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Pre-Reformation Roman Canon Law in Post-Reformation English Ecclesiastical Law

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Roman canon law did not cease to have an effect within the Church of England after the Reformation. English ecclesiastical lawyers continued to use pre-Reformation foreign papal law and domestic provincial and legatine law. These lawyers used several ideas to explain its status in pre-Reformation England. They usually held that it continued in force after the Reformation on the basis of section 7 of the Submission of the Clergy Act 1533 (if not repugnant to laws of the realm)–and a commission would reform it. However, it is submitted here that this statute enabled the continuance of only domestic provincial law and perhaps legatine law but not foreign papal law. Yet a 1543 statute continued the provincial law and 'other ecclesiastical laws' used in England, which may or may not have included legatine and papal law. Another of 1549 has no continuance provision, but the commission was to review 'ecclesiastical laws used here'–which, too, may or may not include legatine and papal law. A statute of 1553 repealed these earlier statutes. A statute of 1558 repealed that of 1553 but revived only the 1533 statute, not those of 1543 or 1549. This suggests that only domestic provincial law, and perhaps legatine law, continued on the basis of statute, and not foreign papal laws. The latter might have applied from 1543 to 1553 but not after 1558, as only the 1533 statute perpetuating solely domestic law was revived. Nevertheless, English lawyers continued to invoke foreign Roman canon law. By the nineteenth century they did so on basis of custom not statute–and the 1533 Act section 7 was repealed in 1969.

Keywords: Roman canon law, papal law, provincial legislation, legatine constitutions, Church of England, sources of law, English ecclesiastical law, statute and custom

Roman canon law was not entirely abandoned within the Church of England when that church was established by a series of parliamentary statutes terminating the jurisdiction of the Roman pontiff in England in the sixteenth century. One of these statutes was the Submission of the Clergy Act 1533 (25 Hen VIII c 19). It provided for:

i. The Convocations of Canterbury and York to make new canons with royal assent;
ii. A royal commission to review pre-1533 Roman canon law and recommend what should be abolished or continued, subject to royal assent; and
iii. The pre-1533 canon laws to continue in force until so reviewed.

The proviso in section 7 states: 'such Canons, Constitutions, Ordinances, and Synodals Provincial, being already made . . . shall now still be used and executed, as they were afore the making of this Act, till such time as they shall be viewed, searched, or otherwise ordered, and determined' by the commission. All three – new Convocation canons, norms submitted for royal assent after the commission review, and continuing pre-1533 norms – operated if they met the statutory condition that they were not 'repugnant' to the laws, statutes and customs of the realm, nor to the hurt of the royal prerogative.[1]

Modern studies interpret the 1533 statute in several ways. Generally they understand that the whole Roman canon law – domestic and foreign – continued to apply. For example, Halsbury declares that, under it, 'the canon law of papal Rome . . . received statutory recognition' and so became 'part of the law of the realm'.[2] Baker writes that 'the old canon law was to continue in force', unless contrary to English law, and until a commission review but, as it 'never materialized, the transitional provision slipped into permanence and is still in force'.[3] According to Helmholz, the Act 'retained the substance of the medieval canon law, [which] became the permanent law of the English church'.[4] Hill argues that 'the canon law . . . to the extent . . . not contrary to the common law or prerogative, remained in force'.[5] The present author has commented that 'pre-Reformation canon law continues to operate in the Church of England by means of its incorporation into the common law', subject to the Act's conditions.[6] Finally, Leeder's contention is:

> Those parts of the *ius commune* . . . neither contrary nor repugnant to the laws of England, nor harmful to the royal prerogative were given statutory recognition. However, their authority depends not upon this statutory recognition, but upon incorporation into the law of the Realm as customary rather than written law.[7]

This article challenges these views. It does so by examining the works of post-Reformation English ecclesiastical lawyers – civilians, common lawyers and clerical jurists. First, it presents how these writers defined pre-Reformation Roman canon law, particularly in terms of its sources: the domestic English provincial

1 This article develops N Doe, 'Papal law in the English Church: post-Reformation Anglican jurisprudence', to be published in 2023 in the *Cambridge History of the Papacy*. I am very grateful to Richard Helmholz, Chicago Law School, for his very helpful comments on drafts of this study.
2 *Halsbury's Laws of England*, vol 34: *Ecclesiastical Law* (London, 2011), para 8.
3 J H Baker, *An Introduction to English Legal History*, fifth edition (Oxford, 2019), p 141.
4 R H Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford, 2004), p 184.
5 M Hill, *Ecclesiastical Law*, fourth edition (Oxford, 2018), para 1.14.
6 N Doe, *The Legal Framework of the Church of England* (Oxford, 1996), pp 86–87.
7 L Leeder, *Ecclesiastical Law Handbook* (London, 1997), para 1.8: this is based on the Acts of 1533 and 1543 (see below) and case law (see note 27).

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legislation, the constitutions of papal legates in England and foreign papal law. Second, it studies what these lawyers considered to be the basis on which Roman canon law applied in England before the Reformation. Third, it explores whether the 1533 Act and other statutes provided for the continuance in England of Roman canon law – domestic and foreign. The article thus builds on the masterful scholarship of Richard Helmholz, who has shown how English ecclesiastical lawyers continued to use Roman canon law (foreign and domestic) in the church courts, as well as later continental civilian and canonist literature, after the Reformation, when it might be expected that it would be in decline. He takes the story to the 1640s.[8] What follows focuses on later generations of English ecclesiastical lawyers from, broadly, the 1640s to the 1940s, the similarities and differences between them, and themes of continuity and change.

THE DEFINITION OF ROMAN CANON LAW

Post-Reformation English ecclesiastical lawyers defined Roman canon law in the context of the 'king's ecclesiastical law of England' consisting of statute, common law, civil law, and canon law.[9] The cleric jurist Richard Hooker (1554–1600) defines 'ecclesiastical law' as the law applicable to the Church of England – and he makes frequent use of Roman canon law – but he does not define 'canon law'.[10] However, the civilian Thomas Ridley (1548–1629), after explaining its root in the Greek word *kanon*, writes:

> The canon law consists partly of certain rules, taken out of the holy scriptures, partly of the writings of the ancient fathers of the church, partly of the ordinances of general and provincial councils, [and] partly of the decrees of popes of former ages.[11]

The great common lawyer Edward Coke (1552–1634) saw it as a foreign importation.[12] This idea became commonplace, straddling common lawyers, civilians and clerics.

8 Helmholz, *Canon Law and Ecclesiastical Jurisdiction*. See also R H Helmholz, *Roman Canon Law in Reformation England* (Cambridge, 1990), taking the story to 1625 and, in part, a companion to F W Maitland, *Roman Canon Law in the Church of England* (London, 1898). Helmholz introduces the use of Roman canon law beyond the 1640s in *The Profession of Ecclesiastical Lawyers: an historic introduction* (Cambridge, 2019).

9 See eg 27 Hen VIII c 20 for the category 'the king's ecclesiastical law of the Church of England'.

10 N Doe, 'Richard Hooker: Priest and Jurist', in M Hill and R H Helmholz (eds), *Great Christian Jurists in English History* (Cambridge, 2017), pp 115–137 at p 118.

