member to continue her missionary work and ordered her to be deported. The Court of Appeal was not prepared to grant relief to the plaintiff who ruled that the Home Secretary had acted in accordance with Home Office policy when refusing to grant the extension of stay to remain within England. The Home secretary had taken his decision on the basis that this group was socially harmful and had acted in accordance with the guidelines of the department.^877 The Court accepted the conclusion reached by the Minister. Twenty one years later in 1980,

^876 424 House of Commons Debate 5 July 1946.

^877 Schmidt-v-Secretary of State for Home Affairs [1969] 2 Ch 149.
the policy was reversed and a different Home Secretary lifted the general ban which had prevented scientology students from entering the United Kingdom.878

9.4. CHARITABLE STATUS FOR RELIGIOUS GROUPS AND MOVEMENTS.

Once a religious group has been recognised by the law as being charitable, it will be entitled to receive and to purchase property, to be used for religious purposes, subject to the receipt of all planning and other permissions and so long as the property acquired or leased, contains no restrictions on such use, imposed by deed.879

All the main religious bodies have registered the majority of their properties as trusts under the law and so these have obtained charitable status. Within the Methodist Churches and the Churches of the reformed tradition, a single local church congregation will have the church property vested in a body of trustees. In England, the Catholic Church operates on the basis that all properties and assets in each diocese are generally vested in diocesan trustees. They legally hold the properties, which include the local churches and buildings, in accordance with the rules of the particular trust. For the Church of England, being the Established Church, there is a different legal framework.880

878 988 House of Commons 16 July 1980.

In 1976, the Home Office was not prepared to exclude American members of the Children of God sect, after police enquiries did not lead to any evidence of criminal activity.

879 For use as a meeting house or a chapel, for religious services, the religious group would be required to comply with all planning and other conditions laid down by the Town and Country Planning Acts in respect of the use and the enjoyment of the property.

There may also be other conditions, restrictions imposed upon the property by deed. For example, a covenant preventing the property from being used as a chapel or place for religious meetings.

880 Every parish church in the Church of England and the house provided for the parish priest, is owned by the "Corporation sole" which consists of the office of the parish priest by virtue of his appointment. He is regarded as having the freehold title to that office and cannot be removed from it, except for reasons of misconduct or health, until he reaches 70 years of age. His appointment carries with it a right to receive a stipend and for this reason it is known as a "living". See David McClean "State financial support for the Church; the United Kingdom "in Church and State in Europe State Financial Support Region and the School Univeristà degli studi di Milano 1992.
The Charities Commissioners are the effective statutory Board within England and Wales which have the general duty of investigating and processing all applications and then, following its studies, either granting or refusing to award charitable status to the body concerned. They have wide powers of investigation and apply specific criteria recognised by the Courts to reach their decisions. As they are a statutory body, their decisions can be challenged under administrative law. The Charities Commission keeps a register of all religious charitable trusts can supply copies of all trust deeds.

Charity law gives distinct advantages to all organisations which are able to register as charities. To obtain such advantages under Charity law, the main line churches and all religious groups endeavour to have themselves registered as charities. Once registered they will receive favourable tax advantages881 and, not being subject to a rule under English law which prevents private non charitable trusts from existing indefinitely (called the rule against perpetuities), they can have perpetual legal existence.

9.4.1. The Charity Commissioners.

The Charity Commissioners, were first established by the Charitable Trusts Act 1858, after an investigation carried out by a Royal Commission set up in 1819.882 The constitution of the Commission and their powers are now governed by the Charities Act 1993. The general function of the Charities Commission is the effective promotion of charitable resources by encouraging the development of better methods of administration by giving charity trustees information or advice on any matter affecting the charity and by investigating and checking abuses.883 The general object of the Commission is to act in the case of any charity as best to help it to promote and to make effective its work in meeting the needs stipulated by its trusts.884 The Commissioners, who make up the Commission, do not have powers to act in the administration of any charity, but possess a monitoring and supervising jurisdiction. They also keep a register of all the charities registered, including those whose objects exist for the promotion of

881 They receive rating relief under the Rating and Valuation Acts. Broadly speaking, they do not pay income tax on profits on any business or trade where these are only used by the Charity.

882 See Tudor on Charity Law. p. 307

883 Charities Act 1993 s.1(3).

884 ibid. s.1(4).
religion. Once charity status has been granted to an organisation, provided that this body acts in accordance with the terms of that trust and uses its assets according to the criteria laid down by law, the Commissioners have no power to intervene. The fact that they may not personally share the opinions or beliefs or give their approval to the organisation in question, is no ground for their involvement. The criteria and guidelines used by the Commissioners, to decide whether a particular religious body is charitable have been determined by the English Courts.

9.4.2. Requirements for registration as a charity.

Charities have been recognised under English law for many centuries. Following the destruction and the dissolution of the monasteries after Henry VIII, one of the first consequences was the rapid increase in poverty, the poor being deprived of the traditional hospitality that they would have received from the hands of the monks and the friars. Under the reign of Queen Elizabeth I, various poor laws were enacted to try to alleviate the pressing needs of the underprivileged. Trusts and Charitable institutions were created to help those less well off and gifts left for such purposes were recognised accordingly and recognised as being charitable.

Trusts and foundations set up for the purposes of the protection and the maintenance of the religion of the Established Church are treated with special favour and recognised as being charitable. With the growth of religious toleration and freedom of conscience, as we have seen in chapters seven and eight, the courts have extended the concept of religion to include the other Christian denominations and indeed all religions.

In the last century, in one of the most important cases on charity law, Lord Macnaghten in the House of Lords was to enumerate the various purposes of a trust which could be at law charitable. Objects of a trust set up for (a) the relief of poverty, (b) the purposes of education (c) the promotion of religion or (d) any other charitable purpose. Thus all religious trusts, which are valid and do receive charitable status, will be registered and recognised at law under category (c).

9.4.3. Religious Trusts.

885 The Commissioners for special purposes of the Income Tax-v-Pemsel [1891] A.C.
The fact that a religious group or organisation exists per se, will not necessarily mean that it will be treated as a religious charity. To be able to take advantage of charitable status under the third head, any religious group has to satisfy two criteria. It first must be an organisation which exists to advance religion, in the sense that this has been interpreted by the courts. Secondly, it must promote that system of religious beliefs, for the instruction or education of the general public. Provided that it can fulfil these criteria, there will be a presumption at law that the religion in question has the necessary element of public benefit. The presumption of a public benefit, that is to say that the religious organisation carries out or promotes activity for the benefit of the public can be rebutted by evidence and if done, then the religious body will not obtain charitable status under the Charities Act.

Any religion must satisfy the requirement of it having a public benefit, as determined by the courts and will ignore the views of others to reach their conclusion, such as the donor of property, which are irrelevant. In each case, they will consider whether the trust or foundation established, objectively is of real benefit to the community, in the light of evidence that is cognizable to the court. This has proved to be difficult for some religious groups, especially enclosed religious communities who never leave their communities, spend their whole day engaged in prayer and do not engage in corporal works of mercy outside the walls of their convent or monastery. English law has found it difficult to accept that these communities are, for the purposes of charity law, engaged in the promotion of a religion for the benefit of the public, even if their life style is of great edification and encourages people to have recourse to religion.

In a learned article appearing in the Law Quarterly Review and written by Professor Newark in 1946, a number of cases were collected and studied to illustrate the problem, decided in both Irish and the English Courts, in different common law jurisdictions. Professor Newark had concluded that this edification principle, whereby a group of religious people-men or women gathered together to pray and to offer worship to Almighty God, in a collective way, but in private and separated from the rest of the world, could not, under English law,

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886 See the comments of Mr Justice Dillon in Re. South Place Ethical Society: Barralet-v-A-G [1980] 3 All.E.R.

887 National Anti-Vivisection Society-v-IRC [1948] A.C.

constitute a sufficient benefit for the public. The benefit had to be tangible and fall within a kind that could be tested by the courts.

In 1943, a bequest had been made to found a convent of Perpetual Adoration, a convent in which the Blessed Sacrament is kept continually exposed in the chapel, and where nuns were always before it in prayer and convention. The judge, Mr Justice Gavan Duffy, had decided that because the bequest was destined to set up a foundation to perpetuate the worship of God, it was a charitable bequest. He concluded:—

"in my judgement a testamentary gift to found a convent for the perpetual adoration of the Blessed Sacrament is, beyond all doubt, a gift charitable at Common law, because it is a gift to God, a gift directly intended to perpetuate the worship of God."

At the same time, the nuns did engage in needlework and teaching. The general public also had access to the private chapel to participate in the adoration. Yet the judge decided the merits of the case chiefly under the edification principle and the fact that the provision of worship to Almighty God was automatically charitable. The presence and the religious activity of the nuns was such that it not only promoted worship but also provided a salutary example to the rest of society. In his view, the convent was clearly a charity and provided a public benefit.

An earlier case under English law, had produced a different result, decided on similar facts. The case was Cocks-v-Manners, which concerned a bequest left to a convent of nuns of an enclosed order. No evidence had been placed before the English court as to the Catholic belief on the benefit of the contemplative life led by enclosed nuns to the general public at large. The Vice-Chancellor decided the case on the basis that a voluntary association of women working out their salvation by religious exercises and self-denial, could not be considered to be charitable. Although they were carrying out a religious purpose, there was no benefit for the public. Nearly seventy years later, the importance of there being a public benefit was again stressed in another case which was decided in the House of Lords, that of Gilmour-v-Coates where the religious community

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889 The case is an Irish decision, Maguire-v-Att.Gen. (1943) Ir. R
890 (1871) L.R. 12 Eq
891 [1949] A.C.
concerned was an enclosed contemplative order of nuns. On this occasion, clear evidence was presented of the general benefit conferred by the contemplative life of the nuns, by way of edification to the public at large, and also by the efficacy of their prayers for the members of the general public. It was argued that their prayers brought about the spiritual improvement of all and the evidence for this was presented in the form of an affidavit, sworn by the Cardinal Archbishop of Westminster, and setting out the Catholic doctrine on the power of prayer. The House of Lords ruled that the community could not be charitable at law, because there was no tangible legal benefit to the public. The benefit of intercessory prayers for the general public was not susceptible of legal proof and the principle of edification by example, was too vague.

Any religious community of whatever religious persuasion, to be charitable under English law, must not only promote the values of a religion, through prayer and worship, but must also engage in exterior works, for the benefit of the general public. If it does not do the latter, it will not be able to qualify for charitable status and any charitable gift to the religious community will fail as a charity.\(^892\)

The difficulty of demonstrating the existence of a public benefit, has not been confined to court cases of enclosed religious communities. In Re: Warre's Will Trusts, a judge determined that a trust fund to apply the income in perpetuity for the provision and upkeep of a diocesan retreat house in the diocese of Salisbury was not charitable. Although the fund was to be applied for the furtherance of religion, it lacked the necessary element of public benefit.\(^893\) A different conclusion was reached in a case concerning a Jewish synagogue,\(^894\) where it was decided that although the synagogue in question was not open to the general public at large, the members spent their lives in the middle of the world. The judge concluded that some benefit accrued to the public from the persons who attended the synagogue and then mixed with their fellow citizens.

\(^892\) If the objects of the religious community are deemed not to be charitable, then great care has to be taken if testators wish to leave it a gift or a donation. Any gift to the members of the community will not necessarily fail if it can be considered to be a gift for the personal use of the members of the community for the time being. The gift can then be held by the members of the religious community upon trust in accordance with the rules of the community.

Re: Clarke [1901] 2 Ch. A legacy to the Corps of Commissioners was valid, even though the Commissioners were not a charity, because the members could spend it as they pleased.

\(^893\) [1953] 1 W.L.R.

\(^894\) Neville Estates Limited-v-Madden [1962] Ch.
These different decisions underlie the legal problem of whatever religious groups hopes to attract charitable status under English law. It first has to satisfy the test that it is a religion and then be able to demonstrate that it promotes a benefit for the public. This will mean that a trust set up for a new religious movement, if it proves that there is a public benefit, will be valid, but a trust for an enclosed community of monks or nuns will not be. Rather than being a limitation on religious freedom, this is more of a limitation placed on Charity law.

9.4.4. Religious Trusts for Masses.

One interesting area of English law, had been that which concerned legacies left by testators for the saying of Masses for their souls, in accordance with the rite of the Catholic Church. In 1919, the House of Lords had ruled that the celebration of the Mass was no longer under English law, superstitious and so unlawful. All bequests and gifts left for the saying of Masses under a will, were therefore not void on grounds of public policy. A testator can legally arrange that a sum of money be bequeathed under his will for the saying of Masses and such a bequest will not only be valid, but can also be charitable, if there is the element of public benefit.

In the case of Bourne-v Keane decided in 1919, a testator had left sums of money as immediate gifts for the saying of Masses for his soul, so there was no question of needing to determine whether money left for this purpose was charitable. But were these personal bequests valid, as a Statute of Edward VI had abolished the foundation of Chantries in 1547, confiscating their revenue to the Crown, and had described the Mass as superstitious? This statute had never been repealed. The House of Lords, by a majority decision, ruled that the provisions of this old statute should be disregarded and decided in favour of the validity of the gift.

In Re: Caus the issue which had to be decided was whether a gift for the saying of Masses was charitable per se. Here, the testator had left a legacy for a "foundation Mass" to be said, the saying of which was to be paid for out of the income of an investment fund. Unless the gift was charitable, it would have been

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895 The case of Bourne-v-Keane [1919] A.C. considered ante.
896 See chapter 4.
897 [1934] Ch. 162.
void, for it would have infringed the legal rule against perpetuities.\textsuperscript{898} Mr Justice Luxmore ruled that a gift for the saying of Masses was charitable because (a) it enabled a ritual act to be performed which was the central act of the religion of a larger proportion of Christian people and (b) it assisted in the endowment of priests whose duty it was to perform that religious act. The testator's will did not expressly require that the foundation Masses be said in public and the judge made no distinction between a Mass said in private and in public.

The whole question of the charitable status of gifts for the saying of Masses was again to come before the Vice-Chancellor, Sir Nicholas Browne-Wilkinson in \textit{Re Hetherington}.\textsuperscript{899} The deceased under her will had left two gifts for Masses for her soul and the souls of members of her family. Nothing was said as to whether they were to be celebrated in private or public. The judge considered the cases of \textit{Re:Caus} and \textit{Gilmour-v-Coates} and concluded that the decision in \textit{Re: Caus} was still good law. These gifts for the celebration of Masses were charitable because they were for a religious purpose. They had the necessary public benefit as in practice the Masses would be celebrated in public and the provision of stipends for priests was a way of helping the clergy of the Catholic Church. The Vice-Chancellor gave a set of legal guidelines, to determine all future like cases. He ruled that all bequests and gifts given for the saying of Masses, should be subject to a prima facie presumption that they are charitable under English law; there is the element of public benefit as these Masses would be celebrated in public.

\textbf{9.5. RIGHT OF RELIGIOUS ASSEMBLY, TO MANIFEST RELIGIOUS CULT AND THE LAW OF BLASPHEMY.}

The right to assemble for religious worship, guaranteed under the Convention, has been recognised by English law and given statutory protection. This protection exists for not only members of the Established Church but all the other churches and other religions, provided they can comply with the statutory requirements, specifically by the Places of Worship Registration Act 1855.

If a building has been registered, then whatever the religious act of worship being carried out on the premises, it has the benefit of the protection of the

\textsuperscript{898} The legal norm that prevents gifts and legacies, given for non-charitable purposes, from lasting indefinitely.

\textsuperscript{899} \cite{1989} 2 All E.R.
Ecclesiastical Courts Jurisdiction Act 1860. All persons causing any disturbance or committing unruly behaviour, can be arrested. In one case decided in 1969, that of Abrahams-v-Cavey\footnote{[1968] 1 Q.B.} the defendant was at a religious service held for the Labour party at the Dorset Gardens Methodist Church, during its party conference in Brighton. He cried out during the service, "Oh, you hypocrites, how can you use the Word of God to justify your policies." He was charged under the 1860 Act and found guilty of indecent behaviour in a place registered for religious worship.\footnote{The protection of the 1855 Act applies to all places used for religious worship. Under the Scientology case, discussed above, it must follow that their meetings would not have the benefit of this Act as they would not be religious but philosophical meetings.}

9.5.1. The right to assemble for religious purposes.

Another dimension to this right to externally manifest the religious views one holds, is the right to assemble in public places, apart from a church building, and to assist at a religious procession, demonstration or a crusading activity. A right which falls with the general category of freedom of expression—the freedom to express those religious views in a public manner—but subject, at the same time, to the general freedom of expression of others to hold and maintain contrary views. Both this right to assemble and freedom of expression exist under English law within the general concept of public order and are subject, as under the terms of the Convention of Human Rights, to certain safeguards. They can be restricted and modified by the Courts for the purposes of public safety or morality.

Within English law, there is no general right of assembly as such and enshrined within an Act of Parliament or by the courts. The approach of English common law is to permit people to assemble and propagate their religious views and manifest their sentiments, so long as this does not cause disturbance and disruption to the general public. In a famous case in 1892, Beatty-v-Gillbanks,\footnote{(1882) 9 QBD 308.} Mr Beatty was arrested after having assembled with 100 other people for the purposes of participating in a procession organised by the Salvation Army through Weston-super-Mare. In the past, there had been public disorder from a rival organisation called the "Skeleton Army". The local magistrates had issued an order, directing that the march should not take place. This was disobeyed by
Mr Beatty. The prosecution failed to convict Mr Beatty for an offence against public order, on the grounds that he had assembled peacefully and that the public disturbance was caused by the unlawful activity of other people. The conclusion reached was that the proposed march of the Salvation Army, was not illegal and that they were assembling for a lawful purpose.

Ten years later in 1902, that of *Wise-v-Dunning*, a certain Mr Wise as part of his religious crusade and a well known Protestant Crusader, had held several meetings in the public highway in Liverpool. He had used deliberately, insulting language calculated to offend and insult Roman Catholics. The local magistrates were concerned that further breaches of the peace could occur and so made an order, binding Mr Wise over for twelve months. Mr Wise unsuccessfully appealed against the order. The Court concluded that whilst he had assembled ostensibly for religious purposes, in reality it was to engage in insulting behaviour. His activity was therefore illegal.

