

# THE PRINCIPLES OF CANON LAW

## A FOCUS OF LEGAL UNITY IN ANGLICAN-ROMAN CATHOLIC RELATIONS

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### INTRODUCTION

In November 1996, Professor Brian Ferme delivered the first of the Lyndwood Lectures. In it he provided a distinguished and vivid account of William Lyndwood's *Provinciale*, its contribution to medieval jurisprudence, and its place in the canon law of the undivided Western church. One feature of medieval canon law, which came to the fore, was its flexibility. This was based on a perception of the need for ecclesial justice, 'a constant refrain of the canonists', and it resulted in the balancing and ordering of texts and opinions'.<sup>1</sup> Needless to say, reconciling legal texts — harmonising discordant canons (and other species of church law) — is as much a task for modern canonists as it was for Lyndwood and his contemporaries. Canonists in both the Roman Catholic Church and the Anglican Communion are engaged from time to time in the balancing of apparently divergent legal rules *within* their respective communions. But this is also a task which is today directly relevant, at another level, to the ecumenical environment. As Robert Ombres OP has suggested recently, one aspect of the ecumenical drive is the uncovering, as *between* churches, of convergence in canon law.<sup>2</sup> Equally, of course, an associated function of comparative canon law is reconciliation of the discordant canons of different churches, when discordance is produced by and is a mark of the divided Western Church. After all, dissonance between the legal systems of churches itself contributes materially to ecclesial division. Whilst I shall not propose the juridification of ecumenism, a question that is worth asking is whether or not canon law, within the framework of convergence and divergence, is sufficiently flexible to assist and promote the ecumenical process between the Anglican Communion and the Roman Catholic Church.

One obvious, potential focal point, at which legal unity might be found, is the concept of the principles of canon law. The concept, which appears on the face of it to be fairly innocuous, is known, of course, to both Roman Catholic and Anglican canonists. The canon law of the Anglican Church of the Province of Southern Africa provides: 'if any question should arise as to the interpretation of the Canons or Laws of this Church, or of any part thereof, the interpretation shall be governed by the general principles of Canon Law thereto applicable'.<sup>3</sup> The 1983 (Roman Catholic) *Code of Canon Law*, that of the Latin Church, states: 'if an express prescription of universal or particular law or a custom is lacking in some particular matter, the case is to be decided in the light of [*inter alia*] . . . the general principles of law observed with

<sup>1</sup> B. Ferme, 'William Lyndwood and the *Provinciale*: Canon Law in an undivided Western Church', (1997) 4 Ecc LJ 615 at 628. See also B. Ferme, *Canon Law in Medieval England: A Study of William Lyndwood's Provinciale with particular reference to Testamentary Law* (Rome, 1996). I am extremely grateful to Robert Ombres, Mark Hill and Heather Payne for reading through, and commenting constructively on, drafts of this paper.

<sup>2</sup> R. Ombres, 'Ecclesiology, ecumenism and canon law' in N. Doe, M. Hill and R. Ombres (eds.), *English Canon Law* (Cardiff, 1998), p. 48.

<sup>3</sup> Constitution and Canons (1994), Canon 50. For other examples, see N. Doe, *Canon Law in the Anglican Communion* (Oxford, 1998), p. 22, n 80.

canonical equity'.<sup>4</sup> With a subtle difference, the 1990 Code of Canons of the Eastern Churches provides that, when the law is silent, 'the case is to be decided in the light of ... the general principles of canon law observed with equity'.<sup>5</sup> What follows are some personal reflections about the concept: its use and its usefulness; whether the principles of canon law exist as an objective reality; their nature, origin, location and form; their authority and content; and their potential for ecumenical dialogue in the divided Western Church. Of course, each of these matters is largely about defining 'the principles of canon law'. My hope is that the analysis of each matter yields a piece of the definitional jigsaw.

## 1. UNDERLYING ASSUMPTIONS

An important preliminary point to make, one which defines the scope of our enquiry, is this. The quest for the principles of canon law can take place at two levels and on the basis of two assumptions. One is fairly incontrovertible, the other more problematic. At one level is the assumption that each church has a set of principles of canon law peculiar to its own canonical system. We might speak of the principles of Roman Catholic canon law, the principles of the law of the Church of England, or even the principles of Anglican canon law, those common principles shared by canonical systems of individual churches in the Anglican Communion. At this level, principles may be particular to individual canonical systems, or else, through actual convergence, principles may be common to individual canonical systems. On the other hand is the possibility that there are principles of canon law common to all divided churches of the catholic and apostolic tradition, regardless both of their own canonical systems and of actual convergence or divergence. This is based on the assumption that canon law is a generic phenomenon enjoying an existence independent of the canonical systems of particular churches. In this sense, we might speak of the principles of canon law applicable to the Roman Catholic Church *and* the Church of England *and* other churches of the Anglican Communion.

This is a challenging concept, both definitionally and practically. That there is such a phenomenon, an overarching canon law which has its own principles, is not out of the question. Analogies may be drawn with other legal entities. The *common law* is often postulated as if it has an existence independent of the States which operate it. Some of the distinct ways in which jurists use the term 'common law' are: that it is a body of law based fundamentally on customary practices and ideas; that it has its own juristic tradition in which enacted legislation is said to play a minimal role; that its rules may be formulated, with varying degrees of precision, in a number of different ways; and that judicial decisions have a key creative significance in its development.<sup>6</sup> Similarly, jurists write of *common law systems* based mainly on the English common law. In a sense, the overarching principles of the common law are particularised in the legal systems of individual States having a common law system. Indeed, the common law can survive division between States: most States of the English-speaking world colonised from England continue to apply the common law and its distinctive tradition, even after division from England. *Civil law*, based on Roman Law and distinguished from common law, is frequently treated as if it has an existence, rooted in its principles and traditions, independent of the national States which operate it. The world's so-called *civil law systems*, originating in Western Europe, have their own distinct legal traditions: the use of codes; the appearance of general principles in these; the predominance of legislation; reliance on academic

<sup>4</sup> *Codex Iuris Canonici* (1983), canon 19: 'generalibus iuris principiis cum aequitate canonica servatis' (this applies unless it is a penal matter). The same provision was found in the 1917 Code, canon 20.

<sup>5</sup> Code of Canons (1990), canon 1501: 'generalia principia iuris canonici cum aequitate servata' (this, too, applies unless the matter is penal).

<sup>6</sup> See eg the studies in W. Twining (ed.), *Legal Theory and Common Law* (Oxford, 1986).

opinion; and less regard for judicial decisions. Much the same, in a religious context, might be claimed for *Islamic law*: with its underlying principles, this is treated as if it had an existence independent of the divided States in which its principles are applied; whilst no State is governed exclusively by it, constitutions not uncommonly affirm an adherence to Islamic law.<sup>7</sup>

Might canon law, like the common law, civil law or Islamic law in their spheres, be perceived as having an existence independent of the particular canonical systems of individual churches? Most Anglican and Roman Catholic canonists define canon law narrowly, by reference only to the internal life of their own, individual churches: canon law for the Roman Catholic canonist, for example, is those 'rules which govern the public order of the Roman Catholic Church'.<sup>8</sup> According to this perception canon law enjoys an existence only as that body of rules providing order and facility in a particular church from whose ecclesiastical authorities it derives—there are canon laws, of individual churches, but there is no overarching canon law. Sometimes, however, (but more rarely) jurists define canon law more widely as a *genus*, with its own tradition distinguished from, for example, civil law or common law.<sup>9</sup> Canon law may be perceived as a distinct juridic entity, at least in the abstract: it is a family of law applicable to the apostolic and catholic church universal; it articulates fundamentals about the nature, organisation and government of the apostolic and catholic church; it has its own juristic traditions and techniques; like the common law in its sphere, its single rules may be formulated in different ways—and they are designed to express (sometimes diffuse) theological concepts; like the civil law, it exists in codes or other species of formal legislation; unlike common law, there is less regard for judicial decisions; and like civil law, there is significant regard for academic opinion. Indeed, as with common law systems, or civil law systems, describing legal arrangements of a particular church as a *canon law system* is predicated on the notion of canon law as a *genus*. In this abstract sense, canon law may enjoy an existence independent of the canonical systems of individual churches: individual churches merely particularise this overarching canon law, and the canonical tradition, in their own legal systems. From an historical perspective,<sup>10</sup> of course, the *genus* canon law existed not in the abstract but as a material fact: in the undivided Western Church, the generic canon law was an objective reality: the *ius commune* was an overarching canon law particularised in the local church; and so legal historians write of the *ius commune* as it applied, for example, in England before the Reformation.<sup>11</sup>

In short, the search for the principles of canon law might happily take place at the level of the principles of individual canonical systems. The simple assumption here is that these systems have ascertainable principles: as between churches, these might differ or converge. If the quest is for principles of canon law at a different level, those applicable to all churches of the apostolic and catholic tradition, another set of assumptions has to be made: that there is a *genus* canon law, containing principles; that there is such a juridic entity as a *canon law system*; that it exists at least in the abstract; and that it has survived the division of the Western Church. The *ius commune* may be an apt designation for this juridic entity. This gives rise to the possibil-

<sup>7</sup> Even for those who consider that 'common law' and 'civil law' have no independent objective existence, such concepts may be powerful fictions.

