II. SHOULD THE PRESBYTERIAN CHURCH IN AMERICA REMAIN INCORPORATED?

by Douglas Kelly

Oklahoma Presbytery sent an overture to the Thirteenth General Assembly of the PCA requesting a study of the theological implications of the denomination's remaining incorporated. The central concern of the Oklahoma Presbytery overture was: "...a corporation is considered to be under the jurisdiction of a state" but "...the church of Jesus Christ is under no jurisdiction of human government."

Your committee responds to this request as follows:

I. The Historical Background of Incorporation

A study of Western Civilization, especially since the Constantinian settlement in the fourth century A.D., indicates that the concept of incorporation has come into economic and political currency by way of the Christian Church.[25] The inspired

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25 The practice of ecclesiastical incorporation is, historically speaking, a post-canonical development, and therefore as such, is not specifically inculcated by particular passages of scripture. It is, however, a development which is consistent with the general principles of the Word of God in the spirit of the Westminster Confession, I. vi:

> ...There are some circumstances concerning the worship of God, and government of the church, common to human actions and societies, which are to be ordered by the light of nature and Christian prudence, according to the general rules of the word, which are always to be observed.

More particularly, incorporation is a legitimate development of the Biblical concept of the fellowship or assembly of the people of God (who, for instance, need to possess a meeting place—equivalent to the Tabernacle or Temple in the OT and synagogue in the NT, and who need the functional authority of the legal structures of the society in which they must live in order to receive, control and disburse funds in accordance with the divinely inculcated goals of the fellowship, e.g. I Cor. 16:1-3 and II Cor. 8:4,10,11). That is, the people of God or corpus Christ! (body of Christ, I Cor. 12:27), being an embodied fellowship, need—within the appropriate legal structures of their particular generation and culture—a place for "the body" to be and means to gather, maintain, control and disburse funds for the wellbeing and increase of the body (I Chron. 17:12 and Luke 4:16). That is, the church is not merely a spirit, but is a real body in space and time, and thus is obligated to care for that body within the structures of the real world. Incorporation is a legitimate means to these Biblically necessary ends (of care, maintenance and increase of the body) in the legal structures of the real world.

Furthermore, post-Constantinian (4th century A.D.) incorporation of the church is a legitimate development of the central Biblical concept of covenant. "For all the promises of God" in the Covenant of Grace (running through both Old and New Testaments) in Christ "are yea, and in him Amen..." (II Cor. 1:20). These covenant promises, of which Christ is the sum and substance, are based on the unvarying fidelity and utter consistency of the character of God, who has confirmed the immutability of his counsel by "oath and promise" (Heb. 6:15-18). The constitutional basis or bylaws of various ecclesiastical incorporations are based upon the Biblical covenant practice of specifying promises, threats, limits, benefits and liabilities, and then consistently carrying out the terms of the constitution, thus "walking in the truth" (III John 3).

A partial synopsis of the traditional Roman Catholic teaching on incorporation is given in Code of Canon Law: Latin English Edition (Canon Law Society of America: Washington, D.C. 20064), 1983, Canons 96-144; 1254-1310. From a conservative Protestant viewpoint, R. J. Rushdoony has written concerning ecclesiastical incorporation from a positive stance in Christianity and the State (Ross House Books, 1986), chapter 25, and in "Position Paper No. 50" (Chalcedon, P.O. Box 158, Vallecito, CA 95251). Gary North has written critically of church incorporation in I.C.E. Position Paper No. 1, July

Pauline teaching that the Church is the "body of Christ" (i.e. corpus Christi) in solidarity with the Old Testament people of God caused the church to be understood as a divine incorporation. At the root of this corporate concept is the Biblical doctrine of covenant and federal headship.

In the development of Medieval History, the church in virtue of its divinely ordained corporate identity was therefore also a primary, legally recognized incorporation with appropriate power to inherit, receive, buy, sell, and control property and other forms of wealth. As time went on, through canon law, common law, and later statute legislation in the various European countries, a whole body of legal rights, privileges, immunities, responsibilities, and liabilities were recognized as inherent in the concept of the church as a divinely ordained, legally accepted incorporation.

Partly because most of the civil servants of the Medieval and early Modern kingdoms were religious clerics (who were expert in canon law), many aspects of church corporate theory and procedure were applied by analogy to various departments of the civil government as well as to merchant guilds and trading companies. While it is not our purpose to pursue the details of this complex history, we must recognize that incorporation is a Christian concept, which by analogy has been applied in many other fields outside of the Church proper. To identify the historical origin of the corporation is of course by no means sufficient to settle the question of its current validity.