11 T Ridley, *A View of the Civil and Ecclesiastical Law* (London, 1607), pp 66–67: while Ridley is critical of 'canon law' as containing 'many gross and superstitious matters', 'there are in it besides, many things of great wisdom' which, 'well applied to the true service of God, may have a good use and understanding'.

12 D C Smith, *Sir Edward Coke and the Reformation of the Law: religion, politics and jurisprudence, 1578–1616* (Cambridge, 2014), p 136, citing Coke, 'De Jure', fols 9v, 16v.

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During the later Stuart period, like the common lawyer William Nelson, who contrasts 'foreign canons', 'made by the papal authority', with the 'Constitutions' of English 'provincial Synods',[13] the cleric Edmund Gibson writes: 'Canon Law … is another branch of the laws of the Church of England and is partly foreign, and partly domestic.' First, 'The foreign is … the Body of Canon Law, consisting of the Canons of Councils, Decrees of Popes, and the like.'[14] These include 'the decretals … papal decisions or decrees … made, either in Councils, or upon particular disputes which were occasionally appealed to Rome and determined there, and … signified to the parties concerned, by Decretal Epistles'. Second, the domestic law: 'The body of constitutions, digested by our learned Lyndwood' (in his *Provinciale* of 1433), namely: 'provincial constitutions … published from time to time by several Archbishops of the Province of Canterbury, from Stephen Langton to Henry Chichley' and 'constitutions' made 'by the [papal] legates, Otho and Othobon', which 'extended equally to both Provinces [Canterbury and York] having been made in national synods or councils, held there by the respective legates'. All these represent 'the common law of the church' and 'deserve great regard' in the church and temporal courts. Alongside this is 'the ecclesiastical constitution of the Church of England', namely: statutes made by Parliament, the convocation Canons of 1603, rubrics, articles, abridgements, commentaries and 'rules of common and canon law'. Together, Gibson explains, these bodies of law form the 'uniform body of ecclesiastical law'.[15]

By way of contrast, in Hanoverian England in 1726, the civilian John Ayliffe defined 'papal law' in more technical detail. For him, 'canon law' includes 'the opinions of the Fathers', 'the Decrees of the ancient Councils' and 'papal law'. However, 'That part of the Canon-Law which is styled *Jus Pontificum*, or the Papal-Law … is distinguished … from the Canon-Law properly so called, it being that Law, which consists of the Rescripts, Decretal Epistles and Constitutions of several Popes.' These were 'published from time to time on the vast increase of the Papal Power and Authority' and were 'founded on the Papal Power alone'. Within 'papal law', he distinguishes a 'General Decretal'–'sent and directed to all persons, [which] binds and obliges all men … subject to the Pope's jurisdiction'–and a 'Decretal Epistle'–'that Law, which the Pope gives as an answer unto such persons as do consult him about any matter relating to the Church'. He then discusses the historic

13 W Nelson, *The Rights of the Clergy of Great Britain, as Established by the Canons, the Common Law, and the Statutes of the Realm* (London, 1709), pp 121–122.

14 E Gibson, 'Discourse', in *Codex Juris Ecclesiastici Anglicani*, 2 vols (London, 1713), vol I, p xxvii. Richard Grey follows suit: see R Grey, *A System of English Ecclesiastical Law* (London, 1730), p 9.

15 E Gibson, 'Preface', in *Codex Juris Ecclesiastici Anglicani*, vol I, pp viii–x: Canterbury laws were 'copied' and 'received' in York.

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collections of canon law, such as Gratian and those under Gregory IX, Boniface VIII and Clement V.[16]

In 1763, the civilian Richard Burn likewise wrote of the 'two parts' of papal law – decrees and decretals – with a complexity similar to Ayliffe's.[17] Samuel Hallifax in the following decade is typical among civilians for his respect for Roman canon law:

> however censurable it may be, when considered as calculated to support an unbounded supremacy in the Pope and Clergy, yet as a collection of rules and principles [for] the administration of justice, and the rights and properties of individuals, it merits no small share of praise.

Moreover, this law 'certainly contributed to introduce more just and liberal ideas than had yet obtained of the nature of government, and the peace and order of society'.[18]

These technical understandings were not the sole preserve of civilians and clergy. The great common lawyer William Blackstone (1723–1780) also writes on the form, method, scope, sources and history of 'Roman canon law'. On form: 'canon laws, or decretal epistles of the popes, are all of them rescripts in the strictest sense'. On method: canonists 'argue from particulars to generals'. On scope: 'The canon law is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to have, the proper jurisdiction over.' On sources: canon law is 'compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the holy see'. On history: all of these 'lay in the same disorder' as Roman civil law,

> till, about the year 1151, one Gratian an Italian monk, animated by the discovery of Justinian's pandects, reduced the ecclesiastical constitutions also into some method, in three books … entitled *concordia discordantium canonum*, but which are generally known [as] *decretum Gratiani*.

Then come: Gregory IX's decretals, published 'about the year 1230, in five books'; the sixth book added by Boniface VIII 'about the year 1298' and 'called *sextus decretalium*'; the 'Clementine constitutions, or decrees of Clement V …

16 J Ayliffe, 'An historical introduction', in *Parergon Juris Canonici Anglicani, or a Commentary by Way of Supplement to the Canons and Constitutions of the Church of England* (London, 1726), pp xv, xix–xxii; he also distinguishes eg a 'Canon, a Decree … a Dogma, Sanction, Interdict, and a Mandate'.

17 R Burn, 'Preface', in *Ecclesiastical Law* (London, 1763), pp vi–vii: he too distinguishes 'decrees', laws of general applicability, and 'decretals', specific determinations having 'the authority of a law in themselves'; he then lists the collections such as John XXII's *Extravagantes* or '*novel* constitutions'.

18 S Hallifax, *An Analysis of the Roman Civil Law*, third edition (Cambridge, 1779), pp vii and 2–3.

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authenticated in 1317 by his successor John XXII; who also published twenty constitutions of his own, called the *extravagantes Joannis*: all which in some measure answer to the novels of the civil law'; and the 'decrees of later popes in five books, called *extravagantes communes*'. And 'all these together ... form the *corpus juris canonici*, or body of the Roman canon law'.[19]

Nineteenth-century lawyers presented much the same picture as their forebears. Continuity trumps change. In 1840, the common lawyer Francis James Newman Rogers, like Burn, wrote of the 'two principal parts' of the 'Canon Law ... decrees and decretals'. He cites Ridley and Ayliffe for his short history of the collections, covering the *Decretum* of Gratian, 'a digest of the whole pontifical Canon law' or 'grand code of ecclesiastical law [which] gave order, consistence, and stability to spiritual government', through to the '*Corpus Juris Canonici* ... published in 1580'.[20] Another Victorian common lawyer, Archibald John Stephens, also uses the well-established distinction between foreign and domestic canon law, and relies on Blackstone for its history.[21] The cleric John Henry Blunt followed suit in 1872, writing of 'foreign, or Roman, canon law' and listing its sources.[22] And, near the end of the century, the barrister Benjamin Whitehead summarised both historic sources and innovatively classified them as 'national' or 'English canon law': 'Prior to the Reformation, the English canon law consisted partly of the general canon law of the Roman patriarchate, and partly of the national canon law composed of (1) provincial and (2) legatine constitutions.'[23]

