CANON LAW AND OECUMENICAL RELATIONS

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1. I have been asked to write on "The recent revision of Canon Law in the Roman Catholic and Anglican Churches and its implications for Anglican/Roman Catholic discussion of authority in the Church". My competence for the task is limited.

i. My interest in the reform of the Canon Law of the Church of England has been academic: I scrutinized, in two articles in Theology (August and September 1947), The Canon Law of the Church of England, the Report of the Archbishops' Commission on Canon Law with Proposals for a Revised Body of Canons (SPCK, 1947), and I followed the subsequent revision, extending over twenty years, with detachment. I am not a member of the Convocations which enacted most of the revisions, nor of the General Synod which is now the depository of authority in the matter. I know no more of canon law and its revision in other Provinces of the Anglican Communion than I have studied historically as in such works as H. Lowther Clarke, Constitutional Church Government (S.P.C.K., 1924) or C.A.H.Green, The Constitution of the Church in Wales (Sweet & Maxwell, 1937), or have encountered in correspondence and discussion over specific issues, like marriage and divorce.

ii. My knowledge of the revision of the Canon Law of the Roman Catholic Church is peripheral. Through the generosity of the Pontifical Commission for the Revision of the Canon Law, and of the Secretariat for Christian Unity, I participate as an observer at the sessions of the coetus drafting the Lex Ecclesiae Fundamentalis. I have studied a little of the work of another coetus revising the section of the Codex Iuris Canonici on marriage, as summarized in Communicationes III. 1, 1971. But I remain ignorant of the great volume of work being done on other parts of the Codex by other committees of the Pontifical Commission.

iii. My experience of the impact of Canon Law on inter-Church relations is limited to the field of mixed marriages (apart from the general legislation concerning admission to eucharistic communion, etc., encountered when working residentially with Roman Catholic friends or colleagues on academic or oecumenical pursuits). In the Anglican/Roman Catholic Commission on Mixed Marriages we have discussed this at length, and our Reports have indicated where the legal embodiment of Roman Catholic pastoral and disciplinary requirements creates difficulties and might be amended.

All this amounts to very little on which to base an informed paper.

2. With these reservations, and with due apology, therefore, I reflect on these three areas of interest in turn.

3. Revision of the Canon Law of the Church of England. For historical reasons the Church of England has no body of pure canon lawyers, either practioners or scholars, on whom to call, either for the administration of the canon law or for its revision. At the Reformation the Canon Law of the Church of England became the Queen's Ecclesiastical Law. The law as already promulgated

and in use in the medieval English Church was taken over, in so far as it was not contrary to the Royal prerogative or to the statutory or common law rights and liberties of the Queen's lay subjects. It continued to be administered in the ecclesiastical courts. It was revised, from time to time, by Convocation, acting under licence from the Crown. Practitioners continued to be trained in the canon and civil law traditions; but gradually the civilians absorbed the canonists, and with the dissolution of Doctors' Commons, their "College", in 1857 the tradition of canon lawyers was broken beyond repair. Judges and advocates in the ecclesiastical courts were increasingly, and remain, members of the bar who have specialized in ecclesiastical law alongside of other professional pursuits. The academic study of canon law became the pursuit of ecclesiastical historians, chiefly of the medieval period, and they are few. Consequently the Archbishops' Commission consisted of historians, theologians and lawyers, with one Professor of Moral and Pastoral Theology (R.C. Mortimer, subsequently Bishop of Exeter). Today the position is hardly different: the one academic and non-legal specialist in canon law who was engaged both in University teaching and in active membership of the Convocation during the years of revision, E.W. Kemp, left the University to become Dean of Worcester, and subsequently, Bishop of Chichester. It follows that the technical work of revision is done in committees of mem of competence in mixed disciplines, and in Church administration, with the minimum of guidance from specialists in the discipline of canon law itself. Two further tendencies are to be noted. First, with the decline of an academically learned episcopate and of a tradition of academically distinguished Deans of cathedrals and other dignitaries, such committees will inevitably become less expert and more susceptible to the pressures of current opinion. The second is that with the virtual (though not absolute) replacement of the Convocations of the Clergy by the General Sybod as the legislative body of the Church of England - a body in which the distinction between the principles of political democracy and those of Church government have not yet been worked out (or perhaps even realized) - the voicing of current opinion and its expression in the popular vote is easier than ever before. The implications of all this have yet to be considered. Where "openness" to the mind or mood of the Church (or of a pressure group within it) is prized, there this new possibility of "immediacy" of response will be welcomed. Where there is concern for the tradition of slow, organic development in the canon lw, for its anchorage in theology and for its fiduciary responsibility for truths and relationships which are non res unius aetatis, there some danger will be discerned. In fact the major revision of the canon law was completed with the final promulgation of canons in 1969; the text is contained in The Canons of the Church of England (SPCK, 1969); but a Canon Law Standing Commission was set up at the same time to keep the canon law under review.

