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COMMENT

Ecclesiological and Canonical Observations on *The Principles of Canon Law Common to the Churches of the Anglican Communion*

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In the Archbishop of Canterbury's Foreword to the findings of the Anglican Communion Legal Advisers' Network, Rowan Williams argues that law is a way of securing two things for the common good: equity and responsibility. Law is against arbitrariness and for knowing who is responsible for this or that. Law in the Church is also about equitable life in the communion of the Body of Christ and the mutual obligations of our interdependence. As Convenor of the Legal Advisers' Network, Canon John Rees observes that their work, which emerged as *The Principles of Canon Law Common to the Churches of the Anglican Communion*,[2] is not a quick fix to the contemporary problems of the Anglican Communion. Nor is it a covert device for the introduction of a universal canon law for the whole Anglican Communion with an aim to impose covenantal sanctions for churches which do not toe the line.

The Legal Advisers began rather with the plurality of the different provincial or national church canon laws. By comparing these autonomous (in the literal sense) sets of ecclesiastical legislation, the network not only reminded themselves of the

1 This paper is the product of a small working group of the Ecclesiastical Law Society which consisted of Chancellor Timothy Briden, Vicar General of the Province of Canterbury; Mr Stephen Slack, Chief Legal Adviser to the Archbishops' Council and the General Synod; Mr Paul Barber, Director of Education of the Archdiocese of Westminster; Mr David Harte formerly of the faculty of law at Newcastle University and myself as convenor. I take responsibility for the final form of these observations, which were first presented at an Ecclesiastical Law Society London Lecture in Lincoln s Inn on 16 November 2011 but I acknowledge my great debt to all those who gave up time for a fascinating discussion of the evolvement of Anglican canon law and ecclesiology. The views here expressed are, of course, our own and do not represent a 'party-line' as if such a thing could exist in Anglicanism. Essentially, I have acted as the Jackdaw in Aesop's Fable; a bird who has clothed himself with other birds' plumage.

2 Anglican Communion Legal Advisers' Network, *The Principles of Canon Law Common to the Churches of the Anglican Communion* (London, 2008). For convenience, the study is shortened to *Principles* hereafter.

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familial historical origins of the various codes found throughout the Anglican Communion, but they also discovered what they believe to be some common, underlying principles: a *ius commune* behind the various sets of constitutions and canons. In stating these common principles they were doing no more than a Commonwealth student of law might do in examining principles undergirding the sovereign legislation of the various parliaments which have their origin or model in the Westminster Parliament, or a European student might do with sundry national laws deriving from the Napoleonic Code. This is not to underplay the significance of this examination of underlying canonical principles; it is rather to set it in calmer waters than the current debate about the proposed Anglican Communion Covenant, not least with the Church of England's decision not to give the Covenant its support.

Admirable as this comparative and analytical study is, there has been little reaction to it, even among ecclesiastical lawyers.[3] Our initial observation was that the principles which have emerged (perhaps over-neatly, there are one hundred listed in *Principles*) suggest that there is more coherence to the Anglican Communion than its critics currently avow. While there are admittedly serious disagreements about the ordination of women and potentially more dangerously in relation to sexual ethics, it can be questioned as to how far these disagreements touch the underlying principles of canon law. This is an important ecclesiological as well as canonical observation. The actual practice of ordination to the threefold order of bishops, priest and deacons, according to the ordinals of the Communion, remains unaffected by the fact that not every province or national Church of the Anglican Communion admits women to the presbyterate or the episcopate. All the Churches otherwise follow a common practice and jurisprudence in respect to ordinations. The analysis of *Principles* demonstrates this in respect of canons concerning ordinations throughout the Anglican Communion; remaining disagreement concerns only who may be ordained, important though this may be.

While some churches (or dioceses) are discussing the possibility of official rites for the blessing of same-sex unions, there is no apparent question – at least at the time the Working Party met – of equating such a blessing with marriage. The principles common to Anglicans in relation to marriage law would therefore seem to be unchanged, at least for the time being. Crucial for the future will be whether some provinces or national churches would wish to officially sanction faithful same-sex unions as distinct from marriage or, more problematically, legally open marriage itself with respect to same-gender partnerships. The latter course – taken by the Church of Sweden because of gender-neutral state marriage law – would point to a serious divergence of

3 A notable exception, in which I was pleased to participate, was a residential symposium *Canon Law in the Service of the Church* held at the Anglican Centre in Rome in May 2010.

canonical marriage principles within the Anglican Communion. Though this is not yet the case within the Anglican Communion, it already has its forceful advocates as well as its opponents.