<sup>8</sup> J. A. Coriden, *An Introduction to Canon Law* (London, 1991), p. 4.

<sup>9</sup> Walker, *Oxford Companion to Law* (Oxford, 1980), p. 175: 'The body of law constituted by ecclesiastical authority for the organization and government of the Christian Church'.

<sup>10</sup> Although across the centuries 'canon law' has acquired different meanings, many of the principles referred to in this paper have persisted regardless of ecclesiastical divisions. This shared heritage clearly points to an existence independent of immediate context.

<sup>11</sup> *The Canon Law of the Church of England*: Report of the Archbishops' Commission on Canon Law (1947), p. 41. For appeals to the *ius commune* by English Civilians following the Reformation, see R. H. Helmholz, *Roman Canon Law in Reformation England* (Cambridge, 1990), pp. 124–143. For the *ius commune* generally, see R. H. Helmholz, *The Spirit of Classical Canon Law* (University of Georgia Press, 1996).

ity that the canonical order of the Roman Catholic Church, that of the Church of England and other Anglican churches, being canonical churches, particularise the *ius commune* and its principles. The final canon of the 1983 Roman Catholic Code contains an obvious candidate for classification as a principle of the *ius commune*: the salvation of souls is in the Church the supreme law.<sup>12</sup>

## 2. NATURE AND FORM: PRINCIPLES, RULES AND NORMS

Definitions of the word *principle* are reasonably straightforward: a principle is a general truth, doctrine, proposition or maxim, on which others are based; it may be a basic moral proposition or an ultimate foundation of individual and more specific rules.<sup>13</sup> The nature and form of principles have been the subject of much consideration in secular jurisprudence. For most jurists principles are fundamental general statements about law expressed with a high degree of generality; they 'reflect and express [a] legal system's underlying values or traditions—in a sense, its underlying political philosophy'.<sup>14</sup> The rule of law, the separation of powers, the legislative sovereignty of the State, for example, are generally seen as principles of United Kingdom constitutional law, and would be treated as constitutional principles by most jurists in democracies throughout the world.<sup>15</sup> Principles differ from *rules* in fundamental ways. A rule is directed to a specific matter, it is prescriptive–preceptive, prohibitive or permissive; it serves as a binding standard for particular behaviour, applying to particular action in a particular set of circumstances; and it is expressed in the form 'if X (the *protasis*), then Y (the *apodosis*)'.<sup>16</sup> For Ronald Dworkin, for instance, rules are either applicable or not; by way of contrast, principles do not apply in an 'all-or-nothing fashion'; principles have what Dworkin calls 'a dimension of weight'. Rules require a particular result in a particular case, whereas principles are fundamental standards which guide but which do not necessarily determine a result. Though, like rules, they may be prescriptive, such as the legal maxim that 'no person shall profit from their own wrong'.<sup>17</sup> Again, unlike rules, *norms* are directory rather than mandatory and binding; norms are ideals, 'the expression of the idea that something ought to occur'.<sup>18</sup> In this respect, as guidance expressed with a high degree of generality, norms may not be dissimilar to principles.

The term 'the principles of canon law', appearing in some Anglican canons and in the Code of the Eastern Churches, and the term 'principles of law' appearing in the Roman Catholic Code 1983 (which have already been mentioned) are a little more problematic. Their meaning depends, once again, on the level at which we approach the terms. The principles in these provisions may mean the principles applicable to the specific, domestic canon law of each of the churches in question—in other words, the expression may mean principles of 'our own' canon law. Or else the term may postulate canon law as a generic phenomenon, in which case 'principles of canon law' represent propositions applicable to all canonical systems. Secondary literature on the use of the specific expression in laws of Anglican churches is very scant,<sup>19</sup> and there would appear to be a mild divergence of opinion amongst Roman Catholic canonists. Commenting on the expression 'principles of law' in the 1917 Code,

<sup>12</sup> *Codex Iuris Canonici* (1983), canon 1752.

<sup>13</sup> See also *McCreaugh v Frearson* (1921) 91 LJKB 365, per Shearman J: 'A "principle" means a general guiding rule, and does not include specific directions, which vary according to the subject matter'.

<sup>14</sup> R. Cotterrell, *The Politics of Jurisprudence* (London, 1989), p. 170.

<sup>15</sup> For the treatment of these as 'guiding principles' in domestic law, see eg C. Turpin, *British Government and the Constitution* (London, 1985), ch 1.

<sup>16</sup> W. Twining and D. Miers, *How to Do Things with Rules* (2nd edn, London, 1982), pp. 138–140.

<sup>17</sup> R. Dworkin, 'Is law a system of rules?' in R. Dworkin (ed.), *The Philosophy of Law* (Oxford, 1977), p. 38.

<sup>18</sup> J. Raz, 'Legal principles and the limits of law', 91 *Yale LJ* (1971) 823.

<sup>19</sup> See, however, N. Doe, *Canon Law in the Anglican Communion* (Oxford, 1998). The entire study proceeds on the assumption that principles of Anglican canon law may be deduced from the actual laws of individual churches.

Amleto Cicognani considered that the term 'refers to the general principles of *Canon Law*, not those of the civil law'—though it could also embrace the principles of law, derived from natural law, which are applicable to both civil and canon law.<sup>20</sup> Commenting on the expression in the 1983 Code, Ladislav Örsy understands the principles of law 'mainly as they are expressed in the Code—but also as they have been known to canonical tradition'.<sup>21</sup> A fuller treatment of the term appears in the Canon Law Society of Great Britain and Ireland's own commentary on the Code: 'Many authors regard these "general principles of law" as referring both to General Norms of the Code (Book I<sup>22</sup>), as well as to the universal and fundamental principles evolved from the law of nature, e.g. the principles contained in *Regulae Juris* [more of which later] found in Roman Law and in authentic collections of canon law'.<sup>23</sup> Implicit in these statements, then, we meet ideas which operate at both levels: the principles of canon law are those of the canonical systems of individual churches; and, if they are truly 'universal' deriving from 'natural law', the principles of canon law are those principles which apply to all Christian churches (continuing the canonical tradition).

Ideas from secular jurisprudence about the form of principles might be applied, needless to say, to canonical principles. And this is the case at each of our levels. Commonly statements about canon law are presented with a high level of generality. Some general statements are *descriptive*: the Roman Catholic Code provides that 'Custom is the best interpreter of laws',<sup>24</sup> for Roman Catholic canonists 'The principle [here] enunciated is an acknowledgement that laws are not to be understood as dead texts, void of life: it is the living community to whom a law is given which demonstrates the true meaning of a law'.<sup>25</sup> Other general propositions are *prescriptive*—they are explicitly cast as precepts, prohibitions or permissions, reflecting a particular Christian value: according to the canons of the Church of England 'it is the duty of clergy and people to do their utmost not only to avoid occasions of strife but also to seek in penitence and brotherly charity to heal such divisions'.<sup>26</sup> Other statements are clearly *foundational*, the basis of more detailed rules; the Roman Catholic Code provides: 'With due regard for justice, all the Christian faithful especially bishops are to strive earnestly to avoid lawsuits among the people of God as much as possible and to resolve them peacefully as soon as possible'.<sup>27</sup> This is the foundation of a number of norms in the Code regulating the settlement of disputes by arbitration rather than in a formal judicial forum.<sup>28</sup> These provisions may be offered not only to illustrate the nature and form of principles of individual canonical systems. They also all clearly have what Dworkin describes as a dimension of weight. The last two particularly—expressing the value of reconciliation in ecclesial

<sup>20</sup> A. G. Cicognani, *Canon Law* (Maryland, 1934), pp. 622ff: that it refers only to canon law is because: the Code treats only canon law, not civil law: the civil law is not a supplementary source of codified canon law; and 'the principles of civil law often disagree with those of Canon Law'. However, 'if one chooses to understand the expression "the general principles of law" as meaning the universal and fundamental principles of law common to both civil and Canon Law, such an opinion should not apparently be rejected, since we may reckon such principles among the general rules of Canon Law, inasmuch as they are common to both, having the same remote origin, namely, the law of nature, and they belong to the natural law rather than to any form of civil law: they are, namely, the common juridical patrimony of all peoples'.

<sup>21</sup> J. A. Coriden, T. J. Green and D. F. Heintschel (eds.), *The Code of Canon Law: A Text and Commentary* (New York, 1985), p. 37.

<sup>22</sup> *Codex Iuris Canonici* (1983), Book I, comprises canons 1–203.

<sup>23</sup> *The Canon Law: Letter and Spirit* (1995), pp. 18–19. See also Acts of the Commission for the Revision of the Code, 2 Communications (1969), p. 77: 'the general principles of law, that vast treasure house of laws and jurisprudence accumulated by the Church in the course of centuries'. By 'jurisprudence', of course, Roman Catholic canonists mean 'case law' rather than 'legal theory', its meaning for the common lawyer.

<sup>24</sup> *Codex Iuris Canonici* (1983), canon 27.

<sup>25</sup> *The Canon Law: Letter and Spirit*, para 78. For the Roman law origin of the principle, see *ibid.*, n. 2.

<sup>26</sup> Revised Canons Ecclesiastical (1969), canon A 8.

<sup>27</sup> *Codex Iuris Canonici* (1983), canon 1446, para 1.