In summary, English law permits a negative right of assembly; a right to assemble for general religious purposes, whether it be for a religious procession or participating in any form of religious activity, so long as this does not contravene the public order.

9.5.2. The law of Blasphemy.

The privileged state of the Established Church within England means that the offence of blasphemous libel exists, to protect the teaching of the Established Church but none of the other Christian bodies. In the court case in 1979, already considered the trial judge, had commented that in his view

"...the offence of blasphemous libel today occurs when there is published anything concerning God, Christ or the Christian religion in terms so

903 [1902] 1 KB.

904 Unlike Mr Beatty, Mr Wise had assembled for an unlawful purpose. Magistrates have the power to make an order, requiring a person to behave in a proper way, for a certain period of time. Subject to this condition, no other sanction is imposed. A binding over order is a warning issued by the courts.

905 See also the articles written by Professor Ewing, Professor of Public Law, Kings College London entitled "Freedom of Religion in England." and "Freedom of Religion and Conscience in the English Courts.”

scurrilous, abusive or offensive as to outrage the feelings of any member of or sympathiser with the Christian religion and would tend to lead to a breach of the peace. *I would be prepared to extend the definition to cover similar attacks on some other religion, as we have become a multi-religion state, but it is not necessary for me to go so far for the purposes of the present case."

Relying upon these comments, in 1990, Mr Choudhury, a devout Muslim tried by a court action to extend the concept of blasphemy to protect the Muslim religion. Following the publication of the novel "the Satanic Verses" by Salman Rushdie and its publication by Viking Penguin, the applicant issued a private summons alleging the common law offences of blasphemous libel and seditious libel had been committed by Mr Rusdie and his publishers. It was argued that the Common law offence of blasphemous libel should be extended to Islam and that Mr Choudury’s right to religious freedom had been violated by the vilification of his religious beliefs. Powerful arguments but they did not succeed. The applicant also placed great reliance upon Articles 9, 10 and 14 of the European Convention of Human rights. The Court however dismissed his case; ruled that he had not been denied his right and liberty to express his religion and stated that an extension of the concept of blasphemy to other religions would prejudice the rights of freedom of expression of Mr Rushdie and Viking Press.

Does this mean that the failure to extend the law on blasphemy, by the English courts to the other religious groups, is a limitation on religious freedom? Not necessarily. The judges in the above case argued that to extend the offence of blasphemy to non-Christian religions would be to change their role from judges to legislators. It would also incidentally give to the courts an impossible task of trying to ascertain the true beliefs of every religion. They ruled that only in limited cases would the court be prepared to prevent an author and his publisher from printing a work. Publication of a work could be restrained, not on the grounds that it was blasphemous but that it would otherwise contravene public order and morality.

9.6. RELIGIOUS FREEDOM IN EDUCATION.

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907 *R-v-Chief Metropolitan Stipendiary Magistrate, Ex Parte Choudhury* [1991] 1 All E.R.

908 This was a court of Appeal decision, consisting of three judges.
Article 2 of the First Protocol to the European Convention on Human Rights, states that:-

"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."909

In England, this general right on the part of the individual to receive education and the respect given to that right by the State in conformity with the religious and philosophical convictions of the wishes of the parents, is governed by the relevant provisions of the Education Act 1944 and the Education Reform Act 1988. With respect to religion, these Acts lay down certain requirements in respect of (a) worship and (b) the religious syllabus. These apply to maintained schools, as defined below.

The Education Act 1944, distinguished between (a) county schools, schools set up and maintained by the local authority and (b) voluntary aided schools, originally established privately but voluntarily brought within the State system and a as a result subject to varying degrees of financial control by the local authority.910 Apart from the county and voluntary aided schools, collectively known as "maintained schools"911 there is a separate category of private schools, which is generally speaking not subject to the same educational regime. These schools, in many cases have been set up by trusts and charitable foundations and fall outside the scope of the Education Acts in one important area. They do not receive any direct funding or finance from either local or central government.

Whilst they can be registered and in many cases are, as educational charities, the help these private schools receive from the State is minimal and indirect. They do not receive direct funds. For this reason, their position is far more precarious and especially politically, as private education has been seen by some politicians as socially divisive, elitist as it is privilege of the richer members of the community. Some have even maintained that such schools should not receive charitable status and other tax advantages.

909 First Protocol 1952.

910 ibid. s 9.(2). There are three types of voluntary aided schools;—(1) controlled, (2) aided (3) special agreement schools.

911 Under the Education Reform Act 1988 s.25(1).

Under sections 6 and 7 of the Education Act 1988, collective worship is mandatory in all maintained schools and by virtue of section 7(1) in county schools, that is to say those directly controlled by the relevant local authorities. The collective worship must be of a broadly Christian character. There are exceptions within the Act, in that where the school population has a large non-Christian population, the school will be allowed to hold its own form of non-broadly Christian worship. Such acts of worship, may be distinctive of any particular faith (such as the Jewish faith) but not "distinctive of any particular Christian or other religious denomination" (under Section 7(6)(b)).

9.6.2. The Religious curriculum.

The curriculum for religious education is also regulated by the Education Act 1988 which is to be given in such a way, in county schools, that it conforms to an agreed syllabus. The Acts prescribes that religious education shall be given in such a way that it will "not include any catechism or formulary which is distinctive of any particular religious denomination." The agreed syllabus, under the terms of the Act, is drawn up by representatives of the local authority, teachers representatives, the Church of England and such "religious denominations as in the opinion of the authority, ought, having regard to the circumstances that there are, to be represented." Any agreed syllabus must broadly reflect the fact that the religious traditions in Great Britain are broadly Christian. The prohibition on the use of a catechism, within county schools, would prevent the teachers therein using the New Catechism of the Catholic Church. In other educational establishments, grant maintained schools, religious education can be given in accordance with the terms of the relevant trust deed.

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912 The broadly Christian character of the provisions for collective worship have been criticised by John M. Hull in "Church-related Schools and religious education in the publicly-funded Educational system of England" in Church and State in Europe: State financial support religion and the school. This article gives an excellent historical background to the Education Act of 1944.

913 ibid. Section 2.

914 ibid. Section 26.

915 The two largest providers of voluntary schools are the Church of England and the Catholic
9.7. ACCESS TO THE MEDIA AND BROADCASTING.

Another aspect to Article 10 of the European Convention on Human rights, which covers freedom of expression, is the guarantee of the right of freedom to impart information without interference by the public authority; a right to broadcast one’s views, religious or otherwise-to use the means of telecommunication (whether the television or radio)- but without prejudice to the state having the right to control the operation and the exercise of such rights by requiring the necessary licences.

Within the whole of the United Kingdom, that is to say in England, Scotland, Wales and Northern Ireland, the principal organ of communication whether by television or the radio, is the British Broadcasting Corporation (B.B.C.). The revenue of the B.B.C. is provided for by an annual licence, the fee being determined by the Government. The B.B.C. is a Corporate Body, set up by its own Act of Parliament and operates under Royal Charter, under the terms of a licensing agreement from the Home Secretary.

The other Commercial Stations are regulated by the Broadcasting Act 1990 and their revenue comes from advertising. There are statutory rules which prevent the independent television companies from permitting the transmission of any advertisement which is directed on behalf of a religious body or towards a religious end.

Whilst both the B.B.C. and the commercial television stations do set aside time every week for the transmission of religious programmes, they are not legally obliged to do so. All programmes transmitted, are subject to the editorial control of the broadcasting stations concerned and in the event of unfair treatment, there are limited powers and remedies available to an aggrieved party. No religious body or organisation can legally demand access to these organs of telecommunication and the general expense and complexity, has made it difficult for religious groups as well as the churches, to establish a television or radio channel of communication.

Church. Of all voluntary schools, 30% are catholic and 67% are Anglican. Of the Catholic voluntary schools, 97% are aided. See further, especially on how this functions, the article of John Hull supra.

916 See the analysis of this position in the article of Professor Ewing. "Freedom of religion in England."
9.8. THE STATUS OF THE LEGAL SYSTEMS OF THE CHURCHES.

Given the existence of the main Christian Churches—apart from the Established Church—the Jewish faith, the Muslims and the other religious movements, to what extent and on what basis do their rules bind their members? The legal systems of the various Churches within England, with the exception of the particular law of the Church of England (which as we have seen is administered as part of the law of the land) have no legal recognition or special status. Their laws are binding, by virtue of the law of contract on its members, in the same way that the rules and regulations of any other society bind its members.

9.8.1. The status of the Canon law of the Catholic Church.

Just as the conditions and regulations of these groups do not form part of the ecclesiastical law of the state and have no special position under English law, the Canon law of the Catholic Church is deemed to be a private collection of rules and regulations which exist between the Church and her members. The 1983 Code of Canon Law and the general canon law of the Church is therefore binding upon its members only on a contractual and voluntary basis. By joining the Church, her members voluntarily agree to abide by her rules and regulations. In particular, by her own internal disciplinary code.

9.8.2. The Ecclesiastical Tribunals of the Catholic Church.

The ecclesiastical court structure of the Catholic Church—its diocesan tribunals—does not form part of the ecclesiastical court system of the Established Church nor of the State. Their decisions and judgements are only binding between the parties on a voluntary basis. Cases which have been determined by the ecclesiastical courts of the Catholic Church are therefore not judicial precedents within English law and have no legal effect as precedents within the secular

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917 There is no concordat between England and the Holy See. The Catholic Church has no juridical personality. It is a voluntary and unincorporated association united on the basis of agreement. See the article of Anthony Kerr "Church and Labour Law in Ireland" p 131 in Churches and Labour law in the EC Countries. Università degli studi di Milano. 1993. Although this is the position of the Church in Ireland, the position is the same as in England, under English law.
courts. Furthermore, their judgements will not be enforced by the secular courts as part of the law of the land, otherwise than on a contractual basis.

On the grounds that the members of the Catholic church have voluntarily agreed to submit themselves to a body of doctrine and beliefs and to a hierarchical organisation, then the English courts will recognise that the particular canon law of the Catholic Church should be invoked and applied systematically to disputes arising between Catholics. Provided that the canonical rules are applied fairly, then the courts will invariably refrain from interfering with a decision and would hold themselves as not being competent to arbitrate upon Catholic doctrine.\footnote{For example, a legal dispute arising only between Catholics and concerning solely the application and the determination of the doctrine or the discipline of the Catholic Church. The case of a pastor teaching beliefs contrary to the magisterium of the Catholic Church and having been disciplined by his bishop, bringing a complaint before the civil courts, asking for redress. On such issues touching and concerning the Catholic faith, the courts will generally refrain from passing judgement. Where disciplinary proceedings have been commenced, then if they have been applied fairly and justly according to the Code and the rules of natural justice, then the Courts will not interfere with the decision.}

In a Irish court decision, \textit{McGrath-v-Trustees of the College of Maynouth},\footnote{(1979) I.R.L.M.} the Plaintiff had been dismissed for various infringements of the college statutes, but principally that as a priest that he had failed to wear clerical dress in the college and had, without permission, written articles prejudicial to ecclesiastical authority. He was held to have been rightly dismissed and that the trustees were acting within their constitutional rights.\footnote{The Plaintiff had argued that the dismissal violated his constitutional rights. The Irish Court determined that the trustees had every right to protect the status of the seminary.} If the Tribunal had acted in an arbitrary way or not followed the disciplinary code of the Catholic Church, then the Court would have reached a different decision. Just exactly what remedies a civil court can issue against an ecclesiastical tribunal is not completely clear, but it would almost certainly have the power to issue an injunction or a declaration that its members had not acted properly i.e. were in breach of contract. Not being a public body and therefore not having any quasi official status, an ecclesiastical tribunal would not be subject to control by the administrative of judicial review.\footnote{Cf. "Church and Labour law in Ireland". Op.cit. Page 133 and the case of \textit{The State-v-D'Arcy}}
9.8.3. The law of the dis-established Church of Wales and the other Churches.

The operation and the application of the canon law of the Catholic Church, to its own members and on a consensual basis, is the same recognised juridical way that the ecclesiastical rules and regulations of the disestablished churches are applied to their members. As all their current rules and regulations no longer have any legislative effect and so do not form part of English ecclesiastical law, so their binding affect arises through the law of contract. All of the members who are members of a disestablished church, are deemed to be persons who have voluntarily agreed to subscribe to its tenets and to be bound by its respective constitution and regulations.

Where legislation has been enacted, disestablishing a part of the Church of England, the specific Act of Parliament confirms this to be the position. Under the Welsh Church Act 1914, the Church of England existing in Wales was to be disestablished. By section 3(1), it was stated that;

"As from the date of disestablishment ecclesiastical courts and persons in Wales and Monmouthshire shall cease to exercise any jurisdiction and the ecclesiastical law of the Church in Wales shall cease to exist as law."

Section 3(2) determined henceforth the legal criteria upon which would operate the ecclesiastical law of the Church of Wales upon its members;

"As from the same date the then existing ecclesiastical law and the then existing articles, doctrines, rites, rules, discipline, and ordinances of the Church of England shall, with and subject to such modification or alteration, if any, as after the passing of this Act may be duly made therein, according to the constitution and regulations for the time being of the Church in Wales, be binding on the members for the time being of the Church of Wales in the same manner as if they had mutually agreed to be so bound..."922

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922 Section 3(1) and (2) of the Welsh Church Act 1914. The provisions of the Act came into force in 1919. As and from that date, the Church of Wales came into existence. Its properties and assets became vested in the Welsh Commissioners. Cf. Section 4 of the Act.
In the event of a private tribunal of any of these Churches failing to respect these norms or acting in a way that would be contrary to natural justice, such as refusing to allow a party to present his or her case, or one of the members of the Tribunal having a personal interest in the case, then such a court could be restrained by the civil courts. So in a disciplinary case involving the minister of the Methodist Church, under English law, as the religious tribunal had followed their own disciplinary procedure, the minister was held to have been rightly dismissed.923

9.8.4. The legal status of the clergy and the ministers of the Churches and other religions.

The Clergy of the Established Church and the other Churches have a special position under English law. The clergy of the Church of England and the Church of Scotland, are prohibited from sitting as a member of Parliament in the House of Commons924 and this prohibition extends to all espiscopally ordained clergy925 and to Roman Catholic Priests.926 The reason for the restriction has been explained on the essential spiritual nature of the office of the priest. There is no prohibition, it should be pointed out, against any other religious minister or leader. Thus, a clergyman of the non-conformist Churches or a rabbi and of any of the other religious denominations can become a member of Parliament.

The clergy and the religious leaders of the Christian Churches as well as the other religious bodies, because of their office are not considered to be employees of the Churches which they represent. In 1984, in the case of the President of the Methodist Conference-v-Parfit927 Lord Justice Dillon in his judgement said

"In my judgement, the spiritual nature of the functions of the minister, the spiritual nature of the act of ordination by the imposition of hands, and the

923 President of the Methodist Conference-v-Parfit [1984] Q.B. The case raised the more important issue as to whether the minister was an employee or not. The court concluded no and because he had been dismissed fairly and according to the rules of the Methodist body, he could claim no damages.

924 By The House of Commons (Clergy Disqualification) Act 1801.

925 Re: MacManaway [1951] A.C.

926 Under The Roman Catholic Relief Act 1829 section 9.

927 See above.
doctrinal standards of the Methodist Church which are so fundamental to that Church and to the position of every minister in it make it impossible to conclude that any contract, let alone a contract of service, came into being between the newly ordained minister and the Methodist Church when the Minister was received into full connection..." in the spiritual sense, the minister sets out to serve God as his master..."

This view was confirmed in the House of Lords in 1986. A similar decision was reached in a northern Irish case where an Industrial Tribunal ruled that a curate was not an employee of the diocesan bishop. These principles have also been applied to the religious ministers of other faiths, such as the *granthi* of a Sikh temple and a rabbi.

9.8.5. The Legal position of Religious leaders: Counselling and Confession.

All the clergy of the Churches, whether of the Church of England or the Catholic Church or the other churches, do not seem to have any special position under the English law of evidence. Consequently, any spiritual counselling that a cleric may give, he may be obliged to disclose as evidence in court. For refusing to do this, he could be punished for contempt of court and committed to prison.

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928 *Davies-v-Presbyterian Church of Wales* [1986] See chapter 5. For a review of the cases see "Church and Labour law in England" by Ingrid Slaughter and David McCLean. *Churches and Labour law in the EC Countries.*

929 *Buckley-v-Daly.* Quoted in the above article.


931 It is worth pointing out that the English courts, since the last century, have determined that there is prima facie a relationship of undue influence between the religious adviser and his disciple. In *Alkard-v-Skinner* (1887) a member of a former Anglo-Catholic community who had converted to Catholicism, was held to be prima facie entitled to recover all the moneys and donations that she had paid over to the community. The court ruled that in such cases, a legally rebuttable presumption of undue influence would always arise in such circumstances.
So far as the confessional is concerned, a Roman Catholic priest is probably not privileged in respect of what is told to him in the confessional and for refusing to reveal its contents, could be held to be in contempt of court. The exact position of the legal category of a confession within the Church of England, is presumably the same, especially as the Church's own internal law seems to admit an exception to the general rule of non-disclosure Church.

9.9. CIVIL RECOGNITION OF RELIGIOUS MARRIAGE.

English law recognises the religious form of marriages contracted by members of all the major Christian and non-Christian religious denominations, provided that their form fulfils the requirements of English law. The marriages of the Society of Friends, Quakers, enjoy special privileges and marriages solemnised according to the Jewish faith, are expressly recognised.

The detailed provisions are set out within the Marriage Act 1949, which specify the conditions under which a marriage is to be contracted. Where the law does not combine facilities for the combination of religious and legal ceremonies, then the civil ceremony must be contracted for the marriage to be valid under English law. In the case of religious groups or sects which have a ceremony or rite not recognised, then this is the procedure which they must follow.