As we have seen, Gibson uses Lyndwood's *Provinciale* (1433) as the principal source for knowledge of the domestic canon law in England. He is not alone. In 1678 the civilian John Godolphin described the *Provinciale* as 'a Canonical Magazine, or a Key which opens the Magazine of the whole Canon Law'.[24] For the cleric Richard Grey, writing in 1730 and following Gibson, the domestic provincial and legatine laws (not the papal law) represent the 'common law of the church'–*jus non scriptum ecclesiasticum*. He elaborates: 'The Common Law of the Church' is the

> ancient custom, and immemorial practice relating to spiritual affairs, which is a law or rule of the same force and obligation in the spiritual

19 W Blackstone, *Commentaries on the Laws of England*, 4 vols (Oxford, 1765–1769) Introduction, Sections 2 and 3. For debate on the authorship of 'Gratian's' *Decretum*, see A Winroth, *The Making of Gratian's Decretum* (Cambridge, 2000).

20 F J N Rogers, *A Practical Arrangement of Ecclesiastical Law* (London, 1840), pp 134–138: Rogers notes that 'A most elaborate history of the canon law, will be found in the Historical Introduction to Ayliffe's Parergon'.

21 A J Stephens, *A Practical Treatise of the Law Relating to the Clergy*, 2 vols (London, 1848), vol 1, pp 223–224.

22 J H Blunt, *The Book of Church Law* (London, 1899; first published 1872), p 19.

23 B Whitehead, *Church Law*, second edition (London, 1899; first published 1892), p 57.

24 J Godolphin, *Repertorium Canonicum, or An Abridgement of the Ecclesiastical Laws* (London, 1678), p 21.

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> administration, that the like immemorial practice, relating to the temporal affairs, is in the temporal administration.

It is found in

> the commentaries of Lyndwood and John de Athon, the first upon the Provincial, the second upon the Legatine Constitutions; whose authority, especially that of the first, is greatly regarded in the Courts of Civil and Canon Law, not only as the opinions of persons eminently learned in both laws, but chiefly, as they are witnesses of the practice of the Church of England in their respective ages

and, importantly, 'down to the present age'.[25] From the eighteenth century, Blackstone, and from the nineteenth, Rogers and (as we have seen) Whitehead are example of common lawyers who also classified domestic law as 'national canon law', while Henry Cripps in 1845 called it 'the law of the English Church … deduced from the general canon law'.[26]

In sum, ecclesiastical lawyers consistently defined 'canon law' as a body of 'foreign' law, including papal law, and 'domestic' law, provincial and legatine law made in England. They had technical understandings of its purposes, sources, forms and history, and several of them used the umbrella term 'Roman canon law' to signify the foreign canon law, with, from Blackstone's time, 'national' or 'English' canon law to signify the domestic provincial law, and, importantly, the legatine law in England.

ROMAN CANON LAW IN ENGLAND BEFORE THE REFORMATION

Having defined foreign and domestic canon law, our ecclesiastical lawyers now turn to the basis upon which it applied in England before the Reformation. The foreign canon law applied on the basis of, variously:

i. Its reception in England, upon which it became part of the king's ecclesiastical law;
ii. Its own papal authority (not by virtue of royal authority);
iii. Its having usurped the common law – it was suffered (or tolerated) in England and was never part of English ecclesiastical law; and
iv. Its (possible) superiority to the domestic law of the English church, provincial and legatine.

25 Grey, *System of English Ecclesiastical Law*, pp 7–8.
26 Blackstone, *Commentaries*, Introduction, Section 3; Rogers, *Ecclesiastical Law*, p 269; H Cripps, *A Practical Treatise on the Law Relating to Church and Clergy* (London, 1845), p 617.

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These lawyers also deal with the basis upon which this domestic canon law applied in England. Reception was the dominant model for both forms of law.

First, most post-Reformation jurists thought that foreign papal law applied because it was 'received' in England. They differed, however, as to whether its reception was based on the consent of: the monarch, people, Church, Parliament, usage, 'general consent' or combinations of these. They also discussed whether received papal law became part of the law of the land. An early statement that it applied on the basis of 'general consent', making it part of the 'king's ecclesiastical law', was *Caudrey's Case* (1591): 'Albeit the kings of England derived their ecclesiastical laws from others, yet as many as were proved, approved and allowed here by and with a general consent are aptly and rightly called the king's ecclesiastical laws of England.'[27] The common lawyer John Davies (1569–1626) reports a case of 1612 emphasising a royal basis:

> Those canons which were received, allowed, and used in England were made by such allowance and usage part of the king's ecclesiastical laws of England, whereby the interpretation, dispensation, or execution of these canons having become laws of England belong solely of the king of England and his magistrates in his dominions.[28]

By way of contrast, the celebrated common lawyer Matthew Hale (1609–1676), much cited by later ecclesiastical lawyers, bases reception (like Coke) on *parliamentary* consent and immemorial *judicial* usage, meaning that papal law does not bind because of its own force:

> All the strength that either the papal or imperial laws have obtained in this kingdom is only because they have been perceived and admitted either by the consent of Parliament, and so are part of the statute laws; or else by immemorial usage and custom in some particular cases and courts, and not otherwise.

Therefore, continues Hale,

> so far as such laws are received and allowed of here so far they obtain and no further; and the authority and force they have here is not founded on or derived from themselves, for so they bind no more with us than our laws bind in Rome or Italy.

27 *Caudrey's Case* (1591) 5 Co Rep Ia, cited by eg Stephens, *Law Relating to the Clergy*, vol I, p 689.
28 J Davies, *Le Primer Report des Cases en Ireland* (Dublin 1615), p 69, Le Case de Commendams (1612), cited by Stephens, *Law Relating to the Clergy*, vol I, p 689.

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Rather, 'their authority is founded merely on their being admitted and received by us, which alone gives them their authoritative essence and qualifies their obligation'.[29]

In 1709, however, another common lawyer, Nelson suggested that the foundations of their applicability differed as between foreign and domestic canon laws. On the one hand, foreign canon law was received by the king and people and the 'Church', so becoming part of the law of the land: 'some of these Foreign Canons were received here, and obtained the force of Laws, by *the general approbation of the King and People*'. Moreover,

> such Foreign Canons which were received here, never had any force from any Papal Legatine, or Provincial Constitutions, *but from the acceptance and usage of the Church here*: For the bishops who were sent from hence to assist in Foreign Councils, consented to the Canons made there, yet that did not bind till allowed by the King and People . . . However, when a Canon is thus received upon an ancient practice and general consent of the People, in such case it is part of the Law of the Land.[30]

On the other hand, Nelson argued that domestic canon law applied only on royal sufferance: 'even from William the First, to the time of the Reformation, no Canons or Constitutions *made in any Synods here* were suffered to be executed if they had not the Royal Assent'. This was 'the common usage and practice here, when the Papal usurpation was most exalted'; for, if the Ecclesiastical Courts endeavoured 'to enforce … such Canons, the Courts, at Common Law … would grant Prohibition'. This explains the 1533 statutory rule that new post-1533 Convocation canons must receive royal assent to be operative: 'So that the Statute of Submission [of the Clergy 1533] seems to be Declarative of the Common Law, that the clergy could not *de jure*, and by their own authority, without the King's assent, enact or execute any Canons.'[31]

Godolphin considers that pre-Reformation English kings could make ecclesiastical and canon law unilaterally, independent of papal authority:

> The ecclesiastical legislative power was ever in the kings of this realm within their own dominions; that in ancient times they made their own ecclesiastical laws, canons and constitutions, appears by several precedents and records of very great antiquity, which were received and observed within their own territories without any ratification from any foreign power.