Observations of a more terminological nature were made in relation to ecclesiastical provinces. The term 'province' has different meanings in different parts of the Communion. In addition to 'national provinces', there are also particular ecclesiastical provinces within autonomous churches, as in the Church of England, the Church of Ireland, the Anglican Church in Australia, the Anglican Church in Canada, the Church of Nigeria and a number of other jurisdictions. But such provinces do not materially affect the overall jurisdiction of the autonomous churches of the Communion. More importantly, ethnic or cultural jurisdictions are found in a number of Anglican Churches: the USA, Canada, Australia and New Zealand. Such cases are not adequately covered in *Principles*, though they have been tolerated and indeed sanctioned by Lambeth Conferences. Overlapping jurisdictions of different Anglican Churches – as for example in Continental Europe with English, American and Iberian jurisdictions – constitute similar 'cultural episcopates'. Diocesan episcopacy has never been strictly mono-episcopal in the West since at least the Fourth Lateran Council.[4]

A question for the future would be whether a body such as the Anglican Church of North America[5] could be recognised as part of the Anglican Communion. Thus far, it could be argued that overlapping jurisdictions have not been seen as violating Anglican principles, provided that there is the necessary degree of ecclesial communion between them. Similarly, any provision for episcopal ministry for those not able to accept the ordination of women to the episcopate in the Church of England will have to include a sufficient element of communion between the differing integrities of the Church. There is need for further ecclesiological and canonical consideration of this question. Is it a presumption that 'full communion' as usually understood is an ecclesiological-canonical principle of being part of the Anglican Communion or of being an Anglican Church? Or are there some circumstances in which there can be an 'inter-communion' short of 'full communion'? Perhaps a study of Churches in partial communion is called for? Relevant to such a study would be the partial canonical communion between the Roman Catholic Church and the Orthodox Churches, or the Convocation arrangements pertaining for many years between the Church of England and the Church of South India. Practically speaking, even 'full communion' can be limited in relation to cultural jurisdictions. For example there can be no immediate interchangeability

4 Where, in 1215, Canon 9 of Lateran IV made cultural provision for suffragan bishops for different language groups within a single diocese in response to the pastoral needs of emerging exiled refugee communities fleeing from the encroaches of Islam.

5 A conservative coalition of jurisdictions which have separated themselves from The Episcopal Church over issues such as the ordination of women and questions of human sexuality, or which, though claiming the name Anglican, had never been in communion with the See of Canterbury.

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of ministers or access to meaningful worship for the laity if there is no common language between communities. In any event, more reflection is certainly required in this area.

The working group also considered the office and role of the Archbishop of Canterbury in the light of a number of Anglican jurisdictions retaining a link with the See of Canterbury. The Church of Nigeria (Anglican Communion), on the other hand, has taken reference to the See of Canterbury out of its constitution, while adding the Anglican Communion to its title. Here *Principles* was welcomed (Principle 11) in describing the Archbishop of Canterbury as the focus of unity, with the Primates Meeting, the Lambeth Conference and the Anglican Consultative Council as its instruments. The Archbishop of Canterbury is, of course, pivotal to these instruments of communion as well as being its focus in his office and person. Ecclesial communion is seen to be based on communion in one way or another, even if imperfectly, with the See of Canterbury (Principle 10.4). The group therefore noted the acute problems for the Anglican Communion, the Church of England and the office of the Archbishop of Canterbury in the event of the Church of England failing to endorse the Anglican Covenant while other Churches have accepted it. This problematic situation has now come to pass. While a number of Churches of the Anglican Communion have accepted the Covenant, the Church of England is, at least for the time being, not one of them, yet the Archbishop of Canterbury's role within the Covenantal Churches remains. Had the Church of England passed the Covenant there would also have been extraordinary complications were the Church of England ever to have been subject to sanctions by reason of the Covenant.

A further observation on the question of Anglican identity concerned the underlying cultural background of the Churches of the Anglican Communion, especially their legal culture. Many Anglican Churches operate within common law jurisdictions; in consequence, their legislation and approach to law has a 'familial' resemblance. This is the case even where other cultural factors are very different (such as in the Churches in Africa) but where Empire and Commonwealth have bequeathed a common practice of law. This has ecumenical significance for a comparative study of ecclesiastical law. Anglican canon (and ecclesiastical) law reflects both the canonical and common law traditions, just as Roman Catholic canon law reflects Roman (civil) law and Orthodox canon law the Imperial law tradition of Byzantium. This recognition must not be allowed to slip over into caricature; nevertheless, such an analysis helps us to see the source of the distinctiveness of Anglican canon law as exhibited in *Principles*.