4. After thirty years of work, then, in revising the canon law, is the Church of England noticeably different? Generalization is dangerous, especially from one not involved in the diocesan life and structure. His personal impression is that in its normal life the Church of England continues as though canon law did not exist. This is not to say that it is a lawless Church. In the process of revision (as in liturgical revision) so many exceptions and provisions for alternatives were built in to the canons as to make a very wide diversity of practice lawful. Where unlawful practice persists, and even grows (as in the refusal of holy baptism to the children of parents whose religious practice does not satisfy the personal judgment of the local incumbent), lawlessness justifies itself in the language of heroic witness to "principle", however theologically disputable;

in the instance of refusal of baptism, it clothes its indecency with the apron of liturgy, in the shape of a "Service of Naming and Blessing". There is no immediate danger of the Church of England's becoming a law-ridden Church, at least in so far as it is governed by canon law. The effect of the administrative law, embodied in Measures of the former Church Assembly and now of the General Synod, is another - and more severe threat; but it is irrelevant to this paper.

5. The shape of the body of canons in the Church of England is historically determined, derived from the canons of 1604. It begins with a short section containing what may be called normative statements with doctrinal significance, on the Church of England and its episcopal government under the supreme juridical supremacy of the Queen. There is in this section, however, nothing to correspond with the theological particularity of the Lex Ecclesiae Fundamentalis of the Roman Catholic Church. There follow major sections on Divine Service and the Administration of the Sacraments, Ministers, the Order of Deaconesses, Lay Officers, Things Appertaining to Churches, and the Ecclesiastical Courts. It follows that in the substance of the law duties are prescribed for lay persons as well as for clerics. The canons are legally binding on lay persons, however, only insofar as they are declaratory of duties and prohibitions (e.g. concerning marriage) which are already part of statutory or common law and insofar as lay persons hold ecclesiastical office, such as that of churchwarden. The jurisdiction of the ecclesiastical courts is correspondingly restricted. The spiritual and ecclesiastical duties of lay persons as such stand on the footing of moral obligations and the canons can be no more than declaratory of those duties according to the mind of the Church at a given time. If the canon law is to be an instrument of organic continuity then clearly there must be, on the one side, provision for its regular revision; on the other side there must be some assurance that the revision is conducted by persons skilled in the relevant ecclesiology and capable of discernment between what is organic growth and what is, to use a medical analogy, either malignant growth or disproportionate surgical mutiliation. In practical terms, there is need of an assured succession of canonists, and of maturity of judgment in the General Synod.

6. Revision of the Canon Law in the Church of Rome

So far as a sympathetic observer can understand it, the Roman Catholic Church is strong in its possession of the first of these requirements, a succession of canonists trained in the schools of canon law, experienced in the practice of the courts, and held together as an international body partly by the juridical system of the Church, with its fount of jurisdiction in the Pope himself, and partly by the possession of common documents and a common professional language. The corporate solidarity and self-awareness of the canonists by no means precludes differences and even conflicts of opinion, both about the interpretation of the existing law and about the extent and direction in which it should be changed. Publications of the various law schools, e.g. from Louvain, Strasbourg, and Washington D.C., and reports of the decisions of tribunals at every stage, reveal very wide diversity both of interpretation and of aspiration. Of this diversity the canonists on the Pontifical Commission are made clearly aware; indeed, the Committee working on the LEF, of which alone the writer has close experience, has sought at every stage of take account of it and to draft accordingly. Successive schemata, drafted by experts