29 M Hale, *The History of the Common Law of England* (London, 1713), p 27, as cited by Rogers, *Ecclesiastical Law*, pp 136–137, also citing Coke 2 *Inst* 652, 658. For Hale, see also Blunt, *Church Law*, pp 18–19.
30 Nelson, *Rights of the Clergy*, pp 126–127, emphasis added.
31 Ibid, p 127, emphasis added.

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For example, kings like Alfred (in 887) made 'ecclesiastical laws . . . by virtue of their own inherent supremacy'. And

> when Pope Nicholas [II] 1066 . . . gave power to Edward the Confessor and his successors, to constitute such laws in the Church, as he should think fit, he gave him therein no more than was his own before: For the Kings of England might ordain or repeal what Canons they thought fit within their own dominions in right of their regal supremacy, the same being inherent *Jure Divino, non Papali*.

Church councils in England were also called by the king not the Pope, and later by the Archbishops of Canterbury, to make 'ecclesiastical laws which are inserted among the Provincial Constitutions'.[32]

The doctrine of reception as the basis on which Roman canon law applied in England before the Reformation continued in later decades. Richard Burn writes: 'the canon law in many instances was received here in England'; and his 1797 editor, Simon Fraser, states: 'That the canon law does not bind except it be received here, but that when received, it becomes a part of the law of the land'.[33] Likewise, for Blackstone: 'For the civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in this kingdom: they are no more binding in England than our laws are binding at Rome', 'their authority being wholly founded upon that permission and adoption'. When canon law is received, it is 'intermixed' with the common law to form 'supplemental parts' of 'the king's ecclesiastical law'.[34] By way of contrast, in the later nineteenth century John Henry Blunt simply writes of the foreign and domestic law 'adopted by custom and common law into our domestic system'.[35]

Second, a minority of post-Reformation lawyers considered that papal law applied in England not on the basis of royal authority but on that of its own authority, or else it was 'received' on the basis of ecclesiastical (not royal or popular) authority. For example, for Gibson,

> the Body of Canon Law, consisting of the Canons of Councils, Decrees of Popes, and the like . . . obtained in England by virtue of their own authority

32 Godolphin, *Repertorium Canonicum*, 6 (popery), 77–78 (pre-Reformation papal law) (emphasis in original). See also Ayliffe, 'Historical introduction', p xxxiii: 'The ancient Canon Law received in this realm is the Law of the Kingdom in ecclesiastical cases, if it be not repugnant to the Royal Prerogative, or to the Customs, Laws, and Statutes of the Realm [n. Vaug. Rep. 152].'

33 Burn, 'Preface', pp vii–viii, and Burn, *Ecclesiastical Law*, sixth edition, p 179, citing Gibson, *Codex Juris Ecclesiastici Anglicani*, vol 1, p xxvii.

34 Blackstone, *Commentaries*, Introduction, Section 3. He cites Hale, *History of the Common Law*, and *Caudrey's Case*.

35 Blunt, *Church Law*, pp 13–18.

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> (in like manner as they did in other parts of the Western Church) till the time of the Reformation.

Likewise the domestic canon law: 'Before the Reformation, such Canons and Constitutions as were made in Provincial Synods, received their last confirmation from the Metropolitan, who also had full power to publish and promulge them.' However, Gibson also recognises the doctrine of reception: 'foreign laws become part of the Law of England, by long use and custom', 'received and practised here, as well before the Reformation, as since'. When the domestic law was silent, the papal law applied:

> in all cases, where no rule was provided by our own domestic laws, the Body of the Canon Law was received by the Church for a rule, so there was no objection against their receiving it in any instance whatsoever, unless it appeared, in that particular instance, to be foreign to our Constitution, or contrary to our laws.[36]

As a result, 'The whole foreign Canon Law was not received here in England'. This included law regarding the legitimization of children born before marriage; the allowance of four months only to a lay patron to present on avoidance of a benefice; the taxation of clergy only with consent of the Pope; the total exemption of the clergy from secular power; and the denial of clergy to bigamists. Gibson continues:

> The authority of papal provisions [of these sorts] some of which were never followed in practice, and others, when attempted, were withstood and declared against, or, though in practice they might prevail by the overruling power of the Court of Rome (which was the case of papal provisions) yet they were all the while against the known Laws of the Land, and on that account were never properly received among us.[37]

The view that foreign papal law applied on the basis of its own authority continued into the nineteenth century. For instance, the common lawyer Archibald John Stephens states, on the one hand: 'This foreign canon law was recognised as binding in England by virtue of its own authority till the time of the Reformation, and from that time has remained binding from consent, usage, and custom.' On the other hand:

36 Gibson, 'Discourse', pp xxvii–xxix.
37 Gibson, *Codex Juris Ecclesiastici Anglicani*, vol II, p 998.

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> As, therefore, in all cases where no rule was provided by our domestic laws, the body of the canon law was received by the church for a rule; so there was no objection against their receiving it in any instance whatsoever, unless it appeared, in that particular instance, to be foreign to our constitution, or contrary to our laws.[38]

Third, there was the view that papal law applied because it was suffered in England (but was never part of English ecclesiastical law) or else it had usurped the common law because of 'the exorbitances of the Pope and court of Rome'.[39] As a result, as John Johnson explains:

> after the Pope had set himself up for sovereign in temporals, as well as spirituals, and in order to exercise this sovereignty, had introduced his Canon Law into all nations that were in communion with him … our kings saw it necessary to check the arrogance of the Popes … by sending prohibitions to the bishops, in their synods (that they might make no Canons to the injury of the King's Prerogative, and of the Civil Constitution) and in their Courts, that they might put no such Canons in execution.[40]

The civilian John Ayliffe likewise acknowledges that 'many attempts were made by the clergy to establish the whole Body of the Canon Law here in England' and 'to usurp and encroach upon several matters which did apparently belong to the Common Law'.[41] And, as seen already, Nelson thinks that papal law was 'suffered' when the king did not consent to it: 'even from William the First, to the time of the Reformation, no Canons or Constitutions made in any Synods here *were suffered to be executed if they had not the Royal Assent*'.[42] In turn, in the next century Stephens cites a *dictum* of Tindal LCJ in *R v Millis* (1844): 'that the canon law of Europe does not, and never did, as a body of laws, form part of the law of England, has been long settled and established law'.[43]

38 Stephens, *Law Relating to the Clergy*, vol 1, pp 224–225, citing *Evans v Askwith*, Jones (Sir W), 160.

39 S Degge, *The Parson's Counsellor with The Law of Tithes or Tithing*, seventh edition (London, 1820; first published 1703), p 27. See also the Ecclesiastical Licences Act 1533 for the 'sufferance' of the laws of 'any foreign prince, potentate or prelate' by 'long use and custom' as well as 'consent' in England.

