

GOSPEL AND ORDER

AS THE SOCIETY'S 1997 RESIDENTIAL CONFERENCE DRAWS NIGH MARK HILL¹ OFFERS A TASTE OF MANCHESTER

In his obituary to the late Chancellor Garth Moore, Chancellor Quentin Edwards QC recalled one of Garth's constant sayings: '*It may be possible to be a theologian without being a canonist; but it is impossible to be a canonist without being a theologian*'.² The recent Lyndwood Lecture³ marking, as it did, the first joint venture between this Society and the Canon Law Society of Great Britain and Ireland, brought into sharp focus some of the differences between Anglican and Roman Catholic canonists. The laws of the latter reveal a more visible and systematic theology whereas those of the Church of England are unashamedly positivist both in form and ostensible origin. This paper⁴ seeks to consider the role of the Gospel in the contemporary governance of the Church of England and to isolate—but not resolve—certain of the 'practical parish problems' which will fall to be addressed at the forthcoming residential conference.

The twentieth century has seen two watersheds in ecclesiastical jurisprudence.⁵ The first in time was the publication in 1947 of the Report of the Archbishops' Commission on Canon Law⁶ and the second, ('a singular day in the history of Latin Catholicism'⁷) was the revised *Code of Canon Law* which was promulgated on 25 January 1983 and came into effect the following November. The Archbishops' Commission had taken eight years to report, and its recommendations then took the best part of two decades to be brought into effect. The 1983 Code represented the culmination of over twenty years' work.

What the 1983 Code produced—and what it replaced—was a comprehensive and codified body of general and specific laws concerning the life and functioning of the Roman Catholic Church.⁸ It is similar in form to civil law codes familiar in Roman law and in continental jurisdictions. The Code is divided into seven books, each sub-divided into several titles, yet is a cohesive unity to the whole. It is a harmonious collection both of principles (theological and jurisprudential); of substantive laws; and of rules of practice and procedure. It is of universal application but falls to be supplemented, as necessary, by bodies of particular law in national churches.

Contrast this with the law of the Church of England—an amorphous mixture of Acts of Parliament, Measures, canons, cases, rules, guidelines, episcopal statements

¹ Barrister, Deputy Chancellor of the Diocese of Winchester.

² Church Times, 15 June 1990. Accordingly it is with some diffidence that I proceed with this paper, being (forgive the oxymoron) but a humble barrister.

³ Brian Ferme, 'William Lyndwood and the Provinciale—Canon Law in an Undivided Western Church', London, 2 November 1996. This lecture, the text of which is reproduced elsewhere in this volume, grew from an idea of O. W. H. Clark Esq. and evidences the power and effect of the letters column of this Journal: see (1993) 3 Ecc LJ 46.

⁴ It had its genesis in a sermon delivered at Keble College, Oxford, on 17 November 1996. I am grateful to the Warden and Fellows for their hospitality, and to Dr Norman Doe, Fr Robert Ombres OP and the Revd Richard Barrett who kindly commented upon earlier drafts.

⁵ The term 'jurisprudence' poses a difficulty in that it has a particular meaning and function within the Roman Catholic Church in relation to the Curia, namely the accumulation of decisions marking a certain direction in doctrine, ie antecedent as opposed to precedent. See the Code of Canon Law (1983), Canon 19.

⁶ *The Canon Law of the Church of England* (SPCK London 1947).

⁷ See the Editors' Preface to *The Code of Canon Law—A Text and Commentary* (Coriden, Green & Heintschel (eds) 1985), p. xv.

⁸ For a discussion of some of the deficiencies in the 1917 Code of Canon Law relating to the subject matter of this paper, see P. Winniger, 'A Pastoral Canon Law' Concilium 8 (1969) 28, and A Greerley, 'Canon Law and Society' Concilium 8 (1969) 67.

and other forms of quasi-legislation—created, amended and re-amended over time.⁹ It is of the common law model. But is the theology of the law diminished by its disparate nature? Can there truly be said to be an articulated ecclesiology of the law of the Church of England? What did the Turnbull Report mean when it spoke of the building up of a dialogue between Christian theology and organisational theory?¹⁰

Canon A5 provides that ‘The doctrine of the Church of England 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.’¹¹ Further, Article XX of the Thirty-nine Articles reads, ‘it is not lawful for the Church to ordain anything that is contrary to God’s Word written’. Accordingly, one takes as a starting point the biblical teachings of Christ, for instance the commission given by Christ to his Apostles to bind and to loose,¹² or Christ’s teaching regarding the resolution of disputes.¹³