<sup>28</sup> *Ibid.*, canons 1713, 1733.

life—would be strong candidates as principles of the *ius commune*. And they are clearly distinguishable from substantive rules of canon law, which apply, in all-or-nothing circumstances, to particular action. Most jurists would agree that the provision of English canon law, ‘If the minister shall refuse . . . to baptise any . . . infant, the parents . . . may apply to the bishop’,<sup>29</sup> is a rule rather than a principle. There may be a principle underlying the provision (about episcopal oversight or access to the sacraments), but the provision itself is formulated as a rule: ‘If X, then Y’. In other words, a canonical principle sets out the general proposition (without an obvious conditional clause, or *protasis*), and canonical rules set out (in detail, and with a *protasis* and *apodosis*) the conditions under which the principle is to operate or apply: rules enact principles.<sup>30</sup>

### 3. THE THEOLOGICAL CONTENT OF CANONICAL PRINCIPLES

An obvious further question about the nature of canonical principles is: what precisely marks off a principle of canon law from one, say, of the common law or of civil law? Most canonists would answer, I think, that it is the principle’s essential theological quality or content. This answer is moulded, of course, by canonists’ ideas about the relationship between theology and canon law. Though Garth Moore emphasised that ‘The basis of the canon law is theological’,<sup>31</sup> generally the connection is underdeveloped in Anglican jurisprudence.<sup>32</sup> Roman Catholic canonists, however, offer systematic descriptions of the relation. At the expense of a gross simplification of their analyses, the relation may be expressed broadly in the formula: God reveals; the church reflects on revelation; the church formulates theology (a knowledge of God’s plan); theology provides the church with a vision and definition of its purpose and of Christian values; and the church implements these values in the form of canon law. In other words, the results of theological study form the data for the discipline of canon law, and canon law provides norms of action for the implementation of values which are designed to serve the purposes for which the church exists.<sup>33</sup> Consequently, a spectrum of ideas emerges as ‘[c]anon law may be conceived either as part of theology, or as distinct from theology but organically united with it’.<sup>34</sup> Some jurists tend to identify the two disciplines and others to distinguish them: for Morsdorf canon law is a theological discipline with a juridical method; Eugenio Corecco defines it as *ordinatio fidei*, a legal system of faith; for Sobanski canon law is part of the event of salvation because it part of the church, ‘the primary salvific event’; Hans Dombois, writing in the Lutheran tradition, considers that ‘the data of revelation and our understanding of them could be and should be presented anew in juridical categories’;<sup>35</sup> Robert Ombres takes ‘as a provisional description of canon law that it is applied ecclesiology’;<sup>36</sup> Ladislav Órsy suggests that canon law may be defined as *ordinatio caritatis*, viewing it as the ‘minimum of charity’: he also speaks of the ‘principle of integration’ as defining the relationship.<sup>37</sup> One has to look no further than Scripture, the New Testament in particular of course, to discover the theological root

<sup>29</sup> Revised Canons Ecclesiastical (1969), canon B 22, para 2.

<sup>30</sup> Principles, of course, may often be re-cast as rules. This is not surprising if principles are understood as the foundation of rules.

<sup>31</sup> T. Briden and B. Hanson (eds.), *Moore’s Introduction to English Canon Law* (3rd edn, London, 1992), p. 1: ‘The canonist, therefore, can never be simply a lawyer; he must always be in some measure a theologian, and he will frequently require the assistance of historians.’ Compare note 122 below.

<sup>32</sup> See generally N. Doe, ‘Towards a critique of the role of theology in English ecclesiastical and canon law’, 2 *Ecc LJ* (1990–1992) 328.

<sup>33</sup> See eg L. Órsy, *Theology and Canon Law* (Collegeville, Minnesota, 1992), and T. Urresti, ‘Canon law and theology: two different sciences’, 8(3) *Concilium* (1967), p. 10.

<sup>34</sup> Órsy, *Theology and Canon Law*, p. 150.

<sup>35</sup> For the various ‘schools’, see *ibid.* pp. 175 ff.

<sup>36</sup> R. Ombres, ‘Canon law and the mystery of the Church’ 62 *Irish Theological Quarterly* (1966–1967) 100.

<sup>37</sup> Órsy, *Theology and Canon Law*, p. 136.

of guiding principles about ministry, structured authority, ecclesiastical responsibilities, and discipline.<sup>38</sup>

These ideas affect profoundly our understanding of the nature of principles of canon law. And they clearly mark off canonical principles from those of the common law or civil law, whose parameters are set not by theology, but by the temporal welfare of society.<sup>39</sup> Principles of canon law are characterised not only by their generality, but by expressing the distinctive theological values and traditions of a church's canonical system—its underlying theology or ecclesiology. Principles are distinctly canonical because, or when, they have a theological content, root or association. The essential theological element appears overtly in statements of some principles: the canon law of the Anglican church in Korea provides that the laity 'must strive to live according to Christ's teachings, to preach the gospel and to realize God's justice in society.'<sup>40</sup> For other principles, the theological dimension is implicit or hidden behind the statement: such as the principle appearing in the Roman Catholic canon law that 'In penalties, the more benign interpretation is to be applied'.<sup>41</sup> Needless to say, one problem area is when a principle has no obvious or conspicuous theological element or when it coincides with, or is shared by, the common law or civil law. In Roman Catholic canon law, there are many principles of this type; for instance: that 'No one can be obliged to [do] the impossible';<sup>42</sup> that 'Laws concern matters of the future, not those of the past, unless provision is made in them for the latter by name';<sup>43</sup> and that 'Christ's faithful have the right that no canonical penalties be inflicted upon them except in accordance with the law'.<sup>44</sup> These are principles of most legal systems: the last two are fundamental principles of secular constitutional law. In short, if the theological element is an essential part of the definition of principles of canon law, one consequence is that when a principle lacks theological content, it cannot be classified as a canonical principle. This is the case even though it may possess the other characteristics of a principle, such as generality. Nevertheless, one might presume that the mere fact of incorporation into, or adoption by, a canonical system supplies the necessary ecclesiological dimension. For practical purposes, after all, lawyers would not deny that these theologically neutral principles were principles of canon law.<sup>45</sup> In sum, canon law is a means to an end, and its principles, rooted in theology, spell out that end.

#### 4. THE USE AND USEFULNESS OF THE CONCEPT OF PRINCIPLES

It may be agreed that canonists share the *perception* that principles of canon law exist: we know something of their nature, their form, and that they ought to have a distinctive theological quality. In this section I should like to explore the actual use of the concept of principles in canonical systems, and the usefulness or purpose of such principles. We have, of course, already met some of the purposes of principles: to express Christian values applicable to ecclesiastical society; to carry theology into the juridic sphere; and to act as foundations for canonical rules. Principles are

<sup>38</sup> See eg J. Coriden, *An Introduction to Canon Law* (London, 1990), pp. 9ff. Scriptural principles shape the whole of a canonical system and provide, needless to say, a common point of contact between Roman Catholics and Anglicans.

<sup>39</sup> Örsy, *Canon Law and Theology*, p. 133.

<sup>40</sup> Canons of the Anglican Church in Korea (1992), canons 42–45.

<sup>41</sup> This *regula iuris*, appearing as no. 49 in the *Liber Sextus* of Boniface VIII (1298), is derived from Roman law (Dig 50. 17. 155), and surfaces in *Codex Iuris Canonici* (1983) as canon 18. See A. Gauthier, *Roman Law and its Contribution to the Development of Canon Law* (Ottawa, 1996), p. 112.

<sup>42</sup> *Liber Sextus*, 6. See also the *Codex Iuris Canonici* (1983), canon 1095. 3.

<sup>43</sup> *Codex Iuris Canonici* (1983), canon 9.

<sup>44</sup> *Ibid.* canon 221, para 3.

<sup>45</sup> The existence of neutral principles is not surprising: in much the same way that grace builds on nature in Christianity generally, so too canon law builds on the natural human impulse towards lawmaking, borrowing and adapting human juridical techniques and concepts. I am grateful to Robert Ombres for this insight, among many others.

employed canonically in two basic ways: reactive and proactive. The formulation of the principles of Anglican canon law, for example, would be a reactive task. There is no material *corpus* of binding law globally applicable to all churches in the Anglican Communion. Each church is autonomous, free to make its own rules to facilitate and to order its internal life. However, from coincidences between the actual rules of canon law in individual churches, and from the global ecclesiastical conventions enunciated by the Lambeth Conference, may be deduced the fundamental principles of Anglican canon law, such as that of synodical government or the right to the sacraments.<sup>46</sup>