40 J Johnson, 'General preface', in *A Collection of All the Ecclesiastical Laws, Canons, Answers, or Rescripts … Concerning the Government, Discipline and Worship of the Church of England* (London, 1720), p xxxv.

41 Ayliffe, 'Historical introduction', pp xxx–xxxii: but 'our kings would never suffer it'.

42 Nelson, *Rights of the Clergy*, p 127 (emphasis added).

43 Stephens, *Law Relating to the Clergy*, vol 1, p 689: *R v Millis* (1844) 10 Cl & Fin 534, at 680. Stephens also cites Hale, *History of the Common Law*, c 2. Also Rogers, *Ecclesiastical Law*, p 137 (emphasis in original): 'In *Norton v. Seton*, 3 Phill. 162 … Sir J. Nicholl said, "If the canon law is to govern this case, the text referred to does not come up to the point, and even if it did, something more would be to be shown, namely, that it has been received as the law of this country;" and … "But even if the canon law were direct upon this point, is it according to the law of England?" Again … the older Canons, even though receivable, are not to be considered as carrying … their *first authority*,

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Fourth, there was discussion as to whether papal law was either superior or inferior to the domestic law of the English Church, provincial and legatine. The relationship between the papal law and domestic church law was the subject of a celebrated debate in the nineteenth century between William Stubbs (1825–1901) and Frederic William Maitland (1850–1906). For Stubbs, the English Church was independent of Rome; papal law was binding in England only if ratified in domestic church councils; and church courts in England applied the domestic law even if in conflict with papal law. However, for Maitland, most papal law was binding of itself; Stubbs's evidence only related to cases where royal law forced church courts to depart from papal law (for example, by writs of prohibition); and, apart from these cases, church courts applied papal law. In turn, Richard Helmholz in 1990 maintained that the Stubbs–Maitland division was unneccessary. Their positions were too positivist: they erred in seeing the issue as one of competing sovereignties – Rome and England – and neither accommodated how canon law allowed for local variation to diverge from the Church's *ius commune*.[44]

ROMAN CANON LAW IN ENGLAND AFTER THE REFORMATION

As we saw at the start, many modern scholars consider that the Submission of the Clergy Act 1533 provided for 'the whole canon law' to continue, which suggests that *both* the foreign and domestic canon law survived (subject to the conditions imposed by that Act). However, a literal interpretation of section 7 of the 1533 Act suggests that the statute provided for the continuing applicability of *only* the domestic provincial law, and perhaps the legatine law, but not the foreign papal law. Section 7 states:

> That such Canons, Constitutions, Ordinances, and Synodals *Provincial* [emphasis added], being already made, which be not contrariant or repugnant to the laws, statutes and customs of this realm, nor to the damage or hurt of the King's Prerogative Royal, shall now still be used and executed, as they were afore the making of that Act, till such time as they shall be viewed, searched, or otherwise ordered, and determined, by two and thirty persons

to be appointed by the King.

This section therefore examines: how post-Reformation English ecclesiastical lawyers interpreted the statutory provision in section 7; whether for them there

per Lord Stowell, *Burgess v. Burgess*, 1 Hag. Con. 393. In many cases, however, they will be found to be only declaratory of the common law.'

44 Helmholz, *Roman Canon Law*, chapter 1.

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were two tests under that section – reception before 1533 and non-repugnancy; whether their understandings are open to debate – a new interpretation is proposed; and what the sixteenth-century *Reformatio Legum Ecclesiasticarum* tells us on these matters.

The views of the post-Reformation English ecclesiastical lawyers

First, a minority of lawyers hint at a literal interpretation: the 1533 Act preserved only the domestic provincial law and not the domestic legatine law nor foreign canon law, subject to the statutory conditions about repugnancy to statute, and the custom of the realm (that is, the common law). The common lawyer Nelson hints at this when, without mentioning foreign canon law, he writes that the 'Constitutions' of English 'provincial Synods … are part of our Ecclesiastical Laws *at this day*' – though, admittedly, he does not claim here that *only* these domestic laws continue to apply.[45] Stephens states that section 7 applies to 'the authority of provincial constitutions made before the Reformation'; as to the section 7 conditions, he adds, presumably by virtue of the declaratory nature of that Act, 'yet they did not lose their ecclesiastical nature and obligation, but would have remained good laws, under the limitations there mentioned, though that proviso had not been made'.[46]

Second, no ecclesiastical lawyer expressly asserts that the 1533 Act perpetuated *only* domestic provincial *and* legatine law made in England (but not foreign law). Third, the majority held that the 1533 Act preserved the domestic (provincial and legatine) law *and* the foreign law received before 1533 (subject to the statutory conditions).[47] When discussing the Act, the civilian John Godolphin makes no distinction between domestic and foreign canon law:

> by the statute of 25 H. 8. c. 19. it [was] enacted, That *all* former Canons and Constitutions, not contrary to the Word of God, the king's prerogative, or the laws and statutes of this realm, should remain in force, until … reviewed by thirty-two commissioners.[48]

Gibson (1713) goes a step further: both domestic and foreign laws continued to apply under the 1533 Act provided both that they had been received in England

45 Nelson, *Rights of the Clergy*, pp 121–122 (emphasis added).

46 Stephens, *Law Relating to the Clergy*, vol 1, p 226. However, see below for this view of the Ecclesiastical Licences Act.

47 For an early example, see R Lever, *Assertions Touching the Canon Law* (1563), in G Bray (ed), *The Anglican Canons 1529–1947* (Woodbridge, 1998), p 762 (Assertion 3), on 'the pope's laws': its 'rules, ordinances and decrees … have warrant by the Holy Scriptures and … law of nature, and thereupon are in force here at this day, *being established by act of parliament to this end*', and 'ought not … taken … for foreign or popish laws, but for good and wholesome English laws' (emphasis in original).

48 Godolphin, *Repertorium Canonicum*, p 23 (emphasis added); but he also continues to cite papal law.

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before 1533 and that they satisfied the statutory condition of not being repugnant to statute, custom and so forth. Under the Act 'foreign laws become part of the Law of England, by long use and custom'–'they were adopted to the Constitution of this Church, and so were *proper* rules, and not contradicted by the laws of the land, and so were *legal* rules'.[49] Furthermore, 'This supposes, what all the Books agree on, that *foreign* Canons and Constitutions, though not obligatory as such, may well remain laws to us, as having been long and generally received, allowed, and practised among us.'[50]

John Johnson is more explicit: the 1533 Act preserves domestic (provincial and legatine) and foreign (papal) law. On provincial law: 'the very worst part of the Constitutions' made by the archbishops (in Lyndwood) 'are partly yet in force', by virtue of that Act under which 'all Canons and Constitutions Ecclesiastical, which were in force before the making of this Statute, do so still remain' (if not repugnant to statute, custom and so forth). On legatine law, this continues, because 'the Legatine Constitutions of Otto and Othobon, are to be reckoned among our own domestic Constitutions'. On the foreign papal law:

> The words of this Statute ... are so understood, as to confirm not only these [pre-1533 domestic] Constitutions, so far as consistent with Statute, Law, or Prerogative Royal, but even so much of the Pope's Canon Law *as was here commonly received.*[51]

Like Gibson, Johnson adds the condition of reception to the express statutory non-repugnancy conditions.