in the science, have been published for criticism by members of the Pontifical Theological Commission and other Congregations (including that for the Oriental Churches) by the schools of canon law, and finally by the Synod of Bishops itself. Observations and objections have been considered and weighed, one by one, both by the draftsmen and by the full committee, before acceptance or rejection. In one particular, relevant to this paper, compliance with the judgment of the Synod of Bishops, while it may have tended towards the formulation of better law, has made the LEF less interesting and useful for an oecumenical purpose. The judgment was that the LEF, as then drawn, contained too much theology, that theology should not obtrude in what is primarily a statement of law. Accordingly a new schema has been prepared with many of the most illuminating theological elements, derived from the documents of Vatican II, pared away. Yet theology cannot be totally removed, for the whole enterprise of the LEF, as this writer understands it, is to ground the corpus of canon law - the revised Codex Iuris Canonici - in ecclesiology, the fundamental doctrine of the Church, and to articulate this in the form of canons. The coetus drafting new canons on marriage and matrimonial causes has shewn itself similarly responsive both to academic argument on the need for a new expression in law of the new insights into the nature of marriage articulated in Vatican II and elsewhere, and to developments in the interpretation of the existing law by tribunals. The new canons are not yet published; but an account of the revision, published in Communicationes III. 1. 1971, makes this clear. The extent of the changes recommended will be, of course, a matter for debate. But the point which this paragraph seeks to establish is that, responsive as the work of revision is to the conflicting interpretations of doctrine and pastoral need voiced in the Church, and most formally in the Synod of Bishops, the canonists doing the work can bring to it from wide resources, a professional competence based on knowledge of and respect for the principles of canon law. Both the need for such a law and its scope and complexity are far greater in the Church of Rome than in the Church of England, or in any Province of the Anglican Communion, because of the conception of the Roman Catholic Church as one universal society, independent of all local national or state jurisdictions, and therefore requiring a comprehensive and unitive juridical structure of its own. This difference is of some importance for a right understanding of the concept of authority in the two Communions.

7. At several stages of the work on the LEF the committee asked itself whether the existence of the LEF, and its probable content, would prove an obstacle to oecumenism or not. When the question was formally put to the Anglican observer his reply was two fold: insofar as the canons gave clear and precise expression of the doctrine of the Roman Catholic Church - and the draftsmen are master-craftsmen in the art of clear-cut expression - they would greatly help oecumenical understanding, since unclarity and confusion were the worst hindrances to its growth; insofar, however, as the reduction of doctrine into the language of law would tend to fossify it and give it a fixity and rigidity which impede both internal development and response to outside influence, the enterprise could be a hindrance to oecumenical growth. The distinction was accepted and understood. Meanwhile the major problem for the canonists themselves is, precisely how to reduce doctrine into canons at a time when doctrine, especially ecclesiology, is itself in a state of change and unresolved tension? Over a broad field the solution is readily at hand: the canons are built up, clause by clause, from the Conciliar documents of Vatican II, supplemented, where necessary, from Vatican I and from other magisterial statements of the Holy

See. At one stage the Anglican observer saw in the process a literalism as restrictive as that of any biblical fundamentalist. For instance, a canon on the Eucharist at one stage included the clause Sanctissima Eucharistia, qua fideles in Corpus Christi mysticum plene incorporantur. The canonists were evidently attracted by the comment of a theological consultor, Schnackenburg, that plenius would less obviously impugn the fulness of the incorporation effected by Baptism. Nevertheless, plene had to remain, because the phrase derives from Vatican II. Later, however, in obedience to a request from the Synod of Bishops to reduce the theological content of the canons, the words Spiritum Christi habentes were excluded from a clause on the baptized despite their presence in the identical description in a Dogmatic Constitution of Vatican II. Moreover, Vatican I and Vatican II have together left the Roman Catholic Church the task of reconciling the position of a Supreme Pontiff with the concept of the Collegiality of Bishops. Canonists given the task of stating precisely the locus of final authority while the theological tension remains unresolved are in an unenviable position; the task simply cannot be completed until the theology is further defined.