By way of contrast, principles are used proactively by ecclesiastical legislators, judges and administrators in both the Roman Catholic Church and in the Anglican Communion. The reason behind them is to give shape, coherence, meaning, and purpose to clusters of canonical rules—to make sense of them. In the Church of England, one device which is beginning to make its mark in Measures of the General Synod is the employment by draftsmen, at the opening of the enactment, of a ‘general principle’: for example, the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 opens with a ‘General Principle’ based on a ‘Duty to have regard to [the] church’s purpose’: ‘Any person or body carrying out functions of care and conservation under this Measure or under any other enactment or rule of law relating to churches shall have due regard to the role of a church as a centre of worship and mission’.<sup>47</sup> The principle displays the classical characteristics: it expresses a basic value, it has a theological content, and it serves the purpose of being the foundation for the detailed rules contained in the remainder of the Measure, spelling out their aims and objectives—the rules enact or particularise the principle. Similarly, the ecclesiastical judges of the Church of England commonly appeal to principles in their decisions: to justify results, to interpret positive law, to explain the operation and effect of individual substantive rules, to provide a solution where the substantive rules are insufficiently comprehensive; the expression ‘the principles governing the exercise of the faculty jurisdiction’ is well-known to diocesan chancellors,<sup>48</sup> as is ‘the principle’ that the granting of faculties is discretionary,<sup>49</sup> or the *de minimis* principle.<sup>50</sup> Sometimes judges accept that principles have a dimension of weight, but then make a judicial decision, as they put it, ‘notwithstanding these general principles’.<sup>51</sup> Indeed, in one recent case, the utility of the general principle contained in the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 was questioned judicially, the court doubting whether the principle applied to chancellors in their exercise of the faculty jurisdiction.<sup>52</sup> A fairly spectacular appeal to principle occurred in *Re St Mary’s, Barnes* (1982), in which the concept of a principle was used to condemn the practice of bishops personally entertaining faculty cases, even when this was lawful under a reservation contained in letters patent; Chancellor Moore was quite forthright: ‘Bishop Stockwood, at the instigation of the original petitioners, has violated the consti-

<sup>46</sup> See N. Doe, *Canon Law in the Anglican Communion* (Oxford, 1998). This book seeks to elucidate deductively these principles.

<sup>47</sup> Care of Churches and Ecclesiastical Jurisdiction Measure 1991 (No 1), s 1. See also the Care of Cathedrals Measure 1990 (No 2), s 1.

<sup>48</sup> 14 *Halsbury’s Laws of England* (4th edn) (1975), para 1310, note 3.

<sup>49</sup> *St Botolph without Aldgate Vicar and Churchwardens v Parishioners* [1892] P 161 at 167, per Tristram Ch: ‘The principle upon which the court holds, that it has jurisdiction to grant such faculties, is, that there is a discretionary power vested in it as to making orders relating to churchyards’.

<sup>50</sup> See now the Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s 11(8), under which the chancellor must issue written guidance on what might be classed as *de minimis*.

<sup>51</sup> *Re Church Norton Churchyard* [1989] Fam 37, *sub nom Re Atkins* [1989] 1 All ER 14, per Edwards Ch: ‘Notwithstanding these general principles cases occur in which the discretion to grant a faculty should be exercised’.

<sup>52</sup> *Re St Luke the Evangelist, Maidstone* [1995] Fam 1, [1995] 1 All ER 321, Ct of Arches.



tutional principle of the separation of functions between the executive and the judiciary'. Here a judge is using a principle to prohibit an otherwise lawful practice.<sup>53</sup>

The proactive use of principles has for a long time been part and parcel of the judicial tradition of the Church of England, as it has been historically in English common law and equity (probably under the influence of the civilians)—one is reminded, for example, of Francis Bacon's restatement of the law in maxims, presenting to Elizabeth I in 1597 his twenty-five *Maxims of the Law*.<sup>54</sup> The use of principles might also be entering the practices of the draftsmen of synodical Measures. Indeed, in this respect the Church of England is following the State: the appearance of a general principle at the opening of parliamentary statutes, or as marginal notes, is now a common practice; and often the principle is enunciated in the context of the statutory objectives.<sup>55</sup> There may be a European influence at work here: the Treaty of Rome speaks of 'general principles of law common to the member states', but they are not listed, and the European Court of Justice has applied 'the general principles' of community law based on its own jurisprudence.<sup>56</sup> Moreover, in the innovative, overt appearance of general principles in synodical legislation, the Church of England would seem to be catching up with other churches in the Anglican Communion. It is commonly the case that both the canons and the constitutions of Anglican churches include, under separate titles, declarations of the fundamental principles applicable to ecclesiastical life, government and law. The Anglican church in Canada, for example, employs a 'Declaration of Principles' which contains 'Fundamental Principles', such as: 'this Church . . . shall continue in full communion with the Church of England throughout the world'; or, 'Provincial synods shall have authority and jurisdiction in all matters affecting the general interests and well-being of the Church within their respective jurisdictions'.<sup>57</sup> Indeed, the constitution of the Anglican Church of Australia, in its entrenched 'Ruling Principles', refers to the principles of worship and the principles of doctrine as well as 'the principles of the Church of England'.<sup>58</sup> The recent Virginia Report of the Inter-Anglican Theological and Doctrinal Commission also uses the concept of principles for the purpose of recommendations about the structure of provincial government in the Communion: subsidiarity, accountability and interdependence are all presented as 'principles' whose purpose is 'to serve *koinonia*, the trinitarian life of God in the Church, and to help all the baptised embrace and live out Christ's mission and ministry in the world'; that 'Bishops exercise their office communally' is presented as a principle.<sup>59</sup>

In the canonical tradition of the Roman Catholic Church, the word *principia* is frequently used, and the expression *regulae iuris* is employed to signify general principles. In a fundamental sense these are used as sources of law. A reading of the

<sup>53</sup> *Re St Mary's, Barnes* [1982] 1 All ER 456, [1982] 1 WLR 531, per Moore Ch. Of course, one might ask whether this is a canonical principle at all: see also his 'use of 'first principles' in the reservation case of *Bishopwearmouth Rector and Churchwardens v Adey* [1958] 3 All ER 441, *sub nom Re St Michael and All Angels, Bishopwearmouth* [1958] 1 WLR 1183. See generally T. Briden and R. Ombres, 'Law, theology and history in the judgments of Chancellor Garth Moore', 3 Ecc LJ (1994) 223.

<sup>54</sup> This was published posthumously in 1630: see P. Stein, *Regulae iuris: From Juristic Rules to Legal Maxims* (Edinburgh, 1966), p. 171.

<sup>55</sup> See eg the Industrial Relations Act 1971 (c 72), s 1(1) (repealed): 'The provisions of this Act shall have effect for the purpose of promoting good industrial relations in accordance with the following general principles' (such as the principles of collective bargaining and of free association of workers). See also the Immigration Act 1971 (c 77), s 1 ('General principles'), and the Courts and Legal Services Act 1990 (c 41), s 17(1) ('The statutory objective and the general principle').

<sup>56</sup> E U Treaty, art 215(2): see generally S. Weatherill and P. Beaumont, *EC Law* (London, 1993), pp. 219ff.

<sup>57</sup> *Handbook of the General Synod of the Anglican Church of Canada* (1996), Declaration of Principles, 1 and 7.

<sup>58</sup> Constitution of the Anglican Church of Australia, Pt I, ch II, 4.

<sup>59</sup> *The Virginia Report* (1997), ch 5.

reports of matrimonial cases determined by the church's tribunals,<sup>60</sup> or papal allocations to the Roman Rota,<sup>61</sup> commonly disclose appeals to both *principia* and *regulae iuris*. But one of the most fruitful and celebrated areas in which principles have been employed was in the process of the revision of the Code of Canon Law following the Second Vatican Council. The Commission for the Revision of Canon Law produced its ten 'Principles which govern the Revision of the Code of Canon Law'.<sup>62</sup> These include: that the rights and obligations of each individual person must be determined and safeguarded; that in canon law there must be a 'perfect harmony and coordination between the external and internal forum'; that rights and duties, the juridic character of the code, must promote the supernatural end of the church; the principle of subsidiarity; the 'need . . . of individual institutions to provide for their own advantage by particular laws'; and 'canon law must foster justice as well as a wise equity which is the fruit of kindness and charity'.<sup>63</sup> These are principles for the making of canon law, being addressed as they were to the legislator of the new Code. They may be classified, therefore, as principles of canon law in the sense of maxims of ecclesiastical polity or order.<sup>64</sup> Both the use and usefulness of principles are, of course, far more extensive than these few illustrations suggest, but it is probably impossible to say whether principles enjoy more significance in Roman Catholic than in Anglican jurisprudence, or *vice versa*.<sup>65</sup>

## 5. THE LOCATION, ORIGIN AND AUTHORITY OF PRINCIPLES

The next area of enquiry concerns the origin, location and authority of canonical principles. These subjects are obviously closely related to each other: once the location of a principle is found, the origin of the principle is more easily determined; and once location and origin are established, we are in a better position to ascertain the authority of a principle.

### *Location*

In secular legal theory, one question which perplexes jurists is the location of principles. For some jurists principles are external to law, they underlie it and do not possess the formal mark of validity enjoyed by the rules of a legal system—legal systems are composed of rules, not principles. For other jurists principles are part of law, or forms of law, 'in the sense that particular rules are, that they [principles] in fact control and regulate'.<sup>66</sup> Much the same questions might be asked about the principles of canon law: some principles are insiders, and some are outsiders; inevitably, this means that some are on the borders.

Clearly, some principles are written and therefore part of canon law through

<sup>60</sup> See eg 29 *Studia Canonica* (1995) 509, decision of the Apostolic Tribunal of the Roman Rota, *coram* Burke (2/12/93), at 511: 'Prudence is called for before laying down juridical principles which would make it impossible for anyone who is a heavy drinker to contract a valid marriage. . . . Moreover, following the principle solidly supported by jurisprudence that any true incapacity under c. 1095. 3, must be permanent in nature' (here follows a list of earlier judicial decisions).

