THE CANON LAW OF THE CHURCH OF ENGLAND: ITS IMPLICATIONS FOR UNITY †

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Among lawyers who profess to know their way about the labyrinth of the Church of England's legal foundations there is a debate whether there are two subjects or one – are ecclesiastical law and canon law the same? As some purists contend that canon law is more restricted in its scope I shall take, for convenience and perhaps accuracy, the description ecclesiastical law, which certainly comprehends, or should comprehend, canon law. The ecclesiastical law of the Church of England is derived from six sources (1) papal and domestic canon law, (2) ecclesiastical common law, (3) the relevant parts of the Corpus Juris Civilis, (4) parliamentary statutes, (5) Measures of the Church Assembly and the General Synod, (6) the Canons.

Let me briefly deal with each of these in turn:

1 Papal and domestic canon law: By papal law I mean the Corpus Juris Canonici and by domestic canon law the legatine and provincial constitutions of the middle ages. These latter were local and often temporary measures taken by the English ecclesiastical authorities to secure that the provisions of the canon law contained in the papal codes were properly carried out. This existing canon law was preserved by s.7 of the Submission of the Clergy Act, 1533 so far as it was not "contrary or repugnant to the laws, statutes and customs of this realm".

2 Ecclesiastical common law: A law older than that contained in the papal codes and derived from immemorial usage, and ecclesiastical counterpart to the temporal common law. Sir John Nicoll, a great 19th century canon lawyer, said that a right may exist as a part of the common law of this land, as part of the "lex non scripta", which is of binding authority as much in the ecclesiastical as in the temporal courts.

3 The relevant parts of the Corpus Juris Civilis: The statement that these form part of English ecclesiastical law is theoretically true but very little can now be said to be relevant. Nevertheless, the doctrine of marriage to be found in the Book of Common Prayer derives from this source.

4 The constitution of the Church of England is governed by Acts of Parliament running from the Submission of the Clergy Act, 1533, until the present time. Generally speaking, up till the 19th century, parliamentary statutes dealing with subjects touching Church matters were few in number compared with other sources of ecclesiastical law. But in the 19th century much of the Church's life, hitherto governed by the canon law, came to be governed instead by statute law. Many of these Acts of Parliament have themselves been repealed but many are still in force, governing the holding of benefices, parsonages, ecclesiastical property and other matters.

† *Much of the material for this paper comes from a monograph entitled 'Church and State' by Brian Hanson.* *Q.E.*

https://doi.org/10.1017/S0956618X00007080 Published online by Cambridge University Press

5 Until 1919 the law-making body for the Church of England was in practice Parliament. The Convocations of the provinces of Canterbury and York, though formally convened, transacted no business between 1715 and 1861, and even after the 1860's the effective legislature for the Church remained Parliament. In 1919, however, after prolonged political action, the Church of England Assembly (Powers) Act was passed (usually, in ecclesiastical circles, called The Enabling Act) which established the National Assembly of the Church of England and empowered it to pass Measures, which, if affirmed by a resolution in each House of Parliament, have the same force and effect as Acts of Parliament. The National Assembly was separate and distinct from the Convocations of Canterbury and York – since 1969 these bodies have been renamed and reconstituted as one in the General Synod of the Church of England. The General Synod retains the former power of the National Assembly to pass Measures and also has the power of the Convocations to promulge Canons, with the Sovereign's assent and licence.

6 Until recent times the Church of England's Canons were those drafted in 1603 and even they were not a complete code. The General Synod has now formulated and promulgated an up to date series of Canons which govern much of the life of the Church of England. The provisions of the Submission of the Clergy Act 1533 still apply to them, however, and no Canon may be made or put into execution which is "contrary or repugnant to the royal prerogative or the customs, laws or statutes of this realm". The right of the Church's own councils, as opposed to Parliament, to order and declare its worship and doctrine was finally established by the Worship and Doctrine Measure 1974, enabling provision to be made by Canon for these purposes. Even so, doctrine remains statutorily established by the following provision in the Measure (without which it would undoubtedly have failed to be affirmed by Parliament). ". . . 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. In particular such doctrine is to be found in the Thirty Nine Articles of Religion, the Book of Common Prayer and the Ordinal."

So much for the elements of English ecclesiastical law. What are the implications in it for unity between the Church of England and the Roman Catholic Church and other Christian bodies? There are three main aspects, doctrinal, ecclesiological and constitutional though it is not altogether possible to disentangle them into neat compartments.

The doctrinal differences between the Church of England and the Roman Catholic Church have been fully examined, and much reconciliation reached, by the Anglican-Roman Catholic International Commission – see their Final Report of 1981 which has been offered to the Churches of the Anglican Communion and the Roman Catholic Church for their serious consideration. It would not be profitable to repeat the matter in the Report here. I shall, however, make mention of the Thirty Nine Articles which, as we have seen, have been recently re-affirmed by statute and also in the Canons of the Church of England. The Thirty Nine Articles were part of the Reformation settlement; they were, according to their title, agreed by the bishops and clergy of both provinces in Convocation, and took their final form in 1571. They are not meant to be a formulary of Christian faith; but are, rather, a statement of the Church of England's attitude towards the doctrinal disputes which were convulsing Europe at the time,

including such doctrines as Predestination and Transubstantiation. I think it is probably correct to say that, except among some extremely conservative evangelical circles, they are regarded as anachronistic, not to say archaic. I consider that with one major qualification, their re-formulation and re-drafting is a perfectly realistic possiblity. The major qualification I make is with regard to the 37th Article. Now that much in the Reformation statutes has been repealed, as part of the process of statute law revision, the statement of the constitutional position of the Sovereign in relation to the Church of England is to be found in this Article, in the unrepealed part of the Act of Supremacy, 1558, (s.8), and in Canon A7.