8. The new theology and facts of oecumenism, too, present their problems; and here the observer can record only his appreciation of the most sensitive and generous courtesy extended towards him in the Committee. How widely is the definition of the Ecclesia catholica, or Ecclesia Christi universa, to be drawn at a time of significant oecumenical development, of a "special relationshop" between Rome and Canterbury and, in particular, of ARCIC's two statements on Eucharist and Ministry? The observer was encouraged to invite consideration of this question when discussion of what may be the final text of the LEF was begun in the December session, 1973. As a result an amendment was made in a definitive canon, inserting the words aliaeque ecclesiae after the words videlicet Ecclesia latina et variae Ecclesiae orientales. The action was deliberate, in order to open the way for developments in a foreseeable future. For another, related, amendment the time is evidently not yet ripe. A canon De Summo Pontifice has a clause which begins Ecclesiae romanae Episcopus, in quo permanet munus a Domino singulariter Petro, primo Apostolorum, concessum et successoribus eius transmittendum... . The observer submitted that the form of the last word appeared to read back into the mind of Christ an intention which could find no warrant in Scipture; if it were desired that the canon should refer to an historical transission, or even to an intention of the Church to perpetuate such a transmission, then it should be re-worded accordingly; at all events there should be a disjunction between a Domino and transmittendum. He recognized that the phrase embodied a quoation from Lumen Gentium 20, but he could cite instances (as above) where the coetus had felt free to depart from the conciliar text. The point was carefully considered, and no decision was taken until after adjournment for consultation, perhaps with the highest authority. Upon decision, the point was rejected: the matter was too substantial to be altered by a committee of the Pontifical Commission: on such a matter what a General Council had stated could be reviewed only in another General Council. We may conclude that in the minds of those drafting this basis of fundamental law for the new Codex Iuris Canonici there is some openness to the possibility of development; there are also limits outside of which change is beyond consideration in any foreseeable future.

9. The Relation of Law to Pastoral Judgment in one Specific Area: Mixed Marriages

The Anglican/Roman Catholic Commission on Mixed Marriages has had five full sessions, and expects to complete its work in a sixth, to be held in the summer of 1975. Meanwhile a final report is being drafted. Some indication of its progress, and of its problems, was given in the third report, which was published (Theology, LXXVI, April 1973, pp.195ff., One in Christ, 1973-2, pp.198-203 and The Tablet 31.3.73). This is not the place to expand upon the specific points where the requirements of the Roman Catholic Law, even after Matrimonia Mixta, create, not simply difficulties for non-Roman Catholic parties and Churches, but actual misunderstanding, actual bitterness, actual scandal in a theological sense by causing resentment against Church control of any sort in the making of marriage and in the living of the matrimonial life. The two major points of pressure are the requirements of the Tridentine "canonical form" and the obligation laid upon the Roman Catholic party to promise in advance, pro viribus, to secure the Roman Catholic baptism and upbringing of all children of the marriage. The matter for consideration here is the different degree of reliance placed by our respective Churches on the arm of law to signal our moral judgments and to effect our pastoral intentions. The Third Report of the Commission (Theology, ad loc., p.195) contained the following sentences:

> 4. We have just brought into conjunction the words "pastoral" and "juridical". Too frequently these words seem to us to be used with emotional overtones having the effect of making them antithetical. A pastoral purpose may require expression in juridical language and process: to legislators and administrators of the law this pastoral end should always be seen to be primary; insensitivity to this truth can lead on the one side to an impression of obstructive legalism and, in reaction, to an impatience with any form of regulation governing marriages. Further study of the relation of the pastoral to the juridical is called for....