From the civilian perspective, John Ayliffe, in an oblique reference to the 1533 Act, also implies that foreign canon law was preserved, subject to its earlier pre-1533 reception and its non-repugnancy to the laws of the realm: 'the ancient Canon Law received in this realm, is a part of the Law of the Kingdom in all Ecclesiastical Courts, if it be not repugnant to the Royal Prerogative, or the Customs, Laws, and Statutes of the realm'.[52] Burn also seems to consider that the statute preserves foreign papal law: 'the whole body of the canon law'

49 Gibson, 'Discourse', p xxviii (emphasis in original): 'to add further proof, that the foreign law being received, and not abrogated by any domestic law, is still in force, we have the declaration of the judges in ... *Evans and Ascuith*, 3 Car. 1, which was, on one hand, That no foreign canons bind here, but such as have been received, and, on the other hand, that being received, they are become part of our laws.'

50 Gibson, *Codex Juris Ecclesiastici Anglicani*, vol II, p 998 (emphasis added): that is, under the statute 25 Hen VIII c 14.

51 Johnson, 'General preface', pp xxix–xxx (emphasis added), on 25 Hen VIII c 19: 'What part of the Canon Law was received in England, and the manner of putting that, and of domestic Constitutions in practice, is to be learned from Lyndwood: for by the common consent of lawyers, what he delivers as the Common Law of the Church is so to this day, excepting where it is annulled by Statute.'

52 Ayliffe, 'Historical introduction', p iv.

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continues under the statute.[53] Samuel Hallifax is more explicit, and he includes reception and non-repugnancy:

> The Canon Law of England comprehends, besides the collections of the Roman Pontiffs, Legatine and Provincial Constitutions and, so far as it was received here before the statute of 25 Henry VIII. c. 19 and is not repugnant to the Common Law, the Statute Law, and the Law concerning the King's Prerogative is acknowledged to be in force by the authority of Parliament.[54]

A similar approach prevailed in the nineteenth century. The common lawyer Stephens considers that the 1533 Act 'expressly recognises that the foreign canon laws had become part of the law of England by long usage and custom'.[55] For the cleric Blunt likewise: 'the seventh clause of the Act of Submission continues in its former force *the whole of the canon law*', which is not repugnant to the laws of the realm.[56] And, as mentioned above, Blunt argues that the 'canon law' included both 'English' and 'Foreign' canon law. In 1903, the cleric Alexander Lacey simply, and in somewhat vague terms, stated that the Act itself merely gave 'statutory force to *ecclesiastical laws* which had formerly stood only on spiritual authority and common custom'.[57]

In other words, the 1533 Act provided for the continuance of provincial law, legatine law and foreign canon law, if it had been received before 1533 and if it was not repugnant to the statutes, laws and customs of the realm or to the hurt of the royal prerogative.

An alternative interpretation and the *Reformatio Legum Ecclesiasticarum*

It is submitted that these understandings may be questionable in the light of the norms applicable to the review of the canon law authorised in the Submission of the Clergy Act 1533 and later statutes. The 32 commissioners whom the king could appoint under the 1533 Act (25 Hen VIII c 19) were to review the 'canons, constitutions, and ordinances provincial and synodal' – that is those 'as heretofore had been *made by the clergy of this realm*' (emphasis added), meaning domestic (not foreign) law – to recommend which should be abolished and which continued. The commission was never appointed. So a 1535 statute (27 Hen VIII c 15) provided for another commission to review, again, the 'canons, constitutions, ordinances provincial and synodal' – that is, once more, domestic canon law, not foreign canon law.

53 Burn, 'Preface', pp viii–ix, discussing 25 Hen VIII c 19.
54 Hallifax, *Analysis of the Roman Civil Law*, pp 3–4.
55 Stephens, *Law Relating to the Clergy*, vol I, p 224: he actually refers to '25 Hen. 8 c. 21' – the attendant discussion suggests that this was a mistake, as it refers to the power of Convocation to make canons.
56 Blunt, *Church Law*, pp 21–24 (emphasis added).
57 T A Lacey, *A Handbook of Church Law* (London, 1903), p 40 (emphasis added).

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This commission similarly never sat and so a further statute was enacted in 1543 (35 Hen VIII c 16) to enable a commission to review 'canons, constitutions, ordinances provincial and synodal and further to set in order and establish all such laws ecclesiastical as shall be thought by the king's majesty and them convenient to be used and set forth'. Crucially, it adds – and this is new – that, in the meantime,

> such canons, constitutions, ordinances synodal or provincial *or other ecclesiastical laws* or jurisdiction spiritual *as be accustomed and used here in the Church of England*, which necessarily and conveniently are requisite to be put in use and execution for the time ... shall be occupied, exercised and put in use for the time being, provided they are not repugnant to the statutes, laws and royal prerogative.

It has been understood that the words in italics refer to the foreign canon law, though this is of course not expressly spelt out in the Act:

> The phrase 'accustomed and used' was important: for it manifested a new theory about the Canon Law, a theory which had been enunciated by Henry Standish, provincial of the Grey Friars, in 1518 and in the Act of 1534 forbidding papal dispensations and the payment of Peter's Pence (25 Henry VIII, c. 21).[58]

In any event, the commission under the 1543 Act also never formed.

Another statute was passed in 1549 (3–4 Edward VI c 11) for a commission to review

> *the ecclesiastical laws of long time here used* [emphasis added], and to gather and compile such laws ecclesiastical as shall be ... convenient to be used ... for the king's ecclesiastical laws of this realm and no other; any law, statute, usage or prescription to the contrary thereof notwithstanding

but not 'ecclesiastical law repugnant or contrary to any common law or statute of this realm'. However, unlike the 1543 Act, the 1549 Act makes no express provision in the meantime for the continuation of 'the ecclesiastical laws of long time here used'. This commission did indeed sit in 1551 and compiled by 1553 the *Reformatio Legum Ecclesiasticarum*. But the project lapsed: in that same year Mary acceded. On the return to Rome the four statutes (25 Hen VIII c 19, 27

58 Archbishops' Commission on Canon Law, *The Canon Law of the Church of England* (London, 1947), p 46. Phillimore makes no mention of the 1543 Act: in R Phillimore, *Ecclesiastical Law*, second edition (London, 1895), p lxviii, 35 Hen VIII c 16 is absent from his table of statutes.