933 See Canon 113 of the Code of 1603: (still in force).

"Provided always that if any man confess his secret and hidden sins to the minister for the unburdening of his conscience and to receive spiritual consolation and ease of mind from him; we do not in any way the said minister by this our Constitution, but do straitly and admonish him that he do not at any time reveal and make known to any person whatsoever any crime or offence so committed to his trust and secrecy (except they be such crimes as by the laws of this realm his own life may be called into question for concealing the same) under pain of irregularity."

Contrast this exception, under the internal law of the Church, with the way that Confession is treated in the Catholic Church. The seal of the Confessional in the Catholic Church is sacrosanct and inviolable.

934 The Marriage Act 1949 s.47.

935 Under the above Act, s.26.

9.9.1. Marriage contracted according to the Catholic rite.

All marriages within the Catholic Church will be recognised, if the canonical form used complies with the Marriage Act 1949 and the marriage is duly solemnised within a place of worship, registered as such under the Places of Worship Registration Act 1855. As most Catholic Churches and chapels are in fact registered, then a Catholic marriage would be legally valid. The Priest or minister or other person, nominated by the Bishop, acts at the same time as the official of the state and has the duty to register the marriage afterwards.

9.9.2. Legal Status of Decrees of Judicial separation and nullity given by Ecclesiastical Tribunals of the Catholic Church.

Decrees of judicial separation and decrees of nullity issued by an ecclesiastical tribunal of the Catholic Church are not recognised by the English Courts. A marriage, if judicially recognised by English law can only be judicially determined and terminated by the English courts according to the provisions of English law. Only a civil court has the power to grant a divorce, a decree of judicial separation or nullity.\(^\text{937}\)

For a Catholic to obtain the legal effects of a canonical separation or annulment granted in an ecclesiastical tribunal, he or she must apply to the civil courts and obtain a separate civil decree of either judicial separation, divorce or nullity under English law. The same grounds for a decree of judicial separation under English law operate for a person seeking a divorce.\(^\text{938}\) English law uses different criteria to annul a marriage, and in contrast to the canon law of the Catholic church, has created the concept of a voidable marriage.\(^\text{939}\) For this

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\(^\text{937}\) By virtue of section 17 of the Matrimonial Causes Act 1973, the English courts were able to grant a decree of judicial separation on the same grounds that it would have granted a petition for a divorce (under section 1 of that Act) where it had been demonstrated that the marriage had broken down irretrievably. There were originally, five distinct grounds for which it was necessary to prove that a divorce should be granted. Those legal grounds were based upon (a) adultery or (b) unreasonable behaviour or (c) desertion of two years or (d) or the living apart of the spouses for two years, with both parties consenting to a divorce or (e) the living apart of the spouses for five years, whether the other party consented to a divorce or not.

\(^\text{938}\) See previous footnote.

\(^\text{939}\) The Catholic Church carefully distinguishes between those cases (1) where a marriage ceremony may have taken place, but it is invalid as there has existed an impediment which has
reason, invariably proceedings for a divorce would be commenced in the civil court as the process is much easier and quicker. Decrees of nullity or judicial separation of the Catholic Church, by themselves, have no legal effect within English law.

9.10. RELIGIOUS DISCRIMINATION UNDER ENGLISH LAW.

Religious freedom and freedom of cult as well as freedom of expression, are all valuable positive rights. Unless they receive adequate legal protection by the law, they are of limited value. What measures does English law use to protect negative discrimination on religious grounds?

Under Article 14 of the Convention, the right to freedom of religion, expression and assembly are all to be enjoyed without any discrimination against sex, colour, language, or religion. In England, direct or indirect discrimination on grounds of sex or race is illegal but regrettably, there is no statutory equivalent, outlawing discrimination on religious grounds. This means that

never been dispensed with (under Canons 1073 to 1084) and (2) where a marriage ceremony has taken place, canonically recognised by the Church, but there have subsequently come to light salient facts which render the matrimonial consent null.

Under Canon 1095, the three grounds for nullity are that one of the parties was suffering from (i) a lack of sufficient reason, (ii) a grave lack of discretionary judgement regarding the essential matrimonial rights and obligations to be given and accepted in marriage and (iii) causes of a psychological nature making it impossible for the assumption of the essential obligations of marriage.

English Matrimonial law recognises the concept of nullity but departs from the Canon law of the Catholic Church in that it distinguishes between (a) marriages which are void and (b) those which are voidable. A void marriage, under English law would never have existed. (e.g. if one of the parties had already been married). Voidable marriages under English law are those contracted but whereby one of the parties (a) lacked the capacity to consummate it, (b) wilfully refused to consummate the marriage, (c) never validly gave their consent (through duress, mistake, unsoundness of mind or otherwise) or (d) was suffering from a mental disorder so as to be unfit for marriage (Section 1 of the Matrimonial Causes Act 1973). The marriage will be deemed to be valid under English law, until the innocent party has made it clear by his behaviour that he does not want to be bound by the marriage. He must do so in good time. Note that it is the innocent party which takes the decision and not the court.

Under Canon law, the same grounds would render the marriage null ab initio and incapable of being validated.

unless the individual can bring and base any claim within the concept of sex or racial discrimination as in Mandla-v-Dowell Lee, a decision of the House of Lords, which ruled that the Sikhs were primarily a racial and not a religious group, any act of discrimination on religious grounds will not be illegal. Employers can, generally speaking, discriminate against individuals, on religious grounds with impunity and are not subject to legal sanctions within England. Religious discrimination is not illegal.

Any measures against discrimination on religious grounds, under English law are regulated by agreement, discrimination on religious grounds being neither illegal nor contrary to public policy. This can be illustrated by two important cases, concerning testamentary dispositions. In each, the court had to confront two bequests and whereby, under the terms thereof, the testators had written into their wills, clauses which were discriminatory in that they penalised individuals from being able to benefit, if they were or became Jews or Roman Catholics.

In the case of Re:Lysaght the testatrix had established a will for scholarships, at the Royal College of Surgeons. To qualify, the student had to be of "the male sex and a British born subject and not of the Jewish or Roman Catholic Faith". Mr Justice Buckley, rejected the submission of the College, that such a provision was void for uncertainty or was contrary to public policy. The Testatrix had the freedom to bequeath her assets in such a way and upon such terms that she felt in accordance with the law. Such a condition, based on religious discrimination was not void and unlawful. He did nevertheless rule that it was an essential part of the Testatrix's intention that the College should be a trustee of the trust fund and as the College felt unable to administer the funds on such terms of discrimination, he ordered the offending words to be deleted.

The same reasoning—the freedom of testators generally to dispose of their assets in the way that they chose—was reaffirmed in the case of Blathwayt-v-Baron Cawley whereby a will contained a provision that any beneficiary would forfeit his interest if he "be or become a Roman Catholic". This too, was held not

941 [1983] 2 A.C.

942 Under the Fair Employment (Northern Ireland) Acts 1976-1989, such discrimination on religious grounds in Northern Ireland is illegal.

943 [1966] Ch.

944 [1976] A.C.
to be void as being contrary to public policy. Lord Cross of Chelsea, in the House of Lords, said:-

"...it is true that it is widely thought nowadays that it is wrong for the Government to treat some of its citizens less favourably than others because of differences in their religious beliefs; but it does not follow from that that it is against public policy for an adherent of one religion to distinguish in disposing of his property between adherents of his faith and another. So to hold would amount to saying that though it is in order for a man to have a mild preference for one religion as opposed to another it is disreputable for him to be convinced of the importance of holding true religious beliefs and the fact that his religious beliefs are the true ones..."

To eliminate all discrimination on grounds of religion, would need the English Parliament to introduce a law which made it illegal, on grounds of religion, to discriminate against a class of people holding religious beliefs. This would outlaw discrimination, by analogy and on the same basis as the discrimination on sex and race. One clear difficulty would be to protect and not to upset the constitutional position of the Crown and the status of the Established Church.

9.11. THE STATUS OF THE EUROPEAN CONVENTION IN ENGLISH LAW.

At the beginning of this chapter, we referred to the relevant Articles of the European Conventions of Human Rights, which exist to guarantee freedom of religion and cult. Nevertheless, we do need to examine to what extent these Articles have been incorporated within and how they have affected English law. Also, to what extent the Convention has been enforceable?

The European Convention on Human Rights entered into force on 3 September 1953. There are thirty parties, of which one is the United Kingdom. Nevertheless, until recently, the Convention did not form part of English law as it had never been ratified by the English Parliament. Where cases of complaint were brought against the United Kingdom, on the basis that UK law in specific instances, infringed the Convention and the Government was found to have been in breach, as a matter of course, the British Government paid out compensation to individuals whose rights had been violated.

As with any Convention, the policy of the English courts had been to treat the Convention with great respect and to try and accommodate the rights guaranteed within the Articles under UK law. In cases concerning freedom of
religion or other rights within English law, then the English courts would look to and be guided (but not bound) by the Convention rights. Where there was a conflict between English Law and the Convention, they would attempt to reconcile any ambiguities, following the criteria given by Lord Ackner in a case decided by the House of Lords in 1991.  

Referring to a dictum of Lord Denning, Lord Ackner commented:

"The position as I understand it is that if there is any ambiguity in our statutes, or uncertainty in our law, then these courts can look to the Convention as an aid to clear up the ambiguity and uncertainty...but I would dispute altogether that the convention is part of our law. Treaties and declarations do not become part of our law until they are made law by Parliament."

So where no reconciliation was possible and a statute denied an aspect of the Convention rights, then the statute prevailed over the Convention and the Articles were judged to be not conclusive. For the Convention on Human Rights to have formed part of English law, it needed to have been formally incorporated by Act of Parliament.

9.12. CONCLUSION.

England now being a multi-cultural and multi-religious society, widespread immigration into the country having been encouraged and then permitted after the Second World War and with the end of the British Empire, many new religions have grown up and flourished. From being an arbiter on faith and determining which beliefs should be followed and which should be shunned, Parliament and the courts have taken on board the concept of religious freedom. The courts will now recognise any religion, no matter how extreme and absurd

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945 *R-v-secretary of State for the Home Department, Ex parte Brand* [1991] A.C.

946 In the case that has been examined, which tried to extend the law of blasphemy to cover Islam, that of *R-v-Chief Metropolitan Stipendiary Magistrate, Ex Parte Choudhury* [1991] 1 All E.R., extensive references were made to the Convention.

947 Since the above section was written, Parliament passed in 1998, the Human Rights Act 1998. The object of this Act is to incorporate the Convention of Human Rights within UK law. The relevant sections of the Act have not yet been brought into force, and it remains to be seen how the above Articles on religious freedom will be interpreted by the UK Courts.
may be its tenets, so long as it is not subversive and does not promote criminal activity. Religious toleration is permitted and rarely will Parliament take legal sanctions or measures to outlaw a particular creed.

The freedom of religion, religious cult and freedom of education for the individual and the same rights for the Churches, by analogy- their right to exist, to provide religious cult, religious education and to acquire property and assets all for such purposes-have all been recognised, in a negative way by English law. Indirectly permitted, because there has not been any Bill of Rights nor the equivalent constitutional safeguards, guaranteeing the existence of these rights in a positive form.

Instead, the starting point in English law has been that each individual or religious organisation or movement is able to do what he or she or they desire unless prohibited by statute. Legislation and case decisions of the English courts have defined those boundaries and limitations. The various rights and guarantees on freedom of religion, set out within the European Convention, have been broadly observed by the United Kingdom, but the rights laid down by the Convention were never deemed to be conclusive and having the same legally binding force as an Act of Parliament.

All of the Churches and religious movements, whether those which have existed for many years or those which have recently been formed, receive broadly the same treatment under English law, so long as they comply with its general rules and principles. That being said, English law is still predominately motivated by a Christian ethical code and specifically that of the Established Church. For some, this bias should be removed, and the State should by her legislation, become more multi-ethnical and multi-religious.948

948 See the Article of Professor Ewing "Freedom of religion in England." He concludes that the virulent anti-Catholicism of English law is an affront to decency and that it is unfair that the laws of Blasphemy do not extend to Jews and Muslims.
CHAPTER 10

OBJECTIONS OF CONSCIENCE WITHIN ENGLISH LAW.
Chapter 10

Objections of Conscience within English Law.

10.1. The concept of objection of conscience—as recognised by Parliament and the Courts. 10.2. Anti-life legislation; abortion and euthanasia; discrimination experienced by doctors and nursing staff who conscientiously object to engage in such activity. 10.3. Refusal to carry out military service and other civic functions on grounds of conscience; oaths and affirmations generally. 10.4. Conscientious objection to receive medical treatment and the criminal law. 10.5. Religious education and parental rights generally (the Gillick case). 10.6. Employment law—discrimination and religious holidays. 10.7. Conscientious objection for journalists. 10.8. Conclusion.

10.1. The concept of conscientious objection as recognised by Parliament and the Courts.949

The growth and the importance of freedom of religion and liberty of cult within UK law, has at the same time been accompanied by legislation to outlaw discrimination based on sex and race. The UK Parliament, has created various Commissions to monitor the actions and conduct of individuals and there have been constituted special tribunals to interpret and to apply the race and sex discrimination laws. This legislation is based on the legal axiom that it is legally immoral to discriminate on the basis of sex or colour. Expressed in another way, the obligation not to discriminate on grounds of sex or race, has become an "objective legal principle" which Parliament and the courts are prepared to enforce, by fines and other civil sanctions. An interesting question would be to what extent it would be legitimate to discriminate on such grounds, based on grounds of conscientious objection and would this be a defence?

An objection of conscience, where recognised under a legal system, is a negative right. As with other legal jurisdictions, if recognised by the UK

949 The major legal works which have been studied to write this chapter have been; Halsbury's Constitutional law, A. St John Robilliard, Religion and the law; Bailey, Harris, Jones, Civil liberties; cases and materials; Freeman, Medicine, Ethics and the law; Stevens & sons, Ltd 1988 and Margaret Brazier, Medicine, Patients and the Law, Penguin Books, London 1992. The statutes are from Halsbury's Statutes. The reported cases come from a variety of sources: from the Weekly law Reports (W.L.R.), the All England Law Reports (All E.R.), the Times Law Reports (Times) and, the Industrial Cases Law Reports (IRLR).
Parliament or by the English courts, it will relieve an individual from carrying out a certain act otherwise required by the law, on the grounds that the person cannot perform such an action on grounds of conscientious objection. Grounds of conscientious objection are deemed to be a legitimate defence. Court cases dealing with the concept of conscientious objection in recent years have received widespread attention. Medical matters, especially involving the Witnesses of Jehovah who refuse to receive blood transfusions on grounds of conscience for religious reasons, have all highlighted the legal problem. Should the Courts override their objections, which are based on genuine religious reasons, and authorise blood transfusions where doctors consider this to be necessary to save the patient’s life? Where young children are involved, should judges ignore the genuine objections of the parents and order young children to be given blood?

In 1985, there was the well known case concerning parental rights, a private action which Mrs Gillick, a mother of ten, brought against her local health authority, to prevent them from prescribing the contraceptive pill to any of her daughters under the age of sixteen, without her consent. She argued that to do so, would infringe her rights as a parent and would conflict with her conscience. She was opposed to Government policy for reasons of conscientious objection. This case raised questions of public importance and was determined differently, on different criteria in the three different courts. It brought to the public light the nature of the problem and the confrontation between an individual and the Government, where a parent is not prepared to allow public officials to interfere with her way of educating her children according to a particular set of religious beliefs.

The Government was ultimately successful in this case, and the judges in the House of Lords, agreed that doctors and the National Health Service did have the power to override parental wishes and personal beliefs, even if these were based on religious or moral principles and to prescribe the contraceptive pill to under age girls, without parental consent. The majority of the judges ruled that there was no general duty to give absolute priority to the conscience of the parents, even though they had the recognised legal duty to educate their children. Parliament by legislation had laid down clear guidelines and which were to be

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950 Gillick-v-West Norfolk and Wisbech Area Health Authority. [1985] A.C. For different approaches to the ways grounds of conscience are covered in the Republic of Ireland and the United Kingdom see. "Conscience and the law: UK national report" by Francis Lyall and "Protection of Freedom of conscience in fields other than that of military service" by J.D. McClean in Conscientious objection in the EC Countries, Univeristà degli studi di Milano. 1992.
followed by medical staff and especially by family practitioners, and under the same, parental rights were not sacrosanct.

In other legal areas, how far the concept of conscientious objection will be respected and to what extent a person may be permitted to follow his or her conscience and refrain from undertaking a certain act, will depend on the courts and on Parliament. Even if that person can rely upon grounds of conscience objection, we also need to consider whether that person will be penalised for doing so. In other instances, legislation does not directly refer to the concept of conscientious objection but to another concept of there being reasonable grounds. We will see how the same are not necessarily coterminous and furthermore, how grounds of conscientious objection do not necessarily have to be based upon religious criteria, i.e. on matters of religious faith, but extend to moral and ethical criteria. Where an Act of Parliament recognises the principle of conscientious objection, then the legal presumption in most cases is that the person who seeks to rely upon this ground, must prove that he holds the same. The courts will not necessarily set a high standard of proof, but will require him to adduce evidence that he holds such beliefs and that they are genuine and not spurious.

The recourse to the right of conscientious objection, is most well known in English law under various Acts of Parliament which have removed the criminal liability in certain instances for the destruction of the unborn child. In certain circumstances, a doctor or medical assistant can refuse to participate in the destruction of the unborn child, where such doctor or medical assistant has grounds of conscientious objection. But there are other medical areas, not of the same importance, but which raise the same issue of conscientious objection. For instance, parents or doctors who refuse to participate in the sterilisation of mentally handicapped girls and the withholding of medical treatment to children and to adults; then within religious education and the exercise of civic duties such as military service and jury service. To what extent is the concept of conscientious objection recognised? Where a teacher, for example refuses to teach certain matters on the grounds that they conflict with his conscience or an individual declares that his religious views would not enable him to carry out jury service.