I set out the relevant parts of each:

Article 37

"The King's Majesty hath the chief power in this realm of England, and his other dominions, unto whom the chief government of all estates of this realm, whether they be ecclesiastical or civil in all causes doth appertain, and is not, nor ought to be, subject to any foreign jurisdiction . . . We give not to our Princes the ministering either of God's Word, or of the Sacraments . . . but that only prerogative, which we see to have been given always to all godly Princes in holy Scriptures by God himself; that is, that they should rule all estates and degrees committed to their charge by God, whether they be ecclesiastical or temporal . . . The Bishop of Rome hath no jurisdiction in this realm of England."

s.8. of the Act of Supremacy 1558 provides that:
"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 reformation, order and correction of the same and all manners of errors, heresies, schisms, abuses, offences, contempts and enormities, were united and annexed to the Imperial Crown of the realm."

Canon A7: Of the Royal Supremacy:
"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."

These are the legal foundations of a national church. The Church of England maintains that it is part of the "true and apostolic Church of Christ" but does not recognise as binding (as opposed to persuasive) any temporal or spiritual authority beyond or above national, viz, the Sovereign's jurisdiction. As matters stand, therefore, bishops, clergy and laity attending any council or synod beyond these shores do so, in the last resort, as observers. No decision reached there will bind the Church of England unless ratified by national, not ecclesistical, authority.

It follows that there can be no acknowledgement of general councils or appeals from England to the wider church without a change in the law.

When, in modern times, we speak of the Sovereign, we often think of the legal abstraction of the Crown. "The Crown" prosecutes in all criminal causes, is the final repository of all executive power, owns the national real estate and so on. In the field of ecclesiastical law the Sovereign is also a human soul and

as such is required, by law, to be in communion with the Church of England. S.3. of the Act of Settlement, 1701, provides that "whosoever shall hereafter come to the possession of this Crown shall join in communion with the Church of England as by law established". Moreover on succeeding to the Crown the monarch has to make certain statutory declarations:

1 At the Privy Council held immediately after the accession an oath for the preservation of the Presbyterian Church in Scotland (Union with Scotland Act 1706);

2 Either on the first day of the meeting of Parliament after the accession, in the House of Lords, or at the Coronation, whichever shall first happen, a declaration that he or she is a faithful Protestant and will, according to the true intent of enactments which secure the protestant succession to the throne, uphold and maintain those enactments to the best of his or her powers according to law (Bill of Rights, 1688 and Act of Settlement, 1701).

3 At the Coronation an oath to maintain the laws of God, the true profession of the Gospel, the Protestant reformed religion established by law and the settlement of the Church of England, its doctrine, worship, discipline and government as by law established in England. These are the terms of the oath taken by Her Majesty the Queen in 1953; her oath was a modern version of, but conformed with the Coronation oath prescribed by the Coronation Oath Act, 1688.

The enactments which secure the protestant succession to the throne are the Bill of Rights, 1688 and the Act of Settlement, 1701. The Bill of Rights provided that the following are excluded and forever incapable of inheriting, possessing or enjoying the Crown and government of the realm and should, so far as the succession of the Crown is concerned, be deemed to be naturally dead: viz. any reconciled to or in communion with the see or Church of Rome or professing "the popish religion" or marrying "a papist". The Act of Settlement of 1701 confirms these provisions of the Bill of Rights and settled the royal succession upon the heirs of the body of the Princess Sophia, Electress of Hanover, grand-daughter of James I, being protestants. No further definition of "protestant" appears in the Act.

The protestant succession to the throne presents a problem which must be solved if there is to be unity, or even formal inter-communion, between the Church of England and the Roman Catholic Church. The monarch is crowned by the Archbishop of Canterbury in an ancient and sacred ceremony. Coronation is an essential rite to full sovereignty and there is within the rite a celebration of the eucharist according to the Book of Common Prayer. The Queen in law and in fact is and has to be a communicant member of the Church of England. If the Church of England joins in communion with the Church of Rome the law as to succession to the Crown must be amended. The statutes which will require amendment or repeal are as follows:

The Coronation Oath Act, 1688

The Bill of Rights Act, 1688

The Claim of Right Act, 1689 (of the Parliament of Scotland)

The Union with Scotland Act, 1706

The Union with England Act, 1707 (of the Parliament of Scotland)

The Act of Union (Ireland) Act, 1800 (of the Parliament of Ireland)

The Union with Ireland Act, 1800

The Regency Act, 1937

Furthermore, any assessment of the practicability of altering the rules governing succession to the throne must take into account the Commonwealth. Her Majesty is Queen not only of the United Kingdom, but also of Antigua, Bermuda, Australia, the Bahamas, Barbados, Belize, Canada, Fiji, Granada, Jamaica, Mauritius, New Zealand, Papua New Guinea, St Lucia, St Vincent and the Grenadines, the Solomon Islands and Tuvalu. To maintain a uniform succession it would be necessary to ensure that the same rules governed the succession to the throne in each of these independent monarchies; if any change in the rules is contemplated a change – and precisely the same change – would have to be made of the law of each of the counties concerned.