10. On the Roman Catholic side it may be said that the pastoral end is clear - using "pastoral" in its fullest theological sense, related to the charge to the Church to feed the flock of God and to gather it into that fold in which his own purpose for them has its fulness. It is important that the spouses should be competent to inter-marry, that they should be helped to do so with the proper intentions and dispositions, and that their marriage should be so contracted as to exhibit to the world, not only their own intention and its fulfilment, not only the true nature of marriage. but also marriage as a sign of the eternal and loving abiding of Christ with his Church. In intention the "canonical form" was devised to secure ends of this sort, endangered as they then were by frequent marriage in clandestinity. English statute law made comparable provision, two centuries later, and it still secures what law can secure to minimize the risk of deceit and other attendant social mischief. But, in the non-Roman Catholic view, that area is narrowly limited, and is more properly protected by the State than by the Church; the fulness of the pastoral provision for those marrying does not require the intrusion of law, may well be hindered by it, and cannot be secured by it. The "canonical form", as operated today, is an anachronismic intrusion of law into an area where pastoral help is acceptable only on the basis of good will, of consent and co-operation from the parties and their families; and this

the priests of the respective Churches are more likely to gain in co-operation than in approved competition, however much the Roman Catholic priest is doing only what the law of his Church requires him to do.

11. Similarly, in relation to the promises concerning the children, the discipline is pastoral in intent. It is essential, pro salute animae, that the parents should discharge their divine obligation of bringing their children to the knowledge of God and to respond to his initiative towards them in Christ. So far, there is no disagreement. But the ecclesiology of the Church of Rome sees such a difference between "Christian upbringing" and "Roman Catholic upbringing" (to use two loose but readily understandable terms) that it must insist, in terms of law, on a promise of this intent to be made by the Roman Catholic partner, to the knowledge of the other, whether inwardly consenting or not. To the non-Roman Catholic this legislation is objectionable. First, he cannot accept the ecclesiological difference. Secondly, he regards it as an offence against the theological unity ascribed to marriage, and against the obligation to seek and create it, to require, by law, a unilateral declaration of intent by one partner only in a matter so integral to the promotion of conjugal unity itself, the Christian upbringing of their children. When the pastoral strategy of the Church should be to help in the development of a conjugal conscience in such matters, here division or the possibility of it is inserted at the outset. The non-Roman rejects the intrusion of law at this point, seeking rather co-operation on the basis of confidence and trust.

12. Moreover, the juridical requirement intrudes into the pastoral activity. The Roman Catholic priest is enjoined to invite the couple for pastoral interviews and instruction on the marriage, its solemnization, its essential ends and properties. On the basis of the knowledge of the parties, non-Roman as well as Roman which he gains in these interviews, he is required to give his Bishop information material to the granting or witholding of the relevant dispensations for the mixed marriage. The non-Roman Catholic partner's intentions regarding the children, as expressed in words or deduced by the priest from his silence, are material. Forms authorized by various Episcopal Conferences for the making of this report have some specific questions, some provision for observations by the priest ad lib. To a non-Roman Catholic, reared in awareness of the liberties protected by the English common law tradition, such a procedure is intolerable. The pastoral interview should not be put to such juridical use; a man should not be judged by his silence with consequences severely detrimental to what he regards as a significant interest, the liberty to marry the woman of mutual choice in a way which accords with the social expectations of his own culture - e.g., marriage normally in the church or locality of the bride - and which will not result in a matrimonial life disapproved of, even to the point of denial of eucharistic communion, by a Church to which there is every desire to remain faithful.

13. The case against the present juridical expression of pastoral aims has been forcibly stated as one of principle, in full awareness of what may properly be argued in mitigation on the other side, e.g. that account must be taken of the large number of marriages in which there is religious indifference in the non-Roman Catholic party. But it is precisely where there is not indifference but faith and commitment that the scandal to the Church arises. No countryman who frequents a country town

on market day will sentimentalize the pastoral image; sheep are about the silliest, most intractable commodities brought to market: they need intelligent and vigorous direction, by man, whistle and dog; they need restraint, in a strong pen. But neither will the exegete or ecclesiologist strain his metaphor beyond propriety. God's sheep are men, as the Shepherd became man; and men are better led than ruled, better free than penned.