A significant example of this is to be found in Part III of *Principles*, dealing with ecclesiastical government, especially Principles 18, 'Representative government', and 19, 'Legislative government'. Such principles reflect both the Westminster Parliament and its procedures and the earlier conciliar and synodal tradition of the Western Church, as embodied in the Convocations of

Canterbury and York; a conciliar tradition somewhat eclipsed in the Roman Catholic Church since the defeat of the Conciliar Movement in the fifteenth century. The part played by representative clergy and laity alongside the episcopate is highly distinctive of Anglican canon law everywhere in the Anglican Communion.

In a much more practical vein, *Principles* was thought to have considerable utility in any revision of canon law by the Churches, which would profit from its referential use. As a species of descriptive law *Principles* might also have great value as a quarry out of which particular legislation could be drafted. The Cathedrals Measure was thought to be an analogous and interesting example of a corpus of general principles offering a format or 'pattern' which appropriate legislative bodies – in this case, chapters – could adapt and adopt. A further observation was that secular legislation in Britain now routinely expanded on the older device of the 'Preamble'. The overriding objective of legislation is now often clearly stated, and application of the law has necessarily to 'have regard for the overriding objective' of an Act. By analogy, *Principles* gives a framework of 'overriding objectives' for Anglican canon law and its revision, composition and application. The text has already been referred to in particular cases of interpretation or dispute.

The Group also observed that, in addition to underlying 'principles' such as those detailing the overriding objectives of canon law, there were statements amounting to good practice. Principle 90 on 'Insurance and risks' is an example of this.[6] Other material in *Principles* has direct reference to the Church of England's establishment and state law and is therefore not relevant to other parts of the Anglican Communion. Strictly speaking, this is therefore not a *ius commune* but a narrower summary of English principles and practice.

The Group noted that, like other collections of canon law, *Principles* expounds law from different sources. Thus some of the material on marriage is understood to be a summary of 'divine law' (because it is biblically based), though this would be less obvious if Churches changed their marriage law as outlined above. Other principles sum up matters of equity and due judicial process, rights and duties. This can be seen to derive in part from an understanding of the Church as the Body of Christ, with each limb and organ having its proper value, *vide* St Paul to the Corinthians (and thus of biblical or divine law), but also in part to be derived from 'natural law' and the long legal tradition stemming from Roman law which civil lawyers increasingly utilised in the mediaeval period. With the inescapable complexity of modern biblical interpretation,

6 Bishop Eric Kemp, in his *Introduction to Canon Law in the Church of England* (London, 1956), noted that the 1603 Canons Ecclesiastical contained canons which were not enforceable by penalty but which were exhortatory. He cited an eighteenth-century judgment by Sir George Lee to this effect: *Lloyd v Owen and Williams* (1753) 1 Lee 434 at 436.

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the concept of divine law is now not clearly self-evident (marriage law is a case in point), and nor is the philosophical or cultural concept of what is 'natural'. In spite of this inevitable complexity, a priest who embezzles the collection can still safely be concluded to have broken one of the Ten Commandments and infringed the natural law imperative to act justly.

A final aspect of our observations was painted in broader canvas: a comparison between *Principles* and other canon law traditions, Eastern as well as Western.[7] The group noted that the idea of the gathering together of principles of law is itself very canonical. It was also noted that the strong principle of 'dispensation' at episcopal and papal levels within the Roman Catholic Church and the earlier Western tradition is itself an illustration of the 'in principle' principle. The canon stated a norm or principle but there could be legitimate non-compliance. Canon law is not an example of legal positivism.[8] Moreover, the style of the earlier canon law and many actual Anglican canons to this day is to state 'what ought to happen' rather than what is forbidden and the penalties to be applied. Equally, when it is not stating principles, the wider canonical tradition moves on to maxims – that is to say, more practical guidance. So *Principles* illustrates that Anglican canon law very much reflects other canon law in its general ethos, as well as having its own particular distinctiveness.

A comparative mistake would be simply to compare and contrast *Principles* with the Western (Latin) Code of the Roman Catholic Church of 1983. It is worthwhile recalling that the Roman Catholic Church did not have any completely codified system of canon law until 1917, and that there have therefore only ever been two 'universal' codes (1917 and 1983), and that a 'universal' code (for the Western, Latin church) has only been in existence for just under one century of the two Christian millennia. Historically, universal codes are a novelty and are *not* typical.[9] It is more fruitful to compare *Principles* with the Code of Canon Law for the Oriental Churches in communion with Rome of 1990. Admittedly, Orthodox Christians have criticised the Oriental Code for occasionally sliding into 'latinisation' or the utilisation of Western canonical methodology even where the content is Eastern. The canonical traditions of the East and West are very different. The lack of a universal legislator in the Orthodox tradition, short of a new Ecumenical Council, means that the force of the autonomous laws of autocephalous churches is stronger – and in this respect closer to the Anglican tradition. But the Eastern Code remains instructive for Anglicans. It is prescriptive. It acknowledges that local law may differ from the 'principles' found in the

7 One area that we did not look at (because of both time constraints and a lack of expertise) was a comparison with the Reformation Churches, which also have a distinct legal ethos.