II. The Contemporary Legal Advantages and Disadvantages of Incorporation

The influential eighteenth century English legal scholar, William Blackstone, dealt with the important legal advantages of ecclesiastical corporations in his epoch-making *Commentaries on the Laws of England* (so influential on the founding documents of the United States). Significant contemporary work has also been done on the advantages of church incorporation. Attorney Wendell R. Bird has summarized the legal benefits as follows:[26]

> The legal advantages of incorporation include (1) limitation of personal liability, (2) litigation in the corporate name, (3) convenience in holding property, (4) availability of financing, (5) limitation of charitable trust regulation, and (6) better protection of the organizational name.

1. Limitation of Personal Liability. Incorporation produces a limitation of personal liability on both contract claims and tort claims, whereas an unincorporated status brings a greater threat of personal liability for church members and non-church organization members. Examples of contract liability are claims of creditors such as construction contractors and printers, and examples of tort liability are slips and falls on stairways, bus accidents, and athletic injuries. Although it is possible for an unincorporated organization to purchase insurance, tort claims often are made that far exceed the maximum insurance coverage available, and the claimants would therefore have to sue all members of the organization as well as the unincorporated ministry. Furthermore, liability insurance is often more expensive for an unincorporated organization than for a corporation. Director and officer insurance is very difficult if not impossible to obtain for an unincorporated ministry, and if available is generally more expensive for an unincorporated ministry. An unincorporated ministry should

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1984. The differing positions have been discussed by Martin G. Selbrede in *Dominion Network*, Vol. One, No. One, Jan/Feb. 1985, pp. 14-15.

26 Wendell R. Bird, "Ought Christian Ministries Incorporate?" (Atlanta, GA, no date), pp. 2-4.

consider whether it has a moral obligation to inform prospective members as well as existing members of their potential personal liability for such claims.

2. Litigation in the Corporate Name. An incorporated ministry is ordinarily sued in its corporate name, whereas an unincorporated association must be sued in the names of all members, and an unincorporated trust often is sued in the names of all members as well as of the trust itself. Such suits, besides producing the possibility of personal liability as mentioned above, cause cautious members to have to pay for separate legal counsel, and in the event of conflicts of interest between governing boards and members would make it necessary to pay for two or more teams of attorneys in the absence of written consent to joint representation. Furthermore, litigation initiated by an unincorporated ministry in many states must be filed in the names of individual members rather than the association, and the defendant often will file a third-party claim against some or all individual members.
3. Convenience in Holding Property. An incorporated ministry finds it much easier to hold property than an unincorporated association. This is both because property can be held in the corporate name instead of in the names of all members, and because transfers of property are easier to accomplish with far fewer legal documents necessary. Although it is possible for an unincorporated ministry to hold property in trust, that is also more cumbersome because of the additional documents necessary for property transfers, and because of the almost inevitable omission of some future-acquired property under the trust terms. Moreover, as pointed out below, property held by a trust is subject to charitable trust regulations in some states that do not apply to religious ministry property held by an incorporated ministry.
4. Availability of Financing. An incorporated ministry has the option of issuing church bonds (if it complies with applicable securities laws), whereas an unincorporated ministry cannot issue bonds in most jurisdictions. A corporation also can more readily borrow significant funds through a line of credit or a long-term loan, whereas an unincorporated ministry either cannot feasibly do so or generally can borrow funds only with personal guaranties of wealthy members or officers.
5. Limitation of Charitable Trust Regulation. Charitable trust statutes generally do not apply to incorporated ministries other than for specific trusts that they establish, whereas they do apply directly to all property of unincorporated ministries that choose a trust form. On the other hand, common law trust requirements would apply equally to charitable corporations and trusts.
6. Better Protection of the Organizational Name. A corporate name is generally easier to protect legally than an unincorporated association name. Although a fictitious name can be reserved, in most states that filing must be made in each county, whereas the corporate name is reserved for the entire state.

There are also certain legal disadvantages of incorporation. These are also summarized by Wendell Bird:[27]

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27 Ibid., pp. 4-6.