As to the manner in which the canon law has since emerged and developed, Roman Catholic jurists such as Fr Robert Ombres place it very firmly in a theological and spiritual context. He acknowledges that the Church is the body of Christ, built on him and having as its foundation the apostles and prophets.¹⁴ He further speaks of canon law resting on a base of eternal and natural laws and mapping and sustaining the God-given summons to a life of liberating yet disciplined mutuality and conviviality not in an arbitrary manner but intuitively.¹⁵ It provides real opportunities for spiritual growth. Divine law is often equated with natural law being the source of canon law. *Ius divinum* is the original law. Compared with it, says Steinmuller, *ius humanum* is only a shadow image of law. Because divine church law is a law of the spirit, a law of grace and love, the ecclesiastical law giver has a corresponding legal obligation to mirror this material structure in his human church law in so far as he can.¹⁶ Note however that the secular courts have exhibited a singular reluctance to recognise appeals by litigants to the divine law.¹⁷

Urresti goes further and contrasts the respective sciences of law and theology.¹⁸ Theology, he says, studies revealed data in order to formulate revealed truth which it defines it with doctrinal judgments. Canon law ‘receives these theological data in generic form as they concern the basic social structure of the church and particularises them in its laws.’ He indicates that the practice of theology serves to discern the will of Christ whereas canon law prescribes the manner in which that will is to be fulfilled. One can see how the regulation of sacramental

⁹ For a useful analysis of the institutional sources, purposes, subject matter, nature and enforceability of the law of the Church of England, see N. Doe *The Legal Framework of the Church of England—A Critical Study in a Comparative Context* (Clarendon Press, Oxford, 1996), p. 16. Dr Doe’s new book is an excellent and erudite tome, being both exhaustive and exhausting.

¹⁰ *Working as One Body*, Report of the Archbishops’ Commission on the Organisation of the Church of England (The Turnbull Report) (Church House Publishing, 1995), para. 1.3.

¹¹ Revised Canons Ecclesiastical, Canon A5. It goes on to say that such doctrine is to be found, in particular, in the Thirty-nine Articles, the Book of Common Prayer and the Ordinal.

¹² Matt 16:19, 18:18, 19:28, 28:18; Luke 10:16, 22:28–30; John 20:21.

¹³ Matt 18:5–17. See also Heb 12:14; Col 1:28; and 1 Cor 5:11–13.

¹⁴ R. Ombres OP, ‘Why then the law?’ [1974] *New Blackfriars* 296.

¹⁵ [1974] *New Blackfriars* 303.

¹⁶ W. Steinmuller, ‘Divine Law and its Dynamism in Protestant Theology of Law’ *Concilium* 8 (1969), 13 at 20.

¹⁷ *Blake v Director of Public Prosecutions* [1993] Crim LR 586, DC. For a fuller transcript, see M. Hill *Ecclesiastical Law* (Butterworths, 1995), p. 13. Note, however, the constitutional right of a jury to return what is often styled a perverse verdict exemplified in the criminal damage trial in 1996 in Liverpool Crown Court which related to aircraft destined for East Timor. As to the question of abhorrent legislation generally, see *Oppenheimer v Cattermole* [1976] AC 249, [1975] 1 All ER 538, HL, discussed in Hill, p. 9.

¹⁸ ‘Canon Law and Theology: Two Different Sciences’ *Concilium* 8 (1967) 10.

freedoms such as to be baptised, to marry and to be ordained facilitates spiritual growth.

So much for theorising.¹⁹ It is something of an alien—or at least undeveloped—concept in the Church of England, by law established, by law governed and by law regulated. In the Report of the Archbishops' Commission on Canon Law²⁰ it is stated, 'The Church needs not only laws but a science of law, its own system of jurisprudence, if it is to do its work.'²¹ Can one be divined?²² Sir Robert Phillimore commences his seminal work *The Ecclesiastical Law of the Church of England*²³ as follows:

'The Church is a society of men instituted for the worship of God, bound together by the profession of a common faith, the practice of divinely ordained rites, and resting upon a visible external order. Such a society was unknown to heathen antiquity, and is the peculiar creature of Christianity'.

In the century which has passed since those words were written, little has changed save, arguably, the introduction of inclusive language. Phillimore asserts that truth is imparted in a society by instruction and society endeavours to secure the observance of moral and religious precepts and by a revelation of the will of God. For an archiepiscopal view of the function of canon law one can usefully turn to the Most Reverend Geoffrey Fisher, who stated in 1957:

'The dominant note of Canon law is not one of legal restriction or of enforcement by charge and punishment. The general purpose of the Canons is to set out a generally agreed norm or standard of behaviour to govern the family affairs of the church.'²⁴

He indicated that the new Canons of the Church of England would derive their authority from the fact that they were approved by the membership of Convocation, both bishops and clergy, and by the laity who were involved in the process of canon making. Accordingly they would reflect 'the general mind and consent of the church' and would have 'the great moral authority' which comes from such consent. A duly authorised norm of behaviour is one to which both sides to a dispute can refer. Thus, he says, 'unity and fellowship will be increased and opportunities of discord decrease.'