951 Under the Abortion Act 1967, which is now subject to a very permissive regime, there is a recognised ground for refusing to participate in the carrying out of an abortion for reasons of conscience, but of very limited application-section 4 of this Act, which will be studied later.
Originally, conscientious objection was integrally linked and confined to religious freedom and toleration. The concept was given permanent statutory recognition under the Toleration Act of 1688, and by virtue of which Protestant dissenters who were prepared to take a modified oath of loyalty and a declaration of faith, were no longer to suffer civil and criminal penalties and could refrain from attending the religious services of the Established Church. Its relevant provisions were confined to a relatively small section of the population who for religious reasons were unable to subscribe to the Thirty-nine articles of Religion and to attend the Divine service of the Established Church. All people who wished to take advantage of its provisions, bore the onus of proving that they had religious objections, but if they could do so, then they were protected by the Act. 952

Two centuries later, the legal notion of conscientious objection had developed beyond purely religious boundaries and was no longer confined simply to those who, for reasons of conscience, were not prepared to subscribe to the tenets of the Anglican Church. By the Oaths Act of 1888, all persons, who for reasons of conscience were not prepared to take a religious oath, were permitted instead to make a solemn affirmation. 953 The concept of conscientious objection had come to include both religious and non-religious reasons.

10.2. CONSCIENTIOUS OBJECTION WITHIN LEGISLATION ON PRO-LIFE ISSUES UNDER ENGLISH LAW.

There is currently, a limited recognised ground of conscientious objection, within English law, offering some statutory protection to doctors and medical staff who refuse to participate in one very important area of the law, concerning the unborn child. Under common law, the unborn child was traditionally recognised as having rights and consequently, doctors and nursing staff could be prosecuted for destroying unborn life. The protection given to the unborn child at common law contrasts with their statutory position. The Common law position will be studied, as it will enable us to analyse and see how the legal protection of the unborn child was greatly diminished by the Abortion Act 1967. This Act revolutionised social attitudes to not only abortion but suicide and euthanasia.

952 By section 13, they were specifically exempted from the requirements of section 2, which required an Oath of loyalty. See the Toleration Act 1688.

953 The Oaths Act 1888, under section 1. Section 2 of this Act, which gave the form of affirmation.
The right to life, is primarily protected by the Criminal law of England though not exclusively. At Common law, the crime of murder was traditionally defined as applying to anyone who had unlawfully wounded another individual resulting in that person's death, within a year and a day after the same. Whether that person was unborn or born, the result was the same. Any one who carried out an abortion on an unborn baby, was guilty of homicide. Before 1861, the unborn child was protected by the Common law and after that date, that protection was put on a statutory basis by a number of Acts of Parliament, to keep pace with the advances of medical science.

10.2.1. The Common Law Position of the Unborn child..

In 1981, Lord Denning, the then Master of the Rolls, and without any hesitation, spoke of the protection that the unborn had received traditionally under Common law. He said:—

"The old Common lawyers spoke of a child en ventre sa mere. Doctors speak of it as a foetus. In simple English it is an unborn child inside the mother's womb. Such a child was protected by the criminal law almost to the extent as a new-born baby."

Nor was any major distinction, initially made to the unborn child under statute. All unborn were protected equally by Parliament, specifically by The offences of the Person Act 1861 and the Infant Life (preservation) Act 1929.

10.2.1.1. The offences Against the Persons Act 1861.

The Offences Against the Unborn Act 1861, contained extensive statutory provisions to protect the unborn child. It placed on a statutory basis, for the first time, the offence of administering drugs or the using of instruments upon a woman, to procure a miscarriage. Under that Act, it was made and still is, an offence not only to cause an abortion but to administer drugs with the intention to procure the same. Under section 58 thereof, it was stated that:—

954 This was judicially defined by Lord Chief Justice Coke in the seventeenth century.

955 The Royal College of Nursing v- D.H.S.S. [1981] 1 W.L.R.
"Every woman, being with child, who, with intent to procure her own miscarriage shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent and whosoever, with intent to procure the miscarriage of any woman, whether she be or not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any interment or other means whatsoever with the like intent, shall be guilty of felony..."

Section 59 made it a further offence to unlawfully supply or procure any poison or other noxious thing or any other instrument, with the knowledge that this would be unlawfully used to procure a miscarriage, whether the woman was with child or not. So enshrined was the fundamental notion, that the unborn child merited the full protection of the law, even if the woman was not actually with child but was believed to be so, then under both sections, it was offence by a third party to administer such drugs or to supply the same for such purposes.

This Statute as well as others, and until relatively recently case decisions, consistently used this description "the Unborn child" in place of "the foetus". Whether the unborn child was healthy or mentally deficient, he or she received equal protection under the criminal law. The only exception which was created by Common law, was deemed to apply to those situations where the life of the mother was held to be at risk and which enabled a doctor to kill the unborn child to protect the life of the mother, where her life was judged to be seriously at risk.

10.2.1.2. The Infant Life (Preservation) Act 1929.

The Infant Life (Preservation) Act of 1929, created a new offence of child destruction. It distinguished between the life of child capable of being born alive and a child actually born alive, with an existence independent of its mother. To kill an unborn child would constitute the offence of child destruction. To kill a child, actually born, and so having a life physically independent of the mother, constituted the offence of infanticide. Section 1 of this Act stated:—

"Subject as hereinafter in this section provided, any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction..."
Section 2 of this Act, which was not often not appreciated, actually created a prima facie assumption that after twenty eight weeks, the unborn child that the pregnant woman was carrying, was *prima facie* capable of being born alive. This section made it clear that:

"For the purposes of this Act, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more, shall be prima facie proof that she was at that time pregnant of a child capable of being born alive."

This did not signify that an unborn child was incapable of being born alive before this period. Only that, and in accordance with the then medical knowledge, until the time limit of twenty eight weeks had been reached, there was no legal presumption that the unborn child would have survived outside the womb of his or her mother.

This Act was also important for another reason. It created a defence, for a medical practitioner, who carried out an abortion on the unborn child, if he or she acted *in good faith*. This applied where the doctor performed this, in accordance with his professional judgement, so as to save the life of the mother. It relieved a doctor from otherwise criminal liability. The doctor had to demonstrate that he had acted in "good faith". The actual proviso to section 1(1), read:—

"...Provided that no person shall be found guilty of an offence under this section *unless* it is proved that the act which caused the death of the child was not done in good faith for the purposes only of preserving the life of the mother."

How to interpret the phrase "preserving the life of the mother" came before the Court in the case of *R-v-Bourne*.³⁵⁶ The trial judge, understood this concept to apply not only to the physical health of the mother but also to those situations where the mental health of the mother could be placed at risk.

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³⁵⁶ [1939] 1 K.B. 687
This case is important for the comments that the trial judge, Mr Justice Macnaghten, made on what he concluded was the position of English criminal law on abortion. Where the mother's life was at risk, elaborating on the general duty and obligation of medical practitioners, he denied that it was legally justifiable for a doctor to refuse to carry out an abortion, on grounds of religious conscience. In such a situation, the law was clear that the doctor had to set aside his religious opinions. The trial judge had concluded that medical practitioners who refuse to carry out abortions do so for religious reasons and not for moral or other motives. The distinction is important for there are many doctors who hold no religious opinions, but still refuse to carry out an abortion for moral and ethical reasons, above all arising from the Hippocratic oath. His actual words were:

"...there are people who, from what are to be said to be religious reasons, object to the operation being performed under any circumstances. That is not the law either. On the contrary, a person who holds such an opinion ought not to be an obstetrical surgeon, for if a case arose where the life of a woman could be saved by performing the operation and the doctor refused to perform it because of his religious opinions and the woman died, he would be in grave peril of being brought before this court on a charge of manslaughter by negligence. He would have no better defence than a person who, again for some religious reason, refused to call in a doctor to attend his sick child, where a doctor could have been called in and the life of the child could have been saved."

This legal reasoning, apart from eliminating the moral and other criteria—(for example medical-objections) which could motivate a doctor from refusing to carry out an abortion, exposed any doctor who refused to abort the unborn child, the possibility of being prosecuted for manslaughter. The example that was given, by analogy, of a parent refusing to summon medical assistance to a sick child, clearly indicated that the judge felt that only those with religious convictions would refuse to participate. The trial judge's comments, as to the law, were in fact criticised by Lord Diplock in 1981.957


The Abortion Act of 1967, gave to England, Wales and Scotland one of the most liberal abortion regimes. It has been much criticised and has led to the general feeling and view that abortion is not only permitted but is completely legal. This is not only inaccurate, but misleading. Properly interpreted, from a legal point of view, what is did do was to remove the criminal penalties for the carrying out of an abortion in specific circumstances. It did not legally grant a legal right to an abortion. The Act preserved and was otherwise subject to the statutory provisions of the Offences Against the Person Act 1861 and the Infant Life (preservation) Act 1929.

The Act also contained certain measures to ensure that, at least in theory, the unborn child should be terminated only on particular defined grounds and contained a procedure to prevent abuses. In contrast to previous legislation, this Act, refrained from using "unborn child" and instead employed terms such as "pregnancy" and elsewhere "foetus". The use of such terminology was deliberate. Also, the provisions of the Act were not applicable to Northern Ireland.958

The Act (as amended by the Human Fertilisation and Embryology Act 1990) changed the Common law position on abortion. Under section 1, it was provided that:

"Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith that—

(a) the pregnancy has not exceeded its twenty fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or

(b) the termination is necessary to prevent grave permanent or mental health of the pregnant woman; or

(c) the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated: or

(d) there is substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped."

958 Section 7, Abortion Act 1967.
The Act, originally decriminalised abortion and envisaged the destruction of the unborn child, only under ground (b). Sub-sections (a), (c) and (d) were added by the Human Fertilisation and Embryology Act 1990. As amended, the Act permits an abortion on wide grounds and has led to an anti-life mentality and culture and the perception that abortion is a legal right.959

In 1996, three women members of the armed forces, sued for damages from the Ministry of Defence. They argued that they were entitled to be compensated for having aborted their unborn children so as to have kept their positions of employment, when the Ministry of Defence had been operating illegally a policy of dismissing women in the services who had become pregnant. The Ministry had since altered their practices of employment but resisted the actions of the plaintiffs and defended their stance not to pay them damages on the basis that what these employees had done was prima facie illegal. Abortion of an unborn child to keep employment, was never a ground recognised by the 1967 Act. The Ministry also drew to the attention of the Court that the Act required two doctors to hold the opinion, in good faith, that the abortion of the unborn child would be necessary for the health of the mother. The Employment Appeal Tribunal dismissed the defence of the Ministry. The judge came to the conclusion that the plaintiffs were indeed entitled to claim damages, for "injury to their feelings caused by the termination of their pregnancies."960

10.2.1.4. Euthanasia generally.

Until 1961, attempted suicide, being the voluntary act of a person attempting to unlawfully take his or her own life, was a crime. By the Suicide Act 1961, section 1 decriminalised the attempt to commit suicide, but left intact the crime of inciting, aiding, abetting, counselling or procuring suicide.961 A doctor would be unable to rely upon grounds of conscience to justify assisting a person to die. The right to life is still considered to be one of the most basic rights under English law and was vigorously defended by Lord Bridge of Harwich in the House

959 The permission of abortion for eugenic grounds, under section 1 (d), as well as for the physical or mental health of the mother or other children, has led to severe inroads on the legal protection of the unborn child, from a criminal law point of view. It has also led to rather startling legal conclusions and results, never anticipated by Parliament.


961 See section 2 of the Suicide Act 1961.
of Lords in 1987. In the case of Bugdaycay-v-Secretary of State for the Home Department, he said:—

"The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."\footnote{962}{[1987] A.C.}

Although this was an immigration case, the principle of the sanctity of life remains embedded within English law. A right to life which is fundamental, but not absolute in the sense that the courts have recognised that in some cases, the right to life must give way to the principle of self determination. In 1993, in another House of Lord's decision,\footnote{963}{Airedale NHS Trust-v-Bland. A.C. [1993].} Lord Goff of Chieveley draw a legal distinction between withholding medical treatment and actively administering a drug to end the life of another. The active administration of a drug, to end the life of another, no matter how humanitarian, would remain murder and so a doctor who did this, would never be able to escape criminal liability under English law, justifying his conduct on grounds of conscience.

Where the patient refuses to receive medical treatment, on the other hand, on grounds of conscience-for religious or other reasons- then provided he is of sound mind then he is entitled to do so, even if he endangers his own life. The patient has to be composit mentis, otherwise he will be deemed to be incapable of reaching such a decision. So in one case, \textit{Re T (adult: refusal of medical treatment)}\footnote{964}{[1993] Fam 95.} the decision of the patient was deemed to be invalid for want of capacity.

English Courts will likewise intervene and protect the life of a seriously handicapped child, even if the parents are opposed to any kind of medical treatment, on grounds of conscience; their wishes are never conclusive. The courts will override the views of the parents to decide whether to allow a medical operation, if they judge that this would be in the best interests of the child. The courts will not say that the life of a seriously handicapped child ought not to be
saved, but will balance the cost of medical treatment with any proposed operation to be carried out.\textsuperscript{965}

10.2.1.5. The Death Penalty.

The death penalty in England was abolished by the Murder (Abolition of the Death Penalty) Act 1965. However, the death penalty can still be imposed for treason, under the Treason Act 1814 and for piracy with violence, under the Piracy Act 1837.

In the event of a woman being convicted of an offence punishable by death and she is pregnant, there is legislation to protect the life of the unborn child. The Sentence of Death (Expectant Mothers) Act 1931 imposes a sentence of life imprisonment instead of the death sentence. Section 1 of the Act provides:—

"Where a woman convicted of an offence punishable with death is found in accordance with the provisions of this Act to be pregnant, the sentence to be passed on her shall be a sentence of penal servitude for life instead of sentence of death."

This law remains in force, although it is absurd and irrational that the preservation of the life of the mother would be dependent upon her decision to keep and not to abort her unborn child.

10.2.1.6. The Status of the Unborn Child in English Civil Law.

The legal right, in English civil law, of the unborn child was considered judicially by Sir George Baker in the case of \textit{Paton-v-Trustees of BPAS}\textsuperscript{966} where a husband sought to restrain by means of an injunction, his wife from aborting their unborn child. The husband had tried to make the unborn child a ward of court, but failed. Sir George Baker dismissed the case and said that:—

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{965} \textit{Re; B (a minor) (wardship: medical treatment) [1990] Fam.}
\item \textsuperscript{966} [1978] 2 All E.R.
\end{itemize}
\end{footnotesize}
"The foetus cannot, in my view, have any right of its own at least until it is born and has a separate existence from its mother. That permeates the whole of the civil law of the Country (I except the criminal law which is now irrelevant)..."

The court was not prepared to support the decision of the husband, based on grounds of conscientious objection, but concluded that under civil law, the rights of the unborn were entirely conditional.

If this is accurate and these comments represent the position of English Common Civil law in 1978, then the unborn child receives wide protection under the criminal law but only conditional rights under civil law. To be eligible to receive such rights, the child must be born. Thus where a child was born disabled as a result of an injury suffered in the womb of the mother, the mother is entitled to sue for damages as a result thereof. The civil rights of the unborn, on this basis, will always legally depend upon two factors. The decision of the mother to keep the unborn child and then, the actual birth of the child.

**10.2.3. The law of conscientious objection on medical issues.**

Statutory protection, was given to all those medical practitioners and nurses who, on grounds of conscientious objection, refuse to carry out an abortion or to participate in the experimentation on live human embryos.

**10.2.3.1. The Abortion Act 1967.**

The Abortion Act of 1967, preserved the legal right of conscientious objection, whether for medical reasons or moral. The Act of 1967 never specified whether such grounds had to be based on religious or moral grounds. What the 1967 Act did state was that:—

"(1) Subject to subsection (2) of this Act, no person shall be under any duty whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection: Provided that in any legal proceedings the burden of
proof of conscientious objection shall rest on the person claiming to rely upon it."

The defence, the legal right not to participate in any such operation, was created under English law in respect of those persons who had conscientious grounds. Within that class of people, medical practitioners and nurses were evidently included, but a problem of interpretation came before the House of Lords in 1989. To what extent could reliance be placed upon this exemption for other staff, working in government hospitals. In the case of Janaway-v-Salford Area Health Authority, the House of Lords felt unable to apply and extend this conscientious objection clause to a receptionist and a secretary, who had refused to type letters whereby women were to be recommended to have abortions. The right of conscientious objection was only available for those who "participated" in any treatment. As she did not directly participate in any treatment, she could not rely upon the conscientious objection clause and so lost her case for unfair dismissal.⁹⁶⁸

The ground of conscientious objection, is therefore only of restricted availability. Only medical practitioners and nurses can refuse to participate in such operations and no other staff. Furthermore, those relying upon it have the burden of proving that they have conscientious objections. The legal presumption, created by Parliament, is that every medical practitioner and nurse is prima facie willing to participate in an abortion.⁹⁶⁹ This legal defence has also been limited by Parliament, in that the provisions of exemption are not available—so there is no legal right to refuse to participate—where such treatment is considered to be "necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman."⁹⁷⁰

If a medical practitioner or nurse refuses to participate in an abortion and the comments made by Mr Justice Macnaghten, which have already been quoted, accurately state the criminal position of English law, then such medical practitioner or nurse must be prepared to defend their position and risk a criminal prosecution for manslaughter and/or criminal negligence. Linked with a

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⁹⁶⁸ [1989] A.C.
⁹⁶⁹ As Francis Lyall has written in "Conscience and the law; a UK report", this is probably the best known provision as to conscience under English. It is remarkable that the provision has produced very little litigation.
⁹⁷⁰ Under Section 4 (2). ibid.
possible criminal charge, he or she could also face a suit for civil negligence, although to date there have been no cases awarding damages and determining civil liability on such a basis.

Doctors and nurses who refuse to participate in the performance of abortions, are not supposed to be subject to any discriminatory measures and be placed under less favourable working conditions and in theory this conscientious objection should be disregarded in appointments to medical posts of gynaecological responsibilities. In 1990, the House of Commons Social Services Committee recommended that the section 4 conscience clause be extended to some ancillary staff working in hospitals and also made a recommendation that the burden of proving a conscientious objection, should not be upon the person claiming it. Notwithstanding this, the law has not been amended and the burden of proving a conscientious objection remains with the person who seeks to rely upon such objection.