<sup>61</sup> W. H. Woestman (ed.), *Papal Allocations to the Roman Rota 1939—1994* (Ottawa, 1994) pp. 18, 20, 120 (for 'rules of law').

<sup>62</sup> For the Latin text, see *Acts of the Commission for the Revision of the Code. 2 Communiones* (1969), p. 77.

<sup>63</sup> For an English translation of the text, see J. Hite and D. J. Ward (eds.), *Readings, Cases and Materials in Canon Law* (Collegeville, Minnesota, 1990), pp. 84ff. For the use by Garbett of 'Seven Guiding Principles' for the revision of canon law in the Church of England at the time of the Archbishops' Commission in the 1940s, see P. H. Boulton, *Revision of the Canon Law of the Church of England* (LL.M. Dissertation, University of Wales, Cardiff, 1996), p. 48.

<sup>64</sup> If conceived in this sense, it would be an interesting exercise to establish the relationship between these principles and those found in the Anglican Richard Hooker's *Laws of Ecclesiastical Polity* (1594).

<sup>65</sup> If these Revision principles are consistent with Anglican ideas, then, they would be candidates for 'principles of canon law'.

<sup>66</sup> R. Dworkin, 'Is law a system of rules?', in R. Dworkin (ed.), *The Philosophy of Law* (Oxford, 1977), p. 38.

incorporation or appearance in the formal laws of individual canonical systems. Thus we might speak of principles *in* canon law, such as the descriptive provision in the Roman Catholic Code that: 'Flowing from their rebirth in Christ, there is a genuine equality of dignity and action among all of Christ's faithful'<sup>67</sup>; this is the foundation on which the rights and obligations of the faithful (in Book II<sup>68</sup>) are based. In many churches of the Anglican Communion, as we have seen, principles are expressly woven into formal constitutions and canons.<sup>69</sup> With respect to the Church of England, principles may be found in synodical Measures (as we have seen<sup>70</sup>), or in the canons; such as the principle that 'Every bishop is the chief pastor of all that are within his diocese, as well laity as clergy, and their father in God'.<sup>71</sup> (Incidentally, it would be an interesting exercise to determine the extent of the use of principles in the English canons—on reading them, one distinct impression gained, particularly with the more modern canons, is that they are structured in terms of detailed rules rather than general principles.<sup>72</sup>)

Equally, many principles are located outside formal laws. Some are unwritten, some are written; they operate as general propositions underlying rules, or as foundations on which canonical practices or rules are based. The principle of the separation of powers, to which Garth Moore appealed in *Re St Mary's, Barnes*, is not stated in any formal law of the Church of England—like other principles it exists as an unwritten proposition applicable to English ecclesiastical law.<sup>73</sup> Again, the Roman Catholic Church's *regulae iuris* (derived largely from Roman law) are to be found not in the modern law of the church, in the 1983 Code, but *inter alia* in the *Liber Sextus* of Pope Boniface VIII (1298): in one sense, these *regulae* are *fontes*,<sup>74</sup> they are not themselves 'law' but, as Robert Ombres has said, the 'sources' or 'the formal causes of the existence of law'.<sup>75</sup> They are used in the interpretation of canon law and are treated by some Roman Catholic canonists as 'legal proverbs, each containing a grain of truth but never the full truth'.<sup>76</sup> Some have been used as the basis for provisions in the Code, such as the proposition 'Prescription does not begin without possession';<sup>77</sup> others have no obvious single reflection in the Code, such as 'Necessity renders licit that which the law declares illicit'.<sup>78</sup> An extreme version of the notion that principles exist outside the law is to be found in the doctrine that they are located in the 'spirit of canon law': the Commission for the revision of the Roman Catholic Code seems to have employed this idea: in identifying 'the general principles of law', it reported, 'special attention has been focused on the spirit of canon law itself and on the special concern which the Church has for ecumenism'.<sup>79</sup> Inevitably, some principles are located on the edge of law; these are a little more difficult to find:

<sup>67</sup> *Codex Iuris Canonici* (1983), canon 208.

<sup>68</sup> *Ibid.* Book II ('The People of God'), comprises canons 204–746.

<sup>69</sup> See the text and notes 58, 59, above.

<sup>70</sup> See the text to note 48 above.

<sup>71</sup> Revised Canons Ecclesiastical (1969), canon C 18, para 1.

<sup>72</sup> See eg *ibid.* canons B 43 and B 44, in which principles are not spelt out overtly — the structure of the canons is very detailed and in the form of rules.

<sup>73</sup> *Re St Mary's, Barnes* [1982] 1 All ER 456, [1982] 1 WLR 531; see the text and note 53 above. It is, needless to say, arguable that when an extraneous principle is adopted by an ecclesiastical judge as part of the *ratio decidendi* of a case it becomes part of the law of those churches in which judicial decisions have a law-creative force.

<sup>74</sup> A. Gauthier, *Roman Law and its Contribution to the Development of Canon Law* (Ottawa, 1996), p. 107. See *ibid.* p. 1, 19, for *regulae iuris* in the Decretals of Gregory IX (1234). On the other hand, these were included in the collections of the *Corpus Iuris Canonici* and may be conceived also as part of law in that sense. For *regulae iuris* in Roman law, see P. Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims* (Edinburgh, 1966).

<sup>75</sup> R. Ombres, 'Faith, doctrine and Roman Catholic canon law', 1(4) *Ecc LJ* (1989) 33 at 37; *fontes* are 'the lawmakers or authors of law'.

<sup>76</sup> L. Orsy, *Theology and Canon Law* (Collegeville, Minnesota, 1992), p. 77.

<sup>77</sup> *Liber Sextus, regula 2*, applied in *Codex Iuris Canonici* (1983), canon 198.

<sup>78</sup> *Regulae Iuris* in the Decretals of Gregory IX, 4. Gauthier (see note 74 above) does not include a reference to the 1983 Code.

<sup>79</sup> J. Hite and D. J. Ward (eds.), *Readings, Cases and Materials in Canon Law* (Collegeville, Minnesota, 1990).

for the sake of argument, principles found in liturgical books,<sup>80</sup> or in doctrinal statements,<sup>81</sup> or in ecclesiastical tradition, are most likely of this type.

This matter of the location of principles is also closely associated with questions about their form. Ultimately, of course, whether a principle is part of or extraneous to church law depends on the definition of law. Even unwritten principles may be part of the law in the sense that they control or regulate decision-making in the church. In this sense unwritten principles may be properly classified as *legal* principles.<sup>82</sup>

### *Origin and Authority*

I shall not rehearse the consequences of these ideas for the purpose of establishing the origin of principles.<sup>83</sup> We believe that there are divinely-given principles which comprise divine law or natural law—that principles, therefore, originate in the divine will revealed to the church. We know that ecclesiological and theological ideas are used to shape principles—that principles originate in these ideas. We know that principles are invented by human legislators and judges, perhaps under the divine influence, that principles—appearing in synodical Measures, in the canons, in judicial decisions, in the ‘vast treasure house of laws and jurisprudence accumulated by the Church in the course of centuries’<sup>84</sup>—originate in the legislative or judicial will. These conclusions about the direct and indirect authorship of principles lead us to some definite conclusions about the authority of principles.

Broadly, principles enjoy four kinds of authority, each dependent on the location and origin of the principle in question. First, those principles incorporated in law will obviously have the same authority as that of the legal instruments in which they appear. This is particularly the case with principles which appear to be human inventions, in which case they will only have the authority of the instrument itself. And the authority of the instrument is determined, of course, by the authority or standing of the institution which creates or issues that instrument. The Church of England’s Parochial Church Council (Powers) Measure 1956 includes the principle that the minister and parochial church council should co-operate ‘in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical’.<sup>85</sup> In the constitutional system of the established Church of England, this principle enjoys the highest authority, synodical Measures being of the same force and effect as parliamentary statutes.<sup>86</sup> Such principles may acquire a greater dimension of weight, however, when they have been the subject of judicial consideration. Commenting on

<sup>80</sup> See eg the Church of England’s Book of Common Prayer (1662), The Order for the Administration of . . . Holy Communion: ‘So many as intend to be partakers of the holy Communion shall signify their names to the Curate, at least some time the day before’ (this may, alternatively, be understood as a norm). See also the principle in The Ministry of Baptism to such as are of Riper Years: ‘It is expedient that every person, thus baptized, should be confirmed by the Bishop so soon after his Baptism as conveniently may be; that so he may be admitted to the holy Communion’ (the generality and normative language of this provision suggest that it is a principle having a dimension of weight; but it may be re-cast as a rule, and today finds its place in the Revised Canons Ecclesiastical (1969), canon B 24, para 3). It is equally arguable that, being appended to the Act of Uniformity 1662 (14 Cha 2, c 4), such principles are part of the law. Compare the principles found in the Alternative Service Book 1980.

<sup>81</sup> Eg the Thirty-nine Articles of Religion of the Church of England, art XX: ‘it is not lawful for the Church to ordain any thing that is contrary to God’s Word written’.

<sup>82</sup> Principles contained in such documents as the Universal Declaration of Human Rights (1948) may clearly be conceived as written statements of fundamental principles about the dignity of the human person.