How then do we see this nascent theological jurisprudence reflected in the law? Let us take some examples. Synods—both diocesan and deanery—and parochial church councils are exhorted to consider and express opinions on matters of reli-

¹⁹ The more stoical reader may care to read E. Corecco, *The Theology of Canon Law—A Methodological Question* (Duchesne University Press, 1992), reviewed in this Journal by Fr Robert Ombres OP at (1994) 3 Ecc LJ 175; N. Doe, 'Towards a Critique of the Role of Theology in English Ecclesiastical and Canon Law' (1993) 2 Ecc LJ 328; T. I. J. Urresti, 'The Theologian in Interface with Canonical Reality' 19(2) *Journal of Ecumenical Studies* (1982) 146; L. Orsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation* (Collegeville, Minnesota, 1992); and R. Barrett, 'Canon Law or Canonical Theology?' 60 *ITQ* (1994) 17–38.

²⁰ See note 6 above.

²¹ *The Canon Law of the Church of England*, p. 5.

²² N. Doe in *The Legal Framework of the Church of England* searches, sometimes in vain, for such a jurisprudence. Dr Doe's work is probably the best discussion since Richard Hooker, *The Laws of Ecclesiastical Polity* (c 1594), Books 1 to IV, ed R. Bayne (New York, 1907). It may be that there is scope for a Hart/Devlin type debate subjecting law and theology to the same critical comparison as law and morality. In this regard, see Basil Mitchell, *Law, Morality and Religion in a Secular Society* (Oxford University Press, 1967), and J. N. D. Anderson, *Morality, Law and Grace* (Tyndale, 1972). I am grateful to the Revd John Rees for providing the latter references.

²³ Sweet & Maxwell (2nd edn., 1895).

²⁴ See The President's address to the Full Synod of Convocation on 21 May 1957. I am grateful to Edward Pinsent of the Church of England Records Office for his assistance in researching Convocation archives and to Canon Peter Boulton for alerting me to this train of enquiry—would that time had allowed more than an *Awayday!* Records of debates in synod contain a wealth of wisdom, and following the House of Lords decision in *Pepper v Hart* [1993] AC 593, [1993] 1 All ER 42, recourse may well be had to these debates on questions of intention and interpretation in like fashion to Hansard.

gious interest but may not purport to declare the doctrine of the church on any question²⁵. Thus the *magisterium* remains vested in General Synod.²⁶ The secular courts, by the same token, have held back from trespassing upon matters of doctrine which are essentially the private affair of an individual church.²⁷ Note also how the distinction between doctrinal and other matters is reflected in wholly separate procedures of clergy discipline²⁸ and in appeals from faculty matters.²⁹

Further, statutory force has now been given to the principle that any person or body carrying out functions of care and conservation under any law relating to churches 'shall have due regard to the role of a church as a local centre of worship and mission'.³⁰ Curiously, this principle has been stated not to apply to chancellors since, *inter alia*, their function is not one of care and conservation but of hearing and determining a cause of faculty.³¹ However, it would appear that this exclusion does nothing to affect the duty and practice of chancellors. There is a useful source of material for a discussion of gospel and order to be found in the decisions of the consistory courts, but a detailed discussion is beyond the scope of this paper.³²

The *Parochial Church Councils (Powers) Measure 1956* places upon PCCs and ministers the *duty* to 'consult together' on matters of general concern to the parish³³ and lists as one of the PCC's functions 'co-operation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical'.³⁴ This gives form and force to what is, in essence, Christ's teaching. Note that in this and related Measures and canons, the guiding principle has been one of co-operation between priest and parish in their collective ministry.³⁵ It is therefore regrettable that despite recognising the 'vital importance of founding our work on a proper theological understanding of lay ministry',³⁶ the recent General Synod Working Party Report devoted merely twenty-three lines to the matter³⁷ and proceeded to recommend a manner of selection of churchwardens contrary both to its own brief statement on theology and to the present trend.³⁸

Clergy discipline is another area where law and theology converge. The Report of the General Synod Working Party Reviewing Clergy Discipline and the Working of

²⁵ See the Synodical Government Measure 1969 (No. 2), ss 4(2), 5(3), and the Parochial Church Councils (Powers) Measure 1956 (No 3), s 2(2)(b) (substituted by the Synodical Government Measure 1969, s 6).

²⁶ See Doe, *The Legal Framework of the Church of England*, p. 258.

²⁷ 'I would certainly deprecate any attempt on either side to put before the court essentially theological or doctrinal disputes': Simon Brown LJ when granting leave to move for judicial review in *R v Ecclesiastical Committee of the Houses of Parliament, ex parte The Church Society* (1993) Times, 4 November. See also *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1993] 2 All ER 249, [1992] 1 WLR 1036 at 1042H.