10.2.3.2. The Human Fertilisation and Embryology Act 1990.

Experiments conducted upon human embryos and their subsequent development, are regulated by the Human Fertilisation and Embryology Act 1990, in accordance with a licence issued by a board called the "Human Fertilisation and Embryology Authority." That Authority has wide and extensive powers to monitor the experiments carried out under the conditions of this Act and to withdraw licences, where abuses have occurred. Like the Abortion Act, it was envisaged, that no person would be forced, to participate in any such operations. Section 38 stipulated that;—

"No person who has a conscientious objection to participating in any act governed by this Act shall be under a duty, however arising, to do so (subsection 1)."

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971 See the Articles in the British Medical Journal: "The Medical profession at last speaks out over abortion" by J. Roberts British Medical Journal 310:(1995) and "Conscientious refusal to assist with abortion" by D.Dooley British Medical Journal 309 (1994).


973 Under section 5 of this Act.

974 Which it amended, by adding the grounds (a), (c) and (d).
So, a doctor or nurse, under the terms and conditions of the contract of any employment, cannot be legally obliged or required to participate in any activity. Sub-section (2), as with the 1967 Abortion Act, places upon the person claiming to rely upon such grounds of conscience, the burden of proving this.\footnote{“In any legal proceedings, the burden of proof of conscientious objection shall rest on the person claiming to rely on it.”}

The problem of conscientious objection within English law, in the whole area of medical ethics, thus remains acute. The law is often contradictory and there can be no doubt that recent legislation has deliberately promoted a pro-abortion mentality and attitude and created a professional climate whereby there is a presumption that doctors and nurses are prima facie disposed to carry out abortions.

10.3. \textbf{Refusal to carry out civic duties and comply with legislation on grounds of conscience.}

English law has recognised that, apart from the area of medical ethics, the right of conscientious objection is applicable in other areas. The right of a citizen to refrain from acting in such a way or performing certain duties for well founded reasons of conscience.

Some times, the legislature will employ the use of clear unambiguous terminology such as grounds of \textit{conscientious objection}. Thus if a person can demonstrate that he has grounds of conscientious obligation, he or she may be excused from exercising a certain duty. On other occasions, Parliament has provide a person with the means to escape from the compliance with a civic obligation and so avoid a criminal sanction, if the person can show that there exist \textit{good reasons}. Finally, a statute may absolve a person if he is able to convince the court that he had \textit{reasonable grounds}. Are grounds of conscience, reasonable grounds or good reasons? The reported court cases on military and jury service as well as on road traffic legislation, reveal the difficulty of the problem.

\textbf{10.3.1. Military Service.}

During the Second World War, Parliament had recognised that some persons would refuse to carry out military service for reasons of conscientious objection.
To ascertain that such grounds existed, that they were genuine and not political, there was created a special tribunal to filter the genuine from the spurious. The true grounds of conscientious objection from the political.

In 1941, the courts were able to examine and elaborate upon these grounds in a court case brought by a young apprentice against his local authority, in which he claimed damages for breach of contract. His local authority had discovered that he had registered himself as a conscientious objector and so they dismissed him from their service. Were they entitled to do so? One of the terms of employment was that the employee should not "be wilfully disobedient... slothful or negligent or otherwise grossly misbehave himself".

Did registration as a conscientious objection, entitle the local authority to dismiss the apprentice on the above grounds, that he had misbehaved himself? The court decided that registration, per se, as a conscientious objector was an insufficient ground for dismissal and so had acted unfairly and in breach of their contract. Yet, the judge only awarded the apprentice nominal damages on the basis that his previous conduct generally (details of which the local authority did not have at the time when they dismissed him) had been negative and unhelpful and that if the local authority had known of this then they would have been able to have terminated his contract for valid reasons.

Mr Justice Atkinson, in his judgement, was to set out the criteria differentiating between a true conscientious objector and a political conscientious objector. In his judgement, he said;-

"The legislature has thought it right to say that, if this young man can satisfy the tribunal that he has a conscientious objection to defending his own or the country's liberty or freedom, or protecting women and children from organised massacre from the air, or protecting our sea borne supplies of food upon which he lives, he shall be exempted from military service, and, if he is a conscientious objector, he has a right to register as such and try to satisfy the tribunal that he has a conscientious objection. He succeeded in satisfying them...(but) in my view, the plaintiff was not a conscientious objector in the true sense. He was a political conscientious objector."

The judge concluded that Mr Newell was not a proper conscientious objector. He was a defeatist. He was pro-nazi and his arguments were not based on

976 Newell-v-Gillingham Corporation. [1941] 1 All E.R.
religious but upon political considerations. He was anti-government. The judge set out what he considered to be the true and proper characteristics of a conscientious objector. A citizen, unwilling to do military service, but nevertheless prepared to do his duty and perform some sort of other work for his country. A citizen who was loyal to his country and its traditions but, for reasons of conscience, could not kill. Mr Justice Atkinson considered what Parliament had in mind when they accepted the concept of conscientious objection. A true conscientious objector was;-

"one who on religious grounds thinks it wrong to kill and to resist force by force. He thinks that that is the teaching of Christ. The true conscientious objector remembers other undoubted teachings of Christ-namely, to help the injured, the suffering and the helpless-and remembers that there is such a thing as duty. The true conscientious objector is ready to do ambulance work, rescue work, A.R.P. work and work among the helpless in shelters. There are many conscientious objectors who have proved the genuineness of their belief by that which they have done. This plaintiff likened himself to Quakers. Everybody knows the fine work done by Quakers, particularly in the last war. One remembers the work they did on mine-sweepers, probably the most dangerous work there is. They were logical in their views. They recognised their duty to do all they could except to kill if need be. The true conscientious objector is loyal to his country."977

This legal reasoning is based on the supposition that a conscientious objection is not merely a refusal to carry out a certain duties. It is a refusal to carry out certain conduct, but coupled with a willingness to perform other acts of service as part of civic obligations. The only comments that can be levelled against the decision of the judge is that the motives for refusing to perform military service (a) should be applicable to anyone who holds genuine religious convictions and opinions and not those of the Established Church and the Christian Churches and (b) need not be confined to religious grounds but should be expanded to cover moral reasons.978

977 Ibid. Quote abstracted from the judgement of Mr Justice Atkinson.

978 Since 1959, compulsory liability for military service under UK law was terminated. Consequently, the number of cases of conscientious objectors are almost non-existent. The legal principle extracted from this case is still valid and especially if the Government were to reintroduce military conscription. See the comments and the old cases cited in the article of Frances Lyall. Op.cit. pp. 167 et seq.
10.3.2. Jury service.

Jury service, within England, is the civic duty that obliges all those eligible and summoned to do jury service and assist in the system of justice. Without juries, the whole legal framework of justice would collapse. Because it is an important obligation of every citizen, religious or conscientious objection is not a ground of exemption as of right. The Juries Act does permit a person to be excused from jury service, if he can show:

"to the satisfaction of the appropriate officer that there is good reason why he should be excused from attending...then the appropriate officer may excuse him from attending..."

The person seeking exemption, has to demonstrate his case and show clearly good grounds, which will excuse him from this civic obligation. There is no automatic exclusion from the civic duty to perform jury service, for grounds of religious or conscientious objection. A case decided in 1988 was to illustrate the principle, a decision involving a member of the Plymouth Brethren, some of whose members refuse for religious reasons to do jury service.

In 1988, a Mrs Susette Siderfin, had been summoned to do jury service. She made a personal application to the chief clerk of the Crown Court at Guildford, for permission to be exempted from jury service, based upon her strongly held religious views. Using Sacred Scripture, she together with most of her adherents, felt unable to perform jury service and so to have been compelled to do this, would have caused her serious grounds of conscience. The chief clerk refused to exempt her, stating that it was not the policy of the particular Crown court to exempt people from jury service for reasons of conscientious objection and in particular, that of members of the Plymouth Brethren. He further went on to say that "if we took these grounds, we would not be able to get any jurors."

Mrs Siderfin challenged the decision of the chief clerk to refuse to exempt her from jury service and appealed to the Judge of the Crown Court. When the Crown court judge dismissed her appeal, Mrs Siderfin applied for judicial review.

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979 Section 9 Juries Act 1974.

980 Section 9(2) ibid.

981 R-v-Crown Court at Guildford, ex parte Siderfin. [1989] 3 All. E.R. Q.B.D.
of his decision in the Queen's Bench Divisional court. Allowing her appeal, on the basis that the Crown Court had not applied the correct test, the judge of the Queen's Bench Divisional Court, sent the case back to the Crown Court for a proper application of the criteria set out within the Juries Act. He ruled that the law is that anyone who has grounds of conscientious objection, will not automatically be exempted. He or she, has to show that his religious beliefs would prevent him from performing his duty as a juror in a proper way. The judge concluded with the following:—

"We feel it right to repeat in conclusion that membership of a religious sect or movement cannot be regarded as a passport to excusal from jury service. Excusal is a personal matter. Every application must, as we have said, be determined on its own facts and strictly according to law."

In such a case, the religious or moral views of the individual are not absolute in themselves and have to be seen in their overall context of each person's civic duty. If those reasons of conscientious objection are such that they would not permit a person to act as a juror in a proper way, then he would be excused from this duty.

10.3.3. Refusal to comply with road traffic legislation on conscientious grounds of objection

There is likewise, generally, no exception determined purely on religious grounds that would enables a person, a motorist or a cyclist, to evade compliance with the road traffic legislation. The road traffic legislation is there to protect the general public, for the common good and the safety of other road users. In some cases a statute permits a person not to comply with a specific provision, it there are reasonable grounds. If a motorist or cyclist has strong religious views or reasons of conscientious objection, for non-compliance with a

982 The special court, having inter alia, powers to intervene and ensure that administrative justice is applied in inferior courts. Decisions of inferior courts can be reviewed and controlled by court orders of (a) certiorari (b) mandamus and (c) prohibition. Mrs Siderfin sought the remedy of certiorari, which would give the Queens Bench Divisional court the power to investigate the reasons and the criteria which the crown court had used and exercised its discretion.

983 Ibid. p.13.

984 One clear exception is the wearing of crash helmets, to be considered later.
statute, he must demonstrate that for him not to comply, would be reasonable. The religious reasons or the motives of conscientious objection, are those contemplated by Parliament within the statute.

Under the Road Safety Act 1967,\textsuperscript{985} it is an offence for a motorist, without reasonable excuse, to provide a specimen for a laboratory test in pursuance of a requirement imposed by the Act. Failure to provide a specimen without reasonable excuse, renders a person guilty of an offence. If a person has genuine religious grounds for failing to comply with the Act, it has been determined that those grounds alone do not constitute a reasonable excuse.

In the case of R-v-John (Graham),\textsuperscript{986} the appellant had been charged with failing, without reasonable excuse, to supply a specimen of blood for a laboratory test, contrary to the above section of the Act. He had been stopped by the police and his breath had smelt of alcohol. He refused to supply a sample of blood on the grounds that he genuinely believed he possessed certain faith healing powers, derived from the presence in his blood of divinely given gifts. He contended that he therefore had a "reasonable excuse" for refusing to supply blood.

The Court of Appeal judges rejected this defence. The defence of reasonableness, would only apply where the mental or physical condition of the defendant was such that he would be unable to comply. His own personal beliefs and religious convictions were held to be irrelevant. On a matter of public policy, where the physical health and safety of the public is concerned, a person will not be able to escape from criminal liability merely on the grounds of religious belief or conscientious objection. His or her, own particular religious beliefs are no statutory defence.

Grounds of religious belief, is nevertheless a statutory defence for Sikh motorcyclists and Sikhs on construction sites. It is a requirement of the Sikh religion that a Sikh wear a turban in public. The wearing of a crash helmet, with or without a turban, is a breach of this principle. Sikhs are now exempt, by road traffic and employment legislation, to wear crash or safety helmets.\textsuperscript{987}

\textsuperscript{985} Section 3. Replaced by the Road Traffic Act 1972.

\textsuperscript{986} [1974] 2 All E.R.

\textsuperscript{987} The Motor-Cycle Crash-Helmets (Religious Exemption) Act 1976. This exemption applies to "any follower of the Sikh religion" (section 1).

The Employment Act 1989, section 11. By this section, a Sikh is exempted from wearing a
10.3.4. Oaths and Affirmations generally.

One of the results of religious toleration in England generally, has been that whereas before, it was incumbent upon all to take an oath, of personal loyalty to the Crown, so as to be able to assume a civil or military office or when summoned to give evidence in any English Court, this legal obligation has been relaxed to accommodate religious and all moral sensibilities. For those who hold religious views or who cannot take an oath for reasons of conscientious objection, they are now permitted to make a solemn affirmation. The effects of an affirmation are the same as an oath. Thus those who hold the Jewish faith and for religious reasons cannot take an oath as well as other faiths, are permitted to solemnly affirm.

The Oaths Act 1978, provides that:—

"(1) Any person who objects to being sworn shall be permitted to make his solemn affirmation instead of taking an oath.

(2) Subsection (1) above shall apply to a person to whom it is not reasonably practicable without inconvenience or delay to administer an oath in the manner appropriate to his religious belief as it applies in relation to a person objecting to be sworn."\(^{988}\)

Regarding the taking of oaths and affirmations, this branch of the law has been allowed to develop in a far more flexible manner than other legal areas. The right to affirm is recognised and no special burden of proof is requires.

10.4. THE CONSCIENTIOUS OBJECTION TO RECEIVE MEDICAL TREATMENT AND CRIMINAL LAW GENERALLY.

A conscientious objection to receive medical treatment, whether based on religious grounds or not, needs to be considered in two categories. The first, where adults are concerned. The second, in cases of young children and where their parents or guardians hold particular religious beliefs. To what extent will safety helmet on a construction site, whilst wearing a turban.

\(^{988}\) Section 5 of the Oaths Act 1978.
English law permit a parent or guardian to impose his or her grounds of conscientious objection on the child?

10.4.1. Legal right of adults to refuse medical treatment.

As a matter of law, any adult is entitled to refuse medical treatment, even if this should result almost certainly in his or her death. This refusal can be based on several grounds, religious or otherwise. Take the example of one of the followers of the Jehovah Witness's sect. If a member of this sect refuses a blood transfusion for religious reasons, the courts will not intervene, unless that refusal is a result of the undue influence of another person. Where the Court, based on the facts in front of it, decided that the person had been under the undue influence of another person, it ruled that the patient has not properly given his consent. It therefore authorised an operation, overriding the wishes of the patient.989 and overruled the wishes of the patient on the basis that there was no consent.

10.4.2. Legal position of medical treatment on children.

In cases of young children and minors, the courts will apply a different policy and especially where the mother has decided to keep her unborn child within her womb or the child to whom she has given birth is very young. The intervention by the Court is justified legally on the basis that another life is in existence. The religious opinions of the parent cannot be used or be considered to be an adequate or sufficient excuse to deny adequate medical assistance to the child. If a child should die, because the parent for religious reasons has refused to give him proper medical treatment, deemed to have been necessary by the court, then the conscientious objections of the parent will be no defence to the crime of manslaughter.990

989 Re T [1992] 4 All E.R.

990 English law distinguishes between the crimes of (a) murder and (b) manslaughter. For murder, there must be an intention to kill or seriously wound the victim, who dies within a year and a day after the injury. For manslaughter, there is no intention to kill or cause serious injury, even though the victim dies as a result of the actions of another. The crime of manslaughter can arise through gross negligence.
In 1899, in the case of *R-v-Senior*\(^{991}\) the defendant was a member of a Christian religious sect called "the Peculiar People." Following his religious beliefs, he had refused to allow his child of nine months to be treated by a doctor. The child died and the defendant was convicted of criminal manslaughter. He had caused the death of his child, by "wilful neglect" contrary to the Prevention of Cruelty to Children Act 1894. The defendant had been the father of twelve children, of whom seven had died. More than one would have appeared to have died because of the defendant's religious beliefs. The case, on appeal, was considered by the Lord Chief Justice, Lord Russell of Killowen, who said:—

"Mr Sutton contended that because the prisoner was proved to be an affectionate parent, and was willing to do all things for the benefit of his child, except the one thing which was necessary in the present case, he ought not to be found guilty of the offence of manslaughter, on the ground that he abstained from providing medical aid for his child in consequence of his peculiar views in the matter; but we cannot shut our eyes to the danger which might arise if we were to accede to that argument, for where is the line to be drawn? In the present case the prisoner is shown to have had an objection to the use of medicine; but other cases might arise, such, for instance, as the case of a child with a broken thigh, where a surgical operation was necessary, which had to be performed with the aid of an anaesthetic; could the father refuse to allow the anaesthetic to be administered?"

The offence under the Act of 1894 has since been replaced by Section 1 of the Children and Young Persons Act 1933. Under this Act, a parent or guardian, can only be guilty of a wilful act and not an omission. If the parent or guardian, has religious or moral objections, and those objections prevent the person from having a proper understanding that the child needs medical assistance, then this would constitute a good defence.

In order to save the life of the unborn child, paradoxically where the mother for religious or reasons of conscientious objection has refused to have an abortion, the courts will also intervene to sanction whatever medical treatment is considered best for the unborn baby. The courts will authorise a medical operation, to save the life of the unborn baby, despite the objections of the

\(^{991}\) 1 QB Court for Crown Cases Reserved.
mother. In one reported case, the mother was a "born-again" Christian. She had refused to have a caesarean birth. Her religious objections were overridden.992

In summary, where the individual has strongly held religious or moral views which prevent him or her, on grounds of conscience from receiving medical treatment and provided that those are genuinely and freely held, without the undue influence of another, the courts will not intervene. No matter how unsound or unorthodox the opinions, English law will respect the rights of the patient to self determination. Where another person is concerned, such as a young child or an unborn baby, the courts will intervene and in cases, will override the religious or moral objections of the mother. The courts will not necessarily conclude that because the parents or those who have parental rights, have moral or religious objections or beliefs, for such reasons it would be in the best interests of the child to deny urgent medical treatment.