8 See W Adam, *Legal Flexibility and the Mission of the Church: dispensation and economy in ecclesiastical law* (Farnham, Surrey, 2011), ch 12.

9 See R Ombres, 'Canon law and the mystery of the Church', (1996–19967) 62 *Irish Theological Quarterly* 201.

code. It establishes – contrary to the Western Code – that existing local custom and law is not necessarily overridden by universal law. This is particularly clear in the Preliminary Canons. Above all, the Eastern Code makes clear that it is dealing with Churches in the plural, each with considerable autonomy. For the older Uniat Churches this is particularly the case: for example, the Maronite and Melchite Churches in Lebanon and the Middle East. The code necessarily has to be one of 'principles' because it explicitly legislates (or describes legislation) for 21 autonomous churches '*sui iuris*'. Thus we can see the importance of the Eastern Code as a comparator with *Principles*.

The Group's final observation follows on from the comparative method. We first recalled the way in which canon law in the West had evolved in its long history. With the exception of biblical (divine) law, the early Church had no universal law other than the ad hoc decisions of local synods and occasionally wider, imperially summoned ecumenical councils. The enactments of councils in their canons (a 'straight rod' or 'line') were collected, and the collection of canons became known as canon law to distinguish it from Roman civil law. Just a little later, starting from the end of the fourth century, papal letters or decretals also became a written source for appropriate norms – largely in connection with local aberrations. The canon law thus began to comprise local canons, wider canons and papal decretals. But all was still ad hoc and each province had its own different collections, to which were added occasional local legislative and practical decisions and letters (such as Augustine of Canterbury's correspondence with Pope Gregory the Great), as well as decisions or material from further local councils and synods. Attempts were made to collect all this material together, though of course this meant editing and selection. They included attempts to put together both Greek and Latin collections. Theodore of Tarsus, as Archbishop of Canterbury, at the Council of Hatfield in 679 speaks of one such collection. Penitentials added yet more to the material and to the confusion. The practice of collecting, editing and adapting existing canons and other material led to a number of forged collections, which, in spite of their dubious origin, brought a certain order to, for example, the Frankish Church, and later, under Archbishop Lanfranc, to the post-Norman Conquest English Church.

The collections began to be schematised and logically ordered, and by the twelfth century were also influenced by the revival of the study of Roman civil law – in part to deal with inconsistencies and contradictions in the material. This was in addition to the earlier material relating to Scripture and the Doctors of the Church. The appearance of Gratian's *Decretum* was decisive. Significantly, its proper title – *Concordia Discordantium Canonum* – was an exact description: a harmonious collection of discordant canons. For almost the first time a mass of incoherent and contradictory material was reduced to a logical system arranged according to subject matter – as codes of canon law are to this day. Where there is contradiction, he adds his own *dicta* by way of interpretation.

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From the middle of the twelfth century to the Reformation, Gratian's *Decretum* was added to by papal texts. In England, in the mid-fifteenth century, William Lyndwood compiled a systematic abbreviation of local provincial canons and constitutions on the same plan as Gratian and the later papal codes, commenting upon them and recognising their authority. Lyndwood's *Provinciale* became the standard book of Church law in late mediaeval England. It is referred to by copious notes in the draft revised Canons Ecclesiastical prepared for the Church of England after the Second World War in preparation for the complete overhauling of the canon law.[10] It was never, however, a legal text as such; rather, it was an edited collection with glosses and interpretation. It is not stretching canonical history too far to call it an edited collection of principles of canon law.

The point of this somewhat oversimplified history of (Western) canon law is to make one simple observation. Canon law does not begin with a universal code. It begins with ad hoc decisions from various sources and from various places. Coherence is given when someone or some body collects edits and publishes a commentary which articulates the principles behind sometimes contradictory or at least inconsistent local decisions. The laudable attempt of our Anglican Communion Legal Advisers Network is therefore truly in the spirit of Gratian or Lyndwood. At a later stage, the systemising work of the canonists was itself turned into actual law as a code. That is unlikely to be the Anglican way, but the purpose of *Principles* remains that of the true canonist: to exhibit the coherence of the canon law and to render it both logical and accessible to practitioners, be they lawyers, ecclesiastics, administrators, teachers of law or its subjects.

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The Royal Peculiars of the Deaneries of Jersey and Guernsey

Burkhard Steinberg

Royal Peculiars are an oddity of the Church of England. Churches and chapels that would normally come under the jurisdiction of the local bishop are in fact

10 Archbishops' Commission on Canon Law, *The Canon Law of the Church of England* (London, 1947).