²⁸ Ecclesiastical Jurisdiction Measure 1963 (No 1), Parts II–VII (ss 14–48). The author notes with some satisfaction that *Under Authority* (see note 39 below) proposes that this distinction be abandoned: see para 7.25. Such satisfaction may not be shared by some members of the General Committee of this Society: see the Report of the ELS Working Party on Clergy Discipline and Ecclesiastical Courts (1996) 4 Ecc LJ 510 at 514, para 5.4.2 and note 15.

²⁹ Ecclesiastical Jurisdiction Measure 1963, ss 7, 10.

³⁰ Care of Churches and Ecclesiastical Jurisdiction Measure 1991 (No 1), s 1.

³¹ See *Re St Luke the Evangelist, Maidstone* [1995] Fam 1 at 6G–7E, [1995] 1 All ER 321, Ct of Arches.

³² See, however, T. Briden and R. Ombres OP, 'Law, Theology and History in the Judgments of Chancellor Garth Moore' (1994) 3 Ecc LJ 223.

³³ Parochial Church Councils (Powers) Measure 1956, s 2(1) (substituted by the Synodical Government Measure 1969, s 6, and amended by the Church of England (Miscellaneous Powers) Measure 1983 (no 2), s 5).

³⁴ Parochial Church Councils (Powers) Measure 1956, s 2(2)(a) (as so substituted and amended).

³⁵ For a general discussion of the powers and duties of the parochial church council, see M. Hill, *Ecclesiastical Law*, pp 89 ff.

³⁶ *Lay Office Holders*, Report of General Synod Working Party (GS 1164), May 1995, para 4.

³⁷ See *ibid.*, paras 5, 6.

³⁸ See *ibid.*, para 49. See also *Re St Peter, Roydon* [1969] 2 All ER 1233, [1969] 1 WLR 1849, Cons Ct.

the Ecclesiastical Courts³⁹ merits careful reading. An entire chapter⁴⁰ is devoted to 'basic principles' which contains a very full discussion of scriptural and historical aspects of discipline and the entire report is underscored by reference to ecclesiology. This is to be applauded.

Furthermore, one can be confident that whatever may result from the Report of the Archbishops' Commission on the Organisation of the Church of England,⁴¹ the discussion will be fully informed and built upon sound principles of theology and ecclesiology as adumbrated in the opening chapters of the Report for which the authors, candidly and justifiably, 'make no apology'.⁴²

It is of more than passing interest that to encourage an ecumenical approach to work and to recognise the increasingly international nature of much of the Synod's business, the Standing Committee of the General Synod recently added to the functions of many of its boards and councils the phrase 'to exchange information and advice in matters relating to [relevant work] with other Christian Churches in the British Isles and abroad'.⁴³ This reflects a number of changes brought about through the *Sharing of Church Buildings Act 1969* and the *Church of England (Ecumenical Relations) Measure 1988*. Whilst these provisions and those of Canons B43 and B44 are of a primarily practical nature, they are indicative of the evolving theology of ecumenism.

These and many other issues of topical concern will fall to be examined at this Society's residential conference in Manchester on 14–16 March 1997. On Saturday 'practical parish problems' (broadly classed as property or discipline) will be introduced by the Ven. George Austin and the Ven. Michael Hill and, in a departure from previous conferences, there will be formal group discussion on specific matters. A panel, including the Bishop of Durham, will conclude the conference on Sunday morning.

The keynote address, however, will be given on Friday evening by the Archbishop of York. The Society awaits with interest his views on the legal and theological themes to be addressed. Forty years on since Geoffrey Fisher's comments and on the tenth anniversary of the formation of this Society, it is comforting that we continue to explore how, through the laws of the Church of England, 'God means to increase yet more the unity of the family, that with one mind, and one mouth we may glorify God'.⁴⁴

³⁹ *Under Authority*, Report of General Synod Working Party (GS 1217) (Church House Publishing, 1996). At the time of writing it is hot off the press.

⁴⁰ *Ibid.*, ch. 3.

⁴¹ *Working as One Body* (see note 10 Above).

⁴² See *ibid.*, chapters 1, 2. The quotation is to be found in para 1.3. The laws which govern the Church of England are but one aspect of its organisation which relies upon human gifts for effective management. 'We live out of the resources which God in his love has promised and given, by the Holy Spirit shed abroad in the hearts of the faithful': para 1.5.

⁴³ See *Board and Council Constitutions Quinquennial Review*, Report of the General Synod Standing Committee (GS 1136) (13 October 1994).

⁴⁴ The President's address to the Full Synod of Convocation, 21 May 1957.