10.5. RELIGIOUS EDUCATION AND PARENTAL RIGHTS GENERALLY.

Another area of equal interest and relevance, concerns the rights of parents and guardians over their children, whether in the field of religious education or their rights qua parents or guardians. To what extent does English law recognise their right to object to matters which they feel unacceptable for their children.

10.5.1. Religious education.

By the Education Act 1944 and the Education Reform Act 1988,993 there is a legal obligation on all maintained schools-whether directly controlled by the local authority or subject to their general supervision to provide acts of collective worship and religious education. The local authority also has the general legal duty to set and to monitor the syllabus for the teaching of all secular subjects so as to maintain standards. Parental concern has been voiced over the last twenty years, over the syllabuses and teaching materials used which often reflects very permissive views, especially in the field of sexual ethics.

Under English law, the general position is that a child's religion and his religious education are matters for the parents to decide, until he or she reaches


993 The provisions of which were examined within chapter 9.
the age of discretion. The mother has equal responsibility with the father.  

Where there is a dispute as to the religious upbringing of a child, then the policy is that the court will decide in accordance with the best interests and welfare of the child. The parent of a child has the right, at a maintained school, to withdraw a child from its acts of collective worship or its religious education classes. This legal right is exercised very rarely and according to a survey carried out by the Assistant Masters Association in 1975, most children withdrawn are those of Jehovah Witnesses. Parents also have the right under English law, to withdraw their children from school on any day exclusively set apart for religious observance by the religious body to which their parents belong.

The legal right to withdraw a child from religious worship and religious education, on grounds of religion or conscience, does not apply to secular subjects. So parents have no right to withdraw a child from a class on sexual ethics and education, taught outside a class of religion. This is the policy laid down by the Department of Education and Science, when considering a request by Plymouth Brethren parents that they be allowed to withdraw their children from classes involving the use of computers and television.

In cases where parents have had a moral or religious objection to the general moral atmosphere of a school, such as a mixed sex school, and so have refused to send their children to such school, their objections have been no defence to a charge of failing to ensure the proper education of their children. A Muslim parent in 1972, was convicted of not giving his daughter a proper education for refusing to send her to the local co-educational secondary school. He held strong convictions that the general atmosphere there would not be conducive for his daughter's moral welfare. The court refused to accept this as a defence. Where parents have strong objections to a particular school, then they must take

994 The Children Act 1989, section 2.
995 Ibid. Section 1.
alternative measures to educate their children. Either sending them to a different school or setting up their own school in conjunction with other parents.

In Government maintained schools, teachers are by law required to teach and follow an agreed teaching syllabus. They are not permitted to depart from this on moral or religious grounds. A teacher not prepared to follow the agreed syllabus, could find himself in disciplinary proceedings and with the threat of dismissal from his job. In 1977, a teacher who had refused to give an undertaking to teach the story of Genesis as "myths and legends", which did not conflict with evolutionary theories as the agreed syllabus, was dismissed from his post as head of religious studies in a comprehensive school. He lost his claim for unfair dismissal.998

The Education Act 1980, section 6(2) gives to parents a limited right to choose and to elect the schools for their children, in accordance with their own wishes and religious considerations. Parental wishes need not always be followed and a voluntary aided school can operate an admissions policy, giving preference to children of a particular religion. A single sex Roman Catholic school, which was attractive for the parents of two girls, a Hindu and a Muslim, had operated a selection procedure in favour of Catholics and then Christians. That was held to be lawful, taking into account the religious character of the school.999

10.5.2. Parental Rights generally.

The most important case, in recent years, which demonstrated the way that Parliament has been prepared to override and to lessen parental rights involved the legal action of Mrs Gillick, the mother of ten children, five of which were girls. Mrs Gillick, on grounds of conscience, had objected to advice given by the Department of Health and Social Security. The Department had issued guidelines to Area Health Authorities, stating that it was in their view, legal and therefore lawful for medical doctors in certain circumstances to prescribe the contraceptive pill to girls under the age of sixteen without either the knowledge or the consent of their parents. Mrs Gillick challenged the right of the Department to issue such advice and maintained that the same was unlawful in that it encouraged criminal

998 Watson-v-Hertfordshire County Council (1977). This case and its source, can be found on page 590 of Bailey, Harris, Jones, Civil liberties; cases and materials.

activity and undermined parental authority. Mrs Gillick sought from the Court a declaration:—

a) against the *Department* that on its true construction, the Department had given advice which was unlawful and wrong and which adversely affected or might adversely affect the welfare of her children, and/or her rights as a parent and custodian of her children and/or her ability to properly and effectively discharge her duties as a parent and custodian and

b) against the *Area Health Authority* that no doctor or other professional person employed by them either in the Family Planning Service or otherwise might give any contraceptive and/or abortion advice and/or treatment to any of her children below the age of 16 without her prior knowledge and consent.  

The case, as it raised issues of public importance, received much public attention. It was originally heard in the Queen's Bench Division in 1983, where the trial judge dismissed Mrs Gillick's claim. On appeal to the Court of Appeal, the claim and the relief sought by Mrs Gillick was allowed by all three judges of that court. On final appeal to the House of Lords, by three decisions to two, the advice given by the Department was ruled to have been lawful and so Mrs Gillick had lost her legal battle.

The fact that three different courts, decided the matter on different principles, indicated that the judiciary was by no means unanimous on their reasoning. The crux of the issue was whether Parliament had allowed parental rights to be moderated, to be diminished in this most important area? The majority decision of the House of Lords came to that conclusion. It held that (i) the National Health legislation indicated that Parliament regarded contraceptive advice and treatment as *essentially medical matters* and that there was no statutory limit on the age of the persons to whom contraceptive facilities might be supplied and (2) that a girl under the age of 16 had the legal capacity to consent to such medical examination and treatment if she had sufficient maturity and intelligence.

The legal result was clear. Doctors and medical staff had the legal right, in certain circumstances, to act against parental authority and to ignore their grounds of conscience. In effect, this legal decision demonstrated that parental authority could be replaced by that of medical staff. Doctors were legally permitted to follow their clinical judgement and without breaking the law, to prescribe the contraceptive pill as well as give medical advice to a minor, without parental knowledge and consent. Their conclusions on the maturity and

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intelligence of the young girl in question, and the prescription of contraceptive
to be medical matters, above traditional moral criteria and
parental authority.

Lord Templeman, one of the dissenting judges, however, did not agree with
this reasoning and concluded that the issue could not be separated from ethical
concerns. He concluded that the case raised important social issues. He
commented:

"My Lords, in this appeal, social issues are entangled with legal issues. In
my view, the law is consistent with social policy in forbidding the provision of
contraceptive facilities for young girls who are under the care and protection
of a parent without the involvement of the parent. But social issues need not
finally be decided and are not best determined by lawyers or by doctors."

10.6. EMPLOYMENT LAW—GROUND OF CONSCIENCE AND RELIGIOUS HOLIDAYS.

The domain of English labour law has been another important area where
grounds of conscience have been brought before the courts and judges have
been asked to determine whether a worker can, for reasons of conscience,
legitimately refuse to join a trade union. Other cases have arisen whereby
workers have joined a particular religion and this has led them to seek a change
in the terms of their employment to permit them to follow their religious
convictions. When this has been denied, they have argued that they have
suffered discrimination on grounds of conscience.

What is the approach of English law and to what extent have the decisions of
the employment and higher tribunals facilitated an employee in the area of work
practices to follow his or her conscience? The answer depends upon the
objections of the employee and whether the relevant trade union legislation,
recognises the concept of conscientious objection. If it does, then whether the
individual rights of the worker can be protected and safeguarded in such a way
that the rest of the workforce and the rights of the employer are not overtly
prejudiced.

10.6.1. Trade Union legislation.

In 1974, by the Trade Union and Labour Relations Act, Parliament had enacted
legislation whereby employers and employees could operate a "closed shop
agreement", by virtue of which all employees of that employer or all employees of the same class, could be required to join a specified independent trade union or a number of independent trade unions. In such cases, where an employee had refused to join a trade union, he or she could be dismissed and this would be fair grounds for a dismissal, not entitling the employee to receive any compensation unless

"the employee genuinely objects on grounds of religious belief to being a member of any trade union whatsoever or on any reasonable grounds to being a member of a trade union, in which case the dismissal shall be regarded as unfair."

How did the courts interpret an objection of conscience based on moral grounds as opposed to religious reasons? Were they the same and could an objection of conscience, for moral reasons, be regarded as being reasonable? In the case of Saggers-v-British Railways Board the Employment Appeal Tribunal ruled that moral grounds were not the same as religious. So even if an employee had strong moral grounds of conscience for refusing to join a trade union, his circumstances were not protected by an objection based upon religious principles reasons. He could therefore be dismissed from his employment, unless those moral grounds were reasonable.

This case concerned a railwayman who was a Jehovah Witness. He had refused to join a union after 1974, when his employers began to operate a closed shop agreement, basing his objections on religious reasons. One of the important facts of the case was that other members of his religious group, did not object to union membership. Was this such an important and an overriding factor so as to be conclusive and to demonstrate that the employee did not have genuine religious grounds? The Court decided that what mattered was not the religious beliefs of his co-religionists, but his personal religious beliefs. Provided that an employee had genuine religious grounds (not other conscientious grounds) of objection, then he or she would be legally protected and entitled for religious reasons to refuse to join a trade union.

10.6.2. Refusal to comply with other working conditions.

1001 Schedule 1. para. 6.

1002 (Employment Appeal Tribunal) 1977.
Apart from a refusal to join a trade union for reasons of religious belief, problems of conscientious objection have arisen with employees who have refused to comply with the terms and conditions of their employment on grounds of conscience. Where an employee has joined a particular religious group, whose tenets prevent him from complying with his existing contract of employment or where new conditions are imposed on the whole workforce unilaterally but which impinge upon his religious beliefs. Once again, the courts have had to try and weigh very carefully, the beliefs of the applicant and his objections and balance these against the general effect that this could have for the rest of the workforce. In other words, the rights of the employee to follow his conscience for religious or moral reasons, where recognised, cannot be absolute.

In the case of *U.M.Esson-v-London Transport Executive* the applicant had within the course of his employment, become a member of the Seventh Day Adventist sect and so had refused to work on a Saturday, for religious reasons. He had either re-organised his work day, gone off on sick leave or simply did not appear for work. His employers, after warning him that he was in breach of contract, as his terms and conditions required him to work on Saturdays, dismissed him. He claimed damages for unfair dismissal. The Industrial Tribunal ruled that he had been fairly dismissed. It was deemed to be unreasonable to expect the employer to permit the employee to break his contract, for religious reasons, especially where he had changed his religious beliefs and there was a staff shortage of bus drivers able to work on Saturdays. His religion and his conscience were his affair. If he had changed his religious beliefs so that they affected his employment, then he should seek other employment which was compatible with his new beliefs.

The situation envisaged within the above case, that is an employee taking paid time off work to be able to fulfil his religious duties and therefore for reasons of conscience, came before an industrial tribunal in 1978. The issue related to a devout Muslim teacher, who placed great reliance upon section 30 of the Education Act 1944, which read

"Subject as hereinafter provided, no person shall be disqualified by reason of his religious opinions or of his attending or omitting to attend religious worship, from being a teacher in a county school or in any voluntary school..."
Mr Ahmad, a devout Muslim had taken time off work every Friday to attend prayers at a mosque. He had worked between 1968 to 1974 and when told by his employers that he was unable to attend a mosque, he was transferred to a school only twenty minutes away. Every Friday, he would absent himself for prayers at the nearby mosque, missing 45 minutes of teaching time and causing disruption for his colleagues who objected. He was told that if he continued to visit the mosque he would have to give up his full time post and apply for a lower salary. He objected and resigned, claiming unfair dismissal.\textsuperscript{1004}

Lord Denning, rejected Mr Ahmad’s claim for unfair discrimination, on the basis that it could never have been the intention of Parliament to permit teachers to absent themselves from teaching, on full pay and so causing disruption to other staff. Freedom from religious discrimination in this area, had to be interpreted properly. Mr Ahmad had been aware of his conditions of contract, from the time when he commenced employment and so should have made it clear to his employers from the very beginning that he needed to take a half a day of leave for Fridays. Lord Denning went on to explain, that to have permitted Mr Ahmad to continue to absent himself from work, for religious reasons, would have given him greater religious freedom than his fellow employers.

Other instances, involving the imposition of working conditions and which affect the sensibilities of a particular ethnic group, have led to the provisions of the Race Relations Act being invoked, to determine whether they are lawful.\textsuperscript{1005} In \textit{Panesar-v-Nestlé Co. Ltd}, a Sikh, who wore an unshorn beard for reasons of religion as well as race, brought an action for discrimination against a company who had a policy of not permitting its employees to have beards for reasons of hygiene. He had been told that he would be wasting his time if he applied for the vacancy being advertised, unless he was prepared to shave his beard. He brought an action against the company, alleging indirect discrimination.\textsuperscript{1006} The court decided that the company were justified in imposing this condition for the benefit of the rest of the Company and for general grounds of hygiene. Likewise, it has been held to be a reasonable requirement imposed for working conditions that the whole of the nurse uniform should be worn, where a lady Sikh had applied for a nurse training course and was told that she could not wear trousers

\textsuperscript{1004} Ahmad-v-Inner London Education Authority [1978] 1 All E.R.

\textsuperscript{1005} The Race Relations Act 1976, section 1 and which contains provisions outlawing direct and indirect discrimination based on colour, race, nationality or ethnic or national origins.

\textsuperscript{1006} The case was decided in the Court of Appeal I.C.R. (1979).
for religious reasons.\textsuperscript{1007} It was also ruled to be reasonable that a Sikh should be required to wear safety headgear, whilst working in a dangerous working environment, even though this conflicted with his religious beliefs. In the latter case, the overall civil liability of the employer and the safety of other employees was specifically emphasised and the tribunal ruled that it would have been otherwise unreasonable for the employer to have waived this newly imposed condition, for the benefit of one employee.\textsuperscript{1008}

\textbf{10.6.3. Religious holidays.}

As a matter of law, apart from the state and public holidays traditionally linked to the Christian calendar, there is generally no right to take or absent oneself from work simply for religious reasons. Holidays for such occasions will need to be negotiated, both sides using goodwill and common sense. Where an employer refuses to grant special leave, and there is no statutory obligation to give it, unless the refusal can be shown to have been based on indirect racial discrimination or on lack of natural justice, then an employee or person will not be able to demonstrate that his conscience and religious views have not been respected.

In \textit{Ostreicher-v-Secretary of State for the Environment},\textsuperscript{1009} the plaintiff was a devout Jewishess and had lodged an objection through her surveyor to a compulsory purchase order in respect of houses which she owned. Her surveyor was informed of the date when the inquiry would be held, which coincided with a Jewish festival day. Her surveyor objected to the date for religious reasons and was subsequently told by the local authority that she could arrange for herself to be represented. Nothing further happened and after the inquiry was held, she appealed to the Court of Appeal applying for the order which confirmed the compulsory acquisition of her property to be set aside. She claimed breach of natural justice. Her claim was dismissed by the Court of Appeal. Lord Denning, said that the local authority had acted reasonably. They had taken into account her religious objections and had allowed her the possibility of independent representation. She had not taken up the offer and the fact that the inspector had chosen to continue the inquiry was perfectly reasonable. Her religious

\textsuperscript{1007} Kingston & Richmond Area Health Authority-v-Kaur (1981) IRLR

\textsuperscript{1008} Sing-v-British Rail Engineering Limited (E.A.T.) (1985).

\textsuperscript{1009} [1978] 3 All E.R.
objections had to be balanced against the rest of those participating in the inquiry.

A different conclusion, regarding respect for religious holidays was reached in a case where a firm, which had previously allowed its Muslim employees who had worked for ten years to take off time for a religious holiday, had changed its policy. Henceforth the Muslim employees were told that they would be required to work on such a day. This was held to be indirect discrimination, contrary to the Race Relations Acts 1976.1010

10.7. CONSCIENTIOUS OBJECTION FOR JOURNALISTS.

We conclude the case of conscientious objection by briefly considering the whole area of journalism and legal privilege. No such legal notion has been recognised by the courts and generally speaking, refusal to disclose sources for reasons of conscience will not be justifiable. So in the case of X-v-Morgan Grampian Limited1011 a journalist was ordered to disclose his information, after he claimed that his conscience prevented him from so doing. He was dealt with for contempt of court. Lord Bridge said

"...to contend that the individual litigant, be he a journalist or anyone else has a right of "conscientious objection" which entitles him to set himself above the law if he does not agree with the court's decision is a doctrine which directly undermines the rule of law and is wholly unacceptable in a civil society."

10.8. CONCLUSION.

The law relating to liberty of conscience has developed since the Second World War within English law in parallel with greater freedom of religion. Unfortunately in several key areas, whilst the right has been grudgingly acknowledged by Parliament and the courts, it has been subject to extensive limitations. The last thirty years within England, have seen a number of statutes, removing

1011 [1990] 2 All E.R.
protection for the weakest members of society, the unborn. The most basic right of all, the right to life has been denied to those most vulnerable.

Medical doctors and nurses who refuse to participate, in the performance of abortion or experimentation with live embryos, bear the burden of proving that they have grounds of objection on conscience. In some cases, they may even be legally required to perform an abortion or face legal consequences and if they refuse to do so for reasons of conscience, they must be prepared to face a criminal prosecution and discrimination within their professional career. Not only are the grounds of conscience within the abortion legislation far too narrow, they are applied unfairly and are insufficient to protect all medical and ancillary staff. The Abortion legislation within the UK is one of the most liberal in the world. Where unborn children are detected as having bodily abnormalities, then this eugenic law can be applied to have them aborted. This legislation has created and generated the legal notion that it is a "woman's right" to have an abortion and the presumption that all doctors and ancillary staff are prima facie willing to carry out abortions. It is for this reason, that doctors and nurses, inspired by the principles of the Hippocratic oath, face difficult situations when they act according to their conscience and their convictions.