<sup>83</sup> A related question is who has authority to create or declare the principles of canon law. One occasionally wonders whether principles are merely the constructs of academics.

<sup>84</sup> Report of the Commission for the Revision of the 1983 Roman Catholic Code of Canon Law, J. Hite and D. J. Ward (eds.), *Readings, Cases and Materials in Canon Law* (Collegeville, Minnesota, 1990), p. 84.

<sup>85</sup> Parochial Church Councils (Powers) Measure 1956 (4 & 5 Eliz 2, No 3), s 2(2)(a) (substituted by the Synodical Government Measure 1969 (No 2), s 6, and amended by the Church of England (Miscellaneous Provisions) Measure 1983 (No 2), s 5). This is presented as one of the ‘functions’ of the PCC.

<sup>86</sup> Church of England Assembly (Powers) Act 1919 (9 & 10 Geo 5, c 76), s 4.

this statutory responsibility of co-operation between a minister and a parochial church council. Chancellor Forbes in *Re St Peter, Roydon* (1969) remarked that 'In the true spirit of charity a clash between an incumbent and a council becomes unthinkable'—there must be a genuine and informed co-operation or else the statutory principle is no more than a 'solemn farce'.<sup>87</sup> As laws exist in a juridic hierarchy, so, needless to say, will principles appearing in some forms of law possess different authorities to others: it depends on the instrument in question.<sup>88</sup> Such principles enjoy an authority, but not an immutable authority.<sup>89</sup>

Secondly, when principles, existing inside or outside law, are designed to coincide with or re-present an idea or proposition of natural or divine law (or when they are applied ecclesiology), they inherit in some sense the authority of their source. Some principles of canon law enjoy, within the terms of a particular church, the same authority as principles of natural or divine law. Many principles of this type appear in Roman Catholic canon law, such as the principle that *ex lege divina* all Christ's faithful are obliged to celebrate the sacrament of penance;<sup>90</sup> or that *ex divina institutione* there are among Christ's faithful sacred ministers and lay people.<sup>91</sup> In the Church of England, the canonical definition of marriage, for example, is affirmed as 'according to our Lord's teaching'.<sup>92</sup> Indeed, it is not uncommon for the English canons to provide that this or that is not repugnant to the Word of God: for instance, the canons assert that 'The government of the Church of England under the Queen's Majesty, by archbishops, bishops, deans, provosts, archdeacons, and the rest of the clergy and of the laity that bear office in the same, is not repugnant to the Word of God'.<sup>93</sup> In other churches of the Anglican Communion, principles are presented as historical facts or as religious truths: the constitution of the former province of the Church of India, Pakistan, Burma and Ceylon provides that the church 'has received the principles and customs set out in the . . . Declarations from the Holy Catholic Church of ages past'; moreover, we read, the church 'believes that it was by the guidance of the Holy Spirit that those principles came to be recognised and those customs adopted'. This is the source of their 'authority'.<sup>94</sup>

Thirdly, then, some principles such as these will enjoy both forms of authority: the superior authority of their extraneous source and the inferior authority of the legal text in which they appear.<sup>95</sup>

Fourthly, the authority of a principle may be in issue in cases where there is a conflict either between principles themselves or between principles and legal rules. As we have seen, secular jurists commonly treat principles generally as having a dimension of weight: in the judicial context, 'they are treated as legal authorities which cannot be ignored'; they are 'essential (not optional or discretionary) elements in reaching decisions in hard cases'.<sup>96</sup> In the much-cited American case of *Riggs v Palmer* (1889), the *legal rule* required that the defendant inherit under the will of his grandfather

<sup>87</sup> *Re St Peter, Roydon* [1969] 2 All ER 1233, [1969] 1 WLR 1849.

<sup>88</sup> In the Church of England, a principle appearing in a synodical Measure would have greater authority than one appearing in ecclesiastical quasi-legislation or in a liturgical book.

<sup>89</sup> This is, obviously, a large question, whether principles can change with time. Given the association between canonical principles and theology, the changeability of a proposition may mean, of course, that it was not a principle (but a rule) in the first place.

<sup>90</sup> *Codex Iuris Canonici* (1983), canon 1249. For the divine law concept, see also canon 210 (holy life), canon 211 (spreading the gospel), canon 222, para 2 (promoting social justice), and canon 849 (baptism).

<sup>91</sup> *Ibid.*, canon 207, para 1.

<sup>92</sup> Revised Canons Ecclesiastical (1969), canon B 30, para 1.

<sup>93</sup> *Ibid.*, canon A 6.

<sup>94</sup> Constitution (1930), Declaration 11: 'Of the authority of the principles and customs set out in the preceding Declarations'.

<sup>95</sup> For an interesting recent discussion of this general area, and the notion of the application in a judicial setting of 'general principles' deduced from scripture, see A. Bash, 'Ecclesiastical law and the law of God in scripture', 5 *Ecc LJ* (1998) 7.

<sup>96</sup> R. Cotterrell, *The Politics of Jurisprudence* (London, 1989), p. 169.

whom he had murdered; the court consciously decided not to apply that rule on the basis of the (superior) principle that a person should not profit from his own wrongdoing.<sup>97</sup> Here the authority of the principle was considered to be higher than that of the legal rule. In the ecclesiastical sphere, Roman Catholic canon law provides ample scope for the supremacy of a principle in cases of divergence, in the doctrine of canonical equity,<sup>98</sup> and in the practice of dispensation.<sup>99</sup> Both afford mechanisms for the relaxation of rules in particular cases to give expression to the principle that the salvation of souls is the supreme law, or to ideas based on mercy and charity.<sup>100</sup>

In churches of the Anglican Communion, neither the principles of equity nor dispensation find an obvious place in either formal law or jurisprudence. Concepts about the relaxation of law come under different guises, most usually in the form of specific exceptions built by legislators into rules of formal law.<sup>101</sup> With regard to the Church of England, it is very rarely the case that we see judges (for example) applying principles, such as that of necessity,<sup>102</sup> at the expense of legal rules. It is perhaps more the norm to see ecclesiastical courts showing a preference for the authority of legal rules rather than that of principles in cases of divergence.<sup>103</sup> In this sense, some principles of canon law may enjoy an authority, a persuasive authority, but not a binding legal authority.<sup>104</sup> Consequently, some principles in English canon law, even those which appear to have authority by virtue of their inclusion in formal law, will lack authority, in the binding legal sense, when set against other principles or rules. The provision contained in the canons of the Church of England that 'It is the duty of all who have been confirmed to receive the Holy Communion regularly',<sup>105</sup> enjoys no legal authority with respect to the laity in the light of the principle of ecclesiastical law that the canons do not bind the laity.<sup>106</sup> The same principle in Roman Catholic canon law enjoys a very different, binding authority for the laity of that church,<sup>107</sup> a church in which, like many Anglican churches, the canons bind the laity.<sup>108</sup>

These rather crude observations about the kinds of authority which principles of canon law may enjoy merely scratch the surface, of course. They do not provide us with answers to a host of more profound questions: whether there is a difference between the principles of canon law and those of natural and divine law, or those of ecclesiastical polity; whether principles enjoy an intermediate authority between that of natural or divine law and that of formal rules of canon law; whether the

<sup>97</sup> *Riggs v Palmer* 115 NY 506 (1889).

<sup>98</sup> 19 February 1977, 22 *The Pope Speaks* (1977) 171: in canon law 'it is equity which governs the application of norms to concrete cases, with the salvation of souls as the goal. . . . Equity takes the form of mildness, mercy and pastoral charity and seeks not a rigid application of the law but the true welfare of the faithful'. See also Paul VI, 8 February 1973: 'The pastoral nature of church law and canonical equity'. W. H. Woestman (ed.) *Papal Allocutions* (1994), p. 115.

<sup>99</sup> *Codex Juris Canonici* (1983), canons 87, 88.

<sup>100</sup> *Ibid.*, canon 1752.

<sup>101</sup> See N. Doe, *The Legal Framework of the Church of England* (Oxford, 1996), pp. 47–52.

<sup>102</sup> For reservation, see M. Hill, *Ecclesiastical Law* (London, 1995), pp. 302ff.

<sup>103</sup> *Re Church Norton Churchyard* [1989] Fam 37, *sub nom Re Atkins* [1989] 1 All ER 14, where legal principles conferring discretion were favoured as against the principles governing the exercise of the faculty jurisdiction.

<sup>104</sup> For principles enunciated by the Lambeth Conference, see eg Resolution 9, 1978: 'We commend the biblical principle of tithing as a guide for normal Christian living'. For the persuasive authority of such resolutions, see N. Doe, *Canon Law in the Anglican Communion* (Oxford, 1998), pp. 345ff.

<sup>105</sup> Revised Canons Ecclesiastical (1969), canon B 15, para 1. The moral or Christian authority of the provision, for the individual consciences of the laity, is obviously a very different matter; it is arguable that there is a deeper principle that the laity will honour that commitment, and the rule (merely) is that the laity is not bound by the canon.

<sup>106</sup> *Middleton v Crofts* (1736) 2 Atk 650.

<sup>107</sup> *Codex Juris Canonici* (1983), canon 898: the faithful have a duty to receive the sacrament frequently; canon 920: the faithful must receive at least once a year.