LEGAL DISADVANTAGES OF INCORPORATION

1. Expenses and Formalities for Corporations. Incorporation does involve filing and legal costs for establishment, amendment, and dissolution. However, generally higher costs are incurred in drafting professional legal documents for a charitable trust or for an unincorporated association, although these can be amended and dissolved more easily if necessary. An annual form must be filed by corporations in most states to maintain corporate status, but many states require similar filings by trusts, and the federal tax forms are the same for all forms of organization. Although minutes are required for corporations, such minutes ordinarily would be kept for all other forms of organization. Although statutory requirements exist for corporations, most requirements in most states are only presumptive and a nonprofit corporation may select contrary provisions.
2. Constitutional Protections and Governmental Regulations for Corporations. In general, corporate status does not reduce the constitutional protections enjoyed by religious ministries. The First and Fourteenth Amendments recognize the same protection for religious corporations, trusts, and associations. Corporate status also does not increase the governmental regulations applicable to a ministry in comparison with the regulations that would be applicable in trust or unincorporated association form:
   Employment standards, discrimination laws and requirements concerning withholding of income taxes for employees apply to associations whether incorporated or not. Finally, when state and local taxation is levied upon an association, it is usually unaffected by the group's corporate status.
   The same is true with securities laws, charitable disclosure laws, labor laws, Social Security and unemployment compensation and other federal taxes, sales and use and other taxes, and property and intangibles and other local taxes.

* J. Jacobs, *Association Law Handbook* 15 (1981). *Accord*, B. Hopkins, *The Law of Tax-Exempt Organizations* 503 (3d ed. 1979); H. Oleck, *Non-Profit Corporations, Organizations and Associations* 18 (3d ed. 1974); G. Webster, *The Law of Associations* 2-3 (rev. ed. 1976); see G. Lamb & C. Shields, *Trade Association Law and Practice* 185 (rev. ed. 1971).

III. Current Problems with Ecclesiastical Incorporation

Your committee recognized that while the historic concept of incorporation is rooted in Christian history, nonetheless there are serious contemporary problems with corporate theory and practice, which are of legitimate concern to the Christian. Perhaps the two central problems most discussed among conservative Christian critics of incorporation are the ethical question of corporate "limited liability" and the allegedly "implied subordination" of the incorporated church to the state.[28]

As to the very real ethical problem of corporate limited liability, this committee feels that it is not our task to enter into either the generalities or specifics of this matter which largely devolves upon secular corporations. This is a legitimate and important task, but it is not our task. We are presently concerned only with the ethics of the

28 See article by North (Footnote 1).

church as an incorporation, and presumably there is no accusation that the church has been using the tool of limited liability in any unethical way.

The real concern over church incorporation (as for instance in the Oklahoma Presbytery overture) would seem rather to be a fear of implied subordination to the secular state. This committee believes that while it is certainly possible for a given church to concede too much to the secular state in its particular incorporation procedures, nevertheless, the mere fact of legal incorporation by no means has to imply a recognition of statist authority over the church. But what would be the appropriate response if a church was felt to have conceded too much in its incorporation papers?

IV. Suggested Solutions to the Problems Raised by Ecclesiastical Incorporation

First, your committee believes that problems and abuses connected with modern statist ideas of incorporation do not justify jettisoning the entire, age-old concept. It is not proper "to throw out the baby with the bath water." For the church to be incorporated is to say no more and no less than to confess that the church is a divinely ordained institution, which looks to God—not to the state—for its right to exist and to handle its own affairs with integrity. Historically, the civil government has simply recognized the corporate rights and independent jurisdiction of the church in its own realm as a previously existing fact (a fact not created by the state, but rather given by God and merely recognized by the state). At the same time, the Church recognizes the state as a divinely ordained institution, and realizes that certain transactions and relationships of the church within the body politic and with the civil government itself have properly been recognized and regularized in terms of specific legal procedures.

Therefore, when a church in a particular country seeks incorporation it is not necessarily doing anything other than specifying in mutually accessible legal terms that which already exists by divine right. To do such has nothing to do with a subordination of the Body of Christ to the civil authority. Incorporation is not subordination, but the recognition of mutually independent jurisdictions. This, at any rate, is the general situation.

Some in our denomination, however, are of the opinion that the Certificate of Incorporation of the PCA in Delaware concedes too much authority to the state and implies an inappropriate subordination to civil government. Those who hold this view should propose amendments to our Certificate of Incorporation rather than seeking to dissolve the incorporation of our denomination. Prior to proposal of these amendments, however, they should be studied by competent legal counsel for tax and constitutional implications.

Moreover, we need to keep in mind that as Bird has pointed out, "In general, corporate status does not reduce the constitutional protections enjoyed by religious ministries." Or to state this negatively, a church's being unincorporated does not in the least remove it from having to deal with the same laws and regulations faced by an incorporated church in an increasingly secularized society. To the contrary, to be unincorporated may in fact cause the church more practical problems than to be incorporated. The real problem is of course not with incorporation but with humanistic secularization. The church must use all the means within its power (including incorporation) to maintain its right to preach and practice the Gospel in order to reverse the secularism of our time. For these reasons your committee recommends that the Presbyterian Church in America retain its incorporated status.