The position appears to be that in relation to Australia, Canada and New Zealand the matter is governed by the Statute of Westminster, 1931 which recites in its preamble that: "it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the throne . . . shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom". This procedure was followed in 1936 on the occasion of Edward VIII's abdication. In relation to all other Commonwealth members legislation would have to be initiated wholly in the legislatures of the countries concerned, as the Statute of Westminster 1931 does not apply, so that no United Kingdom legislation could change the law of those countries even if such action were requested. Such legislative initiatives would of course be subject to the possiblities of amendment in the course of their enactment: A successful amendment in any one legislature (for example to retain some religious tests) would be fatal to the uniformity of succession to the throne.

Any amendment to the above Acts would inevitably involve Parliament in a complex and possibly hazardous legal process. What the solution will be to the problem of the protestant succession – and I am sure that in God's Providence there is a solution – only the future will show. The difficulty has to be recognised and not glossed over – one only has to think of some of the comments from Northern Ireland if a quick solution were taken for granted.

Two other constitutional features of ecclesiastical constitutional law are worth mentioning concerning bishops of the Church as by law established – their position as lords spiritual and their appointment.

At present there are 43 diocesan bishops. The two Archbishops and the Bishops of London, Winchester and Durham occupy seats ex-officio; the next 21 bishops hold seats in accordance with the seniority of their appointment. All hold their seats only during the tenure of their sees. They are not "life peers", but "lords spiritual" while they hold their office.

There can be no doubt that this right of the established church to 26 ex-officio members of Parliament is, in the modern world, an anomaly. But so is a hereditary right to membership of Parliament. The House of Lords cries out for reform but no one knows how, or dares, to reform it. Or, more accurately, most electors probably wish to have a second chamber, but there is no consensus on how its members should be chosen. Anomalous or not, the presence of the bishops in the Lords is valued by many non-Anglicans in that they are regarded as speaking for a large body of Christian opinion. The defeat of the last Government's proposals to legislate for Sunday trading may be attributed, in considerable measure, to the bishops. Nevertheless, a preferable constitutional arrangement would be to choose the holders of comparable offices in other religious bodies to fill some of the seats, if any, allocated to "lords spiritual". Legislation for this

purpose would be necessary if the seats are to be held during office and not for life, as in the case of a life peer. Some such change, however, would be called for if the Church of England were to unite with other bodies and stand on an equal legal footing with them.

A deep-seated objection to union with the Church of England expressed by many non-Anglicans is that "its bishops are appointed by the Prime Minister, who may not even by a Christian, let alone a member of the Church". The full rigour of this objection may, perhaps, be mitigated by recent changes in the law and practice relating to this exercise of the royal prerogative, for this is what it is. Bishops are in law appointed by the Sovereign who commands the chapters in question to elect her appointee. However, as a constitutional monarch must act on the advice of her ministers the choice is in reality the choice of the ministers.

Three points are worth making. First, a new constitutional convention governing the exercise of the royal prerogative has been established by the Vacancy in See Committees Regulation of 1977. Briefly the present practice is that in each see which is vacant or about to be vacant there is formed a committee of ex-officio and elected members. In co-operation with the Crown Appointments Commission of the General Synod two names are submitted to the Prime Minister who accepts an obligation to choose one or the other. Second, there is a long tradition in the Western Church, pre-dating the Reformation and extending far beyond our country, of the appointment by the prince of those whose ecclesiastical duty it is to elect the candidate who shall fill a vacant see. Third, there is, and should be, a presumption that those upon whom grave responsibilities in government fall will fulfil their obligations in an honourable way, taking into account all matters which fairly bear upon the discharge of the obligation in question.

Even so, when all is said and done, if there is to be unity then difficulties will arise if totally different arrangements for appointment of bishops of different communions exist. With unity there would have to be greater uniformity in the appointment of bishops.

These are some of the principal problems – and I hope I am using that much over-worked word in its true and correct sense – which require a solution. There remain many other features of the Church of England which have to be borne in mind – one, at least, is the parochial system which carries with it the claim of every parish priest of the established church to have a cure of souls of all parishioners, at the least of those not adhering to another Christian communion. Included in it, too, are rights of baptism and marriage in the parish church and to burial in the parish churchyard.

Would that I could tell you that the ecclesiastical law, and the constitutional law entwined with it, of the Church of England is well adapted to unity with the Roman Catholic Church, and other Churches, if only doctrinal differences can be overcome. Not so, but with Christian perseverance and true charity, we shall yet help to make Our Lord's prayers prevail.