<sup>108</sup> For Anglican churches, see N. Doe, *Canon Law in the Anglican Communion*, chs 1, 6.

authority of some principles means that they are immutable: whether some principles, unlike rules (based on principles) which can be changed, may be ordered by reference to degrees of changeability;<sup>109</sup> whether principles should prevail over legal rules in cases of divergence within churches; and whether some principles are more authoritative than others and should, in cases of conflict, prevail over them. Needless to say, in the ecumenical field, the difficulties about authority are even more acute when canonical principles conflict as between churches.<sup>110</sup>

## 6. POTENTIAL: CANONICAL PRINCIPLES IN ECUMENICAL DIALOGUE

This brings us to the question of the potential of the concept of principles of canon law in the ecumenical dialogue between the Roman Catholic Church and the Anglican Communion. It is a dialogue to which both churches are committed: the seriousness of the Roman Catholic Church's commitment to unity has already been voiced, at and since Vatican II, in the official teaching of the church;<sup>111</sup> the same commitment has been expressed on numerous occasions by the Lambeth Conference.<sup>112</sup> The commitment also surfaces in the canon law of the two communions. The 1983 Code provides that 'It pertains especially to the entire College of Bishops and to the Apostolic See to foster among catholics the ecumenical movement, the purpose of which is the restoration of unity between all christians which, by the will of Christ, the Church is bound to promote';<sup>113</sup> accordingly: bishops have a canonical duty to 'foster ecumenism as it is understood by the Church';<sup>114</sup> for a just cause, such as ecumenical goodwill, and with episcopal permission, priests may celebrate the eucharist in a sacred edifice of another church or ecclesial community that does not have full communion with the Catholic Church, 'scandal being avoided'.<sup>115</sup> With respect to the Anglican Communion, in several churches the commitment finds juridic expression in formal laws through a variety of duties: to maintain fellowship or mutual understanding, to seek unity, to restore unity, to enter ecumenical agreements, and to heal divisions;<sup>116</sup> by way of contrast, in the Church of England, and the Church in Wales, ecumenism at the local level is cast canonically in permissive terms, not as a duty.<sup>117</sup> Ecumenism, therefore, has become a canonical phenomenon, in the sense that its promotion is embodied in and regulated by the canon laws of churches. To this extent, it is arguable that ecumenism, the restoration of unity as willed by Christ, itself has become a canonical principle, and, given its association with the divine will, perhaps a principle of the *ius commune*.

Why should the concept of the principles of canon law have a part to play in the ecumenical dialogue? There are several reasons, which are at least worthy of consid-

<sup>109</sup> For the idea that Garth Moore 'believed the basic principles that guide the Church to be unchanging', see T. Briden and R. Ombres, 'Law, theology and history in the judgments of Chancellor Garth Moore', 3 *Ecc LJ* (1994) 223 at 226.

<sup>110</sup> One task of lawyers, of course, may be the production of a unifying language (equivalent to the SI units of science).

<sup>111</sup> See eg Vatican II's *Unitatis Redintegratio* (1964), and *Common Declaration* by Pope John Paul II and the Archbishop of Canterbury, 29 May 1982.

<sup>112</sup> For statements dealing specifically with Anglican-Roman Catholic dialogue, see Resolution 53, 1968; Resolution 33, 1978; and Resolution 8, 1988.

<sup>113</sup> *Codex Iuris Canonici* (1983), canon 755, para 1.

<sup>114</sup> *Ibid.* canon 383, para 3.

<sup>115</sup> *Ibid.* canon 933. See generally A. Tché, 'The Code of Canon Law of 1983 and ecumenical relations' in M. Thériault and J. Thorn (eds.), *The New Code of Canon Law*, Proceedings of the Fifth International Congress of Canon Law (2 vols) (Ottawa, 1986), I, p. 401. See also R. Ombres, 'Ecumenism, ecclesiology and canon law' in N. Doe, M. Hill and R. Ombres, *English Canon Law* (Cardiff, 1998), ch 5.

<sup>116</sup> See N. Doe, *Canon Law in the Anglican Communion* (Oxford, 1998), pp. 355ff.

<sup>117</sup> Church of England: Revised Canons Ecclesiastical (1969), canons B 43 and B 44 (see, however, the duty to avoid schism in canon A 8); Church in Wales: canon 28/9/1991 ('To permit the establishment of local ecumenical projects').

eration. First, an exploration of canonical principles provides an innovative point of departure. Historically, the key focus of ecumenical discussion has been agreement about the value of mutual understanding, the need for each communion to understand the character of the other. To this point, this has largely taken the form of dialogue from the perspective of doctrine; the documents of the Anglican-Roman Catholic International Commission, for example, engage predominantly at the level of theology and theological materials, seeking (what is summed up in the expression) 'agreement in faith', on eucharistic doctrine, ministry and ordination, among other important matters.<sup>118</sup>

Secondly, ecclesiology exhibits itself in many forms, and canon law is one of these. Given that the distinctive mark of canonical principles is their theological content, that canon law may be conceived as applied ecclesiology, canonical dialogue is in turn an aspect of the historical, doctrinal approach to ecumenical discussion.

Thirdly, focusing on canon law relates neatly to the most recent trend in ecumenical dialogue, the theme of church order—authority, primacy, episcopacy, collegiality and conciliarity: both churches are canonical churches and ecclesial order is facilitated primarily by canon law. The principles of canon law are a proper focus in ecumenical dialogue because, in a concrete way, they give definition to ideas about ecclesiastical polity.

Fourthly, analysis of convergence at the canonical level challenges the popular conception of canon law as divisive: as was said in one Vatican II document, which treated the so-called 'Catholic principles of ecumenism', '[w]ithout doubt, the differences that exist in varying degrees between [churches] and the Catholic Church whether in doctrine and sometimes in discipline or concerning the structure of the Church—do indeed create many obstacles, sometimes serious ones, to full ecclesiastical communion'.<sup>119</sup> The principles of canon law offer a useful focus because they indicate common goals and problems which the communions share in fulfilling their mission to society at large.

Fifthly, focusing on principles is a much more manageable task than deducing convergence from analysis of myriad and detailed substantive rules. Working at the level of generalities is far less ambitious than analysis at the level of the specificity of individual rules.<sup>120</sup>

Lastly, focusing on canon law and its principles enables the church lawyer to serve the ecumenical dialogue. This is not as outrageous a suggestion as it may seem,<sup>121</sup> particularly if canon law is conceived as applied ecclesiology and ecclesiastical polity. In so many ways, the ecumenical enterprise itself is a juridical enterprise: the synthesis of divergent approaches and practices. A core function of the lawyer is restoration of unity, the reconciliation of competing parties and their respective claims: this is achieved by an application of principles and rules in the context of a disagreement. What lawyers do is, in a fundamental sense, a microcosm of the ecumenical experience. Gratian's synthesis of the discordant canons of the undivided Western Church is a useful model here: the articulation of principles, which in the ecumenical environment will sharpen convergence and divergence, would be part and parcel of a traditional canonical task. On the assumption that the *ius commune* of the undivided Western Church is, historically, the parent of both the modern Roman Catholic canon law and the law of the Church of England and its sister

<sup>118</sup> Lambeth Conference, Resolution 8 (1988).

<sup>119</sup> *Unitatis Redintegratio* (1964), ch 1; *Codex Juris Canonici* (1983), canon 844 (governing admission of other churches to the sacraments) may not be used, the commentaries state, for ecumenical purposes: it may be used only in cases of necessity.

<sup>120</sup> See the attempt at such an analysis of rules in N. Doe, *The Legal Framework of the Church of England: A Critical Study in a Comparative Context* (Oxford, 1996).

<sup>121</sup> Though for many this may be the best reason not to focus on canon law: it would be interesting to determine the role of lawyers thus far in ecumenical discussions.



churches in the Anglican Communion, it may be that the lawyer's art of reconciliation neatly lends itself to the process of canonical synthesis. After all, whenever constitutional union between churches is achieved (whatever form it takes), lawyers will be involved ultimately to give expression to the ecumenical will in the drafting of ecumenical canons. Even the upbringing of church lawyers in the two communions may be exploited. In the Roman Catholic Church the lawyers are predominantly canonists, trained as such. In the Anglican Communion, church lawyers will be trained as common lawyers (as in the United Kingdom) or as civil lawyers (as in the Anglican churches of the Latin American civil law systems).<sup>122</sup> This breadth of experiences, spanning canon law, common law and civil law, might usefully uncover analogous instances of juridical separation which mirror the current Anglican-Roman Catholic condition: Roman Catholic canon lawyers have worked on concordats seeking a compromise between the sometimes competing sovereignties of church and state; and civil and common lawyers are familiar with the need for reconciliation of divergent legal principles in the sphere of international law and treaty-making. On our doorstep, for example, the reconciliation of divergent principles, and the identification of convergent principles, is at the heart of the new juridical culture of the European Union.

#### 7. THE SUBSTANCE OF PRINCIPLES: CONVERGENCE AND UNITY

As I outlined at the outset, the quest for legal unity between the Roman Catholic Church and the Anglican Communion involves three basic tasks. First, the descriptive aspect: it involves identifying convergence between the principles of individual canonical systems—similarities between, on the one hand, the principles of Roman Catholic canon law and, on the other, the principles of Anglican canon law. Secondly, again a descriptive function, it involves uncovering the principles operative in canon law systems, when canon law is postulated as a *genus* of law applicable to the Roman Catholic Church and the Anglican Communion as ecclesial communities of the apostolic and catholic tradition. Thirdly, and more contentiously, it involves the reconciliation of language and of divergent principles, the synthesis of the dissonant canonical principles of individual canonical systems. The fulfilment of these tasks is a first step in establishing the degree of legal unity between the two communions. This final section explores three discrete subjects: the elusiveness of principles; the classification of principles; and the coincidence and reconciliation of principles.