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Hen VIII c 15, 35 Hen VIII c 16 and 3–4 Edward VI c 11) were all repealed by the statute 1 & 2 Philip and Mary c 8.[59] In turn, on the accession of Elizabeth and the re-establishment of the Church of England, the Marian statute was repealed but *only* the Submission of the Clergy Act 1533 was revived – not those of 1535, 1543 or 1549.[60]

If this analysis is correct, then the following seems to follow. The 1533 and 1535 Acts enabled continuance of only domestic provincial and perhaps legatine law but not foreign canon law. The 1543 Act enabled continuance of provincial law and 'other ecclesiastical laws' used in England, which may or may not include legatine and foreign canon law: the Act is silent. The 1549 Act has no continuance provision but the commission was to review the 'ecclesiastical laws here used'; again, this may or may not include legatine and foreign canon law: the Act is silent. The Marian 1553 Act repealed all these earlier Acts. However, the Elizabethan statute of 1558 revived only the 1533 statute and not those of 1535, 1543 or 1549. This suggests that only domestic provincial law (and perhaps legatine law) survived the Reformation but not the foreign canon law, including papal law. This means, technically, that papal law might have continued to apply from 1543 to 1553, but it did not continue to apply after 1558, as only the 1533 statute (perpetuating solely domestic law) was revived. If this is correct, and contrary to the prevailing view, foreign Roman canon law is not a source of English ecclesiastical law on the basis of statute – but it may be on the basis of custom, which is a recognised source of English ecclesiastical law.[61]

In any event, the *Reformatio* was resurrected under Elizabeth and finally published in 1571; but it was not accepted by Parliament and so no more was heard of it. However, the Convocation of Canterbury used the text for its code of Canons Ecclesiastical 1603 and it was regarded by later generations of ecclesiastical lawyers as an authoritative source.[62] So, the question arises: did the *Reformatio* commission think foreign canon law was included in 'the ecclesiastical laws of long time here used' (under the 1549 statute)? If the answer is yes, they considered that the foreign canon law too, including papal law, continued to apply within the Church of England. It seems that they did consider this to be the case as some norms proposed in the *Reformatio* were from papal law.[63]

59 Statute 1 & 2 Ph and M c 8 sought 'to repeal all laws and statutes made contrary to the Supremacy and See Apostolic during the … schism'. The statutes 25 Hen VIII c 9 and 27 Hen VIII c 15 are listed in marginal notes in the Statutes of the Realm; the others, one might presume, were repealed by implication.

60 That is, between 25 Hen VIII (1533) and 35 Hen VIII (1543) only domestic law continued until revised; from 35 Hen VIII (1543), through 3 & 4 Ed VI (1550–1553), until (after Mary repealed these) 1 Eliz 1 (1558), both domestic and foreign law continued till revised; after 1 Eliz 1 (1558) only domestic law continued (until revised) because only 25 Hen VIII (1533) and not 35 Hen VIII (1543) was revived.

61 See below for the 'rule of practice' used by the English church courts.

62 See eg G Bray, 'The strange afterlife of the *Reformatio Legum Ecclesiasticarum*', in N Doe, M Hill and R Ombres (eds), *English Canon Law* (Cardiff, 1998), pp 36–47.

63 See T Kirby, 'Lay supremacy: reforms of the canon law of England from Henry VIII to Elizabeth I (1529–1571)', (2006) 8 *Reformation and Renaissance Review* 349–370 esp at 355, 359 and 363.

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Moreover, later English ecclesiastical lawyers considered whether the focus of the commission revision was to be domestic or foreign law or both. On the one hand, Nelson seems to think it was only domestic law; he writes:

> these canons being *made* in times of Papal Authority *here*, were soon after the Reformation intended likewise to be reformed by Archbishop Cranmer, and some other Commissioners appointed for that purpose by Hen. 8 and Ed. 6. The work was finished, but the King dying before it was confirmed, it so remains to this day'.[64]

On the other hand, Gibson seems to think the revision included foreign law, when addressing 'The ancient Canon Law, as of force, or not of force': 'To prove the inconsistence of these with the Laws of the Land, and, by consequence, the necessity of changing and reforming, Archbishop Cranmer had drawn together many citations out of the Body of the Canon Law'. He then deals with the *Reformatio*: 'This supposes, what all the Books agree on, that *foreign* Canons and Constitutions, though not obligatory as such, may well remain laws to us, as having been long and generally received, allowed, and practised among us.'[65] But Gibson does not expressly comment on whether foreign law was contemplated under the 1543 Act.[66] Nor does Grey: 'Till such review could be completed, the ancient Canons, etc which were not contrary to the Laws of the Land, and the Prerogative Royal, were to continue to be used and executed here as before'; he then writes of the *Reformatio* but does not comment on our question.[67]

In the later eighteenth century, Richard Burn does not address our questions but implies that the effect of the 1558 statute was to return to the position under the 1533 statute:

> In the reign of queen Mary, all the aforesaid acts were repealed, by the statute of 1 & 2 P. and M. c. 8. And so the matter rested till the first year of queen Elizabeth, when by the statute of 1 El. c. 1, the aforesaid act of the 25 Hen. 8. c. 19 was revived, and extended to the queen, her heirs and successors (the rest of the aforesaid acts still remaining repealed).[68]

As to whether the 1549 statute enabled the continuance of foreign canon law, Burn is silent. After mentioning the revival of the *Reformatio* by Archbishop Parker, he simply states: 'So that by this statute [25 Hen VIII c 19], until such reformation as aforesaid shall take effect, the canon law, so far as the same was received here

64 Nelson, *Rights of the Clergy*, p 129 (emphasis added).
65 Gibson, *Codex Juris Ecclesiastici Anglicani*, vol I, p 998 (emphasis in original); see pp 989 and 997.
66 Ibid, p 989.
67 Grey, *System of English Ecclesiastical Law*, pp 344–347.
68 Burn, 'Preface', pp ix–xiv: he lists 25 Hen VIII c 19, 17 Hen VIII c 15, 35 Hen VIII c 16, 3 & 4 Ed VI c 11.

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before the said statute', subject to not being repugnant to the laws of the realm, 'is recognized and enacted to be in force by authority of parliament'.[69]

Among the nineteenth-century English ecclesiastical lawyers, Rogers is typical in explaining the plans for a commission under the statutes of 1533, 1535 and 1543 but sheds no light on whether the legatine and foreign canon law was to continue under the 1543 or 1549 statutes; on whether the 1558 statutory revival of the 1533 statute meant that only provincial law continued; or on whether the *Reformatio* project assumed that the provincial, legatine and foreign (including papal) canon law continued in force.[70]

The statutory basis and customary law

A further view seems to have been that pre-Reformation Roman canon law continued on the basis of custom *independently* of statute. In *Middleton v Crofts* (1736), Lord Hardwicke states, citing *Caudrey's Case*: 'such canons and constitutions ecclesiastical as *have been allowed by general custom and consent within the realm*', not contrary to the laws, statutes, customs and royal prerogative, 'are still in force within this realm as the King's ecclesiastical law'. Crucially, he continues:

> though in the proviso at the end of statute 25 Hen. 8, c. 19 [the 1533 Act], for continuing the ancient canon law until the intended reformation thereof should be completed, no mention is made of custom or usage, yet there are words of the same import; and in the Act 35 Hen. 8, c. 16 [the 1543 Act], for prolonging that power during the King's life, the proviso for continuing the ancient canons is repeated, and more clearly penned thus: 'Such canons, constitutions, &c., as be accustomed and used here'. Here rests the sure foundation of all ecclesiastical jurisdiction in this kingdom.[71]

Rogers suggests that Roman canon law continues in force on the basis either of custom or of statute: 'In England the authority of the canon law, especially since the Reformation, has been much limited, and that part of it only is generally binding which has been sanctioned and adopted by usage or recognized by statute.'[72]

And so, by the nineteenth century, the English courts had developed the 'rule of practice' that pre-Reformation Roman canon law continued to apply as

69 Ibid, p xv (25 Hen VIII c 19), p xii (35 Hen VIII c 16).

70 Rogers, *Ecclesiastical Law*, pp 135–136: 'In England the authority of the canon law, especially since the Reformation, has been much limited, and that part of it only is generally binding which has been sanctioned and adopted by usage or recognized by statute. During the progress of the Reformation, various attempts seem to have been made to consolidate and confirm the canon law.'

71 (1736) 2 Atk 650 at 669 (emphasis added): 'This rule is warranted not only by the reason and nature of the thing, but also by a strong express declaration of Parliament in the preamble to statute 25 Hen. 8, c. 21.'

72 Rogers, *Ecclesiastical Law*, pp 135–136.

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'custom'.[73] As such, it must be pleaded and proved to have been recognised, continued and acted on since the Reformation. No distinction seems to have been drawn between domestic and foreign canon law. In *Bishop of Exeter v Marshall* (1868)–which cited both the pre-Reformation domestic and foreign canon law–it was decided that, for such custom to be operative as law, it must have been 'continued and uniformly recognised and acted upon by the bishops of the Anglican Church since the Reformation'.[74] However, the need for episcopal approval did not appear in the formulation of the rule of practice in *Re St Mary's Westwell* (1968): 'no directive, rule or usage of pre-Reformation canon law is any longer binding on this court unless pleaded and proved to have been recognised, continued and acted on in England since the Reformation'.[75]

Lastly, whatever the statutory or customary basis for the assumption that domestic and foreign Roman canon law continued to apply in England after the Reformation (subject to reception and non-repugnancy), as Richard Helmholz has shown for the period until the 1640s,[76] the later English church lawyers likewise invoked time and time again both the Roman canon law and the works of continental jurists, in their expositions of the ecclesiastical law of the realm beyond the 1640s and into the twentieth century. But that is another story. In any event, Gerald Bray has recently shown that elements of Roman canon law–domestic and foreign–made their way into the substance of the Canons of the Church of England, including revisions of the Canons in the 1960s.[77]

CONCLUSION

It might be expected that Roman canon law ceased in the Church of England at the Reformation. This is not so. It was commonplace for English ecclesiastical lawyers–civilians, common lawyers and clerical jurists–to include pre-Reformation Roman canon law in their expositions of the law applicable to

73 Phillimore does not seem to discuss whether foreign and/or domestic pre-Reformation Roman canon law continued on the basis of statute, but he focuses on custom as its basis, relying inter alia on the judgment of the Dean of Arches in *Martin v Mackonochie*, LR 2 Adm. & Eccl. p 116 at pp 150–155: see Phillimore, *Ecclesiastical Law*, pp 11–14. Moreover, he writes at p 16: 'The law of the Church of England is … *derived* from the leading general councils of the undivided church, from a practice and usage incorporating portions of the general canonical jurisprudence, from provincial constitutions, from canons passed by her clergy and confirmed by the crown in convocation, and from statutes enacted by parliament, that is, the crown, the spirituality and the temporality of the realm' (emphasis added). See also eg Whitehead, *Church Law*, pp 129–130: 'The Ecclesiastical Law of England is not a foreign law. It is a part of the general law of England–of the common law–in that wider sense which embraces all the ancient and approved customs of England which form law.'

74 (1868) LR 3 HL 17 at 53–56.

75 [1968] 1 WLR 513: see N Doe, *Legal Framework of the Church of England*, pp 86–87. M Hill, *Ecclesiastical Law*, para 138: the rule applies to 'pre-Reformation canon law' (papal law is not specified).

76 Helmholz, *Roman Canon Law*, p 137.

77 Bray, *Anglican Canons*, p 929: Index of References to the *Corpus Iuris Canonici*. See also G Bray, *The Development of the Canons: a historical study and summary of the Church of England Canons 1969 to 2020* (London, 2021).

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the Church of England. First, these lawyers were familiar with its sources, purposes and history – and they distinguished foreign canon law, including papal law, and domestic canon law, composed of provincial laws of archbishops and constitutions of the papal legates in England. Second, they used several ideas to explain its status in pre-Reformation England: chiefly that it had been received in England by king and people and so became part of the king's ecclesiastical law. Third, they usually held that both the foreign and domestic canon law continued in force after the Reformation on the basis of section 7 of the Submission of the Clergy Act 1533, until reviewed by a royal commission (which never materialised), and if it was not repugnant to the laws of the realm – and, they added, if it had been received in England before 1533.

However, it is difficult to find clear evidence from this Act and other relevant statutes that *both* domestic provincial and legatine *and* foreign canon law continued in force (subject to reception and the statutory non-repugnancy conditions). It has been suggested here that the 1533 Act continued only domestic provincial law and perhaps legatine law but not foreign papal law. Yet a 1543 Act (also providing for a commission) continued provincial law and 'other ecclesiastical laws' hitherto used in England, which may or may not have included legatine and foreign law. Another Act of 1549 has no continuance proviso, but the commission it proposed was to review 'ecclesiastical laws used here' hitherto – which may or may not have included legatine and papal law. A 1553 Act repealed these earlier statutes. A 1558 Act repealed that of 1553 but revived only the 1533 Act, not those of 1543 or 1549.

Nevertheless, English church lawyers still invoked and used foreign canon law. Contrary to the views of the lawyers studied here, and those of scholars today, this suggests that only domestic provincial law, and perhaps legatine law, continued on the basis of statute, and not foreign canon law – foreign law might have applied on a statutory basis from 1543 to 1553, but not after 1558, as only the 1533 Act perpetuating solely domestic law was revived. Post-Reformation ecclesiastical lawyers differ, or else they are inconclusive, as to whether the focus of the commission which produced the *Reformatio Legum Ecclesiasticarum* was pre-1533 domestic or foreign canon law, or both. By the nineteenth century, they saw custom, not statute, as the basis for the continuing applicability of pre-Reformation Roman canon law to the Church of England. In any event, section 7 of the Submission of the Clergy Act 1533 was repealed by the Statute Law (Repeals) Act 1969.[78]

78 Statute Law (Repeals) Act 1969, Schedule, Part II, repealed 'the whole act [25 Hen VIII c 19] except, so far as unrepealed, sections 1 and 3'; section 7 is thus repealed.

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