In other areas, the ability to rely upon grounds of conscience and to claim exemption from carrying out a civil right, depends upon the legislation that Parliament has enacted and the way that it has been interpreted by the judges. For military service as well as the carrying out of jury service, no citizen has the immediate right to opt out and refuse to fulfil his duties. Such a person also bears the burden of proving that he has well founded grounds and that they are held in such a way that they would prevent him from carrying out his duty.

The whole issue of parental rights has been given a new legal perspective by the courts. The House of Lords has interpreted family planning legislation in such a way that in defined cases medical practitioners can give contraceptive advice and facilities to young girls who are minors, notwithstanding parental opposition. The ability to prescribe the pill and to advise a young girl to abort her unborn child, has been legally justified on the basis that this is above all a medical matter, with morality and parental rights being relegated to a secondary position. The decision has been much criticised on the basis that English law as it stands, weakens the basic fundamental right of parents to educate their children not of age, according to their religious and moral convictions.
CONCLUSIONS.

This legal study has examined the role and the development of English Law on religion in England between 1532 and 1994. How the legislative process was used, initially as an instrument to forge the Established Church and then to punish religious dissent, when Henry VIII abandoned the classical concept of the separation of powers, ecclesiastical and civil, and proclaimed himself, by Act of Parliament, to be Supreme Head of the Anglican Church. By the end of the seventeenth century, constitutional theory within English law had evolved and developed to such an extent that it no longer was the exclusive instrument and tool of the monarch and of one particular religious group. With the supremacy of Parliament being established, English law has evolved and been adapted to reflect the views and opinions of Parliament and in particular jurists and philosophers of the eighteenth and nineteenth centuries.\(^{1012}\) The current status of English law, especially with regard to religion and conscience, has assumed a much greater importance in the general context of human rights over recent years. Moreover, since chapters nine and ten were written, the European Convention on Human Rights has been formally incorporated within English law.\(^{1013}\) For this reason, we set out below our general overall conclusions on the present approach of English law by reference to:-

the current morality which now underlies Parliamentary policy and court decisions, since this is necessary to provide the standards by virtue of which legislators and judges measure and test the role of conscientious objection

the established Church

freedom of religion generally and

liberty of conscience

The current morality underlying English law.

The present status of English law, as expressed in case decisions of the Courts and Acts of Parliament,\(^{-}\)has adopted a far more reduced role in determining matters of faith and religious belief. The change has been gradual, as centuries of prejudice enshrined within archaic legislation, has been eliminated. Both Parliament and the Judiciary have yielded to the view that religious toleration is

\(^{1012}\) In particular the English philosophers, John Stuart Mill and Jeremy Bentham.

\(^{1013}\) Under the Human Rights Act 1998. Most of the provisions of the Act have not yet been brought into force.
Conclusions

not only a good ideal, but is a right which should be recognised and guaranteed for all, especially as the United Kingdom is a multi-cultural and religious society.

Parliament has accepted that it is generally not competent to interfere with private matters of religious belief and worship and- with a few exceptions- to make participation in civic life, completely dependent upon holding the religious beliefs and practising the religious cult of the Established Church. The penal laws directed by and large against Catholics, which required them to support and to adhere to a set of beliefs taught by the Established Church, have largely been swept aside and Catholics, with other Christians, as well as Jews, Muslims and those who adhere to the new religious movements are now able to operate without discrimination. Religious liberty is therefore considered to be a right which is respected within the general framework of the law. Parliamentary policy will not positively outlaw the beliefs or morality of any religious group, unless they are deemed to be subversive of morality, a morality which coincides with governmental policy.1014 The problem arises when we examine the type of morality that is legally being promoted by Parliament, within its legislation and how this can and does undermine the religious tenets and beliefs of religious groups.

At the end of the last century, the English legal historian Maitland had written that the repeal of the provisions of most of the old penal laws, meant that in England “religious liberty and religious equality are complete.”1015 This was his conclusion following the decriminalisation of the religious beliefs of the Roman Catholic faith; when to be a practising Roman Catholic was no longer a crime and Roman Catholics were legally freed from the legal obligation to support and worship according to the religious system of a church to which they did not belong. The great nineteenth century statesman, Gladstone had previously advocated religious toleration on the basis that civil and criminal punishment for the merely holding of religious views differing from those of the Established Church should be abolished. He held the view that for there to be true religious toleration it was necessary that any

“civil penalty or prohibition be not employed to punish or to preclude a man’s acting on his own religious opinions ...it requires that no privilege or

1014 A religious group which preached racial hatred or sexual discrimination, would fall foul of the Racial discrimination and Sexual discrimination laws.

benefit which a person is capable of receiving rightly and of using beneficially
be withheld from him on account of his religious opinions as such."\textsuperscript{1016}

This represented a legal theory above all based upon Judaeo-Christian ethics
and morality. Where legislation and the judges, influenced by traditional
morality, would not punish an individual for acting in accordance with standards
of such behaviour. Since these comments of Gladstone, the law making process
in England has come to be less and less influenced by Christian morality and
more and more by utilitarianism and legal positivism.

In Pro-life issues, to cite one example, professional and ancillary medical staff
who act in accordance with their religious or moral beliefs and so refuse to
recommend or to perform an abortion, face the daunting prospect of being sued
for negligence or prosecuted for manslaughter, by criminal negligence.\textsuperscript{1017} This is
a clear cut case where traditional Judaeo-Christian ethics which had directed
both the civil and criminal side of this branch of English law, protecting unborn
life within the womb of the mother, have been largely swept aside and have
made way for a new morality, based on utilitarianism. This permissive legislation
regrettably reflects the loss of objective moral values and the loss of influence of
the Established Church.\textsuperscript{1018} Common consensus and what is perceived to be the
general utility of certain types of behaviour have become the overriding criteria
for determining the framework of the law.\textsuperscript{1019} For this reason, the current moral
principles promoted by different Governments and as appearing within their
social legislation, can only lead to more cases concerning conscientious objection
coming before the courts, as individuals-whether acting on religious or other
criteria- feel unable to comply with a system of values which do not represent

\textsuperscript{1016} This quotation can be found in Alec Vidler’s \textit{The Orb and the Cross}, 1945. Referred to in

\textsuperscript{1017} These were the comments of an English judge in the case of \textit{R-v-Bourne} \ [1939] K.B..

\textsuperscript{1018} For example, the 1967, the Abortion Act which liberalised the law on Abortion and
decriminalised the destruction of the unborn child. In 1990, the Human Experimentation and
Embryology Act has allowed the experimentation on fertilised human ova. The liberal laws on
divorce, beginning in 1973, with the Matrimonial Causes Act, brought into legal theory the no­
fault concept of divorce. In 1999, the current British Government wishes to reduce the age of
consent for homosexual activity to 16.

\textsuperscript{1019} In 1985, Mrs Gillick had finally lost her court case against the Government, whose lawyers
steadfastly argued that Doctors and health officials on their own moral criteria, could override
the moral and religious views of parents, and prescribe the contraceptive pill to young girls under
the age of 16 without parental consent. Mrs Gillick wrote an account of her legal action in \textit{A
Mother’s tale}, Hodder and Stoughton,
and go against their religious values. Such people must of course be prepared to suffer the legal consequences\textsuperscript{1020} of acting in accordance with their convictions, unless Parliament and the Courts are prepared to extend the legal scope of the concept of conscientious objection.\textsuperscript{1021}

**The Established Church.**

The growing secularism reflected within English legislation and the declining influence of the Anglican Church within civic life, signifies that the Established Church no longer commands, as in previous centuries, the influence that it had over the law making process. As its moral power has declined, there have been growing cries for the Anglican Church to be disestablished by law. Why it should still have a privileged status, over and above all other religious groups is becoming more and more difficult to justify. In chapter five, reference was made by the Labour member of Parliament, Mr Anthony Benn who in 1988 introduced unsuccessfully a private members’ bill to bring about the dis-establishment of the Anglican Church. His reasons for wanting to dis-establish the Church were to make it less a tool of the state of Parliament and to give the Church the independence she needs from the State. These reasons remain as valid as ever.

Juridically speaking, the Established Church essentially retains the peculiar legal and juridical structure given to it by Henry VIII in 1532, namely (a) the legal doctrine of the royal supremacy over the Church and (b) its legal independence from the Church of Rome.\textsuperscript{1022} The monarch remains the Supreme Governor, over all its ecclesiastical matters, whether juridical, legal or executive.\textsuperscript{1023} These theoretical powers, especially the legislative, are now exercised in a modern democracy under the modern constitutional doctrine of the Royal Prerogative. Since the supreme legislative and executive powers of the Crown were effectively acknowledged to be subordinated to Parliament in the seventeenth century under the doctrine of Parliamentary sovereignty, in reality

\begin{itemize}
  \item \textsuperscript{1020} As in the case of *Janaway-v- Salford Area Health Authority* [1989] A.C, where Mrs Janaway’ lost her case for dismissal, for refusing on grounds of conscience to type letters referring patients for an abortion.
  \item \textsuperscript{1021} See below, for our general comments.
  \item \textsuperscript{1022} The legal principles enshrined within the Ecclesiastical Appeals Act 1532, the Submission of the Clergy Act 1533, the Appointment of Bishops Act 1533, the Ecclesiastical Licences Act 1533, and the Act of Supremacy Act 1558 remain unrepealed.
  \item \textsuperscript{1023} The current canons of the Church of England make this clear. Under Canon A.7. the Queen is described as being the highest power under God in the Kingdom and the supreme power over all persons in all causes, ecclesiastical as well as civil.
\end{itemize}
Parliament controls and legislates for the Established Church and therefore has the last say over all its ecclesiastical laws. By members of the Church itself, the fact that all its own internal canons and that its Measures need the full approval of Parliament, without which they do not have legally binding force\textsuperscript{1024} on the whole Church, has been resented. Once Parliamentary sanction has been obtained, then any Measures cannot be challenged as the Courts will not interfere with the sovereignty of Parliament over Church affairs. This very clearly illustrates the continuing complicated relationship existing between the Established Church and the State\textsuperscript{1025} and hardly surprisingly many are calling for the position to be changed. How can it be justified that a religious body should ultimately be in the hands of a secular organ such as Parliament, with the latter retaining the power to legislate on matters of faith and belief? This is an additional reason for its dis-establishment and which would lead to it having greater freedom.

It is comprehensible, for historical and legal reasons, that the Supreme Head of the Established Church should still be a practising and communicating Anglican. The Act of Settlement of 1700, which has not been repealed, made this a legal sine qua non for any person to become the King or Queen of the nation. At the same time that the monarch is the head of the State, he or she is automatically the Supreme Governor of the Established Church. What is difficult to justify in the general legal climate of religious toleration, is the present legal restriction which prevents the monarch from marrying a person belonging to one particular religious group, i.e. those adherents of the Roman Catholic faith. Section 2 disqualifies any person from being the Sovereign if that person is reconciled to or becomes a Roman Catholic or who marries a Roman Catholic.\textsuperscript{1026} This law should be changed and the offensive provision removed by simply making it a legal condition that the monarch be unable by law, to marry any person other than a practising member of the Anglican Church. How can one

\textsuperscript{1024} Disagreements have occurred between the Church and Parliament. In 1929, Parliament had refused to give its approval to a New Prayer Book approved by the provinces of York and Canterbury respectively. Nearly sixty years later, a further conflict occurred when Parliament refused to approve the draft measure which had been given approval by the General Synod to ordain divorced and remarried men to the Anglican priesthood.

\textsuperscript{1025} This was illustrated in the reported decision in chapter five, of Williams-v-the Archbishop of Canterbury and others. The Times 11 November 1994.

\textsuperscript{1026} Under The Act of Settlement 1700. It is thought that any amendment to this Act would need the approval of all the Commonwealth countries, accepting the monarch as such. Cf. Bailey, Harris, Jones, Civil Liberties: cases and materials. p. 583.
justify this existing archaic provision? Why should one particular religious group be singled out for discrimination?

We also conclude that it would be more accurate to refer to the law of the Established Church as either Ecclesiastical or Anglican canon law, because of its overall subordination to Parliament law. It truly lacks independence from the State, unlike the canon law of the Catholic Church and the other religious bodies. Again, this is the price that it must pay for being the religion of the land, established by law. For so long as it lacks true independence, then it will be difficult for its own lawyers to proceed to any sort of codification of its law, bearing in mind that the law of the Established Church is complex and is guided by principles of English law.

The fact that the ecclesiastical law of the Established Church forms part of the general law of the land, and takes its place next to the side of other specialist areas of English law, does of course have its advantages. Legal decisions of the ecclesiastical courts are enforceable within the non ecclesiastical courts, like any other civil or criminal action. Yet that also brings with it the disadvantage, that its judgements can be challenged by the secular courts. How can it be justified that a secular court can not only review but also overturn a decision of a church tribunal?

As the judicial powers of the Monarch over the Established Church are now exercised by the judiciary and the executive functions, by her advisers, all appointments to the senior episcopal positions are no longer carried out by the Queen. Appointments are made, by legal convention, by the Prime Minister, on the advice of an ecclesiastical committee of the Church. The Prime Minister carries out such a decision, even if he or she is not a practising member of the Established Church. The Lord Chancellor, likewise, carries out other ecclesiastical functions hitherto reserved to and carried out by the Monarch, by virtue of her position as Supreme Head of the Church. Again, he or she, need not be a practising Anglican nor indeed a member of the Established Church, but will be prohibited from exercising such functions if a member of the Catholic or Jewish faith. For the reasons already indicated above, it is difficult to find a convincing reason explaining the secular involvement in the nomination of the most senior ecclesiastical positions within the Established Church, especially when the law unfairly discriminates against Catholics and Jews. The law could and should be amended, more in line with religious sensibilities, to make it clear

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1027 Under the Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical functions) Act 1974. This Act has been examined within Chapter eight.
that the religious functions attached to this office should only be exercisable by a
member of the Anglican Church, to the exclusion in general of all other religions
or creeds. It would be most appropriate to repeal, at the same time, all other
provisions within other Acts of Parliament which discriminate on grounds of
religion. 1028

Freedom of religion generally.

In chapter nine, we saw how the European Convention on Human Rights,
under Article 9, guaranteed the freedom of thought, conscience and religion for
everyone, with the right to manifest the same in private or public, whether in
worship, teaching, practice and observance. Article ten, guaranteed the freedom
of expression of those views, i.e. the right to proselytise and under Article
eleven, the right to freedom of peaceful assembly and association. These
positive rights are not paramount and are subject to certain safeguards,
including public order, health and morals. It has not been the practice of English
law to guarantee these convention rights positively, but in a negative manner.
The legal axiom has been that anyone can do whatever they like, unless this is
specifically prohibited by the law.

With the exception of the laws governing the Crown and the Established
Church,1029 all positive laws against religious freedom and liberty have been
abrogated and no-one is barred from taking any secular office, purely on the
basis of his religious views. There is now generally recognised, the freedom of
religion and for any individual to hold the religious views to whatever group he
may feel attracted. The prejudice which had been manifested in the Tudor and
Stuart times by the penal laws, largely aimed against Catholics portraying them
as treacherous and dangerous disobedient enemies of the State, has been has
been slowly overcome, with these laws being repealed. Parliament and the
Courts have acknowledged that theirs is not the task to determine the creed or
the faith of the individual who must act according to his conscience.

1028 The Sections of the Act of Settlement of 1700 and the Catholic Emancipation Act 1829.

1029 We have covered within chapters seven and eight, the civil law which still prevent Catholics
and Jews from exercising particular functions which may attach to a civil position, on the grounds
that their faith may endanger the Crown and the Established Church. Cf. Garth Moore, English
Canon law. Pp 161-162 for the complete list of posts barred to those of the Roman Catholic faith,
although the position with regard to the position of Lord Chancellor has been subsequently
changed. See the Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions)Act
1974.
The English courts now adopt a positive approach to all religions, whether Christian, Jewish, Buddhist, Moslem or the new religious movements. All that they legally require for a religion to be recognised is that its creed demands the acknowledgement of a higher deity or supreme being and that its adherents practice external cult for the public benefit. Provided that it can fulfil this criteria and that it can satisfy this requirements of charity law, then, whatever the religion, it will be recognised as being charitable by the state and so able to take advantage of Charitable status.

In isolated cases, Governments have tried to clamp down on and to outlaw some of the new religious groups and cults, but in general and unless it can be demonstrated that they foster and promote criminal activity, they have left them unmolested and foreign individuals belonging to these movements are not prevented from entering the United Kingdom for the purpose of proselytising. Successive English Governments have taken the attitude that citizens must take responsibility for their actions and for forming their views on religion. Parliament accepts that it is generally not competent to legislate on matters of religion and will not intervene unless it can be demonstrated that such religious views will threaten social order or public morality. This represents a return to the classical separation of the two orders, with the state accepting that it is incompetent to interfere with doctrinal matters of personal religious belief.

The fact that English law still retains an inbuilt bias in favour of Christianity and in particular, that as represented by the Established Church, is hardly surprising since Christianity is tied up with the history of the nation and is part of western culture and civilisation. For this reason, where it does give preference to any religion, it is to Christianity and to that of the Established Church. In practice, English law does try to accommodate and respect all other religious beliefs as much as possible. The rights to assemble for religious reasons and worship, are protected by the laws on public order. and Ecclesiastical law. Any religious worship, so long as it is conducted in a peaceful manner, is protected. Under Charity law, all the traditional religions are by and large able to operate and to set up places for worship and education, so as long as their purposes comply with the requirements of charity law and provide a demonstrable public benefit. This has been fairly narrowly interpreted by the Courts, and it cannot be just that an enclosed Community of Carmelite nuns is not able to receive charitable status, as they do not satisfy the test of giving a "public benefit."1030

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1030 The case is *Gilmour-v- Coats* [1949] A.C., studied in chapter eight.
In one particular area of English law, that concerning blasphemy, the Established Church enjoys special protection over and above all other religions. Civil groups have complained that the law as it stands, inhibits free speech within which they would include the right to insult the feelings and sensibilities of others. The recent case which found a newspaper and its editor, guilty of the common law offence of blasphemy\textsuperscript{1031} was held by the European Court not to contravene Article ten of the Convention.\textsuperscript{1032} The law is nevertheless too restrictive and the offence should be extended to protect the feelings and sensibilities of all religions. It is illogical to outlaw the dissemination of literature or films, where these promote one course of conduct i.e. violence and not where they attack and insult the religious sensibilities of individuals and communities.