By and large, Roman Catholic canon law spells out principles explicitly. The canon law system of the Latin, Roman Catholic, Church is codified: as we have seen, the Books of the 1983 Code, and Titles within them, generally open with the statement of a foundational principle upon which detailed substantive rules are based. Principles are applicable deductively, so to speak, both to the substantive rules which grow from them and to the interpretation and application of those rules. By way of contrast, in the Anglican Communion the articulation of principles is a little more problematic. The principles of the constitutional and canonical systems of individual churches within the Communion are often spelt out formally in the legal system of each church, or they may be articulated inductively from the analysis of clusters of substantive rules.<sup>123</sup> However, the principles of *Anglican canon law* are far more elusive. Because the Anglican Communion has no body of canon law applicable globally to each of its autonomous member churches, the articulation of principles has of

<sup>122</sup> L. Orsy, *Theology and Canon Law* (Collegeville, Minnesota, 1992), p. 32: 'First, one cannot expect canon lawyers to be specialists in theology, philosophy and other subjects: even if it is desirable it is simply not feasible for ordinary human beings. Secondly, canon law is studied and practised by many civil lawyers who have never had any training in theology: in fact, in many European universities canon law is taught in civil law schools and is handled within the horizon of civil legal science only'.

<sup>123</sup> See section 4 above.

necessity to be by way of deduction from actual coincidences between the canonical systems of individual churches. Sometimes there is unanimity as between churches and their formal, substantive rules, and from this unanimity a principle emerges. Sometimes a majoritarian approach has to be used, though such an approach is notoriously susceptible to criticism: when the formal laws of the vast majority of churches contain the same rule on a given subject, for practical purposes it may be said that a principle of Anglican canon law emerges. If a bare majority of churches shares a rule, assumptions about the existence of a principle are more problematic. Principles may also be deduced from the silence of formal laws. And sometimes, canonical principles in the Anglican Communion are at odds with one another. In short, a fundamental (but not insurmountable) problem from the Anglican perspective is that the establishment of canonical principles by induction is a pre-condition to their recognition as having an objective reality.<sup>124</sup>

On the twin assumptions that principles of Roman Catholic canon law exist (being expressed *inter alia* in the 1983 Code), and that principles of Anglican canon law exist (on the basis of coincidences between substantive rules of the legal systems of individual Anglican churches), any meaningful analysis of the relationship between them must proceed within the context of a workable framework. The approach to the framework may be historical—where the determinant for the analysis is the ancient *ius commune*—or it might be analytical, or a mixture of these approaches. The most obvious framework, and the least problematic, is that within which canonical principles are classified by reference to the subjects which they touch. This sort of classification will yield canonical principles of: ecclesiastical government; ecclesiastical ministry; doctrine and liturgy; the sacramental life of the church; and ecclesiastical property. Within this subject-matter framework, what is important for ecumenical purposes is that a distinction be made between principles which are convergent, common, or ecclesologically neutral and, in the area of divergence, those which are negotiable and those which are *prima facie* non-negotiable. A useful overriding concept in the whole analysis is the provisional nature of canon law.<sup>125</sup>

A subject-matter analysis discloses both the commonality or neutrality of some principles, and the negotiability and non-negotiability of others. In the area of *ecclesiastical government*, for instance, both Roman Catholics and Anglicans advance the shared principle that the purpose of canon law is to serve the ends for which the church exists, to enable it to carry out its mission; it does so by means of facility, order and flexibility. It is a common principle of both communions that legislative authority rests with those ecclesiastical authorities which are canonically competent to legislate. It is in the conditions under which law-making power may be exercised, and in the composition of ecclesiastical authorities, that divergence exists. It is a principle of Anglican canon law that the final authority to make law for an individual church resides in the central assembly of that church, an assembly representative of the bishops, clergy and laity of that church—the laity possess the power of governance and a bishop cannot unilaterally create law; resolutions of the Lambeth Conference have a global, persuasive authority, but not a binding authority. By way of contrast, it is a principle of Roman Catholic canon law that final and universal authority to legislate resides in the pontiff and the college of bishops: the Code presents the principle as one of divine institution. In contrast with Anglican canon law, the diocesan bishop enjoys unilateral legislative power and the laity possess no

<sup>124</sup> See generally N. Doe, *Canon Law in the Anglican Communion* (Oxford, 1998).

<sup>125</sup> See R. Ombres, 'Ecclesiology, ecumenism and canon law' in N. Doe, M. Hill and R. Ombres (eds.), *English Canon Law* (Cardiff, 1998), p. 48 at p. 55 (where the idea is related to Pope John Paul II's notion of a *continua reformatio*: see *Ut Unum Sint*, n 17). See also the Apostolic Constitution which promulgated the 1983 Code, *Sacrae Disciplinae Leges*: 'Hence flow certain fundamental principles by which the whole of the new Code is governed, within the limits of its proper subject and of its expression, which must reflect that subject'.

power of governance, though they may participate in its exercise by way of consultation. These two sets of law-making principles appear to be divergent, and perhaps non-negotiable, but they meet around the formal notion, applied also to the judicial and administrative fields, that in some sense the whole church ought to participate in its own governance and that ecclesiastical government must be according to law: these are neutral canonical principles.

Indeed, so many principles spelling out the conditions under which powers may be exercised are of this neutral type in the area of ecclesiastical government. For both communions, judicial decisions do not have a law-creative effect: the Church of England is a notable exception, but even here the doctrine of binding judicial precedent has its softer side. For both communions later laws abrogate earlier laws; ecclesiastical customs must be reasonable to acquire validity; in the interpretation of laws the intent of the legislator is a primary determinant; clergy must comply with the lawful directions of their bishops; penalties may be imposed only after due process; members of the faithful enjoy an equality of dignity. These are all neutral principles of the *ius commune*, applicable to churches regardless of their individual canonical systems. At the same time, some principles, about the conditions of decision-making in the church, are common even though they may not be spelt out in the laws of the two communions: the principle in Roman Catholic canon law that 'In exercising their rights, Christ's faithful . . . must take account of the common good of the Church, as well as the rights of others and their own duties to others',<sup>126</sup> finds no obvious equivalent in the formal laws of any Anglican church—but no Anglican lawyer would deny the applicability of the principle to the Anglican church. All of these are candidates for the status of principles of canon law and, arguably, of the *ius commune*. The same sort of analysis could be applied to the other subjects of canon law: ministry, doctrine, liturgy, the sacraments and property.

## 8. CONCLUSION: THE CHALLENGE OF ARTICULATION

Herbert Broom opens his book *Legal Maxims* (1845) with the sentence 'In Legal Science, perhaps more frequently than in any other, reference must be made to first principles'.<sup>127</sup> What I hope to have shown, in a very rudimentary fashion, is the possible applicability of this observation to the realm of canon law.<sup>128</sup> The concept of the principles of canon law is a rich and powerful one—this is as much the case for a Roman Catholic canonist as for an Anglican. The concept is also a useful one for ecumenical dialogue. Identifying the principles of canon law sharpens both convergence and divergence in the respective ecclesiastical polities of the Roman Catholic and Anglican communions. At the same time, however, the concept is difficult and diffuse. On the one hand, a pessimist might argue: that canonical principles do not exist; that they exist but we do not know what they are; that they are peculiar to the canonical systems of individual churches; that we do not need to know what they are; or that there are good reasons for not using or articulating them. On the other hand, an optimist might argue: that they must exist, because people assume they do; that they certainly operate within individual ecclesial communities; that they may over-arch individual canonical systems; that they are distinctive by virtue of their theological content; that they are appealed to as a matter of canonical practice; that they are valuable in giving shape, meaning and coherence to hosts of individual rules; that they may enjoy an authority superior to the rules which flow from them; or, even, that we know where they are. Principles spell out the purposes of both canon law itself and its substantive rules. Articulation of the principles of canon law—identifying, clarifying, elucidating, or enumerating them—represents a real challenge to

<sup>126</sup> *Codex Iuris Canonici* (1983), canon 223, para 1.

<sup>127</sup> H Broom (ed. R. H. Kersely), *A Selection of Legal Maxims* (10th edn. London, 1939), p. v.

<sup>128</sup> H. Box, *The Principles of Canon Law* (Oxford, 1949).

(perhaps a responsibility of) the modern canonist, pessimist or optimist, as does standardisation of legal vocabulary. The Ecclesiastical Law Society and the Canon Law Society of Great Britain and Ireland, perhaps through the establishment of a joint working party, are ideally placed to contribute something to the challenge which this opportunity affords. Modern ecumenical dialogue is, at least in part, a call to overcome the juridic separation of churches. In the medieval period, one of the quests of the undivided Western Church was a concordance of discordant canonical principles. Articulating the principles of canon law is an opportunity for today's canonists to contribute to ecumenism by giving new life to the medieval task.

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