**Objections of conscience.**

The legal notion of conscientious objection, as a legitimate ground of defence to the performance of a legal duty either under the criminal or civil law, is not globally recognised by English law. For obvious reasons, both Parliament and the Judiciary, are unwilling to create such a general right under the law. If every citizen refused to obey every law on grounds of conscience, then this behaviour would undermine the whole fabric of society. Governments and judges, therefore, face the delicate task of balancing the rights and the particular good of the individual with those of the common good.

The legal concept of objection on grounds of conscience, is the recognition by the state, that an individual in certain circumstances, on the grounds that it would be immoral or wrong for him to do so, is excused from carrying out a certain act. It is a negative right. Whether that negative right actually exists, depends upon the will of Parliament as interpreted by the judges. An Act of Parliament may specify that a criminal offence has been committed or that there is a civil wrong, if a citizen acts or refuses to act in particular way. In some cases, the particular statute in question may remove any punishment for conduct of the individual, if there exist “reasonable grounds.” In other instances, legislation may refer to the existence of a “good excuse” or “religious grounds” or a “conscientious objection.”

“Reasonable grounds,” a “reasonable excuse”, “religious reasons” and “conscientious objection” are not all the same. Grounds of conscientious objection may not be reasonable and furthermore, may not necessarily be based


\textsuperscript{1032} X and Y-v- United Kingdom. 28 DR 77 (1982).
upon the principles of a religion. Whether they exist, will depend upon the Act of Parliament and upon the judge, construing the statute. It is legally accepted that religious reasons are not the same as reasons, based on objections of conscience.\textsuperscript{1033}

For those who hold and act upon strong Judaeo-Christian or Moslem principles, a number of areas of English law must give them growing concern. The state of English law on the family, on education and medical ethics, particularly with reference to the unborn. Having abandoned traditional moral norms, Government policy is now orientated to legally promote “public health campaigns” which in fact facilitate the sexual activity of young teenage girls and boys, in spite of any perceived or actual parental opposition. The rights and wishes of parents can be ignored and overturned, and young children can be prescribed the contraceptive pill without parental knowledge and consent. This is as a result of the famous Gillick case. By its permissive legislation which has decriminalised abortion and allowed the killing of the unborn on very wide grounds, the state is deliberately promoting a policy of undermining the family, eugenics and above all failing in its duty to respect the moral order. The so called legal right to refuse on grounds of conscience to participate in the performance of an abortion, under more careful scrutiny, is of limited applicability.\textsuperscript{1034} All doctors and medical staff who are opposed to the destruction

\textsuperscript{1033} The case of \textit{Saggers-v-British Railways Board}. E.A.T. (1977), was to highlight this distinction. This case has also been cited in chapter ten.

\textsuperscript{1034} The Abortion Act 1967 and the Human Fertilisation and Embryology Act 1990. The onus is on the medical practitioner to prove that he has objections of conscience. This defence is not
of innocent human life, under any circumstances, must be prepared to act on their conscience and to defy what is in fact an unjust law.

available where the life of the mother is deemed to be in danger.
APPENDIX
Appendix A.

Table of Acts of Parliament and Measures of the Church of England consulted and referred to within the text.

Prior to Henry VIII

1279 Statute of Mortmain. 7 Edward I 1351 c.1.
Statute of Provisors of Benefices. 25 Edward III. c.6.

1353 Statute of Provisors. 27 Edward III. c.1

1393 Statute of Praemunire for purchasing Bulls form Rome. 16 Richard II c.5

1400 The Suppression of Heresies Act. 2 Henry IV c.15.

Under Henry VIII (1509-47)


Exoneration from Peter’s pence Act. 25 Henry VIII c.21.
Act of Succession. 25 Henry VIII c.22.

1534 The Act of Supremacy. 26 Henry VIII. c.1.
Act of Obedience. 26 Henry VIII. c.2
First Fruits and Tenths Act. 26 Henry VIII.c.3
Statute of Uses Act 26 Henry VIII c.10
Nomination of Suffragan Bishops Act. 26 Henry VIII c.14

1536 Dissolution of the Monasteries Act. 27 Henry VIII c.1.

1539 Dissolution of the Monasteries Act. 31 Henry VIII c.13.

1543 Suffragan Bishops Act. 35 Henry VIII c.16

1545 Act to allow married laymen to exercise Ecclesiastical Jurisdiction. 37 Henry VIII c.17.

Under Edward VI (1547-53)

1547 The Sacrament Act. 1 Edward VI c.1
Act touching the election of bishops. 1 Edward VI c.2
Abolition of Chantry Act. 1 Edward VI c.14

1548 Act of Uniformity. 2 & 3 Edward VI c.1
Act to take away all positive laws against the marriage of priests. 2 & 3 Edward VI c.21.

1549 Act for the abolishing of divers books and images. 3 & 4 Edward VI c.10.
The New Ordinal Act. 3 & 4 Edward VI c.12

1571 Ordination of Ministers Act. 13 Eliz. c.12
Act making it an offence to deny regal jurisdiction of the Queen and to accuse her of being a schismatic. 13 Elizabeth c.1
Act making it an offence to receive a Papal bull or to be reconciled to the Roman religion. 13 Elizabeth c.2.
Act making it an offence to take refuge abroad, without permission. 13 Elizabeth c.3 amended by 14 Elizabeth 1 c.6.

1581 Act making it an offence to be reconciled to the Roman religion and to hear Mass. 23 Elizabeth c.1.

1585 Act against Jesuits, Seminary priests and other such like disobedient persons. 27 Elizabeth c.2

1586 Act to make void conveyances to those who convert to Catholicism
<table>
<thead>
<tr>
<th>Year</th>
<th>Act Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1593</td>
<td>Act making it an offence to harbour recusants/limitations upon travel. 35 Elizabeth c.1 and 2</td>
</tr>
<tr>
<td>1603</td>
<td>Act to increase penalties upon convicted Catholics. 1 James I c.4.</td>
</tr>
<tr>
<td>1604</td>
<td>An Act for the better discovering and repression of popish recusants. 2 James I c.4</td>
</tr>
<tr>
<td>1608</td>
<td>Acts to impose further penalties preventing Catholics living within City of London; to enter various professions, accept commissions and act as guardians. 3 &amp; 4 James I c. 4 &amp; 5</td>
</tr>
<tr>
<td>1610</td>
<td>Acts, regarding taking oath of allegiance. 7 James I ch 2 &amp; 3</td>
</tr>
<tr>
<td>1627</td>
<td>Act to restrain the Passing or sending of any Popishly-bred beyond the Seas 3 Charles 1 Ch 3</td>
</tr>
<tr>
<td>1642</td>
<td>Clerical Disabilities Act.</td>
</tr>
<tr>
<td>1662</td>
<td>Act of Uniformity. 14 Charles II c.4</td>
</tr>
<tr>
<td>1664</td>
<td>Conventicle Act. 16 Charles II</td>
</tr>
<tr>
<td>1672</td>
<td>Act for preventing Dangers which may happen from popish recusants. 25 Charles II c.2.</td>
</tr>
</tbody>
</table>
1677  Act for the more effectual preserving the King's Person and Government, by disabling Papists from sitting in either House of Parliament. 30 Charles II c.2

1678  Act requiring every member of the House of Commons to take two oaths and to make declaration against popery. 30 Charles II st.c2.

**Under William and Mary (1688-1704)**

1688  Act for the amoving Papists and reputed papists from the cities of London and Westminster and ten miles distance from the same. 1 William and Mary c.9.

Toleration Act. 1 William & Mary c.118

1689  Bill of Rights of 1689.

Act to impose Penalties against those who refuse to take the oath of allegiance. 1 William and Mary sess 1. c.8 (reenacted 1 George I st 2 ch 13).

1696  Act permitting Quakers to affirm and not take an oath. 7 & 8 William.c.34

1697  Blasphemy Act. 9 & 10 W.3. c.32.

1699  An act for further preventing the growth of popery. 11 & 12 William and Mary sess 1 c.13

1700  Act of Settlement. 12 & 13 William III c.2

**Under Queen Anne (1702-14)**

1703  The Queen Anne's Bounty Act. 2 & 3 Anne c.20

**Under George I (1714-27)**
### Table of Statutes and Measures

<table>
<thead>
<tr>
<th>Year</th>
<th>Description</th>
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<tbody>
<tr>
<td>1715</td>
<td>Act for appointing Commissioners to enquire of the Estates of popish recusants. 1 Geo. I st 2 c.50</td>
</tr>
<tr>
<td></td>
<td>Act to oblige Papists to register their names and Real Estates. 1 Geo. I c.55</td>
</tr>
<tr>
<td>1722</td>
<td>Act for granting an aid to His Majesty by levying a Tax upon Papists.</td>
</tr>
</tbody>
</table>

**Under George III (1760-1820)**

<table>
<thead>
<tr>
<th>Year</th>
<th>Description</th>
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<tbody>
<tr>
<td>1778</td>
<td>Roman Catholic Relief Act. 17 Geo. III c 49</td>
</tr>
<tr>
<td></td>
<td>Roman Catholic Relief Act. 18 Geo. III c.60</td>
</tr>
<tr>
<td>1779</td>
<td>Nonconformist Relief Act. 19 Geo. III c.44</td>
</tr>
<tr>
<td>1791</td>
<td>Roman Catholic Relief Act. 31 Geo. III c.32</td>
</tr>
<tr>
<td>1801</td>
<td>House of Commons (Clergy Disqualification) Act. 41 Geo. III c.63</td>
</tr>
<tr>
<td>1813</td>
<td>The Doctrine of the Trinity Act. 53 Geo. III c.160</td>
</tr>
<tr>
<td>1817</td>
<td>Act to Regulate Administration of Oaths to officers in His Majesty's Land and Sea forces. 57 Geo. III c.92</td>
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</table>

**Under George IV**

<table>
<thead>
<tr>
<th>Year</th>
<th>Description</th>
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<tbody>
<tr>
<td>1829</td>
<td>Roman Catholic Relief (Emancipation) Act. 10 George IV c.7</td>
</tr>
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**Under William IV (1830-37)**

<table>
<thead>
<tr>
<th>Year</th>
<th>Description</th>
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<tbody>
<tr>
<td>1832</td>
<td>The Privy Council Appeals Act. 2 &amp; 3 Will. IV c.92</td>
</tr>
<tr>
<td></td>
<td>Roman Catholic Charities Act. 2 &amp; 3 William c.115</td>
</tr>
</tbody>
</table>
Under Queen Victoria (1837-1901)

1838   The Pluralities Act. 1 & 2 Vict. c.102
1840   The Church Discipline Act. 3 & 4 Vict. c.86
1840   The Ecclesiastical Commissioners Act. 3 & 4 Vict. c.113
1846   The Religious Disabilities Act. 9 & 10 Victoria c.59
1851   Act to prevent the Assumption of certain Ecclesiastical Titles in respect of places in the United Kingdom. 14 & 15 Vict. c.60.
1855   The Ecclesiastical Courts Act. 15 & 15 Vict.
       The Liberty of Religious Worship Act. 18 & 19 Vict.
       The Places of Worship Registration Act. 18 & 19 Vict. c.81.
1857   The Court of Probate Act. 20 & 21 Vict. c.77
1858   The Matrimonial Causes Act. 20 & 21 Vict. c.85
1858   The Jews Relief Act. 21 & 22 Vict. c.29
       The Charitable Trusts Act. 21 & 22 Vict..
1860   The Ecclesiastical Courts Jurisdiction Act.23 & 24 Vict. c.32.
       The Roman Catholic Charities Act. 23 & 24 Vict. c.134
1865   The Clerical Subscription Act. 28 & 29 Vict. c.122
1869   The Irish Church Act. 32 & 33 Vict. c.42
1871   The Universities Tests Act. 34 Vict. c.26
       The Ecclesiastical Titles Act. 34 & 35 Vict. c.53
1872   Act of Uniformity Amendment Act. 35 & 36 Vict. c.35
1874   Public Worship Regulation Act. 37 & 38 Vict. c.85
       The Colonial Clergy Act. 37 & 38 Vict. c.77
1892   The Clergy Discipline Act. 55 & 56 Vict. c.32
1898   The Benefices Act. 61 & 62 Vict. c.48
### Table of Statutes and Measures

**Under Edward VII (1901-10)**

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<tr>
<th>Year</th>
<th>Act Description</th>
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**George V (1910-35)**

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<tr>
<th>Year</th>
<th>Act Description</th>
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<tr>
<td>1914</td>
<td>The Church of Wales Act. 4 &amp; 5 Geo. V c.91</td>
</tr>
<tr>
<td>1919</td>
<td>The Church of England Assembly (Powers) Act. 9 &amp; 10 Geo. V c. 76</td>
</tr>
<tr>
<td>1925</td>
<td>The Interpretation Measure.</td>
</tr>
<tr>
<td>1926</td>
<td>The Roman Catholic Relief Act. 16 &amp; 17 Geo. V c.55</td>
</tr>
<tr>
<td>1929</td>
<td>The Parochial Registers and Records Measure.</td>
</tr>
<tr>
<td></td>
<td>The Infants life (preservation) Act.</td>
</tr>
<tr>
<td>1932</td>
<td>The Chancel Repairs Act. 22 &amp; 23 Geo. V c.20</td>
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**Edward VIII (1936)**

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<tr>
<th>Year</th>
<th>Act Description</th>
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<tr>
<td>1936</td>
<td>The Tithe Act. 26 Geo. V and Edward VIII c.43</td>
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</table>

**Under George VI (1936-52)**

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<tr>
<th>Year</th>
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<tr>
<td>1944</td>
<td>Education Act. 7 &amp; 8 Geo. VI c.31</td>
</tr>
<tr>
<td>1947</td>
<td>The Church Commissioners Measure.</td>
</tr>
<tr>
<td>1949</td>
<td>Representation of the People Act.</td>
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<tr>
<td></td>
<td>Marriage Act. 12 &amp; 13 Geo. VI c.76</td>
</tr>
</tbody>
</table>

**Under Elizabeth II (1952 —) (quoted by reference to their year, only)**
1961  Clergy Pensions Measure.
       The Suicide Act.
1963  The Ecclesiastical Jurisdiction Measure.
       Cathedrals Measure.
1964  The Church Commissioners Measure.
       The Faculty Jurisdiction Measure.
1967  Abortion Act
       Road Safety Act.
1969  Pastoral Measure.
       Synodal Government Measure.
1972  The Road Traffic Act.
1974  The Church of England (Worship and Doctrine) Measure.
       The Lord Chancellor (Tenure of Office and Discharge of
       Ecclesiastical Functions) Act.
       The Juries Act/
1976  Race Relations Act.
       Motor Crash Helmets (religious exemptions) Act
1988  Education Reform Act.
1990  Clergy (Ordination) Measure.
       Human Fertilisation and Embryology Act.
1993  Charities Act.
<table>
<thead>
<tr>
<th>Year</th>
<th>Statute/Matter</th>
</tr>
</thead>
</table>

Appendix B.

Table of Cases cited.\textsuperscript{1035}

Abrahams-v-Cavey [1968] 1 Q.B.\textsuperscript{1036}
Ahmed-v- Inner London Educational Authority [1978] 1 All E.R.\textsuperscript{1037}
Airedale N.H.S. Trust-v- Bland [1993] A.C.\textsuperscript{1038}
Alkard-v-Skinner (1887) 36 Ch. D.
Attorney-General-v-Dean and Chapter of Ripon Cathedral [1945] Ch 239, 244
Attorney-General-v-Guardian Newspapers Limited (No 2) [1988] 3 All E.R. 545
Attorney-General-v-Power (1809) 1 Ball & B.
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Barker-v-Warren (1677) 2 Mod
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Bishop of Exeter v Marshall (1868) L.R. 3 H.L. 17
Blathwayt-v-Baron Cawley [1976] A.C. 397
Blundell's Trusts (1861) 30 Beav. 360
Bourne-v-Keane [1919] A.C.815

\textsuperscript{1035} The old English reported cases, prior to 1865 are to be found within the English Reports, a collection compiled of all the old case decisions. Throughout the text, these cases have been identified with the description (E.R.)

\textsuperscript{1036} A decision of the Queens Bench Court. Unless otherwise indicated, these decisions are to be found within the Weekly Law Reports (W.L.R.) for that year.

\textsuperscript{1037} The All England Law Reports.

\textsuperscript{1038} Appeal Court i.e a House of Lord’s decision. To be found within the W.L.R. of that year.
Brown (1898) 1 L.R.

Buckley-v-Daly

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Carberry-v-Cox (1852) I.R. Ch. 1039

Caudrey's Case (1591) 5 Co. Rep 1a

Caus [1934] Ch.162


Clarke (1901) 2 Ch.

Cocks-v-Manners (1871) L.R.

Cooper-v-Dodd (1850) 7 notes of Cases 514

Cowan-v-Milbourn (1867) L.R. 2 Exch.

Davies-v-Presbyterian Church of Wales [1986] 1 W.L.R.

Dawson-v-Small (1874) L.R.

De Windt-v-De Windt (1854) 23 L.J. Ch 776

Diplock [1948] Ch

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Gillick-v West Norfolk & Wisbech Area Health Authority [1986] A.C.

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Kingston and Richmond Area Health Authority-v-Kaur (1981) I.R.L.R.

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R-v-Chancellor of St Edmunsbury and Ipswich Diocese, Ex Parte White [1947] K.B.

R-v-Chief Metropolitan Stipendiary Magistrate, Ex Parte Choudhury [1991] All E.R.


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R-v-Gay News and Lemon [1979] A.C.

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